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Volume 90 — No. 2 — 1/19/2019

## **Court Issue**



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# THE OKLAHOMA BAR Journal

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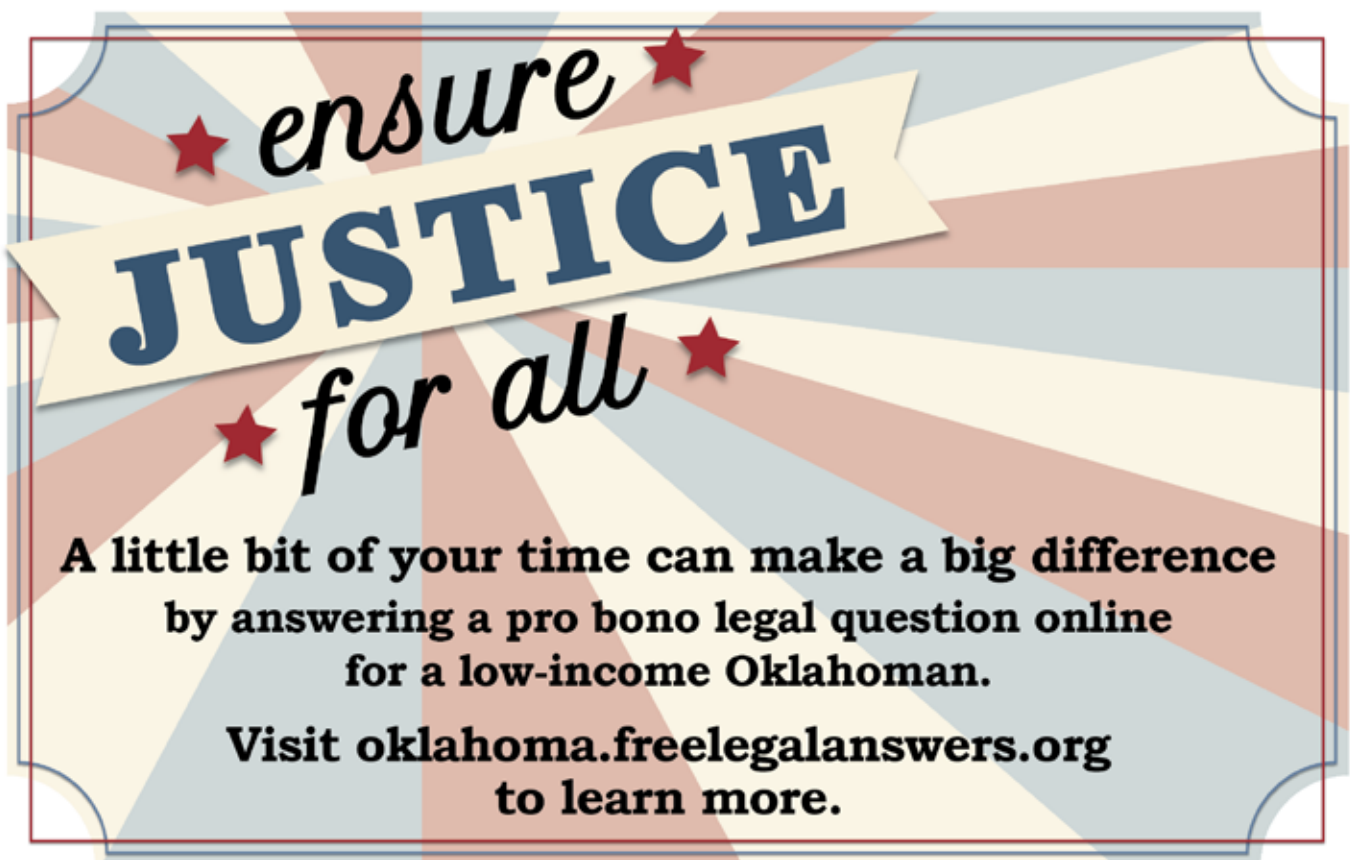
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# Opinions of Supreme Court

*Manner and Form of Opinions in the Appellate Courts;  
See Rule 1.200, Rules — Okla. Sup. Ct. R., 12 O.S. Supp. 1996 (1997 T. 12 Special Supplement)*

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**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 amend-

ed (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

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# Opinions of Court of Criminal Appeals

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2019 OK CR 1

LUBUTO MUSONDA, Appellant, v. THE  
STATE OF OKLAHOMA, Appellee.

No. F-2016-988. January 10, 2019

## SUMMARY OPINION

HUDSON, JUDGE:

¶1 Appellant, Lubuto Musonda, was tried by a jury and convicted in Tulsa County District Court, Case No. CF-2015-770, of Count 3: Child Abuse by Injury, in violation of 21 O.S. Supp.2014, § 843.5; Count 4: Second Degree Robbery, in violation of 21 O.S.2011, § 791; Count 5: Assault and Battery on a Police Officer, in violation of 21 O.S.2011, § 649; Count 6: Misdemeanor Assault and Battery, in violation of 21 O.S.2011, § 644; and Count 7: Cruelty to Animals, in violation of 21 O.S.2011, § 1685.<sup>1</sup> The jury recommended the following sentences: Count 3 – ten (10) year imprisonment and a \$5,000.00 fine; Count 4 – seven (7) years imprisonment and a \$7,000.00 fine; Count 5 – one (1) year imprisonment and a \$500.00 fine; Counts 6 – ninety (90) days in the county jail and a \$1,000.00 fine; and Count 7 – ninety (90) days in the county jail and a \$500.00 fine. The Honorable Kelly Greenough, District Judge, sentenced Musonda in accordance with the jury's verdicts and ordered the sentences be run consecutively.<sup>2</sup> The trial court further imposed various costs and fees.

¶2 Musonda now appeals, raising two (2) propositions of error before this Court:

- I. THE TRIAL COURT ERRED BY NOT REQUIRING THE PROSECUTION TO DIVULGE TO THE DEFENDANT THE FINDINGS OF A PRIVATE EXPERT WITNESS, RETAINED BY THE STATE TO REBUT APPELLANT'S PLEA OF NOT GUILTY BY REASON OF INSANITY; and
- II. THE TRIAL COURT SHOULD HAVE REQUIRED THE STATE TO FURNISH WHATEVER FINDINGS OR OTHER DETERMINATIONS THE STATE'S EXPERT MADE TO THE COURT FOR AN *IN CAMERA* DETERMINATION AS TO WHETHER THOSE FINDINGS COULD

BE CONSTRUED AS EXCULPATORY TO THE DEFENDANT.

¶3 After thorough consideration of the entire record before us on appeal, including the original record, transcripts, exhibits and the parties' briefs,<sup>3</sup> we find that no relief is required under the law and evidence. Musonda's judgments and sentences are **AFFIRMED**.

¶4 **Proposition I:** Musonda complains the trial court erred when it denied his discovery request for any reports or statements made by the State's expert medical consultant, Dr. Shawn Roberson. Musonda argues that the trial court read too narrowly subsection (A)(1) (d) of the Oklahoma Discovery Code – 22 O.S. 2011, § 2002. He further challenges the trial court's determination that Dr. Roberson's unsworn statements gathered by the State in preparation of its case were "work product" and thus excluded from discovery.

¶5 Notably, Musonda fails to cite in the record where he objected to this alleged discovery violation at trial. *See Bramlett v. State*, 2018 OK CR 19, ¶ 27, 422 P.3d 788, 797 (failure to object at trial to alleged discovery error waived all but plain error review). This Court will not search the record to determine if Musonda properly preserved his claim for appellate review. Rule 3.5(A)(5) & (C), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2018) (requiring appellants support their arguments by citations to the authorities, statutes and relevant pages of the record); *Logsdon v. State*, 2010 OK CR 7, ¶ 41, 231 P.3d 1156, 1169-70 (claim is waived for failure to cite the applicable portion of the record); *Stouffer v. State*, 2006 OK CR 46, ¶ 126, 147 P.3d 245, 270-71 (same); *Brown v. State*, 1997 OK CR 1, ¶ 33, 933 P.2d 316, 324-25 (appellant's failure to make sufficient citation to the record waived his claim that State improperly withheld an investigatory report containing exculpatory evidence). Musonda has thus waived all but plain error review of this claim.

¶6 To be entitled to relief under the plain error doctrine, Musonda must show the existence of an actual error (i.e., deviation from a legal rule), that is plain or obvious, and that



affects his substantial rights, meaning the error affected the outcome of the proceeding. *Bramlett*, 2018 OK CR 19, ¶ 23, 422 P.3d at 796. If these elements are met, this Court will correct plain error only if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Id.*; 20 O.S.2011, § 3001.1. Musonda fails to show error, plain or otherwise.

¶7 The Oklahoma Discovery Code exempts legal work product from discovery. 22 O.S.2011, § 2002(E)(3) (“[t]he discovery order shall not include discovery of legal work product of either attorney which is deemed to include legal research or those portions of records, correspondence, reports, or memoranda which are only the opinions, theories, or conclusions of the attorney or the attorney’s legal staff.”). However, the work product exemption is not absolute. Irrespective of the exemption, “[d]ue process requires the State to disclose exculpatory and impeachment evidence favorable to an accused.” *Bramlett*, 2018 OK CR 19, ¶ 28, 422 P.3d at 797 (citing *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)). See also *Nauni v. State*, 1983 OK CR 136, ¶ 31, 670 P.2d 126, 133 (“the work-product privilege may not be applied in derogation of a criminal defendant’s constitutional rights to disclosure of evidence favorable to the defendant”).

¶8 In the present case, the State’s conversations with Dr. Roberson were not discoverable under state law. Dr. Roberson was a consulting expert for the State. He was never retained as or endorsed as a fact witness. Moreover, he never examined or spoke with Musonda. While he reviewed Musonda’s expert’s notes, Dr. Roberson never generated any reports or findings. Nor were the State’s conversations with Dr. Roberson recorded or memorialized in a report. Dr. Roberson’s role as a consulting expert thus did not produce a discoverable species of evidence. Rather, his involvement in the case was purely limited to aiding the State in trial preparation. The conversations had between the State and Dr. Roberson therefore fell within the work product exception. Cf. *Ellison v. Gray*, 1985 OK 35, ¶ 7, 702 P.2d 360, 363 (“The opinion work product area is carved out to protect the right of counsel to privacy in the analysis and preparation of the client’s case.”).

¶9 Moreover, there is no indication from the record that a *Brady* violation occurred in this

case. During the pre-trial discovery hearing, the State repeatedly acknowledged its ethical duty to disclose exculpatory evidence and assured the trial court that there was nothing exculpatory. We must presume that the prosecutor, as an officer of the court, adhered to her oath and nothing exculpatory was borne out of the State’s consultation with Dr. Roberson. *Brown*, 1997 OK CR 1, ¶ 33, 933 P.2d at 325.

¶10 Musonda fails to show error, let alone plain error, in the trial court’s denial of his discovery request. Proposition I is denied.

¶11 **Proposition II:** Musonda argues the trial court, at the very least, should have conducted an *in camera* review of Dr. Roberson’s findings to determine if these materials contained anything exculpatory in nature. Given that Dr. Roberson did not evaluate Musonda or prepare a report containing any findings, we assume Musonda contends the State should have been made to produce any notes it generated from its consultation with Dr. Roberson for the trial court’s review.

¶12 Again, Musonda’s failure to object at trial to the alleged discovery error waived all but plain error review of this claim. *Bramlett*, 2018 OK CR 19, ¶ 27, 422 P.3d at 797. Musonda fails to show error, plain or otherwise, occurred. As previously observed in Proposition I, the prosecutor clearly acknowledged her ethical duty to disclose exculpatory evidence and assured the trial court that there was nothing “exculpatory in any way” in its communications with Dr. Roberson. Given that there is nothing in the record indicating a *Brady* violation occurred, we must presume the prosecutor, as an officer of the court, adhered to her oath. Musonda’s mere speculation is insufficient to overcome this presumption and cause reversal. See *Fairchild v. State*, 1999 OK CR 49, ¶ 93, 998 P.2d 611, 629-30 (“The Appellant presents nothing beyond mere rank speculation to support this argument factually. Absent some showing of harm, we find no relief is warranted.”). Musonda’s Proposition II is therefore denied.

## DECISION

¶13 The Judgments and Sentences of the District Court are **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2019), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT  
OF TULSA COUNTY  
THE HONORABLE KELLY GREENOUGH,  
DISTRICT JUDGE

**APPEARANCES AT TRIAL**

Larry Edwards, Attorney at Law, 601 S. Boulder, Ste. 1305, Tulsa, OK 74119, Counsel for Defendant

Andrea Brown, Katie Koljack, Asst. District Attorneys, 500 S. Denver, Ste. 900, Tulsa, OK 74013, Counsel for the State

**APPEARANCES ON APPEAL**

Neal B. Kirkpatrick, 2021 S. Lewis, Ste. 335, Tulsa, OK 74104, Counsel for Appellant

Mike Hunter, Okla. Attorney General, William R. Holmes, Asst. Attorney General, 313 N.E. 21st St., Oklahoma City, OK 73105, Counsel for Appellee

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

1. The jury acquitted Musonda on Counts 1 and 2 – First Degree Burglary and Attempted Kidnapping, respectively. As to Count 4, Musonda was originally charged with Robbery by Force or Fear, but the jury rejected the original charge and convicted him of the lesser included offense of Second Degree Robbery.

2. Musonda must serve eighty-five (85) percent of his Count 3 sentence before becoming eligible for parole. 21 O.S.Supp.2014, § 13.1(14).

3. On December 13, 2017, this Court granted Musonda an extension of time to file his reply brief. The final due date for filing this brief was December 19, 2017. Musonda tendered his reply brief for filing on December 20, 2017. An application to file the reply brief out of time was not contemporaneously filed with the reply brief. Thus, Musonda's reply brief is ordered **STRICKEN** as it is not properly before the Court. See Rule 3.4, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2018).



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# CALENDAR OF EVENTS

## January

**21 OBA Closed** – Martin Luther King Jr. Day

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

**30 OBA Solo and Small Firm Conference Planning Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Charles R. Hogshead 918-708-1746

**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

## February

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

**2 Legislative Reading Day;** 10 a.m.; Oklahoma Bar Center, Oklahoma City; Contact John Morris Williams 405-416-7000

**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 Christians 405-705-3600 or Brittany Byers 405-682-5800



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

# Opinions of Court of Civil Appeals

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## 2019 OK CIV APP 1

**ANGELA HERRING, As Administrator for the ESTATE OF ELIZABETH A. JONES, Judgment Creditor/Appellant, vs. RICKY GRAHAM, Judgment Debtor/Appellee, and LISA GRAHAM, Judgment Debtor.**

**Case No. 116,184. December 7, 2018**

APPEAL FROM THE DISTRICT COURT OF ALFALFA COUNTY, OKLAHOMA

HONORABLE JUSTIN P. EILERS,  
TRIAL JUDGE

### REVERSED

Samuel L. Stein, LAW OFFICES OF SAM STEIN, PLLC, Cherokee, Oklahoma, for Appellant,

Brendon S. Atkinson, GUNGOLL, JACKSON, BOX & DEVOLL, P.C., Enid, Oklahoma, for Appellee.

BRIAN JACK GOREE, VICE-CHIEF JUDGE:

### I. FACTS

¶1 This is an appeal from an order of the district court granting a motion to vacate a foreign judgment from the Harper County, Kansas district court. The primary question in this appeal is whether the district court abused its discretion in vacating the Kansas judgment as facially void for lack of jurisdiction. The parties dispute the characterization of the Kansas court's exercise of jurisdiction.

¶2 Some background regarding the Kansas litigation is helpful in understanding this appeal. In the underlying Kansas proceeding, Ricky and Lisa Graham filed their Petition for Protection from Stalking against Elizabeth Jones.<sup>1</sup> In response, Jones filed her Answer and Counterclaims alleging breach of fiduciary duty as attorney in fact, fraud, and breach of contract. Later, Jones filed her Motion for Sanctions, including default judgment against the Grahams. The Kansas district court entered its Journal Entry *Nunc Pro Tunc* for default judgment and other sanctions against the Grahams.

¶3 After securing this relief, Angela Herring, Appellant, registered the Kansas foreign judgment pursuant to the Uniform Enforcement of Foreign Judgments Act, 12 O.S. § 719 *et seq.* On August 19, 2014, Herring filed in the Alfalfa County, Oklahoma district court her Amended Foreign Judgment Registration Affidavit and attached the Kansas district court's Journal Entry *Nunc Pro Tunc* dated August 11, 2014 (Kansas Judgment). The Kansas Judgment provides in pertinent part:

5. As sanctions, the factual allegations of Elizabeth A. Jones's verified Answer to Petition for Protection from Stalking and Counterclaims are found to be true and correct, and default judgment is rendered thereon in favor of the Estate of Elizabeth A. Jones. Pursuant to this judgment, the Court orders:

- a. the Estate is awarded damages for Plaintiffs' breach of fiduciary duty as attorney in fact, fraud, and, breach of contract, said damages to be liquidated by the Court at a subsequent hearing;
- b. the August 12, 2004, Agreement between Elizabeth A. Jones ("Jones") and Plaintiff Rick Graham is rescinded due to material breach of contract and fraud;
- c. the August 12, 2004, deeds of real property are found to be void *ab initio* due to fraud in the inducement and breach of fiduciary duty, those properties being more specifically described as:
  - i. SE/4 of Section 6, Township 35S, Range 8W of the 6th P.M., Harper County, Kansas;
  - ii. NE/4 of Section 7, Township 35S, Range 8W of the 6th P.M., Harper County, Kansas; and
  - iii. S/2 SE/4 of Section 33, Township 29N, Range 9W of the Indian Meridian, Alfalfa County, Oklahoma

¶4 In response to Herring's registration of the Kansas Judgment, Rick Graham, Appellee, filed his Motion to Vacate Foreign Judgment arguing that the Kansas court did not have jurisdiction to affect title to real property in Oklahoma, and therefore, the Kansas Judgment

ment was void on its face. The district court agreed and vacated the Kansas Judgment. Herring appealed.

## II. STANDARD OF REVIEW

¶5 On review, the issue is whether the district court erred in vacating the Kansas Judgment as facially void due to the Kansas court's extraterritorial exercise of jurisdiction over real property in Oklahoma. We review the trial court's decision to vacate the Kansas Judgment for abuse of discretion. *See Ferguson Enters., Inc. v. H. Webb Enters., Inc.*, 2000 OK 78, ¶5, 13 P.3d 480, 482.

¶6 An appellate court's inquiry into a district court's decision to vacate a judgment focuses on the correctness of the trial court's response to the motion to vacate and not on the underlying judgment. *Central Plastics Co. v. Barton, Indus. Inc.*, 1991 OK 103, ¶2, 818 P.2d 900. "An abuse of discretion occurs when a court bases its decision on an erroneous conclusion of law or where there is no rational basis in evidence for the ruling." *Christian v. Gray*, 2003 OK 10, ¶43, 65 P.3d 591. A showing of a trial court's abuse of discretion is different when the court's decision is founded on an erroneous legal conclusion than when founded on an erroneous factual finding. When a court reviews a trial court's ruling for abuse of discretion on a legal conclusion, the effective standard of review is *de novo*. *Id.* A stronger showing of abuse of discretion is required when a trial court vacates a judgment than when it refuses to vacate a judgment. *Midkiff v. Luckey*, 1966 OK 49, ¶6 412 P.2d 175, 176-77. "To reverse on the grounds of abuse of discretion, the appellate court must find that the trial judge made a clearly erroneous conclusion and judgment, against reason and evidence." *Okla. Turnpike Auth. v. Asher*, 1993 OK 136, ¶7, 863 P.2d 1205 citing *Abel v. Tisdale*, 1980 OK 161, ¶20, 619 P.2d 608.

## III. ANALYSIS

### A. Foreign Judgment Registration and Vacation Procedure

¶7 The Kansas Judgment registered in Oklahoma must be valid to receive full faith and credit under the law. *See Sharp v. Sharp, L.R.A.*, 1916 OK 736, ¶16, 166 P. 175. The Uniform Enforcement of Foreign Judgments Act, 12 O.S. §719 *et seq.*, governs the enforcement in Oklahoma of a sister state's judgment. *RKO Pictures, Inc. v. Barkley*, 1992 OK CIV APP 18, ¶11, 838 P.2d 518. Oklahoma gives full faith and credit

to valid judgments of sister states. 12 O.S. §720. Validity requires that the court meet all the jurisdictional requirements: jurisdiction of the parties, jurisdiction of the subject matter, and jurisdiction to render the particular judgment. *Sharp*, ¶6. A judgment rendered without jurisdiction is void. *Id.*

¶8 A sister state's judgment registered in Oklahoma pursuant to 12 O.S. §721, is treated as any other Oklahoma district court judgment and is "subject to the same procedures . . . and proceedings for . . . vacating." 12 O.S. §721.

¶9 In Oklahoma, a facially void judgment may be vacated at any time. 12 O.S. §1038. A judgment is facially void when the judgment roll<sup>2</sup> reveals a lack of any of the requisite jurisdictional requirements. *Booth v. McKnight*, 2003 OK 49, ¶11, 70 P.3d 855, 859-60.<sup>3</sup> A facially void judgment is subject to collateral attack by any interested party at any time wherever venue may be laid. *Id.*

### B. Jurisdictional Inquiry

¶10 While the Oklahoma Court may not inquire into the merits of the Kansas Judgment, it does have the ability to review its exercise of jurisdiction. *See Sharp*, ¶6 citing *Elliott v. Piersol*, 26 U.S. 328, 7 L. Ed. 164 (1828).

¶11 The parties disagree about the characterization of the Kansas court's jurisdiction in the underlying proceeding. Appellee argues the Oklahoma district court was correct in voiding the judgment because the Kansas court entered judgment *in rem* by finding the deed to Oklahoma real property void. Appellant, on the other hand, argues the Kansas court exercised *in personam* jurisdiction over the parties when it found the deed concerning Oklahoma real property void *ab initio*. Appellant further urges it was error for the Oklahoma district court to vacate a properly registered foreign judgment as void on its face when the Oklahoma district court did not have the entire judgment roll for review.

¶12 The district court reviewed Appellee's Motion to Vacate Foreign Judgment and the parties' respective brief in support of the motion and response to conclude that the "subject of the domesticated Foreign Judgment is real property [in Oklahoma] . . . which the Kansas Court . . . had no jurisdiction."

¶13 The district court reviewed the Kansas judgment and found it void on its face. The



Kansas Judgment awards Appellant “damages for Plaintiffs’ breach of fiduciary duty as attorney in fact, fraud, and, breach of contract”, rescinds “the August 12, 2004 Agreement between Elizabeth A. Jones and Plaintiff Rick Graham”, and finds “the August 12, 2004 deeds to real property . . . void *ab initio* due to fraud in the inducement and breach of fiduciary duty.” The deed to real property includes the “S/2 SE/4 of Section 33, Township 29N, Range 9W of the Indian Meridian, Alfalfa County, Oklahoma.”

¶14 While a Kansas court may have jurisdiction over the parties and the subject matter of certain claims, a Kansas court lacks authority to issue a judgment *in rem* with regard to Oklahoma property. *See Sharp*, ¶6.<sup>4</sup> A judgment *in rem* has the effect of establishing title to land. *Sharp*, ¶¶8-10.<sup>5</sup>

It is characteristic of a judgment *in rem* that it operates on a thing or status rather than against the person, and binds all persons to the extent of their interest in the thing whether or not they were parties to the proceedings, and that it operates only on the property which is the subject of the litigation.

*Arvest Bank v. SpiritBank, N.A.*, 2008 OK CIV APP 55, ¶20, 191 P.3d 1228.

¶15 A court in equity with *in personam* jurisdiction may adjudicate the rights of the parties before it, even though such rights relate to lands in another state, but it may only make such decree effective by exerting power over the individuals by contempt or otherwise. *Sharp*, ¶6. A Kansas court having jurisdiction over the parties may only indirectly affect title to land in Oklahoma. *Id.* ¶9. The remedies granted by a Kansas court can only operate upon the person and not upon land in Oklahoma. *See id.* A court of equity acts *in personam* “by compelling a deed to be executed or canceled by or in behalf of [a] party.” *Id.* It has no inherent power, by the mere force of its decree, to annul a deed, or to establish a title. *Id. citing Hart v. Sansom*, 110 U.S. 151, 3 S.Ct. 586, 28 L.Ed. 101 (1884).

¶16 Whether a judgment is *in personam* or *in rem* depends upon the character of the action. *Arvest Bank v. SpiritBank, N.A.*, 2008 OK CIV APP 55, ¶20, 191 P.3d 1228. “The character of an action is determined by the nature of the issues framed by the pleadings and the rights and remedies of the parties, and not solely by

the form in which the action is brought or by the prayer of relief.” *Id.* citing *Comstock v. Little*, 1961 OK 35, 359 P.2d 704 and *Green v. Correll*, 1928 OK 501, ¶0, 133 Okla. 94, 271 P. 241.

¶17 In the case at hand, it is difficult to determine the character of the action; the inquiry into the Kansas court’s exercise of jurisdiction is obscured by the fact that the judgment roll and record before the district court and this court is lacking. The record fails to include those items which assist in determining the character of the action. *See id.*

¶18 Herring argues as one of her propositions of error that the district court erred when it vacated the judgment as void on its face when the Oklahoma trial judge did not have the complete judgment roll to review.<sup>6</sup> From the face of the Kansas Judgment, it appears the subject of the litigation was Grahams’ Petition for Protection from Stalking and Jones’ Answer to Petition and Counterclaims for breach of fiduciary duty, fraud, and breach of contract. It is difficult to discern the effect of the Kansas Judgment in isolation from the entire judgment roll.<sup>7</sup> In order to understand the effect of the Kansas Judgment it is necessary to understand the relationship, if any, between the rescission of the August 12, 2004 Agreement (referenced in paragraph 5b) and the finding that the August 12, 2004 deed is void *ab initio* (referenced in paragraph 5c). The Agreement, deed, or any other pleading referencing either document were not included in the record before the district judge or in the record on appeal. While the Kansas Judgment is included as part of the judgment roll, the district court’s record was insufficient to determine that the Kansas court lacked jurisdiction and to base its decision to vacate the judgment as void on its face. *See Halliburton Oil Producing Co. v. Grothaus*, 1998 OK 110, ¶¶10-11, 981 P.2d 1244. A reviewing court may only take notice of the record before it. *Id.*

¶19 In paragraph 5b of the Kansas Judgment, the Kansas court rescinded the August 12, 2004 Agreement between Elizabeth A. Jones and Rick Graham due to fraud and breach of contract.<sup>8</sup> A court in equity may rescind an agreement between parties. *See Jeter v. De Graff*, 1923 OK 826, ¶0, 219 P. 345. “The effect of a rescission of an agreement is to put the parties back in the same position they were in prior to the making of the contract.” *Berland’s Inc. of Tulsa v. Northside Vill. Shopping Ctr, Inc.*, 1968 OK 136, ¶18, 447 P.2d 768. *Accord Whiteley v. O’Dell*, 219

Kan. 314, 548 P.2d 798 (1976). “The effect of a rescission is to extinguish the contract and to annihilate it so effectually that in contemplation of the law it has never had any existence.” *Id.* Where the power of attorney is itself invalid, any document executed by the purported attorney in fact is void. *See ABN Amro Mtg. Grp. Inc. v. Stephens*, 91 A.D.3d 801, 939 N.Y.S.2d 70 (N.Y.App. Div. 2012) (a deed based on forgery of the power of attorney or obtained by false pretenses is void *ab initio*).

¶20 In paragraph 5c of the Kansas Judgment, the Kansas court found the August 12, 2014 deed concerning real property in Oklahoma “void *ab initio* due to fraud in the inducement and breach of fiduciary duty.” A court declaring a deed void by virtue of the decree alone would be to attribute to the decree the force and effect of a judgment *in rem*. *Sharp*, ¶13 citing *Carpenter v. Strange*, 141 U.S. 87, 11 S.Ct. 960, 35 L.Ed. 640 (1891).<sup>9</sup> This case is distinguishable from *Carpenter* if the Kansas court found the deed void *ab initio* indirectly as a result of the rescission of the Agreement rather than directly by force of the decree alone. While a Kansas court cannot by force of its decree affect title to real property in Oklahoma, it can indirectly affect title by its exercise of power over the parties. *See Sharp*, ¶¶ 6-16.

¶21 A review of the record indicates the Kansas court may have been exercising jurisdiction *in personam*; the Kansas court finding the deed void *ab initio* is potentially the result of rescinding the Agreement. The deed may be void by operation of law rather than by mere force of the decree.<sup>10</sup>

¶22 If there is any doubt regarding what issues were determined in a judgment, it is proper for the court to construe the judgment in light of the entire judgment roll or record. *Keel v. MFA Mut. Ins. Co.*, 1976 OK 87, ¶¶6-7, 553 P.2d 160. It is presumed that the court entering judgment intended to render a valid judgment on the issues presented. *Id.* ¶7. Error is not presumed from a silent record. *Reeves v. Agee*, 1989 OK 25, ¶15, 769 P.2d 745. When error is not shown, or its presence cannot be ascertained from an incomplete, deficient or equivocal record, an appellate court must always yield to the law’s presumption that the trial court’s decision is legally correct. *Id.*

¶23 The record does not show that the Kansas court was exercising jurisdiction *in rem*. The district court’s review of the record before it

could, at best, demonstrate that there was an uncertainty regarding jurisdiction. “A judgment is void on its face when it so appears by an inspection of the judgment roll, but would not be held void on its face unless the record thereof affirmatively shows the court was without jurisdiction.” *Thomason v. Thompson*, 1926 OK 865, ¶3, 253 P. 99. As such, the district court abused its discretion in vacating the Kansas Judgment.

#### IV. CONCLUSION

¶24 The district court abused its discretion in vacating the underlying Kansas Judgment when the record before it did not affirmatively show the court was without jurisdiction. Only when the lack of jurisdiction is apparent from the face of the judgment roll may a judgment be vacated as void on its face. Here, the record reveals uncertainty about whether the judgment was rendered *in personam* or *in rem*. The district court lacked the requisite record to determine the Kansas court was without jurisdiction and therefore void on its face.

¶25 REVERSED.

SWINTON, P.J., and MITCHELL, J., concur.

BRIAN JACK GOREE, VICE-CHIEF JUDGE:

1. Elizabeth Jones, defendant in the underlying proceeding, passed away during the course of the litigation and was succeeded by Angela Herring, the administrator of Jones’ estate.

2. The term “judgment roll” is generally synonymous with “common-law record” or “record proper.” *Rodgers v. Higgins*, 1993 OK 45, ¶11 n. 31, 871 P.2d 398. It includes “the petition, the process, return, the pleadings subsequent thereto, reports, verdicts, orders, judgments, and all material acts and proceedings of the court.” 12 O.S. §32.1.

3. 12 O.S. §1038 states: “A void judgment, decree or order may be vacated at any time, on motion of a party, or any person affected thereby.” *See also Halliburton Oil Producing Co. v. Grothaus*, 1998 OK 110, ¶10 n. 11, 981 P.2d 1244, (when a district court judgment is void on the face of the judgment roll and no proof other than the record is needed to show the fatal jurisdictional defect, no lapse of time can bar an attack, direct or collateral. But if extrinsic evidence is needed to show the jurisdiction’s absence, the judgment is not facially invalid)(citations omitted).

4. “Jurisdiction to render a judgment *in rem* inheres only in the courts of the state which is the situs of the res.” *Sharp*, ¶6.

5. The primary question in *Sharp* was whether the sister state’s decree affected title to real estate in Oklahoma. The decree declared Husband owner of real property located in Oklahoma free from any claim of title or interests whatsoever of Wife. *Sharp*, ¶8. The court concluded the decree did not attempt to render a judgment *in personam* as it related to the real estate, but “in form at least rendered a judgment *in rem*.” *Id.* ¶9. The decree did not purport to exercise control over the parties, but “through the force of the decree itself, determine the validity of the asserted rights of [Wife] in and to the real estate, and thus, not indirectly but directly, affect[ed] the title or status of lands in Oklahoma.” *Id.* In Oklahoma, Husband brought an action in ejectment against Wife. In support of his ownership, Husband provided a deed and the sister state’s decree declaring him the owner of the real property. On review, the Oklahoma Supreme Court reversed concluding it was error to hold the sister state’s decree conclusive as to ownership of the land in Oklahoma and preclude the Wife’s opportunity to establish her asserted rights in the real property. *Sharp*, ¶¶16-17.

6. Herring cites *Halliburton*, *supra* note 3, for the proposition that the entire judgment roll is necessary before determining the facial

validity of the Kansas Judgment. In *Halliburton*, the appellant claimed the court lacked subject matter jurisdiction to determine a deficiency. *Halliburton*, ¶8. On review, the court concluded that the record before it was insufficient to determine the facial validity of the foreclosure suit, the sheriff's sale, the post sale confirmation, and the deficiency determination. *Id.* at ¶11. Here, like in *Halliburton*, the meaning and effect of the court's adjudication must be resolved by resort solely to the face of the judgment roll. See *Fent v. Okla. Nat. Gas Co., a Div. of Oneok Inc.*, 1994 OK 108, ¶11, 898 P.2d 126. The meaning, legal effect and validity cannot be assessed solely from the Kansas Judgment alone. See *id.* at n. 10.

7. The judgment roll includes "the petition, the process, return, the pleadings subsequent thereto, reports, verdicts, orders judgments, and all material acts and proceedings of the court." 12 O.S. §32.1.

8. Prima facie case of fraud is established if the plaintiff shows that the defendant held the principal's power of attorney and that the defendant, using the power of attorney, made a gift to himself or herself; the burden of going forward under such circumstances falls upon the defendant to establish by clear and convincing evidence that the transaction was made pursuant to power expressly granted in the power of attorney document and made pursuant to the clear intent of the donor.

140 Am. Jur. Trials 185 citing *Litherland v. Jurgens*, 291 Neb. 775, 869 N.W.2d 92 (2015).

9. In *Carpenter*, a New York court having jurisdiction of the parties declared a deed to Tennessee lands void and that the defendant took no title under it. The Tennessee court refused to recognize the New York Judgment. On appeal to the United States Supreme Court, the Court agreed that Tennessee was "not obliged to surrender jurisdiction

to the courts of New York over real estate in Tennessee, exclusively subject to its laws and the jurisdiction of its courts." *Carpenter v. Strange*, 141 U.S. 87, 106, 11 S.Ct 960, 35 L.Ed. 640 (1891). The New York court in equity could have "compel[led] him to act in relation to property not within its jurisdiction" but cannot directly operate upon the real property or affect title in Tennessee. *Id.* at 105-06. A New York court declaring the deed to Tennessee real property void "would be to attribute to that decree the force and effect of a judgment *in rem* by a court having no jurisdiction over the res." *Id.* at 106. "Direct action upon . . . real estate [located in another state is] not within the power of the court." *Id.*

10. Included in the record before us is the Appellant's Suggestion Upon the Record of the Entry of Mandate and attached copy of the Kansas Mandate. Rec. at 103. The Kansas Court of Appeals stated:

It is important to remember that Jones had filed counterclaims against the Grahams for conversion of personal property and against Rick Graham for breach of fiduciary duty, breach of contract, and fraud. The controversy centers on (1) Rick Graham's role as Jones' attorney-in-fact to manage all of her personal and real property, financial and personal affairs, and to make health care decisions for her; and (2) a contract between Jones and Rick Graham to deed him two tracts of land in Harper County, Kansas, amounting to 320 acres, as well as 80 acres in Alfalfa County, Oklahoma. All of this was in exchange for Rick Graham's agreement to assume a small mortgage on the property and to continue an existing cattle operation, splitting the net proceeds equally between Jones and himself. Jones retained a life estate on the tract in Kansas containing her residence.

Rec. at 118.

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# Disposition of Cases Other Than by Published Opinion

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## COURT OF CRIMINAL APPEALS Thursday, December 27, 2018

**F-2016-1160** — Tyler Lee Shea, Appellant, was tried by jury for the crimes of Count 2: Burglary in the First Degree; Count 3: Aggravated Assault and Battery - Great Bodily Injury Inflicted; and Count 4: Violation of Protective Order, in Case No. CF-2015-143, in the District Court of Washington County. The jury returned a verdict of guilty and recommended as punishment seven years imprisonment on Count 2; five years imprisonment on Count 3; and one year county jail time on Count 4. The Honorable Curtis DeLapp, District Judge, sentenced Shea in accordance with the jury's verdicts. Judge DeLapp imposed various costs, fines and fees. He also ordered the sentences for Counts 3 and 4 to run concurrently. From this judgment and sentence Tyler Lee Shea has perfected his appeal. **AFFIRMED.** Opinion by: Hudson, J.; Lumpkin, P.J., Concur; Lewis, V.P.J., Concur; Kuehn, J., Concur; Rowland, J., Concur.

**F-2017-496** — Daryl James Kaiser, Appellant, was tried by jury for the crimes of Count 1: Assault and Battery Upon a Police Officer; and Count 3: Outraging Public Decency, in Case No. CF-2014-2756, in the District Court of Tulsa County. The jury returned a verdict of guilty and recommended as punishment one year in the county jail on Count 1 and a fine of \$500.00 on Count 3. The Honorable Sharon K. Holmes, District Judge sentenced accordingly and ordered credit for time served. From this judgment and sentence Daryl James Kaiser has perfected his appeal. **AFFIRMED.** Opinion by: Hudson, J.; Lumpkin, P.J., Concur; Lewis, V.P.J., Dissents; Kuehn, J., Dissents; Rowland, J., Concur.

**C-2017-567** — Teresa Lorena Altobella, Petitioner, was charged in Case No. CF-2016-103, in the District Court of Woods County, with Harboring a Fugitive from Justice. Altobella entered a negotiated guilty plea before the Honorable Mickey J. Hadwiger, Associated District Judge. Judge Hadwiger sentenced Altobella to five years imprisonment, to be suspended subject to successful completion of the Community Sentencing program, a \$500.00

fine, and 500 hours of community service. Judge Hadwiger further imposed various costs and fees. Altobella sent a letter to the court seeking to withdraw her guilty plea and was accepted as a *pro se* motion to withdraw her plea. After a hearing, Judge Hadwiger denied the motion. Altobella now seeks a writ of certiorari. The Petition for Writ of Certiorari is **GRANTED IN PART.** The order of the district court denying Petitioner's motion to withdraw guilty plea is **REVERSED** and the case **REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.** Opinion by: Hudson, J.; Lumpkin, P.J., Concur in Results; Lewis, V.P.J., Concur; Kuehn, J., Concur; Rowland, J., Concur.

**F-2017-899** — Marcus Scott Chezem, Appellant, was tried by jury for the crime of Sexual Abuse of a Child Under Twelve, After Former Conviction of Two Felonies, in Case No. CF-2015-4698, in the District Court of Tulsa County. The jury returned a verdict of guilty and recommended as punishment twenty-five years imprisonment. The Honorable William J. Musseman, Jr., District Judge, sentenced accordingly, and further imposed various costs and fees. From this judgment and sentence Marcus Scott Chezem has perfected his appeal. **AFFIRMED.** Opinion by: Hudson, J.; Lumpkin, P.J., Concur; Lewis, V.P.J., Concur; Kuehn, J., Concur; Rowland, J., Concur.

**RE-2017-165** — Charles William Beets III, Appellant, appeals from the revocation in full of his fifteen year suspended sentence in Case No. CF-2014-272 in the District Court of Pontotoc County, by the Honorable Gregory D. Pollard, Special Judge. **AFFIRMED.** Opinion by: Kuehn, J.; Lumpkin, P.J., concur in results; Lewis, V.P.J., concur; Hudson, J., concur; Rowland, J., concur.

**F-2017-1102** — Andrew David Leach, Appellant, was tried by jury for the crime of Child Abuse by Injury and Child Neglect in Case No. CF-2016-4569 in the District Court of Tulsa County. The jury returned verdicts of guilty and set punishment at forty years imprisonment on each count. The trial court sentenced accordingly and ordered the sentences to be served consecutively. From this judgment and

sentence Andrew David Leach has perfected his appeal. **AFFIRMED.** Opinion by: Rowland, J.; Lumpkin, P.J., concurs; Lewis, V.P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs.

**RE-2017-264** — Damion Deshawn Polk, Appellant, appeals from the revocation in full of the remaining balance of his ten year suspended sentence (nine years and two hundred seventy-five days) in Case No. CF-2012-7751 in the District Court of Oklahoma County, by the Honorable Ray C. Elliott, District Judge. The State confessed error in this appeal. **REVERSED.** Opinion by: Rowland, J.; Lumpkin, P.J., concurs in results; Lewis, V.P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs.

**F-2017-1126** — Appellant John Stephen Routt was charged in the District Court of Tulsa County, Case No. CF-2016-4467, with Kidnapping (Count 1), First Degree Burglary (Count 2), Assault with a Dangerous Weapon (Count 3), and Unlawful Possession of a Controlled Drug (Count 5), each After Former Conviction of Two or More Felonies. Routt was also charged with Threatening an Act of Violence (Count 4). The jury found Routt guilty of First Degree Burglary (Count 2), Threatening an Act of Violence (Count 4), and Unlawful Possession of a Controlled Drug (Count 5). The jury set punishment at forty years imprisonment on each of Counts 2 and 5, and six months on Count 4. The Honorable Doug Drummond, District Judge, sentenced him in accordance with the jury's verdicts, ordering the sentences imposed on Counts 2 and 5 be served concurrently and the sentence imposed on Count 4 be served consecutively to the sentence imposed on Count 2. From this judgment and sentence John Stephen Routt has perfected his appeal. **AFFIRMED.** Opinion by: Rowland, J.; Lumpkin, P.J., concurs; Lewis, V.P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs in results.

**F-2017-183** — Waylon Jerry Peltier, Appellant, entered guilty pleas in the District Court of Logan County, before the Honorable Phillip C. Corley, District Judge, in the following cases: CF-2017-184: Counts 1, 2 and 4 – Burglary in the Second Degree; and Count 3 – Grand Larceny; CF-2016-251: Count 1 – Attempted Robbery with a Firearm; CF-2016-194: Count 1 – Larceny from a Person at Night; Count 2 – Possession of a Stolen Vehicle; and Count 3 – Concealing Stolen Property; and CM-2016-369: Count 1 – Embezzlement by an Employee. Judge Corley deferred sentencing for a period of seven years on each count in each case. The

trial court ordered each count and case to run concurrently each to the other. Peltier was ordered in each case to pay \$960.00 in prosecutorial reimbursement costs to the District Attorney's office. The trial court further ordered that Peltier be supervised by Oklahoma Court Services (OCS) and imposed a supervision fee payable to OCS in the amount \$40.00 per month for two years. Peltier was also ordered to pay other various costs, fines, fees and restitution. From this judgment and sentence Waylon Jerry Peltier has perfected his appeal. The conditions for deferral of Judgments and Sentences are **AFFIRMED.** Opinion by: Hudson, J.; Lumpkin, P.J., Concurs; Lewis, V.P.J., Concurs; Kuehn, J., Concurs; Rowland, J., Concurs.

**F-2017-848** — Appellant Joshua Lynn Roof was tried by jury for eighteen (18) counts of Child Sexual Abuse, After Former Conviction of Two or More Felonies, in the District Court of Oklahoma County, Case No. CF-2015-5119. The jury found Appellant guilty in Count 1 and acquitted him of Counts 2 through 18. At the conclusion of the second stage of trial, the jury recommended as punishment twenty (20) years in prison. The trial court sentenced accordingly. It is from this judgment and sentence that Appellant appeals. The judgment and sentence is **AFFIRMED.** Opinion by: Lumpkin, P.J.; Lewis, V.P.J., Concur; Hudson, J., Concur; Kuehn, J., Concur; Rowland, J., Concur.

#### Thursday, January 10, 2019

**F-2017-657** — Sharon Frances Morris, Appellant, was tried by jury for the crime of first degree murder in Case No. CF-2016-3387 in the District Court of Tulsa County. The jury returned a verdict of guilty and set punishment at life imprisonment without the possibility of parole. The trial court sentenced accordingly. From this judgment and sentence Sharon Frances Morris has perfected her appeal. The Judgment and Sentence of the District Court is **AFFIRMED.** Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs; Rowland, J., concurs.

**F-2017-700** — Travis Horn, Appellant, was tried by jury for the crimes of lewd or indecent acts with a child under age twelve (Count 1) and forcible oral sodomy (Count 2) in Case No. CF-2016-86 in the District Court of Garvin County. The jury returned a verdict of guilty and set punishment at twenty-five years imprisonment on Count 1 and fifteen years imprisonment on Count 2. The trial court sentenced accordingly and ordered the sentences



to be served consecutively. From this judgment and sentence Travis Horn has perfected his appeal. The Judgment and Sentence of the District Court is **AFFIRMED**. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs in results; Hudson, J., concurs; Rowland, J., concurs.

**F-2017-1043** — Keyshawn Butler, Appellant, was tried by jury in the District Court of McCurtain County for the following crimes: Count I – Conspiracy, Count II – Conjoint Robbery, Count III – First Degree Burglary, Count IV – Kidnapping, Count V – First Degree Rape, Count VI – Forcible Sodomy and Count VII – Feloniously Pointing a Firearm in Case No. CF-2016-306C. The jury returned a verdict of guilty and recommended as punishment 10 years imprisonment in each of Counts I, II, III and VII, 20 years in each of Counts IV and VI, life in prison on Count V and a \$5000.00 fine on Count I. The trial court sentenced accordingly and ordered the sentences for Counts I-IV to run concurrently with each other and consecutively to the sentences in Counts V-VII (which run concurrently with one another). From this judgment and sentence Keyshawn Butler has perfected his appeal. **AFFIRMED**. Opinion by: Kuehn, V.P.J.; Lewis, P.J., concur; Lumpkin, J., concur; Hudson, J., concur; Rowland, J., concur.

**F-2017-1249** — Armando Rodriguez, Appellant, was tried by jury for the crime of Unlawful Possession of a Controlled Substance in Case No. CF-2016-5817 in the District Court of Oklahoma County. The jury returned a verdict of guilty and set punishment at two years imprisonment. The trial court sentenced accordingly and partially suspended all but the first fifty-one days because of an Immigration and Customs Enforcement hold. From this judgment and sentence Armando Rodriguez has perfected his appeal. **AFFIRMED**. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs.

**F-2017-1089** — Preston Lee Jones, Appellant, was tried by jury for the crime of Aggravated Possession of Child Pornography (Counts 1 and 2), Possession of Child Pornography (Counts 3 and 4) and Violation of Oklahoma Computer Crimes Act (Count 5) in Case No. CF-2014-335 in the District Court of Garvin County. The jury returned verdicts of guilty and set punishment at twenty years imprisonment on each of Counts 1 and 2, ten years imprisonment on each of Counts 3 and 4, and two years imprisonment

and a \$5,000.00 fine on Count 5. The trial court sentenced accordingly and ordered the sentences to be served consecutively. From this judgment and sentence Preston Lee Jones has perfected his appeal. **AFFIRMED**. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs.

**C-2018-462** — Petitioner Lawrence Lee Young entered a negotiated plea of guilty in the District Court of Garfield County, Case No. CF-2015-592, to Possession of a Controlled Dangerous Substance (Methamphetamine) Within 1000 Feet of a School (Count 1), Misdemeanor Unlawful Possession of Drug Paraphernalia (Count 2), and Misdemeanor Resisting an Officer (Count 3). The Honorable John W. Michael, District Judge, accepted Young's plea and, pursuant to the plea agreement, placed him in the Garfield County Adult Sobriety Court. The State filed a motion to terminate Young from the drug court program and the Honorable Dennis Hladik, District Judge, sustained the State's termination motion and sentenced Young in accordance with his plea agreement to a ten year sentence and methamphetamine registry on Count 1, one-year in the county jail on each of Counts 2 and 3, with all sentences running concurrently, plus the assessment of various costs and fees. Young filed a timely motion to withdraw his plea which was denied. Young appeals the denial of his motion to withdraw plea. The Petition for Writ of Certiorari is **DENIED**. The district court's denial of Petitioner's motion to withdraw plea is **AFFIRMED**. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs in results; Lumpkin, J., concurs; Hudson, J., concurs.

#### **ACCELERATED DOCKET** **Thursday, January 3, 2019**

**JS-2018-0917** — Appellee, M. W. born January 4, 2001, was charged February 16, 2018, as a Youthful Offender in Tulsa County District Court Case No. YO-2018-0009 with Count 1 – Rape, First Degree, and Count 2 – Sexual Battery. Appellee's motion for certification as a Juvenile was granted by the Honorable James W. Keeley, Special Judge, on August 29, 2018. The State appeals. The order of the District Court granting Appellee's motion for certification as a Juvenile 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. 2)

Monday, January 7, 2019

**116,722** (Companion with Case Nos. 116,244 and 116,896) — Lena Renee Roodzant, Petitioner/Appellee, vs. Daniel Charles Roodzant, Respondent/Appellant. Appeal from an order of the District Court of Custer County, Hon. Donna L. Dirickson, Trial Judge, imposing a sentence for contempt. Husband claims abuse of discretion by the trial court asserting that the punishment and fines imposed against him are in excess of that allowed under Oklahoma law. First, Husband contends the sentence he “received was solely penal” because “it was intended to punish Husband for the violations.” He contends the only violation that had a monetary remedy was the failure to pay child support, but he purged that violation when he paid the arrearage in full. We agree that the sentence imposed by the trial court was penal because, in the final analysis, there was no way for Husband to purge his sentence after the trial court imposed it. However, there is no indication Husband was denied due process or other procedural protections. We find the sentence complied with 21 O.S.2011 § 566(A) in that the punishment did not exceed six months in the county jail. Because the record shows no denial of federal due process protections or state statutory and constitutional protections, we affirm the trial court’s order imposing a six-month deferred sentence. Husband also argues that the trial court’s imposition of a fine of \$5,516 for the balance transfer he acquired on Wife’s credit card and the \$2,500 for attorney fees violates 21 O.S.2011 § 566(A) because the fine is over \$500. We disagree. The \$5,516 was part of the trial court’s property division, and the trial court could properly award attorney fees. We agree with Wife that the trial court revoked its incentive rather than fining Husband when it ordered him to pay \$5,516 for the balance transfer on Wife’s credit card as part of its property division. Husband also challenges the propriety of the attorney fee award. We conclude Husband’s actions outlined by the trial court were sufficient to show he acted in bad faith and so were sufficient to support the award of attorney fees. But the record is silent on how the \$2,500 amount was reached. We are unable to substantiate the \$2,500 in Wife’s attorney fees from any supporting evidence in the record. We must remand this issue to the trial court to redetermine the amount of the attorney fee award for services related to the

contempt proceedings. After review, we affirm the portions of the trial court’s order imposing a six-month deferred sentence, requiring Husband to pay \$5,516 to Wife for a balance transfer on her credit card, and awarding her attorney fees. We reverse the amount of the attorney fee award and remand for further proceedings on this issue. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS.** Opinion from the Court of Civil Appeals, Division II, by Wiseman, P.J.; Thornbrugh, C.J., and Fischer, J., concur.

**116,856** — Kevin Quinnelly, Deceased, and Caryn Quinnelly, Deceased, Claimant, Petitioner, vs. Gerdau Ameristeel US, Inc., Indemnity Insurance Co. of North America, and The Workers’ Compensation Court of Existing Claims, Respondents. Proceeding to review an order of the Workers’ Compensation Court of Existing Claims, Hon. L. Brad Taylor, Trial Judge, denying payments of deceased Claimant’s benefits to his surviving heirs-at-law, his adult sons. Claimant’s proposition on appeal is that the trial court’s order not “allowing the payment of benefits to the heirs at law” and abating this claim is contrary to law. Claimant argues the trial court erred as a matter of law by denying payment of benefits to Caryn Quinnelly’s heirs-at-law, her two adult sons. Claimant admits that although the sons cannot revive the claim, “the claim was already revived in an eligible recipient – their widowed mother” and the sons should simply receive the award as her “heirs-at-law.” This dispute requires us to determine the meaning of certain governing statutes. The revivor statute Claimant relies on provides that permanent partial disability compensation shall be awarded to a surviving spouse “in case of the death of the claimant, due to causes other than” injury for which a person “has been awarded permanent partial compensation.” 85 O.S.2001 § 48(1)(a)(emphasis added). The statutory language clearly allows a permanent partial disability claim to be revived when claimant’s death was due to causes other than the compensable injury. In this case, the parties agree that Claimant’s death was caused by something other than the compensable injury. Claimant’s interpretation, that the statutory language of 85 O.S. §§ 41(a) and 48(1) allows Claimant’s two non-dependent adult sons to recover the award as heirs-at-law of their mother’s estate, would require us to read a good deal more into that statutory language than it says. We do not see how we can agree with Claimant that when a “person in

whom the claim has been revived dies, the award should then be made to the heirs-at-law of that person.” The clear language of § 48(1)(e) states that if a claimant is not survived by a surviving spouse or any other category of persons identified in the statute, “then the award for compensation benefits shall abate.” Looking at the plain statutory language governing the issue before us, the trial court was correct to abate this claim and we must sustain the Workers’ Compensation Court’s decision. SUSTAINED. Opinion from the Court of Civil Appeals, Division II, by Wiseman, P.J.; Thornbrugh, C.J., and Fischer, J., concur.

**116,986** — Multiple Injury Trust Fund, Petitioner, vs. James Gerald Graham and The Workers’ Compensation Court of Existing Claims, Respondents. Proceeding to review an Order of a Three-Judge Panel of The Workers’ Compensation Court, Hon. Michael W. McGivern, Trial Judge. The Multiple Injury Trust Fund (MITF) seeks review of a panel’s order that vacated the trial court’s denial of permanent total disability (PTD) benefits to Claimant. The applicable statutory provisions are from the 2011 version of Oklahoma’s workers’ compensation statutes, 85 O.S.2011 §§ 402(A), 404 (A), 308(40), and 329(J) (now repealed). MITF admits jurisdiction and that Claimant is a “previously impaired person”; however, it argues the panel’s order is erroneous because Claimant’s shoulders are not a “member” under Oklahoma law and thus are not “combinable” with Claimant’s previous adjudicated injuries. The law on which MITF relies does not control here, because the cases in question were concerned with the combinability of injuries for purposes of deciding a claimant’s threshold eligibility as physically impaired in order to establish jurisdiction against MITF. Here Claimant is undisputedly physically impaired but MITF disputes whether he is PTD. We find the rationale of *MITF v. Sugg*, 2015 OK 78, 362 P.3d 222, applicable, and thus find the *en banc* panel properly considered Claimant’s previous impairments to his shoulders and hand in determining whether he is PTD. The panel’s decision therefore is sustained. SUSTAINED. Opinion from the Court of Civil Appeals, Division II, by Thornbrugh, C.J.; Wiseman, P.J., and Fischer, J., concur.

**Thursday, January 10, 2019**

**116,724** — RPC Macro Storage, LLC, Plaintiff/Appellant/Counter-Appellee, vs. 122nd Street Mini Storage, LLC; Mohammad Farzaneh; Jalal Farzaneh; and Yosef Hooshyar,

Defendants/Appellees/Counter-Appellants, and First American Title Insurance Company, Defendants. Proceeding to review a judgment of the District Court of Oklahoma County, Hon. Patricia Parrish, Trial Judge. RPC Macro Storage, LLC (RPC), and 122nd Street Mini Storage, LLC (122nd), appeal the judgment of the district court in a commercial property case which arose from a discrepancy between the number of climate controlled storage units stated in a purchase contract, and the number actually provided when construction was complete. On review, we reach the following conclusions: (1) The district court correctly dismissed RPC’s fraud claim for a lack of damages; (2) the district court incorrectly found that 122nd had not breached a contractual obligation sufficient to trigger the contractual attorney fees provision of the Agreement; (3) the district court correctly awarded a return of the earnest money to RPC; and (4) the district court correctly disposed of RPC’s fraud claim based on a lack of any further damages, rather than the on the ground that there was no fraud. AFFIRMED IN PART, REVERSED IN PART AND REMANDED. Opinion from the Court of Civil Appeals, Division II, by Thornbrugh, C.J.; Wiseman, P.J., and Fischer J., concur.

**116,051** — Tinker Federal Credit Union, Plaintiff/Appellee, vs. Galan D. Cobb, Defendant/Appellant. Proceeding to review a judgment of the District Court of Oklahoma County, Hon. Roger H. Stuart, Trial Judge. Galan D. Cobb appeals a decision of the district court granting a *nunc pro tunc* order creating a journal entry of judgment (JE). In July 2006, Appellee TFCU obtained a default judgment against Appellant Galan Cobb on a delinquent automobile loan. The judgment was in the form of a docket entry indicating that a JE was to be submitted for signature. Around October 2016, TFCU discovered that it had been making collection efforts on the debt for many years without the benefit of a signed and filed journal entry of judgment. In May 2017, the court provided a journal entry as a *nunc pro tunc* order more than ten years after the original minute. We find no evidence sufficient to support a finding that a journal entry was ever submitted. This is not, therefore, a matter of a scrivener’s error or administrative error that may be corrected by a *nunc pro tunc* order. We find that a *nunc pro tunc* order cannot be used, more than 10 years after the event, to create a journal entry that was never made, when the details of the JE were not specified in the court’s original

minute. REVERSED AND REMANDED. Opinion from Court of Civil Appeals, Division II, by Thornbrugh, C.J.; Fischer, J., concurs, and Wiseman, P.J., concurs in result.

**(Division No. 4)**

**Monday, December 31, 2018**

**116,522** (Consolidated with 116,777) — Hadleigh Summers, an individual; Tony Summers, Konna Summers, and Kent Brown, individuals and Next Friends to Hadleigh Summers, Plaintiffs/Appellants, v. Sayre Public Schools, a political subdivision of the City of Sayre; Sayre Board of Education, a political subdivision of the City of Sayre; Tammy Stafford, individually and as former President of Sayre Board of Education; Vickie Hinkle, individually and as former Vice President and Member, and as current President of Sayre Board of Education; Calvin York, individually and as former Clerk and Member, and as current Vice President of Sayre Board of Education; Brian Chapman, individually and as former and current Member of Sayre Board of Education; Michael Spieker, individually and as Member of Sayre Board of Education; Todd Winn, individually and as Superintendent of Sayre Public Schools; and Danny Crabb, individually and as Principal of Sayre High School, Defendants/Appellees. Appeal from the District Court of Beckham County, Hon. Doug Haight, Trial Judge. This case arises from allegations of grade manipulation and bullying. Plaintiffs appeal from the trial court's order granting summary judgment in favor of Defendants as to a theory of ordinary negligence, as well as from the trial court's order granting Defendants' motion to dismiss the remaining theories: violation of the due process clause of the Oklahoma Constitution; breach of contract; negligent supervision; intentional infliction of emotional distress; and violations of the Oklahoma Open Records Act, 51 O.S. 2011 & Supp. 2017 §§ 24A.1-24A.31, as well as of the Oklahoma Open Meeting Act, 25 O.S. 2011 & Supp. 2017 §§ 301-314. We conclude Plaintiffs have failed to state a claim with regard to any of these allegations. Furthermore, we conclude the trial court properly granted summary judgment in favor of Defendants as to the theory of ordinary negligence. Accordingly, we affirm. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Goodman, J., concurs, and Rapp, J., concurs in part and dissents in part.

**117,493** — Torrance Gene Jackson, Plaintiff/Appellant, v. Board of County Commissioners

of the County of Oklahoma; P.D. Taylor, Oklahoma County Sheriff; John Doe, an agent of Oklahoma County, Defendants/Appellees. Appeal from the District Court of Oklahoma County, Hon. Aletia Haynes Timmons, Trial Judge. Plaintiff (Jackson) appeals from the trial court's order granting the motion to dismiss of Defendants. Jackson filed this action alleging "[t]he actions of, and force used by, the Sheriff's deputy or jailer who assaulted [Jackson] were unnecessary and excessive, and in violation of [Jackson's] rights under the Oklahoma Constitution, Article 2, § 30. *Bosh v. Cherokee County Governmental Building Authority*, 2013 OK 9, 305 P.3d 994." As explained by Jackson on appeal in his petition-in-error, Defendants sought dismissal on the basis that "the legislature's 2014 amendments to the Governmental Tort Claims Act, 51 O.S. §§ 151-172," necessitate "compliance with the jurisdictional pre-suit notice and denial requirements of the GTCA." Jackson argues, however, that he has "stated a cognizable legal claim for an excessive force violation and was not required to comply with the pre-suit GTCA provisions." A recent decision of the Oklahoma Supreme Court is dispositive of this appeal. Pursuant to *Barrios v. Haskell County Public Facilities Authority*, 2018 OK 90, \_\_ P.3d \_\_, and Oklahoma Supreme Court Rule 1.201, 12 O.S. 2011, ch. 15, app. 1, we summarily affirm the trial court's order. SUMMARILY AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Rapp, J., and Goodman, J., concur.

**117,083** — In the Matter of J.R., and E.R., Adjudicated Deprived Children. Victoria Krohn and Stephon Krohn, Petitioners/Appellants, vs. The State of Oklahoma, Respondent/Appellee. Appeal from Order of the District Court of Garvin County, Hon. Trisha Misak, Trial Judge. Victoria Krohn and Stephon Krohn (Foster Parents) appeal an order overruling their objection to the State of Oklahoma, ex rel. Department of Human Services' (DHS) notice of removal of the minor children from out-of-home placement. Based on our review of the record and applicable law, we affirm the order under review. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Goodman, J.; Barnes, P.J., concurs, and Rapp, J., dissents.

**116,006** — In re the Matter of: Kasey L. Wiles (now Bailes), Petitioner/Appellant, v. Leslie H. Wiles, Jr., Respondent/Appellee. Appeal from an Order of the District Court of Oklahoma County, Hon. Martha F. Oaks, Trial Judge, denying Kasey L. Wiles' (now Bailes) (Wife) peti-

tion/motion to vacate or, alternatively, motion for new trial. Wife contends the trial court erred in determining the amount of child support arrearages. She further contends the court erred by modifying visitation. The trial proceedings were not reported stenographically. Thus, no transcript of the proceedings is available to review. Wife did not submit a narrative statement. In reviewing the trial court's decision for abuse of discretion, we are limited to the record presented on appeal. Accordingly, the Court will not presume the trial court committed reversible error by acting against the clear weight of the evidence or abusing its discretion. Finding no basis in the record on appeal to support Wife's assertions of error, we affirm the trial court's decision. **AFFIRMED.** Opinion from Court of Civil Appeals, Division IV, by Goodman, J.; Barnes, P.J., and Rapp, J., concur.

**116,349** (Companion with Case No. 116,078) — In the Matter of the Guardianship of Harold S. Wood, A Partially Incapacitated Person. Virginia L. Wood, Plaintiff/Appellant, vs. Mark Lyons, Defendant/Appellee. Appeal from Order of the District Court of Tulsa County, Hon. Kurt G. Glassco, Trial Judge. Plaintiff Virginia L. Wood appeals the trial court's order awarding Defendant Mark Lyons a guardianship fee, his costs, and discharging him as the Limited Guardian of Harold S. Wood, a partially incapacitated person, now deceased. Based on our review of the facts and applicable law, we affirm the award of fees and costs. **AFFIRMED.** Opinion from Court of Civil Appeals, Division IV, by Goodman, J.; Barnes, P.J., and Rapp, J.

**116,836** — Catherine Patron, Plaintiff/Appellant, v. The Estate of Jack Sauer, deceased; Berdine Sauer, deceased; and/or the Estate of Jack and Berdine Sauer, deceased, Defendants/Appellees. Appeal from the District Court of Custer County, Hon. Doug Haught, Trial Judge. Plaintiff appeals from an order of the trial court denying her motion for new trial after the court granted the motion to dismiss her petition filed by Defendants (collectively, the Estate). The trial court's determination that Plaintiff had shown good cause for her delay in effecting service on the Estate's personal representative was not vacated by the trial court and Patron made service upon the personal representative within the time set by the trial court for service. Consequently, the trial court abused its discretion in subsequently dismissing Plaintiff's petition after service was effected and in denying Plaintiff's motion for new trial. Accordingly,

we reverse and remand for further proceedings. **REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.** Opinion from Court of Civil Appeals, Division IV, by BARNES, P.J.; RAPP, J., concurs, and GOODMAN, J., dissents.

**Monday, January 7, 2019**

**116,520** — In the Matter of the Guardianship of: K.L.L. and B.T.L. Jimmy D. Lewis and Jill E. Lewis, Respondents/Appellants, v. Orval Ray Burleson and Tracy L. Burleson, Petitioners/Appellees. Appeal from the District Court of Delaware County, Hon. Harry M. Wyatt, Trial Judge. Appellants Jimmy D. Lewis and Jill E. Lewis (Parents) appeal from an order of the district court denying their motion to modify, correct or vacate an order of the court. Parents raise three propositions on appeal: (1) the trial court erred in finding Parents' counsel had an ex parte communication with the court that resulted in the trial court vacating a minute order; (2) the trial court erred in sua sponte dismissing all pending matters including their applications for contempt and thus denying them their right to due process; and (3) the trial court erred in denying their 12 O.S. Supp. 2013 § 1031.1 motion. Based on our review of the record, we conclude the communication between the court and Parents' attorney that led to the minute order was an ex parte communication within the meaning of 5 O.S. 2011, ch. 1, app. 4, Rule 2.9(A). We further conclude Parents' due process rights were not violated because the contempt herein sought is criminal and sought punishment in vindication of public authority, the dignity of the court and the majesty of the state, and not, as is true for civil contempt, to coerce the performance of an act compensatory or remedial for the benefit of Parents. We therefore conclude the trial court did not abuse its discretion in denying Parents' motion to modify, correct or vacate its order 2 vacating the minute order. Accordingly, we affirm. **AFFIRMED.** Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Rapp, J., and Goodman, J., concur. January 4, 2019.

**116,564** (Companion to Case No. 115,072) — In the Matter of the Marriage of: Svetlana Sanclement, Petitioner/Appellant, vs. Jose Sanclement, Respondent/Appellee. Appeal from Order of the District Court of Oklahoma County, Hon. Richard C. Ogden, Trial Judge. Svetlana Sanclement (Wife) seeks review of the trial court's post-trial order denying her an attorney's fee in her divorce action against Jose Sanclement (Hus-



band). Incorporated within the parties' Decree of Dissolution of Marriage were two documents, denominated the Plan and the Agreement, which set out in detail what the parties refer to as the Time Sharing Schedule (TSS). Following various attempts by the parties to modify the terms of the TSS, Wife filed a motion for an attorney's fee. She relied on the terms of the Agreement and on 43 O.S.2011, § 110(E). The trial court denied Wife's fee request. Wife's argument on appeal essentially asks this Court to reweigh the evidence considered by the trial court and reach a conclusion favorable to her. We decline to do so. Our analysis of a trial court's discretionary decision requires us to presume the trial court's decision was correct. The trial court's order denying Wife's motion for an attorney's fee, pursuant either to the agreement of the parties as set out in the Decree, or pursuant to 43 O.S.2011, § 110(E) is affirmed. **AFFIRMED.** Opinion from Court of Civil Appeals, Division IV, by Goodman, J.; Fischer, P.J., and Rapp, J., concur.

**115,072** (Companion to Case No. 116,564) — In the Matter of the Marriage of: Svetlana Sanclement, Petitioner/Appellee, vs. Jose Sanclement, Respondent/ Appellant. Appeal from Order of the District Court of Oklahoma County, Hon. Richard C. Ogden, Trial Judge. Jose Sanclement (Husband) appeals the trial court's

order awarding an attorney's fee to Svetlana Sanclement (Wife). Husband raises three issues on appeal. He contends the trial court erred in its interpretation and application of the attorney fee provision of the Agreement to the Plan; that the award of a fee pursuant to the Agreement is a violation of the American Rule and; the trial court's interpretation of the attorney fee language violates public policy. The parties agreed a fee would be awarded under the language contained in the Agreement, but chose to be silent regarding a fee under the language in the Plan. We hold, therefore, that the parties have clearly spoken on the subject of an attorney's fee on this issue by creating an exception to the American Rule and providing for a fee. We further conclude the trial court's interpretation of the order does not violate public policy. The trial court's decisions were correct, and its order is affirmed. **AFFIRMED.** Opinion from Court of Civil Appeals, Division IV, by Goodman, J.; Fischer, P.J., concurs, and Rapp, J., dissents.

#### **ORDERS DENYING REHEARING**

**(Division No. 1)**

**Monday, January 7, 2019**

**115,708** — Joy Yolanda Skiles, Plaintiff/Appellee, vs. David Fritz, Defendant/Appellant. Appellant's Petition for Rehearing and Brief, filed December 31, 2018, is **DENIED**.

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