THE OKLAHOMA BAR
Journal
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# Court Issue

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THE OKLAHOMA BAR
# Journal

Volume 90 – No. 1 – 1/5/2019








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Oklahoma Bar Association

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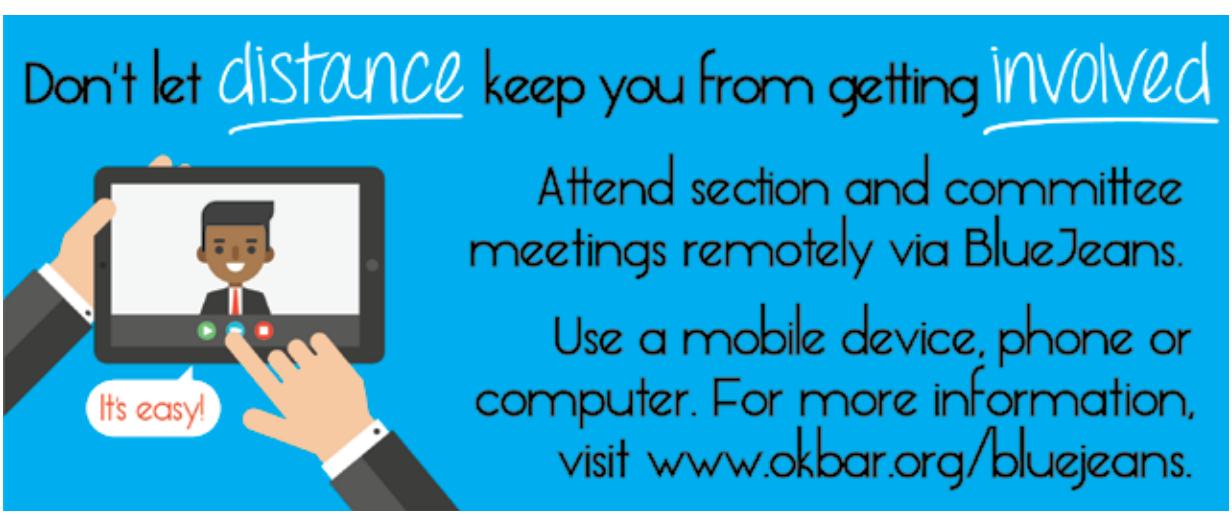


**2018 OK 86**

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

**SCBD-6707. November 13, 2018**

**ORDER**

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

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

/s/ Douglas L. Combs
CHIEF JUSTICE

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

Wyrick, J., dissents.

**EXHIBIT A**

**RULE SEVEN**

FEES

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

(a) Registration:

Regular.....$125

Nunc Pro Tunc.....$500

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

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

FEBRUARY BAR EXAM

Application filed on or before:

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

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

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

JULY BAR EXAM

Application filed on or before:

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

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

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

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

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

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

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

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

FEBRUARY BAR EXAM

Application filed on or before:

1 September..... $400

1 October.....$450

1 November.....$550

JULY BAR EXAM

Application filed on or before:

1 February .....$400

1 March .....$450

1 April .....$550

**2018 OK 94**

**State of Oklahoma ex rel. Oklahoma Bar Association, Complainant. v. Stephen J. Merrill, Respondent.**

**No. SCBD 6712. December 19, 2018**

CORRECTION ORDER

This Court's Order dated December 10, 2018, in the above-referenced matter is hereby corrected in Paragraph 1, subparagraph 1 by striking the language: "following the commencement of a hearing before the Professional Responsibility Tribunal." Paragraph 1, subparagraph 1 now reads: "On October 22, 2018, the respondent submitted his written affidavit of resignation from membership in the Bar Association pending investigation of a disciplinary proceeding."

In all other respects, this Court's Order of December 10, 2018, shall remain unchanged.

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

/s/ Justice Patrick Wyrick
ACTING CHIEF JUSTICE

**2018 OK 98**

**IN RE: RULES FOR THE COMMITTEE ON JUDICIAL ELECTIONS**

**SCBD 5703. December 17, 2018**

**ORDER APPROVING AMENDMENTS TO RULES FOR THE COMMITTEE ON JUDICIAL ELECTIONS**

This matter comes on before this Court upon an Application to amend Rules for the Committee on Judicial Elections, 5 O.S. ch.1 app.4C. This Court finds that it has jurisdiction over this matter and that an Order should enter as follows:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Application of the Oklahoma Bar Association to amend Rules 3(L) and 5(A) and Rule 6 (Definitions) for the Committee on Judicial Elections, said Rules attached hereto in entirety as Exhibit A, is hereby granted.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Rules for the Committee on Judicial Elections shall be published two times in the *Oklahoma Bar Journal* and published on the website within sixty (60) days of the execution of this Order. The amendments shall become effective upon filing of this Order.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 17th day of DECEMBER, 2018.

/s/ Douglas L. Combs
CHIEF JUSTICE

ALL JUSTICES CONCUR.

**EXHIBIT A**

**RULES FOR THE COMMITTEE ON JUDICIAL ELECTIONS**

**INDEX**

## RULES FOR THE COMMITTEE ON JUDICIAL ELECTIONS

### *(WITH PROPOSED AMENDMENTS APPROVED BY THE OKLAHOMA BAR ASSOCIATION BOARD OF GOVERNORS ON OCT. 12, 2018)*

In order to maintain the independence, integrity and impartiality of the judiciary in the State of Oklahoma, the Supreme Court has adopted the Code of Judicial Conduct which governs the conduct of candidates for judicial office under its exclusive supervisory and administrative power over the inferior courts, as provided under Article VII of the Oklahoma Constitution. To facilitate the enforcement of the Code, as it relates to judicial elections, the Supreme Court now establishes a Committee on Judicial Elections.

RULE 1. ORGANIZATION

A. **ORGANIZATION**. There is established a Committee on Judicial Elections. The Committee shall consist of nine (9) members. Three (3) members shall be members of the Oklahoma Bar Association, in good standing, who are not judges of a court of record. Three members shall be district judges or associate district judges with at least 10 years of service. These judges may be judges in active service or they may be retired judges with the required length of service before their retirement. Three members shall be lay persons.

B. **APPOINTMENT**. The Board of Governors of the Oklahoma Bar Association shall appoint the attorney members and the lay members of the committee. The Chief Justice of the Supreme Court shall appoint the judge members. The terms of the initial appointments to the Committee shall be as follows: two attorney members, two judge members and one lay member shall be appointed for a term of four years; one attorney member, one judge member and two lay members shall be appointed for a term of eight (8) years. Following the initial appointments, the terms of service for the members of the Committee shall be for eight (8) years.

If a member of the Committee changes his or her status as a member of one of the three (3) categories of membership, the Committee member shall immediately submit his or her resignation from the Committee to the Chairperson of the Committee. The Chairperson of the Committee shall provide notice of resignation to the appointing authority for the affected category of membership. Within sixty (60) days the appointing authority shall appoint a new member of the Committee. The resignation of the former committee member shall not be effective until the replacement member is appointed. The replacement member shall be appointed for the remainder of the unexpired term of the former member and may be reappointed.

If a member of the committee resigns for a reason other than a change of eligibility status or death the procedure set out in the previous paragraph shall be followed in appointing a new committee member.

C. CHAIRPERSON. The chairperson and vice-chair person shall be elected by the members of the Committee from any of the three groups represented on the Committee. The term of office for the chairperson and vice-chair person shall be four (4) years, and these officers may be reelected for two additional terms. The chairperson and vice-chairperson shall furnish their contact information to the Administrative Director of the Courts and en-

sure that such information is accurate and up to date.

D. CONFIDENTIALITY. Except as provided under Rule 3 L and Rule 5 A all filings, documents, correspondence and proceedings before the Committee shall be confidential and shall not be released to the public.

RULE 2: COMPLAINTS

A. COMPLAINT FORM. Any individual who believes there has been a violation of Canon 4 of the Code of Judicial Conduct may file a complaint against a judge or a candidate seeking election to a judicial office. The complaint shall be made in writing and be signed and verified by the complaining party. The complaint shall allege a violation or violations of Canon 4 with specific facts and sufficient documentation to support the allegations. If the violation or violations alleged concern written or recorded material, those materials shall be attached to the complaint.

1. It shall include contact information for both the complaining party and the defending party. The contact information should include the e-mail address, telephone number, facsimile number, mailing address and physical address for both parties.

B. FILING. The original complaint and (5) five copies of the complaint with all attachments shall be filed with the Administrative Director of the Courts. The complaint and attachments may be filed during regular business hours by personal delivery, by United States Postal Service First Class mail or another express delivery service or by e-mail or facsimile. Immediately upon receipt of a complaint, the Administrative Director shall notify the Chairperson of the Committee of the receipt of the complaint and forward five (5) copies of the complaint with all attachments to him or her. This shall be sent by overnight delivery using the United States Postal Service or another express mail provider. The Administrative Director of the Courts will file in the Director's office one copy of the complaint with all attachments.

C. RECEIPT. The Chairperson shall ensure that each complaint meets the requirements of Rule 2. If the complaint fails to meet the requirements of Rule 2 the Chairperson shall notify the complaining party and indicate the reasons why the complaint is insufficient. The complaining party shall have the right to file an amended complaint to correct the deficiencies, pursuant to and in accordance with Rule 2 B.

D. PANEL. If the complaint meets the requirements of Rule 2 the Chairperson shall, within two business days after its receipt, appoint a Hearing Panel comprised of three (3) members of the Committee including one judge member, one attorney member, and one lay member. The Chairperson shall designate a member of the Hearing Panel to serve as panel chairperson and shall forward the complaint to all members of the panel.

E. NOTICE OF A COMPLAINT. The Chairperson shall immediately notify the defending party that a complaint has been made against him or her and forward a copy of the complaint with a copy of all attachments to him or her by overnight delivery using the United States Postal Service or another express delivery service. In addition, to provide more immediate notice, the chairperson may send a copy of the complaint by e-mail or facsimile.

F. **NOTICE OF PANEL MEMBERS**. Immediately upon the appointment of the Hearing Panel the Chairperson shall provide, by e-mail or facsimile to the complaining party and the defending party, the names and contact information of the three panel members.

G. RESPONSIBILITIES OF THE PANEL CHAIRPERSON. The panel chairperson shall ensure that all members of the panel receive copies of all written communications with the parties and the documents and materials provided by the parties.

RULE 3: HEARING PROCEDURES

A. NOTICE OF THE HEARING. The panel chairperson shall set a date for a hearing to be held not less than two (2) calendar days and not more than six (6) calendar days after the appointment of the Hearing Panel and shall by e-mail or facsimile immediately notify both parties of the date of the hearing.

B. RESPONSE. The defending party shall serve a written response to the allegations of the complaint along with any supporting documentation or materials to the members of the Hearing Panel and to the complaining party. A copy of the response with all supporting documentation and materials shall also be filed with the Administrative Director of the Courts. Except as provided in Rule 3 E, the Response

shall be filed within two business days of receiving a copy of the complaint. The response may be filed during regular business hours by personal delivery or be sent by overnight delivery using the United States Postal Service First Class mail, another express delivery service, or by e-mail or facsimile. The date of personal delivery, the sending of the e-mail, or facsimile or the date of mailing shall be considered the date of filing.

C. FAILURE TO RESPOND. If the defending party does not file a response in the manner required by Rule 3 B the Hearing Panel may proceed to hear the matter. However, at its discretion, the Committee may consider a late filed response.

D. HEARING. The chairperson of the Hearing Panel shall conduct the hearing which may be in person or at the chairperson's discretion by teleconference or some other effective means which allows all parties and the panel to communicate directly with each other.

1. The parties shall have an opportunity to appear at the hearing in person and/or by counsel.
2. The parties may call witnesses to give testimony relevant to the issues raised in the pleadings and may present any relevant evidence in support of the party's position.
3. The parties may offer oral arguments in support of their positions.
4. The rules of evidence shall not be strictly enforced and the chairperson shall endeavor to conduct the proceedings in such a way as to ascertain the truth of the matter before the panel without allowing undue or duplicative proof.

E. **EXPEDITED HEARING**. If a complaint is filed within two weeks of an election in which the parties are involved, the panel chairperson may determine that an expedited hearing is necessary. If such an expedited hearing is determined to be necessary the panel chairperson, in the chairperson's sole discretion, shall set the date for the hearing and the time for filing a response to the complaint. All panel members and the parties shall be notified by e-mail or facsimile of the date and time for the expedited hearing and the time in which to respond to the complaint. The provision of Rule 3 C shall apply if no response is filed.

F. DETERMINATION. Following the hearing the panel shall determine if a violation(s) of Canon 4 have occurred and that the allegations warrant speedy intervention or, alternatively, that a violation(s) of Canon 4 has not occurred, and/or that the allegations do not warrant speedy intervention by the panel.

G. BURDEN OF PROOF AND EVIDENTIARY STANDARD. The party bringing the complaint shall have the burden of proof. The standard of evidence to be used by the panel in making its determination of whether a violation of the Rules of Judicial Conduct has occurred shall be by clear and convincing evidence.

H. HEARING PANEL'S REPORT. The panel shall issue a written report within two (2) business days after the hearing specifying the panel's determination. If a violation is found the report shall identify the rule(s) which has been violated and the conduct constituting the violation(s). A majority of the panel members must agree with the report and sign it. The report of the panel shall be transmitted to the parties orally, or by facsimile or by e-mail and copies shall be sent to the parties by overnight delivery.

I. **WAIVER OF HEARING PROCEDURES.** The hearing before the Hearing Panel may be waived if the Complaining Party, the Defending Party and the Hearing Panel agree to the waiver of the hearing. The waiver by the parties shall be in writing and sent by facsimile or e-mail to the Chair of the Hearing Panel. Each party shall submit his or her individual waiver to the panel chair. Following the receipt of the waivers by the parties the panel members and the parties may then confer in person or by a telephone conference in an attempt to resolve the complaint. If the complaint is resolved through the informal procedure the Hearing Panel may dismiss the complaint if it is determined there was no violation of Canon 4. If it is decided by the Hearing Panel there has been a violation of Canon 4, the panel may require any of the action provided for in Rule 3 J. The Hearing Panel shall provide oral notice of its decision to the parties and shall send a written decision by facsimile or e-mail to the parties and to the Chair of the Committee on Judicial Elections.

If the complaint is resolved through the waiver of the hearing procedure there is no right of appeal by either party.

J. CEASE AND DESIST ORDER. If the panel determines that a violation(s) of Canon 4 has occurred, it may issue a cease and desist order which identifies the rule(s) violated and the conduct determined to be a violation of Canon 4. The panel may direct the defending party-candidate to take appropriate remedial measures which may include:

1. Immediately cease the offending conduct;
2. Withdraw the offending material, if any, from public distribution and/or publication;
3. Publish a retraction in the specific media required by the panel;
4. Publish an apology in the specific manner required by the panel; and/or
5. Submit a signed written agreement of compliance within time certain;
6. Any other remedial measure deemed appropriate by the panel;
7. Any combination of the above remedial measures.

The order shall provide for a reasonable time as determined by the panel, within which a defending party-candidate must comply with the cease and desist order and the manner for establishing proof of such compliance. In setting the time for compliance with the cease and desist order the panel shall take into consideration the time remaining before the judicial election. Before publication the chairperson of the panel shall approve the wording of any retraction or apology required of a candidate.

If the defending party candidate does not comply with the cease and desist order, the panel may request that the Committee on Judicial Elections refer the matter in accordance with Rule 6 to the General Counsel of the Oklahoma Bar Association or to the Council on Judicial Complaints.

K. FINDING OF NO VIOLATION. If the panel's decision is that it does not believe that a violation(s) has occurred, the panel shall issue a decision that it has determined no violation has occurred. The complaining party shall have the opportunity to request an appellate hearing.

L. DISCLOSURE OF THE HEARING PANEL'S REPORT. ~~The Hearing Panel shall consider and determine if the report or any part of the report should be released to the public. In making the decision the Hearing Panel shall consider the requests of the parties and what is in the best interests of the public, but it shall be in the sole discretion of the Hearing Panel to make the decision to release or not release the report.~~ After the Hearing Panel has considered the complaint and made its report, if no appeal of the decision of Hearing Panel is filed pursuant to Rule 3N, the Hearing Panel will release the report to the public within five (5) business days after the filing of its report pursuant to Rule 3H. If the decision of the Hearing Panel is appealed, the Hearing Panel shall not release its report to the public.

M. CHANGE OF TIME LIMITS. The chairperson of the Hearing Panel, for good cause shown may shorten or extend the time limits set out in this rule.

N. DECISION TO APPEAL.

1. If either the complaining party or the defending party wishes to appeal the decision of the Hearing Panel that party may do so by notifying the chair of the Committee on Judicial Elections of the decision to appeal and following the appointment of the Appellate Panel file with that panel a notice of appeal and a position paper. The position paper shall set out the basis of the party's appeal and why there was or there was not a violation(s) of the Rules of Judicial Conduct. The defending party may commence such an appeal even though he or she has agreed to comply with a cease and desist order or other directive.

2. If the appeal is commenced the Hearing Panel will file with the Appellate Panel its decision, orders and/or directives and the original record of all materials filed with the Hearing Panel. This material together with the party's notice of appeal and position paper shall be the record on the appeal.

3. The party appealing the decision of the Hearing Panel shall now be designated the Appellant. The other party shall be designated the Appellee.

O. STAY OF ACTION PENDING APPEAL. The Hearing Panel may stay any remedial action pending on appeal.

P. TIME FOR FILING NOTICE OF APPEAL AND POSITION PAPERS. If the appeal is commenced, the Notice of Appeal and Position

Paper(s) provided for in Rule 3 N shall be filed within five (5) business days of the receipt of the decision of the Hearing Panel.

RULE 4: APPELLATE PROCEDURES

A. APPOINTMENT OF APPELLATE PANEL. Upon receiving notice of the institution of the appellate procedures, the chairperson shall appoint an Appellate Panel consisting of three members of the Committee including one judge member, one attorney member and one lay member. The Chairperson of the Committee shall designate a member of the panel to serve as the panel chairperson. None of the members of this panel shall have served on the Hearing Panel in the matter now before the Committee.

B. NOTIFICATION. The chairperson of the Appellate Panel shall set a date for the hearing and notify the parties. The hearing shall occur within ten (10) business days after receipt of the appellant's notice of appeal and position paper.

C. APPELLEE'S POSITION PAPER. The appellee shall file a written position paper with the panel chairperson and serve a copy on the appellant at least three (3) business days before the date set for hearing. The Appellee's position shall also become a part of the record on appeal.

D. FORM OF POSITION PAPERS. The position papers shall indicate why the specific conduct alleged in the matter does or does not constitute a violation(s) of Canon 4, why the decision of the Hearing Panel was or was not in error and also may indicate why the specific conduct alleged is or is not allowed by law or the Code of Judicial Conduct.

E. ADMINISTRATOR. The chairperson of the Appellate Panel shall act as the administrator of the proceedings and shall call witnesses, hear arguments, entertain objections and take such other actions as are necessary to maintain the decorum of the proceedings.

F. COUNSEL. The parties may be represented by counsel, if desired, or may represent themselves.

G. HEARING.

1. The hearing shall be a de novo hearing.

2. The parties may call witnesses to give testimony relevant to the issues raised in the pleadings and may present any relevant evidence in support of the party's position.

3. The parties may offer oral arguments in support of their positions.

4. The rules of evidence shall not be strictly enforced and the administrator shall endeavor to conduct the proceedings in such a way as to ascertain the truth of the matter before the panel without allowing undue or duplicative proof.

H. DECISION.

1. Within five (5) business days of the date of the hearing the Appellate Panel will issue its decision. The Panel may affirm, modify or reverse the decision of the Hearing Panel. If the Committee finds that there has been a violation of the Code of Judicial Conduct it shall determine if remedial action should be imposed and, if any, the remedial action that is to be imposed upon the person or persons committing the violation.

2. The decision shall be issued in writing and shall contain findings of fact and conclusions of law and it shall specify any action taken by the Appellate Panel and the remedial action to be imposed, if any.

3. A majority of the members of the Appellate Panel must agree with the decision and sign it.

RULE 5: ACTIONS AND SANCTIONS

A. PUBLIC STATEMENT. Upon entry of the final decision of the Appellate Panel, ~~The~~ the Appellate Panel shall make the decision available to the public: within five (5) business days of the entry of the decision.

B. CEASE AND DESIST ORDER. The Appellate Panel may issue a cease and desist order to the party-candidate requiring him or her to stop the behavior that violates Canon 4 and/or if warranted, to issue a public apology and/or a retraction in one or more forums, as determined by the Appellate Panel. The cease and desist order shall set out the conduct which violates Canon 4 of the Code of Judicial Conduct, including the specific statements which were made, if applicable.

RULE 6. REFERRAL FOR DISCIPLINE.

In no event shall the Committee on Judicial Elections have the authority to institute disciplinary proceedings against any candidate for judicial office, which power is specifically re-

served to the Council on Judicial Complaints or the Oklahoma Bar Association, as the facts may warrant. As may be appropriate, the Committee on Judicial Elections may refer its file, findings, conclusions and recommendations for discipline to the Council on Judicial Complaints or the Oklahoma Bar Association.

DEFINITIONS

"Business Day" - The term "business day" in these rules shall include all the days of the week Monday through Friday except for legal holidays recognized by the state of Oklahoma.

"Committee" - The term Committee in these rules means the Committee on Judicial Elections.

"Complaint" - the term "complaint" refers to the original complaint and/or any amended complaint which is filed.

"Filing" - Filing may be accomplished by personal delivery during regular business hours, by facsimile, e-mail or any form of overnight mail delivery requiring certification of delivery. If the filing is made by facsimile or e-mail, a copy shall also be sent by overnight mail delivery.

"Forum" - A forum for purposes of the rules can include an organization, group of people or any form of publication including written, television, radio or digital media.

"Forward" - Forwarding may be accomplished by personal delivery during regular business hours or by facsimile, e-mail or any form of overnight mail delivery requiring certification of delivery. If made by facsimile or e-mail, a copy shall also be sent by overnight mail delivery.

"Remedial action" - Remedial action shall include all of those actions which a Hearing Panel may impose or require as specified in Rule 3 J of these rules.

"Service" - Service may be accomplished by personal delivery during regular business hours or by facsimile, e-mail or any form of overnight mail delivery requiring certification of delivery. If made by facsimile or e-mail, a copy shall also be sent by overnight mail delivery.

"Submit" - Submitting may be accomplished by personal delivery during regular business hours or by e-mail, facsimile or any form of overnight mail delivery requiring certification of delivery. If made by e-mail, or facsimile, or a copy shall also be sent by overnight mail delivery.

**2018 OK 100**

**KELLI BRAITSCH, Petitioner, v. CITY OF TULSA, OWN RISK #10435 and THE WORKERS' COMPENSATION COMMISSION, Respondents.**

**No. 116,510. December 18, 2018**

CORRECTION ORDER

The statement in dissent, filed on December 18th, 2018, is hereby corrected to add paragraph numbers, starting with ¶ 1.

In all other respects the December 18, 2018 statement in dissent shall remain unchanged.

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

/s/ Noma D. Gurich
VICE CHIEF JUSTICE

**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

# Calendar of Events

## January

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

**OBA Government and Administrative Law Section meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Melissa L. Blanton 405-521-3921

10 **OBA Solo & Small Firm Conference Planning Committee meeting;** 9:30 a.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Charles R. Hogshead 918-851-0813 or Nathan Richter 405-376-2212

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

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

12 **OBA Young Lawyers Division meeting;** 1 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Brandi Nowakowski 405-214-2346

15 **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

**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

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

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

**OBA Board of Governors meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City; Contact John Morris Williams 405-416-7000

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

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

## 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

# Opinions of Court of Civil Appeals

**COCA-ADM-2018-1**

**IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA OKLAHOMA CITY AND TULSA DIVISIONS**
**JUDICIAL DIVISION ASSIGNMENTS**
**and**
**ELECTION OF PRESIDING JUDGES**

**December 14, 2018**

TO THE CLERK OF THE APPELLATE COURTS:

You are hereby requested to cause the following notice to be published twice in the Journal of the Oklahoma Bar Association.

NOTICE

For the calendar year 2019, the Honorable Larry Joplin has been elected to serve as Presiding Judge of **Division One** of the Court of Civil Appeals, Oklahoma City Division. **Division One** will consist of Larry Joplin, Presiding Judge; Kenneth L. Buettner, Judge; and Brian Jack Goree, Chief Judge.

For the Calendar year 2019, the Honorable John F. Fischer has been elected to serve as Presiding Judge of **Division Two** of the Court of Civil Appeals, Tulsa Division. **Division Two** will consist of John F. Fischer, Presiding Judge, Jerry L. Goodman, Judge, and P. Thomas Thornbrugh, Judge.

For the Calendar year 2019, the Honorable E. Bay Mitchell, III, has been elected to serve as Presiding Judge of **Division Three** of the Court of Civil Appeals, Oklahoma City Division. **Division Three** will consist of E. Bay Mitchell, III, Presiding Judge, Robert D. Bell, Judge; and Barbara G. Swinton, Judge.

For the Calendar year 2019, the Honorable Deborah B. Barnes has been elected to serve as Presiding Judge of **Division Four** of the Court of Civil Appeals. **Division Four** will consist of Deborah B. Barnes, Presiding Judge, W. Keith Rapp, Judge, and Jane P. Wiseman, Vice-Chief Judge.

DONE BY ORDER OF THE COURT OF CIVIL APPEALS this 12th day of December, 2018.

/s/ P. Thomas Thornbrugh
Chief Judge

**COCA-ADM-2018-3**

**IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA OKLAHOMA CITY AND TULSA DIVISIONS**

**ORDER**

**December 14, 2018**

The Clerk of the Appellate Courts is directed to cause the following notice to be published twice in the Oklahoma Bar Journal.

**NOTICE**

Judge Brian Jack Goree has been elected to serve as Chief Judge of the Court of Civil Appeals of the State of Oklahoma for the year 2019. Judge Jane P. Wiseman has been elected to serve as Vice-Chief Judge of the Court of Civil Appeals of the State of Oklahoma for the year 2019.

Dated this 12th day of December, 2018.

/s/ P. Thomas Thornbrugh
Chief Judge

**2018 OK CIV APP 73**

**H. MICHAEL KRIMBILL, Plaintiff/Appellee, vs. LOUIS C. TALARICO, III, an Individual, and LCT CAPITAL, LLC, a Delaware limited liability company, Defendants/Appellants.**

**Case No. 115,496; Comp. w/114,777**
**July 3, 2018**

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

HONORABLE LINDA G. MORRISSEY, TRIAL JUDGE

**DISMISSED**

John J. Carwile, Clayton J. Chamberlain, MCDONALD, MCCANN, METCALF & CARWILE, LLP, Oklahoma City, Oklahoma, for Plaintiff/Appellee

Joel L. Wohlgemuth, Ryan A. Ray, NORMAN WOHLGEMUTH CHANDLER JETER BAR-

NETT & RAY P.C., Tulsa, Oklahoma, for Defendants/Appellants

P. THOMAS THORNBRUGH, CHIEF JUDGE:

¶1 Appellants Louis C. Talarico, III, and LCT Capital, LLC (collectively Talarico) appeal the district court's refusal to grant a new trial of their denied motion to dismiss the libel suit of Appellee H. Michael Krimbill. On review, we find that this decision is not immediately appealable, and we dismiss this appeal on that basis.

## BACKGROUND

¶2 This appeal is a companion to Appeal No. 114,777. In Appeal No. 114,777, Talarico appealed the district court's decision denying their motion to dismiss the libel petition of Appellee, Krimbill, pursuant to the Oklahoma Citizens Participation Act, 12 O.S. Supp. 2014 §§ 1430 through 1440 (OCPA or the Act).

¶3 In analyzing the Act, we found that the legislative purpose of the OCPA is to weed out meritless suits while protecting "the rights of a person to file meritorious lawsuits for demonstrable injury." OCPA § 1430. Further, the Act states that it will not "abrogate or lessen any other defense, remedy, immunity or privilege available under other constitutional, statutory, case or common law or rule provisions." OCPA § 1440. The dismissal procedures of the Act should therefore be interpreted in terms of the traditional and established views of what constitutes a meritorious suit.

¶4 After a thorough analysis of the procedural workings of the Act, we determined that the district court did not err in refusing to grant Talarico's motion to dismiss. (*See Krimbill v. Talarico*, 2018 OK CIV APP 37, __ P.3d__ for the full details of our analysis). Talarico sought certiorari on this decision, which the Supreme Court denied without dissent. Some six months after the district court denied Talarico's dismissal motion, while the matter was on appeal, Talarico filed a petition for new trial on the motion, citing newly discovered evidence that went to the affirmative defense of "truth" in a libel action. The district court denied this petition. Talarico now attempts to appeal the denial of his petition for new trial.

## STANDARD OF REVIEW

¶5 "[T]he question of jurisdiction is an issue which is primary and fundamental in each case. This Court must inquire into its own jurisdiction as well as to the jurisdiction of the court from which the appeal is taken, regardless of whether it is raised by the litigants." *Baylis v. City of Tulsa*, 1989 OK 90, ¶ 6, 780 P.2d 686, citing *Cate v. Archon Oil Co.*, 1985 OK 1, 695 P.2d 1352, n. 12.

## ANALYSIS

### I. MAY TALARICO FILE A PETITION FOR NEW TRIAL IN THESE CIRCUMSTANCES?

¶6 Krimbill's brief raises the question of whether the decision by the district court was a "trial," the result of which may be contested by an immediately appealable petition for new trial. Established law is clear that many decisions by a district court are not subject to appellate review until the conclusion of the litigation.[1] At the same time, however, 12 O.S. 2011 § 952(b)(2) provides for the *immediate* appellate review of an order that grants or refuses a new trial. It is possible to argue, therefore, based on § 952, that any decision by a district court that is *not* immediately reviewable *may be made so* simply by filing a motion for a "new trial" on that decision.

¶7 This principle appears contrary to the established law that not all decisions by a trial court are within the immediate review jurisdiction of the appellate courts. Two possibilities are thereby presented: either [1] not all decisions by a district court qualify as "trials," and hence not all decisions can be the subject of a petition for "new trial;" or, [2] not all denials of a motion for "new trial" are immediately appealable.

¶8 Title 12 O.S.2011 § 952(b)(2) appears unambiguous that all properly heard and decided motions for new trial *are* immediately appealable. We must therefore investigate the first option. In *Gilliland v. Chronic Pain Associates, Inc.*, 1995 OK 94, 904 P.2d 73, the Supreme Court rejected the proposition that "every judicial refusal to give a favorable dispositive order in a prejudgment contest" constitutes a final order that "determines the action" or "prevents judgment." The order in this case did not "determine the action" and the *Gilliland* Court was clear that an order which "prevents a judgment" must "preclude the appealing party from proceeding further in the case for the pursuit of the very relief that is then and there sought."

¶9 The relief sought, and denied in this case was either [1] a declaration that Krimbill could not show a *prima facie* case for libel, or [2] a

declaration that Talarico had an absolute defense to the libel action. We find no indication that Talarico is in any way prevented from pursuing these theories by summary judgment, or utilizing any new evidence he may have to defend his position in this suit, which has *not yet proceeded beyond the pleading stage*.[2]

¶10 Most recently, in *Andrew v. Depani-Sparkes*, 2017 OK 42, ¶ 17-18, 396 P.3d 210, the Supreme Court noted that, although motions for reconsideration are not technically recognized, and motions to reconsider **may** be treated as a § 651 motion for new trial or a motion to vacate pursuant to § 1031.1 or § 1031, not all decisions of the district court are proper subjects in the first instance for a motion for new trial or motion to vacate.[3]

¶11 In this case, the OCPA dismissal decision neither "determines the action" nor prevents Talarico from proceeding further in the case on the same theories, nor does it prevent the presentation of any defense. Nor is it inherently a final order that may be reduced to judgment, any more than a denial of summary judgment constitutes a final order.[4] As an initial basis for decision, we therefore hold that the denial of an OCPA dismissal motion is not a "trial" from which a motion or petition for new trial may be made.

## II. EVEN IF A NEW TRIAL IS AVAILABLE IN THESE CIRCUMSTANCES, THE DENIAL OF THE PETITION IS NOT AN IMMEDIATELY APPEALABLE ORDER

¶12 Our conclusion that some equivalent of a final order must occur before a motion for new trial can be made is bolstered by the traditional treatment of denied motions or petitions for new trial on appeal. Title 12 O.S.2011 § 952(b) states that an order which grants or refuses a new trial is an appealable order. However, we find no history of the review of the denial of any motion or petition for new trial that does not involve an *underlying final order that may be reduced to judgment or otherwise prevents the proponent from pursuing his or her case*.[5] Review is historically confined to two circumstances.

¶13 The first such circumstance is that in which a party files a motion or petition for new trial, alleging error *based on the record below,* at a time when the underlying final order is not otherwise beyond appeal. Although the issues on review may be constrained by the motion for new trial, our review concentrates on the *correctness of the underlying final order,* rather than on the motion for new trial. *See, by example, Reeds v. Walker*, 2006 OK 43, 157 P.3d 100. Hence, it constitutes a review of a final order.

¶14 The second circumstance is that in which a party files a motion or petition for new trial *not* alleging error based on the record below, but arguing for a *vacation* of the prior decision on extrinsic grounds such as newly discovered evidence, fraud or irregularity. A denial of a new trial under these circumstances is clearly a final order that precludes the appealing party from proceeding further in pursuit of the relief sought. Both circumstances are, therefore, grounded in a judgment, decree or final order.

¶15 The denial of the new trial petition in this case does not fit either of these "final order" scenarios, because Talarico is in no way prevented from utilizing any new evidence he may have to defend in the *still ongoing suit*, or prevented from pursuing judgment if the new evidence indicates such a right. The denial of his motion for new trial does not represent a final order or substantive decision on the merits of the case. This finding concurs with our survey of current case law. We find no instance of the law approving of a motion for new trial on the grounds of "newly discovered evidence" *unless* the proponent is otherwise prevented from raising or utilizing this evidence in the case below.

¶16 We finally note that the initial OCPA dismissal hearing may take place pre-answer, and pre-discovery. Under such circumstances, the likelihood of "newly discovered evidence" after hearing is high. One aim of the OCPA is clearly to provide a quick and simple process for weeding out meritless suits in the early stages of litigation. A district court's refusal to dismiss pursuant to the OCPA is already an appealable order. If it is possible to move for a "new trial" of the original denial of dismissal each time new evidence becomes available, OCPA procedures may make two or more trips to the appellate courts before the merits of the underlying suit are even considered in the district court. Such a structure appears incompatible with the aims of the Act.

## CONCLUSION

¶17 We find that the petition in this case did not seek a "new trial" as traditionally defined. Further, the denied petition for new trial in this case bears none of the hallmarks of a judgment, decree or final order, and is not an interlocuto-

ry order appealable by right. We therefore find that no appealable order is currently before us.

¶18 **DISMISSED**.

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

P. THOMAS THORNBRUGH, CHIEF JUDGE:

1. By example, discovery decisions, evidentiary rulings and denials of summary judgment are traditionally not subject to immediate appeal.

2. The OCPA proceedings have effectively halted this suit for over two years, and Talarico has yet to file an answer.

3. *Andrew* held that the "motion to reconsider" in that case was neither a motion to vacate ("A motion to reconsider an interlocutory order anterior to judgment is not a § 1031 motion to vacate unless made so by the terms of the statute"), nor was it a motion for new trial filed "after the announcement of the decision on all issues in the case."

4. This common occurrence illustrates the tension between the principle that not all decisions are immediately appealable, but the denial of a motion for new trial is immediately appealable. If there is no restriction, a refusal of summary judgment can be rendered appealable simply by filing a "motion for new trial," and suits could be litigated piecemeal, punctuated by numerous interim reviews by the appellate courts. *Andrew* at ¶ 17.

5. *Lillard v. Meisberger*, 1925 OK 633, ¶ 11, 260 P. 1067, notes that:

> While subsection 2 of section 780, Comp. Stats. 1921, provides for appeal from an order granting or refusing a new trial, yet this court will determine for itself whether the record is such as it has jurisdiction to review, and jurisdiction cannot be conferred by a mere order overruling a motion for a new trial, where no judgment was rendered in the case.

Although *Lillard* rejected appellate jurisdiction on the grounds that the underlying jury verdict had not been reduced to a judgment, it strongly implies that a final decision is a *prerequisite* to a motion for new trial.

**2018 OK CIV APP 74**

**MICHAEL SCHAUF, GUARDIAN OF THE PERSON AND ESTATE OF DANIEL LEE BOLING, III, Plaintiff/Appellant, vs. THE GEO GROUP, a Florida corporation, d/b/a LAWTON CORRECTIONAL FACILITY, Defendant/Appellee, Randy Glenn Mounce, in his individual capacity, and The Wackenhut Corrections Corporation, a Florida corporation, Defendants.**

**Case No. 116,099. May 11, 2018**

APPEAL FROM THE DISTRICT COURT OF COMANCHE COUNTY, OKLAHOMA

HONORABLE GERALD F. NEUWIRTH, JUDGE

AFFIRMED

Stanley D. Monroe, Tulsa, Oklahoma, and Kirsten L. Palfreyman, Tulsa, Oklahoma, for Appellant,

Robert S. Lafferrandre, Carson C. Smith, Pierce, Couch, Hendrickson, Baysinger & Green, Oklahoma City, Oklahoma, for Appellee.

Larry Joplin, Judge:

¶1 Plaintiff/Appellant Michael Schauf, Guardian of the Person and Estate of Daniel Lee Boling, III (Plaintiff), seeks review of the trial court's order granting the motion to dismiss of Defendant/Appellee The GEO Group, a Florida corporation, d/b/a Lawton Correctional Facility (Defendant), in Plaintiff's action to recover for personal injuries sustained by Daniel Lee Boling, III, while he was incarcerated at the Lawton Correctional Facility. In this appeal, Plaintiff asserts the trial court erred in holding his claim was barred by the statute of limitations.

¶2 On or about July 3, 2015, Daniel Lee Boling, III, was severely beaten by his cell mate, Randy Glenn Mounce, while the two men were incarcerated at the Lawton Correctional Facility. According to Plaintiff, Daniel Lee Boling, III, has ever since been in a coma.

¶3 In December 2015, Plaintiff Michael Schauf was appointed as the Guardian of the Person and Estate of Daniel Lee Boling, III, his brother. On January 13, 2016, Plaintiff submitted to Defendant a notice of claim to comply with the Oklahoma Governmental Tort Claims Act (OGTCA), 51 O.S. §§151, et seq., §157(A). *See also*, 57 O.S. §566.4(B).[1]

¶4 To obtain an expert's affidavit of merit pursuant to 12 O.S. §19.1(A)(1),[2] Plaintiff served Defendant with a subpoena *duces tecum* to compel Defendant's production of records concerning the assault on Daniel Lee Boling. On March 1, 2016, Defendant refused to comply with Plaintiff's subpoena *duces tecum* as seeking proprietary and confidential information.

¶5 Later in March 2016, Defendant requested the production of documents concerning the assault from the Oklahoma Department of Corrections. DOC produced the requested documents in June 2016. Plaintiff made additional requests for documents from DOC in August 2016 and October 2016, to which DOC responded in October 2016 and January 2017, respectively. According to Plaintiff, his expert issued a §19.1 affidavit of merit March 9, 2017.

¶6 On June 29, 2016, Plaintiff filed his original petition to commence the instant action against Defendant Randy Mounce. On March 13, 2017, Plaintiff filed his amended petition adding additional parties, including Defendant, and asserted claims of negligence.

¶7 On April 6, 2017, Defendant filed its motion to dismiss. Defendant asserted that, in

his amended petition, Plaintiff did not allege compliance with the notice-of-claim provisions of the OGTCA, rendering Plaintiff's petition subject to dismissal. Defendant further asserted that Plaintiff did not timely commence the instant action against it within one-hundred eighty (180) days of the date his claim was deemed denied on April 13, 2016, that is, not later than October 13, 2016, and, accordingly, the claim was barred. 51 O.S. §§157(A),[3] (B).[4]

¶8 On April 21, 2017, Plaintiff filed his response.[5] Plaintiff first asserted the claim was timely presented to Defendant within one year of the date of loss as required by 51 O.S. §156(B),[6] and set forth the date, time, place and circumstances of the claim as required by §156(E).[7] Plaintiff secondly asserted that the filing of the amendment to his original petition adding Defendant as a party, albeit more than one hundred eighty days after the deemed denial of his OGTCA claim, related back to the date of filing of his original petition, well within the 180-day period prescribed by §§157(A) and(B), inasmuch as Defendant knew or should have known of its potential liability when served with the OGTCA notice of claim January 13, 2016, and the action against Defendant was therefore timely filed. *See* 12 O.S. §2015(C).[8] Plaintiff thirdly argued that his failure to allege compliance with the OGTCA notice-of-claim provisions could be cured by amendment of the petition. Alternatively, Plaintiff asserted the 180-day filing period set forth in §157(B) should be equitably tolled during the period Plaintiff was seeking adequate document discovery to obtain the affidavit of merit required by §19.1, particularly considering Defendant's refusal to comply with his subpoena *duces tecum* and produce documents on March 1, 2016, and that, given the continuing disability of Daniel Lee Boling, Plaintiff timely filed the action well within the two-year limitation of 12 O.S. §96.[9]

¶9 On May 8, 2017, Defendant filed a reply to Plaintiff's response. Defendant first argued the provisions of §2015(C) did not apply because, when Plaintiff filed his original petition, there was no "mistake concerning the identity of the proper party" that should have been named as required for relation back by §2015(C)(3). Defendant secondly argued that §2015(C) does not apply where a plaintiff makes a "tactical" decision not to name a particular defendant and discovers, after passage of the 180-day period, the potential liability of the unnamed defendant. *Pan v. Bane,* 2006 OK 57, 141 P.3d 555. Defendant also argued that §19.1 did not excuse the untimely filing of the amended petition because (1) whether Plaintiff's negligence claim required the support of an affidavit of merit was questionable, (2) §19.1(B)(1) allowed an extension of time to obtain an affidavit of merit, and (3) Plaintiff was in possession of the documents he needed to obtain his affidavit of merit on October 6, 2016, prior to expiration of the 180-day period on or about October 13, 2016. Moreover, said Defendant, §96 did not apply to extend the time for filing more than ninety (90) days after the date of loss. 51 O.S. §156(E); *Hall v. GEO Group*, 2014 OK 22, 324 P.3d 399.

¶10 On May 17, 2017, upon consideration of the parties' filings and argument, the trial court granted Defendant's motion, and dismissed Plaintiff's claim against Defendant with prejudice.[10] Plaintiff appeals and the matter stands submitted on the trial court record.[11]

¶11 "'[C]ompliance with the written notice of claim and denial of claim provisions in §§156 and 157 [of the Oklahoma Governmental Tort Claims Act] are prerequisites to the state's consent to be sued and to the exercise of judicial power to remedy the alleged tortious wrong by the government.'" *Kennedy v. City of Talihina*, 2011 OK CIV APP 108, ¶4, 265 P.3d 757, 759-760. (Citations omitted.) "'[J]udicial power is invoked by the timely filing of the governmental tort claims action pursuant to §157, and . . . expiration of the 180-day time period in §157(B) operates to bar judicial enforcement of the claim against the government to which the Legislature waived sovereign immunity.'" *Id.* (Citations omitted.) "[W]e review [a] motion to dismiss *de novo* to determine whether the petition is legally sufficient." *Kennedy,* 2011 OK CIV APP 108, ¶4, 265 P.3d at 759-760. (Citations omitted.)

¶12 A petition which fails to allege compliance with the notice provisions of §157 is subject to dismissal, but the failure to allege such compliance may be cured by amendment. *See, Girdner v. Board of Com'rs,* 2009 OK CIV APP 94, ¶24, 227 P.3d 1111, 1116. In his amended petition, Plaintiff failed to allege compliance with the notice of claim provisions, but the pleadings demonstrate Plaintiff indeed complied with §157's notice of claim provisions.

¶13 Plaintiff submitted his notice of claim January 13, 2016, timely under 12 O.S. §96 and 51 O.S. §156(B). By force of §157(A), the claim

was deemed denied April 13, 2016. Section 157(B) required Plaintiff to commence a suit against Defendant within 180 days of the deemed denied date, i.e., not later than October 13, 2016.

¶14 Plaintiff commenced his action against Defendant Mounce on June 29, 2016. Plaintiff amended his petition to add Defendant Geo Group as a party on March 13, 2017, more than 180 days after Plaintiff's claim against Defendant Geo Group was deemed denied. The amendment is timely only if (1) it relates back to the date of filing of the original petition naming Defendant Mounce alone, or (2) the 180-day period for commencement of suit after deemed denial of the claim was tolled.

¶15 On the second question, this is not a case where the charged entity has concealed the facts of its liability as to toll the running of the 180-day period, like what happened in *Tice v. Pennington*, 2001 OK CIV APP 95, 30 P.3d 1164. The basic facts of Mounce's assault on Boling, and the role Defendant's negligence may have played in that assault, have never been in dispute, inasmuch as Plaintiff asserted the basic facts of Defendant's negligence in its initial notice of claim served on Defendant in January 2016.

¶16 Further, while Defendant argues Plaintiff was not required to obtain an affidavit of merit in this ordinary negligence action, it would appear that whether or not Plaintiff was required to obtain a §19.1 affidavit of merit to assert a negligence claim against Defendant, the failure to obtain such an affidavit was not fatal to the earlier assertion of the claim against Defendant because §19.1 permits both an extension of time to obtain such an affidavit, and, upon failure to obtain such an affidavit, directs only a dismissal without prejudice, which would permit the re-assertion of the claim upon obtaining the desired affidavit. And, the record is clear that, prior to expiration of the 180-day period, Plaintiff was possessed of all the documents he needed to obtain the affidavit of merit, which his expert eventually provided.

¶17 On the first question, we have previously observed that an amended pleading relates back to the date of filing of the original pleading if:

> 1. Relation back is permitted by the law that provides the statute of limitations applicable to the action; or
>
> 2. The claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading; or
>
> 3. The amendment changes the party or the naming of the party against whom a claim is asserted if paragraph 2 of this subsection is satisfied and, within the period provided by subsection I of Section 2004 of this title for service of the summons and petition, the party to be brought in by amendment:
>
> a. Has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits; and
>
> b. Knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

12 O.S. §2015(C). In the present case, the parties raise no questions concerning §2015(C)(1) or (C)(2). The question here concerns application of §2015(C)(3), and particularly, §2015(C)(3)(b), and that is, whether Plaintiff's failure to name Defendant as a party prior to the expiration of the 180-day period mandated by §157(B) constituted a "mistake concerning the identity of the proper party" as to relate back.

¶18 In *Roth v. Mercy Health Center, Inc.*, 2011 OK 2, 246 P.3d 1079, the Oklahoma Supreme Court held that, for relation back under §2015(C)(2), when new parties are sought to be added by an amended pleading, the proper inquiry focuses on whether the new parties sought to be added "knew or should have known they would have been named as defendants, but for error." 2011 OK 2, ¶26, 246 P.3d 1088.

¶19 But, in *Pan v. Bane,* 2006 OK 57, 141 P.3d 555, the Oklahoma Supreme Court held that "[a] mistake under Rule 15(c)(3) exists where a plaintiff intended to sue the proper party but misidentified or misnamed him or her in the original pleading and the new party knew within time that he or she would have been sued but for the plaintiff's mistake." 2006 OK 57, ¶¶25, 28, 141 P.3d at 563. And, the Oklahoma Supreme Court in *Pan* also held that, "when a plaintiff is aware of all possible defendants and makes a tactical decision to name a particular defendant rather than another, only to learn after the statute expires that he has made an

error in judgment about liability, it is not a mistake of identity within the rule." 2006 OK 57, ¶28, 141 P.3d at 563.

¶20 We hold the present case falls within the holding of *Pan*, and that the Plaintiff's failure to name Defendant as a party prior to the expiration of the §157(B) 180-day period was not such a mistake concerning the identity of a party as to qualify for relation back under §2015(C)(3). That is to say, neither Plaintiff nor Defendant ever entertained any doubt that the Defendant was a proper party defendant in the present case. Plaintiff made a decision not to name Defendant as a party, either in his original petition or in an amended pleading filed prior to expiration of the §157(B) 180-day period. We have noted no concealment of the operative facts of Defendant's negligence tolling the 180-day period as in *Tice*. We have also held the 180-day period was not tolled during the time Plaintiff sought a §19.1 affidavit of merit.

¶21 Plaintiff did not assert a claim against Defendant within 180 days of the date his claim was deemed denied. Plaintiff's amended petition, naming Defendant as a party for the first time, does not relate back to the date of filing of the original petition. The trial court did not err in granting Defendant's motion to dismiss. The order of the trial court is AFFIRMED.

BELL, P.J.; and BUETTNER, J., concur.

Larry Joplin, Judge:

1. That section provides:
No tort action or civil claim may be filed against any employee, agent, or servant of the state, the Department of Corrections, private correctional company, or any county jail or any city jail alleging acts related to the duties of the employee, agent or servant, until all of the notice provisions of the Governmental Tort Claims Act have been fully complied with by the claimant. This requirement shall apply to any claim against an employee of the state, the Department of Corrections, or any county jail or city jail in either their official or individual capacity, and to any claim against a private correctional contractor and its employees for actions taken pursuant to or in connection with a governmental contract.

2. Section 19(A)(1) provides:
In any civil action for negligence wherein the plaintiff shall be required to present the testimony of an expert witness to establish breach of the relevant standard of care and that such breach of duty resulted in harm to the plaintiff, except as provided in subsection B of this section, the plaintiff shall attach to the petition an affidavit attesting that:
a. the plaintiff has consulted and reviewed the facts of the claim with a qualified expert,
b. the plaintiff has obtained a written opinion from a qualified expert that clearly identifies the plaintiff and includes the determination of the expert that, based upon a review of the available material including, but not limited to, applicable records, facts or other relevant material, a reasonable interpretation of the facts supports a finding that the acts or omissions of the defendant against whom the action is brought constituted negligence, and
c. on the basis of the review and consultation of the qualified expert, the plaintiff has concluded that the claim is meritorious and based on good cause.

3. "A person may not initiate a suit against the state or a political subdivision unless the claim has been denied in whole or in part. A claim is deemed denied if the state or political subdivision fails to approve the claim in its entirety within ninety (90) days, . . ."

4. "No action for any cause arising under this act, Section 151 et seq. of this title, shall be maintained unless valid notice has been given and the action is commenced within one hundred eighty (180) days after denial of the claim as set forth in this section. . . ."

5. On April 21, 2017, Plaintiff also dismissed the claim against The Wackenhut Corrections Corporation without prejudice.

6. "[C]laims against the state or a political subdivision are to be presented within one (1) year of the date the loss occurs. A claim against the state or a political subdivision shall be forever barred unless notice thereof is presented within one (1) year after the loss occurs."

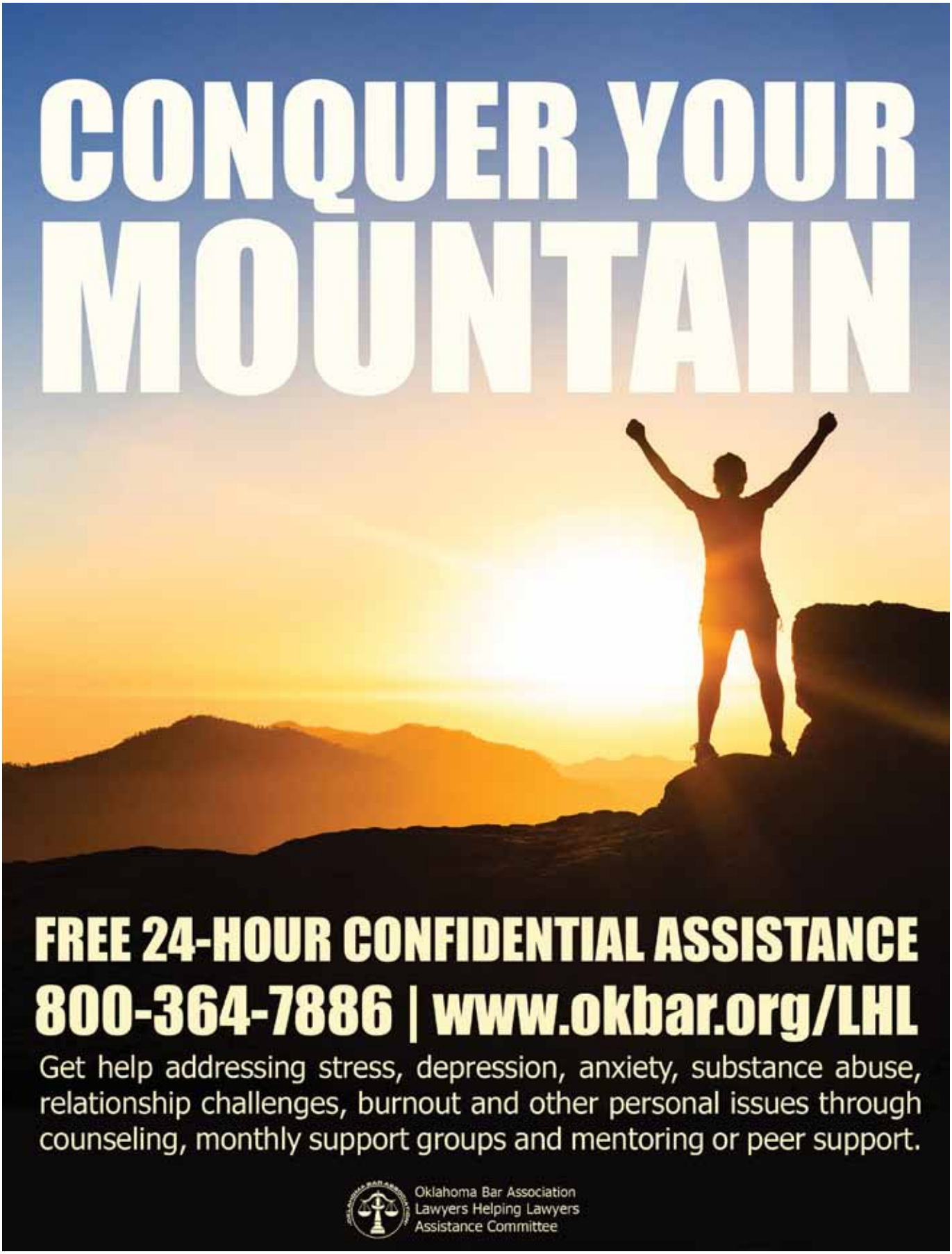
7. "The written notice of claim to the state or a political subdivision shall state the date, time, place and circumstances of the claim, the identity of the state agency or agencies involved, the amount of compensation or other relief demanded, the name, address and telephone number of the claimant, the name, address and telephone number of any agent authorized to settle the claim, and any and all other information required to meet the reporting requirements of the Medicare . . . . The time for giving written notice of claim pursuant to the provisions of this section does not include the time during which the person injured is unable due to incapacitation from the injury to give such notice, not exceeding ninety (90) days of incapacity."

8. That section provides:
An amendment of a pleading relates back to the date of the original pleading when:
1. Relation back is permitted by the law that provides the statute of limitations applicable to the action; or
2. The claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading; or
3. The amendment changes the party or the naming of the party against whom a claim is asserted if paragraph 2 of this subsection is satisfied and, within the period provided by subsection I of Section 2004 of this title for service of the summons and petition, the party to be brought in by amendment:
a. Has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits; and
b. Knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

9. "If a person entitled to bring an action other than for the recovery of real property, except for a penalty or forfeiture, be, at the time the cause of action accrued, under any legal disability, every such person shall be entitled to bring such action within one (1) year after such disability shall be removed, except that, after the effective date of this section, an action for personal injury to a minor under the age of twelve (12) arising from medical malpractice must be brought by the minor's parent or guardian within seven (7) years of infliction of the injury, provided a minor twelve (12) years of age and older must bring such action within one (1) year after attaining majority, but in no event less than two (2) years from the date of infliction of the injury, and an action for personal injury arising from medical malpractice to a person adjudged incompetent must be brought by the incompetent person's guardian within seven (7) years of infliction of the injury, provided an incompetent who has been adjudged competent must bring such action within one (1) year after the adjudication of such competency, but in no event less than two (2) years from the date of infliction of the injury."

10. On May 17, 2017, Plaintiff also dismissed the claim against Randy Mounce without prejudice.

11. *See,* Rule 4(m), Rules for District Courts, 12 O.S. 2011, Ch. 2, App., and Okla.Sup.Ct.R. 1.36, 12 O.S. 12 O.S. 2011, Ch. 15, App.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# Disposition of Cases Other Than by Published Opinion

**COURT OF CRIMINAL APPEALS**
**Thursday, December 13, 2018**

**RE-2017-125** — In the District Court of LeFlore County, Dakota Gregory Maxwell, Appellant, entered a plea of guilty to Arson in the Third Degree in Case No. CF-2013-165 and a plea of nolo contendere to Burglary in the Second Degree in CF-2015-121. Following Appellant's commitment to the Delayed Sentencing Program for Young Adults and Appellant's completion of that program, the Honorable Marion D. Fry, Associate District Judge, on April 19, 2016, deferred Petitioner's sentencing for five (5) years conditioned on written rules of probation. On February 7, 2017, Judge Fry found Appellant violated his probation and thereupon accelerated sentencing, pronounced judgments of guilt, and imposed a concurrent term of seven (7) years imprisonment for each offense. Appellant appeals the final orders of acceleration. AFFIRMED. Opinion by: Kuehn; J.; Lumpkin, P.J., concur; Lewis, V.P.J., concur; Hudson, J., concur; Rowland, J., concur.

**F-2016-1127** — Stephen Wayne Brown, Appellant, was tried by jury for the crime of Trafficking in Illegal Drugs (Cocaine Base), in Case No. CF-2012-4941, in the District Court of Oklahoma County. The jury returned a verdict of guilty and recommended as punishment twelve years imprisonment and a $25,000.00 fine. The Honorable Michele D. McElwee, District Judge, sentenced Appellant in accordance with the jury's verdict. Judge McElwee imposed various costs and fees. She also ordered credit for time served. From this judgment and sentence Stephen Wayne Brown has perfected his appeal. AFFIRMED. Opinion by: Hudson, J.; Lumpkin, P.J., Concurs; Lewis, V.P.J., Concurs; Kuehn, J., Concurs in Results; Rowland, J., Recuses.

**F-2017-780** — Oswaldo Vargas, Appellant, was tried by jury for four counts of Child Sexual Abuse in Case No. CF-2015-2112 in the District Court of Cleveland County. The jury returned verdicts of guilty and set punishment at forty years imprisonment on each count. Judge Walkley sentenced accordingly, declined to impose any fine and ordered the sentences on each count to run concurrently. From this judgment and sentence Oswaldo Vargas 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-2017-745** — Derrick Darrell Morris, Appellant, was tried by jury and convicted of Count 1, assault and battery with deadly weapon, after former conviction of two or more felonies, and Count 3, possession of a firearm, after former conviction of two or more felonies in Case No. CF-2015-590 in the District Court of Comanche County. The jury set punishment at twenty years imprisonment on each count. The trial court sentenced accordingly and ordered him to pay $11,310.00 in restitution for Count 1. The court further ordered the sentences to be served consecutively, with credit for time served, and imposed various fees and costs. From this judgment and sentence Derrick Darrell Morris has perfected his appeal. The Judgment and Sentence of the District Court is AFFIRMED. Opinion by: Lewis, V.P.J.; Lumpkin, P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs; Rowland, J., specially concurs.

**F-2017-759** — Esther Lee Bales, Appellant, was tried by jury for the crime of second degree felony murder in Case No. CF-2016-50 in the District Court of Kay County. The jury returned a verdict of guilty and set punishment at thirty years imprisonment. Due to an error in the sentencing instructions, the trial court pronounced judgment and resentenced her to twenty years imprisonment. From this judgment and sentence Esther Lee Bales has perfected her appeal. The Judgment and Sentence of the District Court is AFFIRMED. Opinion by: Lewis, V.P.J.; Lumpkin, P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs; Rowland, J., concurs.

**C-2018-146** — Barbara Joann Roberts, Petitioner, entered a plea of guilty to Count 1, providing a firearm to a convicted felon, a misdemeanor, and Count 2, obstructing an officer, a misdemeanor, in Case No. CM-2016-160 in the District Court of Logan County. The Honorable Susan C. Worthington, Special Judge, found Petitioner guilty and sentenced her to six months in jail and a $250.00 fine in

Count 1 and one year in jail and a $250.00 fine in Count 2. The trial court suspended the sentences of imprisonment. Petitioner filed a timely motion to withdraw the plea, which the District Court denied after evidentiary hearing. Petitioner now seeks the writ of certiorari. The Petition for Writ of Certiorari is DENIED. The Judgment and Sentence of the District Court is AFFIRMED. Opinion by: Lewis, V.P.J.; Lumpkin, P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs; Rowland, J., concurs.

**C-2018-200** — Petitioner Mark Ronald Elam entered blind pleas of no contest to Possession of a Stolen Vehicle (Count I); Possession of a Controlled Dangerous Substance (methamphetamine) (Count II); Possession of a Controlled Dangerous Substance (Lortab) Count III); and Attempting to Elude (Count IV) in the District Court of Kay County, Case No. CF-2017-9. The pleas were accepted by the Honorable Phillip A. Ross, District Judge, on April 24, 2017. Sentencing was continued until May 8, 2017, for the parties to consider placing Petitioner in Drug Court. On that date, the court ordered Petitioner to Drug Court and sentenced him to a thirty (30) year suspended sentence in each of Counts I, II, and III upon successful completion of Drug Court but if Petitioner did not successfully complete the drug court program, he would be sentenced to concurrent thirty-five (35) year prison terms with the final five (5) years suspended. On November 9, 2017, the State filed a motion to remove Petitioner from the drug court program. Petitioner was terminated from the program at the conclusion of a hearing held January 19, 2018. On January 24, 2018, counsel filed a Motion to Withdraw Nolo Contendre pleas. At a hearing held on February 16, 2018, the Honorable David Bandy, Associate District Judge, denied the motion to withdraw. The Petitioner for Writ of Certiorari is DENIED. The Judgment and Sentence of the District Court is AFFIRMED. Opinion by: Lumpkin, P.J.; Lewis, V.P.J., Concur; Hudson, J., Concur; Kuehn, J., Concur; Rowland, J., Concur.

**F-2017-249** — Douglas Barry Willmon, Appellant, was tried by jury for the crime of Concealing Stolen Property, After Former Conviction of Two or More Felonies, in Case No. CF-2015-2033, in the District Court of Oklahoma County. The jury returned a verdict of guilty and recommended as punishment ten years. The Honorable Ray C. Elliott, District Judge, sentenced accordingly and ordered this sentence to run consecutively with the sentences imposed in Case Nos. CF-2007-848 and CF-2010-551. From this judgment and sentence Douglas Barry Willmon has perfected his appeal. AFFIRMED. Opinion by: Hudson, J.; Lumpkin, P.J., Concur in Results; Lewis, V.P.J., Specially Concurs; Kuehn, J., Concurs; Rowland, J., Concurs.

**F-2017-602** — Kenneth Donald Knox, Appellant, was tried by jury for the crime of Child Abuse by Injury, in Case No. CF-2015-6231, in the District Court of Tulsa County. The jury returned a verdict of guilty and recommended as punishment twenty-five years imprisonment. The Honorable Doug Drummond, District Judge sentenced accordingly, and imposed three years of post-imprisonment supervision. From this judgment and sentence Kenneth Donald Knox has perfected his appeal. The Judgment and Sentence of the District Court is AFFIRMED except the period of post-imprisonment supervision imposed by the District Court is MODIFIED to one year. Opinion by: Hudson, J.; Lumpkin, P.J., Concurs; Lewis, V.P.J., Concurs; Kuehn, J., Concurs; Rowland, J., Concurs.

**F-2017-876** — Appellant, Aaron Francis Langley, was tried by jury and convicted of Assault and Battery with a Deadly Weapon, in District Court of Cleveland County Case Number CF-2015-1670. The jury recommended as punishment imprisonment for fourteen (14) years. The trial court sentenced Appellant in accordance with the jury's recommendation and directed that Appellant receive credit for the time he had served awaiting trial. It is from this judgment and sentence that Appellant appeals. The Judgment and Sentence of the District Court is hereby AFFIRMED. Opinion by: Lumpkin, P.J.; Lewis, V.P.J., Concur; Hudson, J., Concur in Results; Kuehn, J., Concur in Results; Rowland, J., Concur.

**F-2017-301** — Luke Tyrone Robinson, Appellant, was tried by jury for the crime of Concealing Stolen Property, After Former Conviction of Two or More Felonies, in Case No. CF-2016-2204, in the District Court of Oklahoma County. The jury returned a verdict of guilty and recommended as punishment twelve years imprisonment. The Honorable Cindy H. Truong, District Judge, sentenced accordingly and imposed a $25.00 District Attorney fee plus a $50.00 fine. She also ordered credit for time served. From this judgment and sentence Luke Tyrone Robinson has perfected his appeal. AFFIRMED. Opinion by: Hudson, J.; Lumpkin,

P.J., Concurs; Lewis, V.P.J., Concurs; Kuehn, J., Concurs; Rowland, J., Concurs.

**Thursday, December 20, 2018**

**C-2018-441** — Clinton Lee Myers, Petitioner, entered a blind plea of guilty to Count 1, trafficking in illegal drugs and Count 2, possession of a controlled substance with intent to distribute within 2,000 feet of a school in Case No. CF-2017-108 in the District Court of Stephens County. The Honorable G. Brent Russell, Associate District Judge, accepted the plea, delayed sentencing and ordered a pre-sentence investigation. At the conclusion of his sentencing hearing, Judge Russell sentenced Petitioner to thirty-five years imprisonment and a $25,000.00 fine on Count 1 and thirty-five years imprisonment on Count 2, with credit for time served, to be served concurrently. Petitioner filed a timely motion to withdraw plea which was denied after evidentiary hearing. Petitioner now seeks the writ of certiorari. The petition for writ of certiorari is DENIED. The Judgment and Sentence is AFFIRMED. Opinion by: Lewis, V.P.J.; Lumpkin, P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs; Rowland, J., concurs.

**F-2017-568** — Dewayne Craine Johnson, Appellant, was tried by jury for the crime of failure to notify address change as a sex offender after former conviction of one felony in Case No. CF-2016-575 in the District Court of Stephens County. The jury returned a verdict of guilty and set punishment at sixteen months imprisonment. The trial court sentenced accordingly and imposed various fees and costs. From this judgment and sentence Dewayne Craine Johnson has perfected his appeal. The Judgment and Sentence is AFFIRMED. Opinion by: Lewis, V.P.J.; Lumpkin, P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs; Rowland, J., concurs.

**F-2017-946** — Christopher Lee Douglas, Appellant, was tried by jury for the crime of sexual abuse of a child under twelve (12) in Case No. CF-2014-837 in the District Court of Tulsa County. The jury returned a verdict of guilty and set punishment at twenty-five (25) years imprisonment. The trial court sentenced accordingly. From this judgment and sentence Christopher Lee Douglas has perfected his appeal. The Judgment and Sentence is AFFIRMED. Opinion by: Lewis, V.P.J.; Lumpkin, P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs; Rowland, J., concurs.

**C-2017-439** — Delfred Brooks, Petitioner, entered a negotiated guilty plea, in Case No. CF-2017-273, in the District Court of Tulsa County, before the Honorable Martha Rupp Carter, Special Judge, to Count 1: First Degree Rape; and Count 2: Indecent Exposure. In accordance with the plea agreement, Judge Rupp Carter sentenced Brooks to eight years imprisonment on each count with both sentences to run concurrently. Brooks was additionally given credit for time served and ordered to pay various fines, fees, and costs. Brooks filed a motion to withdraw his guilty plea and after a hearing Judge Rupp Carter denied the motion. Brooks now seeks a writ of certiorari. The Petition for Writ of Certiorari is DENIED. The Judgment and Sentence of the District Court is AFFIRMED. Opinion by: Hudson, J.; Lumpkin, P.J., Concurs in Results; Lewis, V.P.J., Concurs; Kuehn, J., Concurs; Rowland, J., Concurs.

**PCD-2015-47** — Petitioner Darrell Wayne Frederick was convicted of First Degree Malice Murder (Count I), Assault and Battery with A Dangerous Weapon, After Former Conviction of Two or More Felonies (Count II), and Domestic Abuse Assault and Battery (Count III), Case No. CF-2011-1946, in the District Court of Oklahoma County. In Count I, the jury found the presence of three aggravating circumstances: 1) the defendant was previously convicted of a felony involving the use or threat of violence to the person; 2) the murder was especially heinous, atrocious or cruel; and 3) the existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society, and set punishment at death. In Counts II and III, the jury recommended imprisonment for twenty-five (25) years and one (1) year, respectively. The trial judge sentenced Petitioner in accordance with the jury's determination and ordered all sentences to run consecutively. This Court affirmed the judgments and sentences in *Frederick v. State,* 2017 OK CR 12, 400 P.3d 786. Petitioner timely filed his *Original Application for Post-Conviction Relief* and *Motions for Evidentiary Hearing, Discovery, and Reserving the Right to Supplement Original Application for Post-Conviction Relief in a Death Penalty Case* with this Court in accordance with 22 O.S.2011, § 1089. The requests for *Discovery and Reserving the Right to Supplement Original Application for Post-Conviction Relief in a Death Penalty Case* are denied. The *Application for Post-Conviction Relief* is DENIED. Opinion by: Lumpkin, P.J.; Lewis,

V.P.J., Concur; Hudson, J., Concur; Kuehn, J., Concur; Rowland, J., Recused.

**F-2017-1305** — Appellant Wilbert Lamon Rivers, Jr., was tried by jury and convicted of Distribution of Controlled Dangerous Substance (CDS) Within 2,000 feet of a Park or School (63 O.S.Supp.2012, § 2-401(F)) (Counts I and II) and Maintaining a Vehicle for Keeping/Selling CDS (63 O.S.2011, § 2-404) (Count III), all charges After Former Conviction of Two or More Felonies, in the District Court of Okmulgee County, Case No. CF-2014-289. The jury recommended as punishment thirty (30) years imprisonment and a $40,000.00 fine in each of Counts I and II and ten (10) years imprisonment and a $10,000.00 fine in Count III. The trial court sentenced accordingly, ordering the sentences to be served consecutively. 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 in Results; Rowland, J., Concur.

**F-2017-1179** — Bryan Eugene Morris, Appellant, was tried by jury for the crime of two counts of Sexual Abuse of a Child Under Twelve in Case No. CF-2014-134 in the District Court of Muskogee County. The jury returned a verdict of guilty and recommended as punishment 38 years imprisonment on each count. The trial court sentenced accordingly. From this judgment and sentence Bryan Eugene Morris has perfected his appeal. AFFIRMED. Opinion by: Kuehn, J.; Lumpkin, P.J., Concur in Results; Lewis, V.P.J., Concur; Hudson, J., Concur; Rowland, J., Concur.

**RE-2017-45** — Casey William Sargent, Appellant, appeals from the revocation in full of his twenty-two year suspended sentence in Case No. CF-2008-2686 in the District Court of Tulsa County, by the Honorable Sharon K. Holmes, District Judge. AFFIRMED. Opinion by: Rowland, J.; Lumpkin, P.J., concurs; Lewis, V.P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs.

**Thursday, December 27, 2018**

**F-2017-776** — On September 9, 2016, Appellant Steven Ray Acuff entered a guilty plea to a Count 1, Distribution of a Controlled Dangerous Substance (Methamphetamine) and Count 2, Possession of Drug Paraphernalia, in Muskogee County Case No. CF-2016-339. Acuff's sentencing was deferred for five (5) years for Count 1 and one (1) year for Count 2, subject to terms and conditions of probation. On May 1, 2017, the State filed an Application to Accelerate Acuff's Deferred Sentences alleging he committed the new offense of Assault with a Dangerous Weapon as alleged in Muskogee County Case No. CF-2017-501. On July 14, 2017, Acuff's deferred sentences were accelerated and he was sentenced to ten (10) years for Count 1 and one (1) year for Count 2 in Muskogee County Case No. CF-2016-339. From this judgment and sentence, Acuff appeals. The acceleration of Acuff's deferred sentences is AFFIRMED. Opinion by: Lewis, V.P.J.; Lumpkin, P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs; Rowland, J., concurs.

**F-2017-179** — Stephen Kyle Scyffore, Appellant, was tried by jury for the crime of First Degree Murder, After Former Conviction of Two or More Felonies in Case No. CF-2014-6035 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, awarded credit for all time served and ordered the sentence to run concurrently with his sentence in CF-2014-2761. From this judgment and sentence Stephen Kyle Scyffore has perfected his appeal. AFFIRMED. Application for Evidentiary Hearing on Sixth Amendment Claims is DENIED. Opinion by: Rowland, J.; Lumpkin, P.J., concurs; Lewis, V.P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs in results.

**ACCELERATED DOCKET**
**Thursday, December 20, 2018**

**J-2018-879** — In the District Court of Tulsa County, Case No. YO-2018-6, Appellant, J.K.D., was charged as a youthful offender with Rape-First Degree. On August 1, 2018, the Honorable Clifford J. Smith, Special Judge, sustained a motion by the State to certify Appellant eligible for adult sentencing if convicted and denied a motion to certify Appellant as a juvenile. Appellant appeals those final certification orders. AFFIRMED. Opinion by: Rowland, J.; Lumpkin, P.J., concurs; Lewis, V.P.J., concurs; Hudson, J., concurs; Kuehn, J., concurs.

**COURT OF CIVIL APPEALS**
**(Division No. 1)**
**Friday, December 21, 2018**

**115,773** — Bank2, an Oklahoma Banking Corporation, Plaintiff/Appellee, v. Alicia Seyler, and Spouse, if any, of Alicia Seyler, and John Doe, Occupant, Defendants/Appellants. Appeal from the District Court of Tulsa Coun-

ty, Oklahoma. Honorable Jefferson D. Sellers, Judge. Alicia Seyler, Appellant/Defendant and mortgagor, seeks review from the district court's January 4, 2017 order denying Seyler's motion to vacate the district court's summary judgment order in favor of Appellee/Plaintiff, Bank2. Bank2 sought judgment against Seyler for a promissory note upon which she allegedly defaulted. Bank2 filed its foreclosure petition on December 2, 2014. Bank2 filed a motion for summary judgment in July 2015 and the district court granted the summary judgment in favor of Bank2 on September 22, 2015, judgment filed on September 29, 2015. On October 28, 2015, Appellant/Seyler filed her motion to dismiss Bank2's petition for lack of standing and motion to vacate the journal entry of judgment; both Seyler's requests were denied by the district court. This appeal resulted. Appellant/Seyler sets out three propositions of error in her appeal. First, Seyler asserts Bank2 has no standing to pursue the foreclosure action it initiated, because the bank did not engage in specific steps required to resolve the indebtedness issues prior to initiating the foreclosure action. Second, Seyler alleges Bank2 failed to comply with federal regulations which are conditions precedent to the cause currently before the court, and both standing and subject matter jurisdiction are lacking as a result. Third, the MERS (Mortgage Electronic Registration Systems, Inc.) mortgage is a nullity under Oklahoma law, depriving the bank of standing and depriving the court of jurisdiction. These issues have been recently considered by this court in the context of a similar case, *Wells Fargo Bank, N.A. v. Taylor,* 2018 OK CIV APP 24, 417 P.3d 1212. The appellate court reviews a lower court's ruling either vacating or refusing to vacate a judgment using the abuse of discretion standard. *Ferguson Enters. Inc. v. H. Webb Enters. Inc*., 2000 OK 78, ¶ 5, 13 P.3d 480, 482. Seyler asserted Bank2 lacked standing to bring the foreclosure action, primarily because she alleges the bank failed to comply with mandatory prefiling requirements to meet with the mortgagor to resolve the payment dispute prior to filing the foreclosure. *See* 24 C.F.R. §203.604. We do not find the bank lacked standing. The bank made multiple attempts to reach out to Seyler prior to bringing the action. In addition, the bank made the original note available for inspection and filed a copy with the petition, a prima facie showing of standing. *Wells Fargo v. Taylor,* 2018 OK CIV APP 24, ¶7, 417 P.3d at 1215. With respect to Seyler's allegations the bank did not comply with regulations for Housing and Urban Development (HUD), she has failed to demonstrate she has a private right of action for any breach of these regulations and has not demonstrated she can assert an affirmative defense based on these alleged failures. Seyler's MERS objections do not provide a basis for relief. In looking at the parties' intent and considering the mortgage as a contract, we note Appellant/Seyler accepted the loan from Bank2 to finance her house, and Bank2 is the entity which loaned Seyler the funds to purchase the home and brought this action against her for nonpayment. 15 O.S. 2011 §152; *Wells Fargo v. Taylor,* 2018 OK CIV APP 24, ¶¶18-20, 417 P.3d at 1217-18. Under the circumstances presented in this case, Seyler is estopped from denying the validity of the mortgage in these proceedings. The district court's order denying Appellant's motion to dismiss and motion to vacate the journal entry of judgment is AFFIRMED. Opinion by Joplin, J.; Bell, P.J., and Buettner, J., concur.

**116,623** — Harry O'Brien, Plaintiff/Appellee, v. Robert Wayne McGaugh, Defendant/Appellant. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Aletia Haynes Timmons, Trial Judge. This appeal arises from a civil suit between plaintiff Harry O'Brien (O'Brien) and defendant Robert Wayne McGaugh (McGaugh) pertaining to a physical altercation that arose during an argument regarding the living arrangements of Tiffany Mayes (Ms. Mayes). O'Brien sought damages for injuries sustained from an alleged battery committed by McGaugh. The jury returned a verdict in favor of O'Brien, awarding him $2.4 million in actual damages and $1 million in punitive damages. Because the trial testimony regarding the relationship between McGaugh and Ms. Mayes prior to her reaching the age of majority did not result in undue prejudice, and because the award granted by the jury was supported by the evidence, we AFFIRM the trial court. Opinion by Buettner, J.; Bell, P.J., and Joplin, J., concur.

**(Division No. 2)**
**Thursday, December 20, 2018**

**116,461** — Town of Vian and Vian Public Authority, Plaintiffs/Appellees, vs. Sequoyah County Water Association, Defendant/Appellant. Appeal from an order of the District Court of Sequoyah County, Hon. Matthew Orendorff, Trial Judge, granting Plaintiff Town of Vian's ("via the Vian Public Works Authority") appli-

cation for temporary injunctive relief prohibiting Defendant from turning off its water services. Defendant argues the trial court erred in granting the temporary injunction due to an absence of evidence and because an adequate remedy at law existed. However, considering all the evidence on appeal, as we must, we conclude the trial court correctly granted a temporary injunction. First, simply given the contract language in question, Plaintiff has a substantial likelihood of prevailing on the merits in this contractual dispute. Second, the trial court asked Plaintiff's counsel to show "what irreparable harm do you have." Plaintiff's counsel responded that Plaintiff would be irreparably harmed if the water is turned off to essential services such as medical facilities, schools, and fire departments. Third, this threatened injury, *i.e.*, terminating water services to an entire town, clearly outweighs the injury of monetary damages Defendant would suffer pursuant to an injunction. Fourth, the evidence submitted establishes the trial court's injunction was "in the public interest." Because the requirements for temporary injunctive relief were met, the trial court's decision was not clearly against the weight of the evidence or an abuse of discretion. The trial court's decision is affirmed. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Wiseman, P.J.; Thornbrugh, C.J., and Fischer, J., concur.

**117,003** (Companion to Case No. 117,002) — Todd Landwehr, Plaintiff/Appellant, vs. UHS of Oklahoma, Inc., an Oklahoma corporation, d/b/a St. Mary's Regional Medical Center, an Oklahoma for-profit hospital and Dean Hughes, M.D., an individual, Defendants/Appellees. Ap-peal from an order of the District Court of Garfield County, Hon. Paul K. Woodward, Trial Judge, granting Defendants UHS of Oklahoma, Inc., d/b/a St. Mary's Regional Medical Center's and Dean Hughes' motions to dismiss. Plaintiff seeks reversal alleging trial court error in dismissing his original case for failing to timely serve the petition within 180 days after it was filed and using the 181st day as the beginning date for the one-year period under the Savings Statute, rather than the date the dismissal was actually filed in the original case. Plaintiff further argues trial court error in dismissing the case because Plaintiff had good cause for failing to timely serve the original petition, and even if he did not, the trial court erred in failing to give Plaintiff an opportunity to show good cause prior to dismissal pursuant to 12 O.S. § 2004(I). In the refiled action before us, we find Plaintiff did receive an opportunity to show good cause in response to Defendants' motions to dismiss. However, the trial court determined "Plaintiff failed to show good cause as to why service was not performed" based on Plaintiff's argument that he believed the Oklahoma Supreme Court would find 12 O.S. § 19.1 to be unconstitutional. We concur with the trial court and conclude Plaintiff has not shown good cause for failing to timely serve Defendant. Finding good cause under these circumstances could extend indefinitely, without any action by a plaintiff or the court, the time allowed to serve a defendant in anticipating a final determination by the Oklahoma Supreme Court, which might or might not be favorable. Like the trial court, we cannot find good cause for lack of service under these circumstances. Plaintiff's original petition was therefore deemed dismissed on the 181st day after filing. Plaintiff then had one year from that dismissal date to refile his case pursuant to 12 O.S.2011 § 100. The trial court properly dismissed the second case for failure to refile within that year. We apply the same reasoning to Plaintiff's arguments pertaining to Hughes that we do to those pertaining to St. Mary's. Plaintiff's claims against Defendants were time-barred and cannot be rescued by the savings statute. The trial court's order of dismissal is affirmed. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Wiseman, P.J.; Thornbrugh, C.J., concurs, and Fischer, J., concurs in result.

**117,002** (Companion to Case No. 117,003) — Todd Landwehr, Plaintiff/Appellant, vs. UHS of Oklahoma, Inc., an Oklahoma corporation, d/b/a St. Mary's Regional Medical Center, an Oklahoma for-profit hospital, Defendant/Appellee. Appeal from an order of the District Court of Garfield County, Hon. Paul K. Woodward, Trial Judge, granting Defendant UHS of Oklahoma, Inc., d/b/a St. Mary's Regional Medical Center's motion to dismiss. Plaintiff seeks reversal alleging trial court error in dismissing his original case for failing to timely serve the petition within 180 days after it was filed "and using the 180th day as the date in which the one-year period under the Savings Statute would begin to apply," rather than "within one year of when the District Court filed its own dismissal." Plaintiff further argues trial court error in dismissing the case because Plaintiff had good cause for failing to timely serve the original petition, and even if he did not, the trial court erred in failing to give Plain-

tiff an opportunity to show good cause prior to dismissal pursuant to 12 O.S. § 2004(I). In the refiled action before us, we find Plaintiff did receive an opportunity to show good cause in response to Defendant's motion to dismiss. However, the trial court determined "Plaintiff failed to show good cause as to why service was not performed" based on Plaintiff's argument that he believed the Oklahoma Supreme Court would find 12 O.S. § 19.1 to be unconstitutional. We concur with the trial court and conclude Plaintiff has not shown good cause for failing to timely serve Defendant. Finding good cause under these circumstances could extend indefinitely, without any action by a plaintiff or the court, the time allowed to serve a defendant in anticipating a final determination by the Oklahoma Supreme Court, which might or might not be favorable. Like the trial court, we cannot find good cause for lack of service under these circumstances. Plaintiff's original petition was therefore deemed dismissed on the 181st day after filing. Plaintiff then had one year from that dismissal date to refile his case pursuant to 12 O.S.2011 § 100. The trial court properly dismissed the second case for failure to refile within that year. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Wiseman, P.J.; Thornbrugh, C.J., concurs, and Fischer, J., concurs in result.

**Friday, December 21, 2018**

**116,952** — Pamela Fortenberry, Plaintiff/Appellant, vs. Tulsa Community College Metro Campus, Defendant/Appellee, and John Doe, a business entity, and Jane Doe, an individual, Defendants. Appeal from an order of the District Court of Tulsa County, Hon. Caroline Wall, Trial Judge, granting Defendant TCC's motion to dismiss. Plaintiff alleges that Defendant was negligent and "instructed Plaintiff to sit in a dangerous chair" without warning her it was a hidden danger. Plaintiff claims the trial court improperly dismissed the case (1) because it found she failed to plead "sufficient facts to present a claim, (2) "without providing time for discovery," and (3) pursuant to Governmental Tort Claims Act (GTCA) exemptions found at 51 O.S. Supp. 2017 §§ 155(4), (5), (13), or (30). Generally, GTCA exemption issues are fact-driven. We conclude that is the case here, and the record contains no discovery to help the court resolve these exemption questions. Defendant has taken the position that the exemptions provided in the GTCA are not defenses to be asserted and proven, but constitute an absolute bar to suit, and Plaintiff, in order to sue the State, is only able to overcome that hurdle by a higher standard of pleading to show the exemptions do not apply. This is not, and cannot be, the law. Discovery has not yet been undertaken, and considering the current posture of the case, any determination on whether these exemptions apply to the facts as alleged, but not yet developed, is premature. We conclude Plaintiff has stated a claim that, if proven, would entitle her to recover damages. The trial court erred in granting Defendant's motion to dismiss based on the stated GTCA exemption "and potential other exemptions." The court apparently found that once invoked by Defendant, GTCA exemptions require dismissal of Plaintiff's negligence claims unless she is able to plead "sufficient facts" "to overcome the exemptions." Granting Defendant's motion to dismiss the case with prejudice on the basis stated in the order required consideration, and adoption, of affirmative GTCA defenses pled by Defendant and acceptance of their validity as a matter of law as applied to Plaintiff's claims as pled. Moving to dismiss on 12 O.S. § 2012(B)(6) grounds is a procedure intended to test the legal sufficiency of the claims pled in the petition, not to test or determine the facts underlying those claims. Whether any of the claimed exemptions applies in this case and the sufficiency of proof to establish any of these exemptions remain to be established by Defendant on remand after further development of facts to demonstrate the applicability of any asserted exemption. This is not a matter of pleading, but of proof. We conclude Plaintiff's claims have been sufficiently pled to withstand Defendant's motion to dismiss and it was erroneous as a matter of law to dismiss these claims. We therefore reverse this dismissal order and remand the case for further proceedings. REVERSED 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.

**(Division No. 3)**
**Friday, December 14, 2018**

**115,985** — Old Glory Insurance Company, Petitioner, vs. Stonetrust Insurance Company, and The Workers' Compensation Court of Existing Claims, Respondents. Proceeding to Review an Order of The Workers' Compensation Court of Existing Claims. Honorable L. Brad Taylor, Trial Judge. Petitioner Old Glory Insurance Company (Old Glory) appeals from an order of the Workers' Compensation Court of

Existing Claims determining the proper carrier and ordering reimbursement between Old Glory and Respondent Stonetrust Insurance Company (Stonetrust). The trial court entered an order determining that Old Glory is the proper insurance carrier, and that Stonetrust is entitled to reimbursement from Old Glory for the payments Stonetrust made on the claim. This Court finds that the Workers' Compensation Court's findings lacked the requisite specificity for there to have been meaningful judicial review. The order of the trial tribunal is VACATED and this matter is REMANDED FOR FURTHER PROCEEDINGS consistent with this opinion. Opinion by Swinton, P.J.; Goree, V.C.J., and Mitchell, J., concur.

**116,241** — In the Matter of the Guardianship of Kenneth L. Poyner, an incapacitated person: Charles Dean Baker, Petitioner/Appellant, vs. Karen Thornburg, Jeana Reed, and Selena Scism, Co-Guardians of the Person and Estate of Kenneth L. Poyner, Respondents/Appellees. Appeal from the District Court of Okmulgee County, Oklahoma. Honorable Cynthia D. Pickering, Judge. Petitioner/Appellant Charles Dean Baker appeals from the trial court's order denying his motion to vacate orders permitting Respondents/Appellees Karen Thornburg, Jeana Reed, and Selena Scism, Co-Guardians of the Person and Estate of Kenneth L. Poyner, to sale and/or transfer certain real property. Baker contends the trial court did not have subject matter jurisdiction because it failed to comply with 30 O.S. §3-107 before appointing Co-Guardians and, as a result, the guardianship orders authorizing the sales and/or transfers are void. After *de novo* review, we find a jurisdictional defect does not appear on the face of the judgment roll. We AFFIRM. Opinion by Mitchell, J.; Swinton, P.J., and Goree, V.C.J., concur.

**Friday, December 21, 2018**

**116,363** — Mortgage Clearing Corporation, Plaintiff/Appellee, vs. Ana Frewaldt, a/k/a Anna C. Frewaldt, a/k/a Anna Frewaldt, Defendant/Appellant, and Jerry D. Frewaldt, a/k/a Jerry Frewaldt; Jane Doe, Spouse of Jerry D. Frewaldt, a/k/a Jerry Frewaldt, if any; John Doe, Spouse of Anna C. Frewaldt, a/k/a Anna Frewaldt, a/k/a Ana Frewaldt, if any; Paul Sowinski, Attorney at Law; Emilyn Ann Arbital, Attorney at Law; Occupants of the Premises of 1213 South 33rd Street, Broken Arrow, OK 74014, Defendants. Appeal from the District Court of Wagoner County, Oklahoma. Honorable Dennis Shook, Trial Judge. Defendant/Appellant Ana Frewaldt (Defendant) appeals the trial court's order granting Plaintiff/Appellee Mortgage Clearing Corporation's (Plaintiff) motion for summary judgment and denying Defendant's counterclaims in a foreclosure action. Defendant argues that the trial court erred in denying her counterclaim based on violations of the Oklahoma Discrimination in Housing Act, 25 O.S. § 1451, *et seq.* Plaintiff argues that Defendant failed to establish any facts supporting her claims, and that the evidence establishes that no valid claim for violations of the discrimination statute was presented. We agree that there was no evidence to support an inference that Plaintiff's actions prior to and throughout the foreclosure proceedings were taken because of Defendant's race, gender, or national origin. We AFFIRM. Opinion by Swinton, P.J.; Goree, V.C.J., and Mitchell, J., concur.

**116,895** — Jimcy McGirt, Plaintiff/Appellant, vs. Michael Roach, Chairman, Board of Corrections; Janice Hill, DOC Dietitian; Stella Ezugha, Food Services Quality Assurance Coordinator; Kelli Curry, Food Services Manager III, Defendants/Appellees. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Trevor Pemberton, Trial Judge. Appellant, Jimcy McGirt, an inmate in the custody of the Department of Corrections (DOC), filed his Pro se Petition for Declaratory Judgment in district court pursuant to the Declaratory Judgment Act, 12 O.S.§651 *et seq*. Appellant requested three DOC operational policies be declared invalid. The policies at issue were the subject of the inmate's previous administrative grievance proceedings. The grievances were either approved or denied. The district court correctly dismissed Appellant's claim pursuant to 12 O.S. §2012(b)(6). Appellant failed to state any cognizable legal theory upon which declaratory judgment may be rendered. The court's jurisdiction pursuant to the Act requires a justiciable controversy. Additionally, the Act does not apply to review of agency orders. AFFIRMED. Opinion by Goree, V.C.J.; Swinton, P.J., and Mitchell, J., concur.

**(Division No. 4)**
**Thursday, November 29, 2018**

**116,702** (Companion with 115,578) — Norma Jean Schritter, individually and as Trustee of the Norma Jean Schritter Living Trust, Plaintiff/Appellee, v. Ernie Schritter, individually and as Trustee of the Ernie Schritter Living Trust, Defendant/Appellant. Appeal from the

District Court of Canadian County, Hon. Paul Hesse, Trial Judge. In a companion appeal, we concluded that Appellant's arguments challenging the trial court's rescission of a certain deed, as well as Appellant's arguments challenging the trial court's denial of a continuance of an underlying hearing, were unpersuasive. Thus, in that appeal, we affirmed the trial court's two orders, filed in October 2016 and October 2017, setting forth these determinations. The present appeal was taken from the trial court's denial of Appellant's motion to vacate the trial court's October 2017 order. In particular, Appellant requested that the trial court vacate its order pursuant to the trial court's term-time authority, and, on appeal, Appellant contends the trial court abused its discretion because it did not hold a hearing on this motion. Oklahoma District Court Rule 4(h) provides that motions may be decided without a hearing. Okla. Dist. Ct. R. 4(h), 12 O.S. Supp. 2013, ch. 2, app. Thus, to the extent Appellant is arguing the trial court automatically abused its discretion as a matter of law by failing to hold a hearing on Appellant's term-time motion, we reject this argument. Appellant also argues the trial court was "duty bound" to hold a hearing because Appellee attached newly-discovered evidentiary materials to its response to Appellant's motion. We also find this argument to be unpersuasive. Even taking as true Appellant's assertion that the materials attached to Appellee's response to the motion to vacate include new and previously undisclosed information, Appellant's argument fails because Appellant does not argue the new and previously undisclosed information attached to Appellee's response supports any sufficient cause for the granting of Appellant's post-judgment motion. In addition, even if Appellant had set forth such a basis, this Court previously affirmed the trial court's October 2017 Order in the prior appeal, and this Court's prior Opinion affirming the underlying determinations of the trial court renders harmless any error in the trial court's failure to hold a hearing on Appellant's term-time motion attacking the October 2017 Order. For these reasons, we affirm the trial court's order denying Appellant's motion. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Goodman, J., and Rapp, J., concur.

**Thursday, December 13, 2018**

**116,503** — In Re The Marriage Of: Heather Marie Morgan, now Gruenberg, Petitioner/Appellee, v. Mark Ray Morgan, Respondent/Appellant. Appeal from an Order of the District Court of Rogers County, Hon. Lara M. Russell, Trial Judge. Trial court respondent, Mark Ray Morgan, (Father) appeals the trial court's Order for Parental Support of a Disabled Adult Child ordering Father to pay support for his disabled adult son. Father also appeals the trial court's order awarding attorney's fees to Heather Marie Morgan, now Gruenberg (Mother). Although the trial court did not err in determining Mother is entitled to support for SCM pursuant to Title 43 O.S.2001 § 112.1A, the trial court did err in using only the Oklahoma Child Support Guidelines to calculate the support. The standard under Section 112.1A(E) requires a more individualized inquiry into the needs of an adult child with disabilities. Section 112.1A is not susceptible to a generalized formula, such as the Child Support Guidelines, to calculate support for a person who has medical or psychological needs unique to that person. Unlike the general Child Support Guidelines, under Section 112.1A, the court must consider the factors set forth in Section 112.1A(E) in determining the amount of support required to meet the individualized needs of a post-majority child with disabilities. The issue of the amount of support owed under Section 112.1A is reversed and remanded to the trial court to calculate support pursuant to the instructions set forth in this Opinion. This Court further finds the trial court erred in awarding Mother a judgment for past due support for SCM and the trial court's judgment for past due child support is vacated. In all other respects, the trial court's Order for Parental Support of a Disabled Adult Child is affirmed. The trial court's Order on Petitioner's Application for Attorney Fees is affirmed. AFFIRMED IN PART, REVERSED IN PART AND REMANDED, AND VACATED IN PART. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., and Goodman, J., concur.

**Monday, December 17, 2018**

**117,325** — Nathan J. Powell, Plaintiff/Appellant, v. State of Oklahoma ex rel. Department of Public Safety, Defendant/Appellee. Appeal from the District Court of Oklahoma County, Hon. James B. Croy, Trial Judge. The Oklahoma Department of Public Safety (DPS) entered an order revoking the driving privileges of Appellant (Powell) for 180 days. Powell appealed this order to the district court, which sustained in part and modified in part the DPS order. The district court modified the order to allow "Class D privileges" so that Powell can operate

a "vehicle equipped with an ignition interlock device," but otherwise affirmed the license revocation. Powell now seeks review of the district court's order. It is undisputed that Powell was arrested for driving under the influence, that he agreed to take the State's breath test, that a breath test was performed on an Intoxilyzer 8000, and that the results of the test exceeded the legal limit. However, DPS bore the burden of proving in the district court that a breath test was performed on a properly maintained testing device, yet the district court appears to have placed the burden on the driver, stating at the hearing as follows: "This is a driver's license revocation appeal that comes on the merits placing the burden on the driver." On the other hand, the district court ruled in Powell's favor when Powell objected on the basis of hearsay to the admission of certain documents of the Oklahoma Board of Tests for Alcohol and Drug Influence (BOT) which DPS sought to admit to show that the breathalyzer was properly maintained. However, a breathalyzer maintenance log is admissible under the public records exception to the hearsay rule. *See, e.g., Derrick v. State ex rel. Dep't of Pub. Safety*, 2007 OK CIV APP 56, ¶ 14, 164 P.3d 250; *Clark v. State ex rel. Dep't of Pub. Safety*, 2007 OK CIV APP 12, ¶¶ 24-27, 153 P.3d 77. In the present case, the district court found in favor of DPS, but erred in placing the burden of proof on Powell. The district court also erred in refusing, on the basis of hearsay, to admit the BOT documents offered by DPS. For these reasons, we conclude a new hearing is warranted. We reverse the district court's order, and we remand this case to the district court for further proceedings consistent with this Opinion. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Rapp, J., and Goodman, J., concur.

**Tuesday, December 18, 2018**

**115,132** — Ky Vargas, Michiele Vargas, Andreas Bader, Eileen Bader, Paul Gibson, and Tracy Gibson, Plaintiffs/Appellants/Counter-Appellees, v. David Steeber, individually and as Trustee of the Tracy J. Steeber 2009 Revocable Trust; Tracy Steeber, individually and as Trustee of the Tracy J. Steeber 2009 Revocable Trust; the Tracy J. Steeber 2009 Revocable Trust; Dennis Dorsey, individually, and as President of Timber Crest I Owners Association, Inc., and Timber Crest I Owners Association, Inc., Defendants/Appellees/Counter-Appellants. Appeal from an Order of the District Court of Wagoner County, Hon. Jeff Payton, Trial Judge. Ky Vargas, Michiele Vargas, Andreas Bader, Eileen Bader, Paul Gibson and Tracy Gibson (collectively, "Plaintiffs") appeal a June 6, 2016, judgment entered on a jury verdict. Plaintiffs, as well as David Steeber, individually and as trustee of the Tracy J. Steeber 2009 Revocable Trust, Tracy Steeber, individually and as trustee of the Tracy J. Steeber 2009 Revocable Trust, the Tracy J. Steeber 2009 Revocable Trust, Dennis Dorsey, individually and as President of Timber Crest I Owners Association, Inc., and Timber Crest I Owners Association, Inc. (collectively, "Defendants"), also appeal a December 14, 2106, order awarding Plaintiffs and Defendants an attorney's fee. Based upon our review of the record and applicable law, the trial court's June 6, 2016, journal entry upon jury verdict is affirmed. The trial court's December 14, 2016, order awarding Plaintiffs attorney's fees is in error and is reversed. The order is affirmed in all other respects. AFFIRMED IN PART, REVERSED IN PART. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., and Thornbrugh, C.J. (sitting by designation), concur.

**ORDERS DENYING REHEARING**
**(Division No. 2)**
**Wednesday, December 19, 2018**

**116,544** — In the Matter of the Estate of Frank Kimball Berry, Deceased: Laurie Martin Berry, Appellant, vs. James E. Berry, III, Appellee. Appellant's Petition for Rehearing is hereby *DENIED*.

**(Division No. 4)**
**Friday, December 21, 2018**

**115,902** — 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. Oklahoma Public Employees Assocation's Petition for Rehearing is filed untimely leaving this Court without jurisdiction to consider same.

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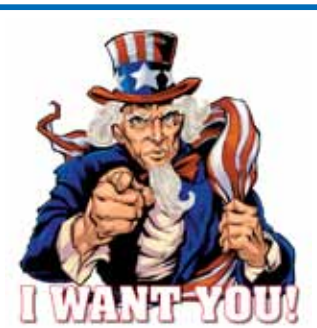


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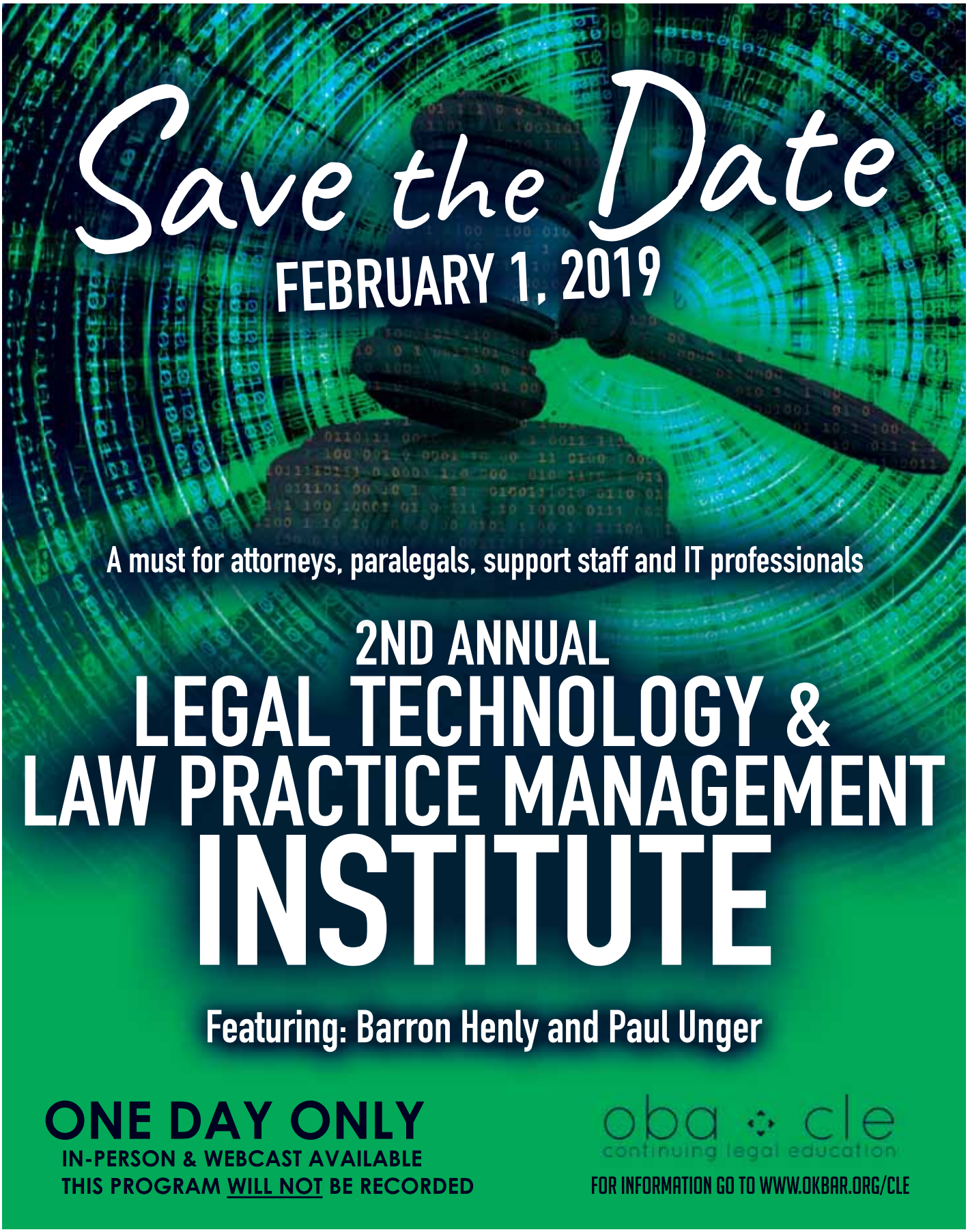
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