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Opinions of Court of Civil Appeals

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

2019 OK CIV APP 5

IN RE THE MARRIAGE OF: HEATHER MARIE MORGAN, now GRUENBERG, Petitioner/Appellee, vs. MARK RAY MORGAN, Respondent/Appellant.

Case No. 116,503. December 13, 2018

APPEAL FROM THE DISTRICT COURT OF ROGERS COUNTY, OKLAHOMA

HONORABLE LARA M. RUSSELL, TRIAL JUDGE

AFFIRMED IN PART, REVERSED IN PART AND REMANDED, AND VACATED IN PART

Nancy K. Anderson, Oklahoma City, Oklahoma, for Petitioner/Appellee

Patrick H. McCord, N. SCOTT JOHNSON & ASSOCIATES, P.L.L.C., Tulsa, Oklahoma, for Respondent/Appellant

KEITH RAPP, JUDGE:

¶1 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).

BACKGROUND

¶2 Father and Mother were married on June 11, 1994, and had one child, SCM, born August 22, 1998. SCM was born with autism spectrum disorder with speech delay and intellectual disability. The parties divorced on April 12, 2004, and the trial court awarded custody of SCM to Mother, with reasonable visitation to Father. The trial court ordered Father to pay \$630.09 per month, which included \$557.30 in child support calculated pursuant to the Child Support Guidelines and \$72.79 as Father's contribution toward the cost of speech therapy for SCM. The trial court also ordered that Mother would be responsible for 42% and Father 58% of SCM's uncovered medical expenses.

¶3 Father lives out-of-state and has limited interaction with his son, SCM.

¶4 SCM graduated, with accomodations, from Inola High School in Inola, Oklahoma, in May 2016. He turned 18 later that year, on August 22, 2016.

¶5 Prior to SCM's 18th birthday, on May 16, 2016, Mother filed a Motion for Parental Support of a Disabled Child. Mother alleged SCM requires "substantial care and personal supervision and will never be capable of self-support" and that as a result of the care and expenses due to his preexisting disability, the trial court should order Father to pay financial support for SCM pursuant to Title 43 O.S.2011 §112.1A. Mother requested child support calculated according to the Oklahoma Child Support Guidelines through August 2016, and, beginning in September 2016, support for SCM calculated based on the factors set forth in Title 43 O.S.2001 § 112.1A(E).

¶6 Father filed a Motion to Determine Overpayment on January 30, 2017. Father argued that, under the Decree of Divorce, his child support included an amount of \$72.79 per month for speech therapy for SCM. Father alleged SCM ceased receiving speech therapy although Father continued to pay for the therapy. Father also alleged he paid for medical expenses that Mother did not incur. Father asked the trial court to determine the amount of overpayment and to enter a judgment against Mother and in favor of Father in the amount of the alleged overpayment. Father also requested an award of attorney fees and costs.

¶7 In response to Father's request for overpayment, Mother denied Father was entitled to an award for overpayment of child support or medical expenses. Mother alleged the parties mutually agreed that SCM would attend a private reading tutor instead of speech therapy and that Father never complained about contributing to payment for the reading tutor. Mother also alleged SCM quit seeing a reading tutor while in high school, which she also discussed with Father. Father did not request

overpayment nor did he ask to recalculate the child support. Mother stated she paid medical expenses for SCM and did not ask Father to contribute payment for those expenses. Mother alleged there was an "understanding between the parties that the [child] support amount would stay the same." Mother also argued that, even after she filed her Motion for Parental Support for a Disabled Child, Father did not complain about the alleged overpayment or request to be reimbursed. Mother asked the trial court to deny Father's request for overpayment and an award of attorney's fees.

¶8 After several continuances, the trial court set this matter for trial on May 15, 2017.

¶9 On April 28, 2017, Father filed a Motion to Dismiss, arguing the trial court should dismiss Mother's Motion for Parental Support for a Disabled Child as there was no cognizable legal theory on which she could prevail. Father argued SCM was "capable of the minimum level of financial self-support." Father also alleged the trial court must consider all the resources available to support SCM, including government financial assistance.

¶10 Father also filed a Motion to Recuse on April 28, 2017, asking the trial court to order Mother's counsel to disqualify himself from representation of Mother because he represented Father's current wife in an unrelated matter approximately ten years previously.

¶11 The trial court entered a Minute Order on May 4, 2017, denying Father's Motion to Dismiss and Motion to Recuse. The trial court stated the trial remained set for May 15, 2017.

¶12 Father subsequently issued a subpoena to SCM at his current place of employment, Rogers State University. Mother filed a Motion to Quash Subpoena, arguing SCM was not subject to service of process or subpoena because he was the subject of a guardianship proceeding.

¶13 The trial court conducted a two-day trial beginning on May 15, 2017, and concluding on July 31, 2017. At trial, Mother presented several physicians and developmental experts to testify concerning SCM's cognitive limitations. Dr. Pamela A. Jarrett, SCM's pediatrician, testified SCM was diagnosed with Autistic Spectrum Disorder with Aspergers Characteristics and ADHD when he was eight years old, in May 2006. She stated that SCM has limited cognitive abilities and that the diagnosis is permanent and not expected to change. She also testified

that SCM has an IQ of a third or fourth grader. She stated SCM needs a limited legal guardian to help with certain decisions and a job coach to assist with employment. Concerning employment, Dr. Jarrett testified SCM would require close supervision and he would require a limited job scope. She also stated he would not be able to solely provide for his daily living cost and care. In addition, she testified that SCM suffers from anxiety and should not be alone at home for more than one to two hours a day. She also stated that he should not drive.

¶14 Stefani L. Northcutt, a psychometrist that specializes in special education testing, such as IQ and achievement testing, testified SCM tested at below to well below average.

¶15 Dr. Cynthia Jean Fuller, a developmental pediatrician and one of SCM's previous pediatricians, also testified concerning SCM's cognitive disabilities and ability to be employed. Dr. Fuller testified that SCM needs financial assistance because the type of job he is able to perform will not pay a livable wage. She stated SCM currently cleans tables at the cafeteria at Rogers State University and needs assistance to keep him on task. She opined that his overall function is that of a seven or eight year old. She also opined he was unable to function independently for activities of everyday life and currently functions at the level of a fourth grader.

¶16 Mother also presented the testimony of Pamela Meyer, SCM's supervisor at Rogers State University. Ms. Meyer testified SCM's job responsibilities include cleaning the tables and wiping down and refilling salt/pepper shakers. SCM needs constant supervision and needs a job coach to keep him on task. She said she had to move SCM to six hours a day because he was unable to handle working eight hours a day. Ms. Meyer testified SCM is paid \$8.75 per hour, but is not paid during breaks, such as spring break, fall break, or summer break.

¶17 Mother also testified at the trial. Mother testified SCM made \$4,000 in income in 2016 and introduced supporting documentation. Mother testified SCM might make approximately \$10,000 in 2017. She stated SCM's income is used to pay for his I-pad, Disney channel, and other entertainment expenses, but does not pay for the essential overhead costs. She also stated she does not seek unemployment for SCM when he is laid off during the summer because SCM is unable to look for employment, which is a requirement to obtain

unemployment. Mother also testified that she has not applied for government financial assistance because she was told it would probably be denied. She also testified she believes SCM is her and Father's responsibility, not the government's responsibility. Mother stated SCM is unable to live independently.

¶18 In addition, Mother testified she covers SCM on her insurance so she has not looked into Sooner Care. She stated SCM turned eighteen on August 22, 2016, and Father's last support payment was on August 15, 2016. Concerning the speech therapist costs that ceased, Mother testified she and Father agreed that SCM would meet with a reading tutor after he quit seeing the speech therapist and that Father's \$72.79 payment would be applied to the reading tutor. She said that, after SCM quit seeing the reading tutor, the parents verbally decided child support would be increased if they returned to court so they left the child support as originally ordered.

¶19 After the close of Mother's case, the trial court heard argument on Mother's Motion to Quash Subpoena. SCM was represented by an attorney during this argument. The trial court ruled that he would conduct an in-camera interview of SCM and then rule on the Motion to Quash Subpoena after talking with SCM. After the in-camera interview, the trial court sustained Mother's Motion to Quash Subpoena. The trial court stated:

My interview indicates that [SCM] would not be able to be sworn, would not be able to understand what we are doing here and accurately answer questions. [SCM] was extremely nervous shaking, holding onto stuffed animals that he brought for support, was very scattered in his thoughts. For those reasons the subpoena is hereby quashed and we will proceed with testimony.¹

¶20 In support of his case, Father presented the testimony of Amy Morgan, his sister. Ms. Morgan testified she does not have an educational background dealing with cognitive disabilities, but has worked in the area. Ms. Morgan stated she thought SCM could live in a group home and that it was possible for him to live independently with training and assistance.

¶21 Father also testified at trial. He stated he did not have any verbal agreement with Mother concerning the funds originally paid for the speech therapist and that he did not discuss the child support with Mother. He opined that

SCM's money should be used on necessities, not entertainment, and that SCM needs to learn to live independently. Father also testified he thought Mother should be required to pursue government financial assistance for SCM.

¶22 Father admitted he had not had contact with SCM since he turned eighteen years old and had lost contact with him. Father stated he thought SCM could work full-time and support himself.

¶23 After hearing testimony and reviewing the evidence presented at trial, the trial court denied Father's Motion for Overpayment of Child Support and granted Mother's request for support for SCM. The court held:

Based upon the evidence presented, my review of the exhibits and notes from our beginning of trial and the evidence presented today, Mr. Morgan's Motion for Overpayment of Child Support is denied. Mr. Morgan did not meet his burden in showing that the calculations would be different or lower had they been recalculated.

Further, I find that his testimony related to the services provided for [SCM] to be unreliable based on all of the information presented about the needs of the, at that time, minor child.

Based upon the testimony of both expert and lay witnesses, it's clear that the level of care for [SCM] has not diminished in any way based on his reaching majority. He's an adult by number only.

As a matter of fact, the level of care required by his mother has increased based on him no longer being in public school.

. . . .

[SCM] is an adult child who requires substantial care and personal supervision because of a mental disability, who is not capable of self-support. It's uncontroverted that this disability existed before [SCM's] eighteenth birthday.

Adult child support will be ordered pursuant to the Child Support Guidelines with [Mother] calculated at her testified income amount. Five thousand dollars will be added to her income to account for [SCM]'s income. [Father] will be calculated at his income shown on his 2016 tax return.²

The trial court also ordered Father would have three years to pay back the support for the time after the Motion was filed.

¶24 The trial court entered an Order for Parental Support of a Disabled Adult Child, filed on October 5, 2017. The trial court found:

The Court finds that the parties' now-adult child, [SCM], born August 22, 1998, suffers from a mental disability that existed prior to his eighteenth birthday, and as a result of this disability requires substantial care and personal supervision and is not capable of self-support.

¶25 The trial court ordered Father to pay Mother the sum of \$649.03 per month, beginning September 1, 2016, as adult child support for [SCM] until further order of the court. The trial court also found Father stopped paying child support following [SCM's] 18th birthday and, therefore, owed past due child support in the amount of \$7,788.36. The court ordered Father to repay the arrearage within thirty-six months and to pay \$216.34 per month on the judgment, beginning September 1, 2017. The trial court also ordered that Mother shall pay 54% and Father 46% of the reasonable and necessary physical or mental health expenses for [SCM] not covered by insurance or some other third-party coverage. In addition, the trial court denied Father's Motion for Overpayment.

¶26 Mother subsequently filed an Application for Attorney's Fees, which the trial court granted in part. Mother requested attorney's fees in the amount \$14,168.41 and the trial court awarded Mother \$8,000 in attorney's fees. The trial court held:

- 1. The Court finds that the delays and complications that arose prior to trial were well beyond those expected, even considering the busy schedules of the trial attorneys and litigants.
- 2. The Court finds that [Father's] conduct created additional attorney fees for [Mother].
- 3. The court grants, in part, the Petitioner's Application for Attorney Fees. The Court awards [Mother] the sum of \$8,000.00 and hereby enters a judgment in favor of the Petitioner against the Respondent in the amount of \$8,000.00, all over the Respondent's objection.

¶27 Father appeals both the trial court's Order for Parental Support of a Disabled Adult Child and Order on Petitioner's Application for Attorney Fees.

STANDARD OF REVIEW

¶28 Matters relating to child support are addressed to the sound legal discretion of the trial court and will not be reversed absent a showing of abuse of discretion or that the decision is clearly contrary to the weight of the evidence. *Merritt v. Merritt*, 2003 OK 68, ¶ 7, 73 P.3d 878, 882 (citations omitted).

¶29 "The question of whether an award of attorney's fees is authorized presents a question of law, subject to *de novo* review on appeal." *Hall v. Dearmon*, 2015 OK CIV APP 40, ¶11, 348 P.3d 1107, 1109. The reasonableness of the trial court's award of attorney's fees is reviewed for abuse of discretion. *Id.* This Court will not disturb an attorney's fee award unless the appellate court finds the trial court made a clearly erroneous conclusion and judgment against reason and evidence. *Green Bay Packaging, Inc. v. Preferred Packaging, Inc.*, 1996 OK 121, ¶ 32, 932 P.2d 1091, 1097.

ANALYSIS

¶30 Father first argues the trial court did not have subject matter jurisdiction over Mother's request for financial support for SCM due to the pendency of the guardianship action involving SCM and, therefore, erred as a matter of law by not declining jurisdiction in the support action.

¶31 Father argues the trial court did not have jurisdiction to decide the financial support issue, relying on Title 30 O.S.2011 § 1-113. Section 1-113 provides:

- A. A guardian of the person or property, or both, of a person residing in this state, who is a minor, or an incapacitated or partially incapacitated person, may be appointed in all cases by the court as provided in this title.
- B. After the service of notice in a proceeding seeking the appointment of a guardian or other order, in subsequent proceedings pertaining to the guardianship of a ward and until termination of the proceeding, the court in which the petition is filed has exclusive jurisdiction to determine:

- 1. the need for a guardian or other order; and
- 2. how the estate of the ward shall be managed, expended, or distributed to or for the use of the ward or the dependents of the ward.

(Emphasis added.) Father focuses his argument on the emphasized language above, arguing the action for financial support was an action concerning the estate of the ward and how the estate would be "managed, expended, or distributed to or for the use of the ward" and, therefore, the guardianship court had jurisdiction, not the trial court here.

- ¶32 This Court does not agree. The current support action is not one "pertaining to the guardianship of a ward" and does not involve how the ward's estate shall be managed, expended, or distributed to or for the ward's use. Furthermore, Father's interpretation is in conflict with the language of Title 43 O.S.2011 § 112.1A,³ that provides for the support of an adult child with disabilities. Section 112.1A provides in part:
 - 2. A court that orders support under this section shall designate a parent of the child or another person having physical custody or guardianship of the child under a court order to receive the support for the child. The court may designate a child who is eighteen (18) years of age or older to receive the support directly.
 - C. 1. A suit provided by this section may be filed only by:
 - a. a parent of the child or another person having physical custody or guardianship of the child under a court order, or
 - b. the child if the child:
 - (1) is eighteen (18) years of age or older,
 - (2) does not have a mental disability, and
 - (3) is determined by the court to be capable of managing the child's financial affairs.

(Emphasis added.) The express language of Section 112.1A reflects the Legislature's intent that a person having guardianship of an adult child with disabilities be able to bring an action for support.⁴

¶33 This Court finds that under the facts and applicable law, the trial court did not err in

finding it had subject matter jurisdiction to decide this matter.

¶34 Father next argues he was denied due process of law by the trial court's decision to quash Father's subpoena for SCM to testify. Father argues he was unable to fully present his case because he was unable to call SCM as a witness.

¶35 The determination of the competency of a witness to testify is a matter for the trial court's discretion. "[I]t is the province of the trial court to determine the witness' competency, and its decision will not be reviewed unless there is a clear abuse of discretion." Missouri-Kansas-Texas Railroad Co.v. Embrey, 1934 OK 238, ¶ 6, 33 P.2d 481, 483 (citing Adams v. State, 1911 OK CR 87, 114 P. 347).

¶36 Here, the trial court examined SCM in camera and determined SCM was unable "to be sworn, would not be able to understand what we are doing here and accurately answer questions." After examining SCM and considering the previous testimony about SCM's cognitive disability and limitations, the trial court determined SCM was unable to understand and participate in the proceedings. This Court, based on the evidence presented at the trial, finds the trial court did not abuse its discretion in granting Mother's motion to quash the subpoena of SCM.

¶37 Father next argues the trial court erred in its award of post-majority support for SCM, a disabled adult child. Father argues the trial court erred in using the Oklahoma Child Support Guidelines to calculate support for SCM under Title 43 O.S.2011 § 112.1A. Father also contends the trial court was required to consider whether SCM was eligible for government financial assistance to reduce or eliminate Father's support obligation under Section 112.1A.

¶38 Thus, the issue here presented is whether the Oklahoma Child Support Guidelines should be used to calculate financial support for an adult child with disabilities under Title 43 O.S.2001 § 112.1A. This Court responds in the negative for the reasons set out herein.

¶39 Section 112.1A(E) provides the basis for determining child support for an adult child with disabilities. Section 112.1A(E) sets forth the factors the trial court must consider in determining support:

E. In determining the amount of support to be paid after a child's eighteenth birthday, the specific terms and conditions of that support, and the rights and duties of both parents with respect to the support of the child, the court shall determine and give special consideration to:

- 1. Any existing or future needs of the adult child directly related to the adult child's mental or physical disability and the substantial care and personal supervision directly required by or related to that disability;
- 2. Whether the parent pays for or will pay for the care or supervision of the adult child or provides or will provide substantial care or personal supervision of the adult child;
- 3. The financial resources available to both parents for the support, care, and supervision of the adult child; and
- 4. Any other financial resources or other resources or programs available for the support, care, and supervision of the adult child.
- F. An order provided by this section may contain provisions governing the rights and duties of both parents with respect to the support of the child and may be modified or enforced in the same manner as any other order provided by this title.

¶40 Although this Court has not found an Oklahoma Supreme Court case addressing this issue, this Court addressed the issue in an unpublished opinion *In re Marriage of Rooney*, Case No. 109,481 (December 19, 2012)(cert. denied). This Court finds the analysis in *Rooney* instructive. In *Rooney*, the Court of Civil Appeals compared the statues dealing with child support for a minor child and Title 43 O.S.2001 § 112.1A, the statute dealing with support of an adult child with disabilities in determining whether to use the Child Support Guidelines to calculate support for an adult child with disabilities. The *Rooney* Court stated:

The question presented is whether a decision as to the level of parental support of adult children with disabilities pursuant to § 112.1A is an award of "child support" subject to the calculation provisions of 43 O.S. 118 and 12 O.S. 118D (2001). We find it is not.

Section 43 O.S. 112.1(A) allows suit for such an award of adult support "regardless of the age of the child ...," while the child support statute, 43 O.S. 112 (2011) mandates provision for the support of "minor children" ("If there are minor children of the marriage, the court . . . [s]hall make provision for guardianship, custody, medical care, support and education of the children "). Further, 43 O.S. 118D is clear that base child support is based primarily upon a percentage of the combined gross income of both parents, and the number of supported children. Conversely, 43 O.S. 112.1A focuses on the specific needs of the adult child and who is caring for the child. Similarly, 43 O.S. 118B (2011) dictates that government disability benefits are not normally considered in calculating child support, while 43 O.S. 112.1A requires an assessment of "[a]ny other financial resources or other resources or programs available for the support, care, and supervision of the adult child."

Finally, the needs of children in general are clearly uniform enough that the state may generalize their support needs into a series of guidelines. By comparison, the needs of a disabled adult child are highly individualistic to that child. Section 43 O.S. 112.1A therefore concentrates on the "existing or future needs of the adult child directly related to the adult child's mental or physical disability and the substantial care and personal supervision directly required by or related to that disability." Such a standard clearly contemplates a more individualized inquiry into the needs of a specific child than a guideline-based approach centering on income. If the legislature intended support for an adult disabled child to be treated identically to minor child support, it would not have enacted a separate statute with substantially different requirements. We find the Child Support Guidelines are not the basis for the calculation of support for an adult disabled child.

(Emphasis added.)

¶41 As discussed in *Rooney*, the Legislature enacted Section 112.1A to provide the trial court a means to determine financial support for a post-majority child with disabilities that has specific, individualized needs. 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. This consideration may exceed, or be less than, the generalized calculation based on the Child Support Guidelines depending upon the specific long-term medical or psychological needs of the child.

¶42 However, Section 112.1A does not preclude the trial court from using the Child Support Guidelines to assist in determining the relative financial responsibility of each parent for the child's needs as determined based on the Section 112.1A factors. Thus, after considering the factors stated in Section 112.1A and determining the amount of support needed for the care of the post-majority child with disabilities pursuant to Section 112.1A, the trial court may utilize the Child Support Guidelines to assist in determining the financial resources of each parent and to allocate to each parent their percentage of the support as determined under Section 112.1A needed to meet the needs of the post-majority child with disabilities.

¶43 This Court finds the trial court here erred in calculating support for SCM based solely on the Oklahoma Child Support Guidelines. The trial court decision in this matter is reversed and remanded to the trial court. The trial court, on remand, is instructed to consider the Section 112.1A factors in determining the amount of support needed for SCM. The trial court may utilize the Oklahoma Child Support Guidelines to assist in determining the percentage of the determined support under Section 112.1A for which each parent is responsible.

¶44 In relation to the child support issue, Father also argues the trial court erred in not considering all of SCM's income from his employment when determining support. At trial, Mother presented evidence that SCM made \$4,000 in 2016 and maybe \$8,000 to \$10,000 in 2017. Father did not present any evidence to contradict this evidence. The trial court allocated \$5,000 of SCM's income to Mother's available income in computing support for SCM.

¶45 Section 112.1A provides the trial court shall consider "[a]ny other financial resources ... available for the support, care, and supervision of the adult child." Here, the trial court was presented with a definite amount of income for SCM for 2016 and a possible income amount for 2017. The trial court set SCM's income at \$5,000, which was within the range of evidence presented to the trial court. This Court finds the trial court determination of income for SCM was not error. However, the trial court did err in its application of SCM's total income by attributing SCM's income to Mother. On remand, the trial court is instructed that SCM's income should be considered in the analysis of the Section 112.1A factors when determining the amount of SCM's support.

¶46 In addition, Father argues Mother is required to seek government financial assistance for SCM under Section 112.1A and the trial court must consider this assistance in making the support determination. It should be noted that the specific language of Section 112.1A does not mandate that Mother seek and obtain government financial assistance for SCM. Moreover, there is a question about whether Mother would qualify for any such assistance that is based on a means test. Thus, this Court finds this argument to be without merit.

¶47 Next, Father argues the trial court erred as a matter of law by retroactively establishing support for SCM and awarding Mother an arrearage for child support from the date Father ceased paying child support. Father alleges there is no legal authority for a retroactive application of a support obligation imposed per Title 43 O.S.2001 § 112.1A.

¶48 In response, Mother couches her action as a modification of the original child support award and contends the trial court correctly awarded an arrearage for payment of back adult child support. Mother relies on Section 112.1A(D)(3), which provides "[i]f there is a court of continuing, exclusive jurisdiction, an action under this section may be filed as a suit for modification pursuant to Section 115 of this title." Section 115 provides that an income assignment shall be contained in every child support order. Mother argues "[I]t is possible that subsection 112.1A(D)(3) should refer to 43 O.S. § 118I, regarding modification of child support orders, instead of § 115."5 Title 43 O.S.2001 § 118I(A)(3)⁶ provides that a modification order is effective upon the date the motion is filed.

¶49 The Legislature specifically provided in Section 118I(A)(3) that an order modifying child support of a minor child is effective the date the motion to modify is filed. However, the Legislature did not extend the retroactive application to Section 112.1A, the statute providing for support for an adult child with disabilities.

¶50 This Court cannot speculate as to why the Legislature made special arrangements for an income assignment in a support action involving an adult child with disabilities, but failed to provide that a motion for adult child support relates back to the date the applicant filed the motion. Nor can this Court speculate as to what the Legislature meant to do. However, this Court is bound by the statutory language drafted by the Legislature. Based on the express language of Section 112.1A, this Court finds the trial court erred in awarding Mother a judgment for past due support for SCM. The trial court's judgment for past due child support in the amount of \$7,788.36 is vacated.

¶51 Next, Father argues the trial court erred in denying his Motion to Determine Overpayment, claiming he was entitled to a credit for his alleged overpayment of support after SCM ceased receiving speech therapy and tutoring. Father claims he is entitled to a credit of \$2,984.39.

¶52 In denying Father's request for overpayment, the trial court held that Father did not sustain his burden of proof. The trial court further found "the [Father's] testimony to be unreliable based upon the testimony and evidence presented regarding [SCM's] needs."⁷

¶53 The trial court acts as the sole judge of the witnesses' credibility and the weight to be given their testimony and evidence. *Brown v. Brown*, 1993 OK CIV APP 142, ¶ 3, 867 P.2d 477, 479. Here, the trial court considered the conflicting evidence and made its decision according to its assessment of the credibility of the witnesses and the evidence. This Court will give deference to the trial court's conclusions concerning the witnesses and the evidence because it is in the best position to evaluate the witnesses' demeanor and to gauge the credibility of the evidence. *Beale v. Beale*, 2003 OK CIV APP 90, ¶ 6, 78 P.3d 973, 975.

¶54 This Court, based on the evidence presented in this case, finds no error in the trial court's denial of Father's Motion to Determine Overpayment.

¶55 Father also argues the trial court erred in awarding support for SCM pursuant to 43 O.S.2011 § 112.1A to Mother. Father claims Mother failed to meet her burden of proof under Section 112.1A and, therefore, the trial court's decision is against the clear weight of the evidence.

¶56 Here, Mother presented evidence relating to the four factors set forth in Section 112.1A(E). Mother testified SCM is covered on her insurance and the monthly costs are: health - \$286, dental - \$29.26, and vision - \$6.19, for a total of \$321.45. Mother also presented her Exhibit 15 – an itemized monthly list of expenses for SCM of \$2,322.24 (including insurance costs). In addition, Mother presented both expert and lay testimony regarding SCM's existing and future needs relating to his mental disabilities, including testimony of SCM's inability to care for himself and the unlikelihood of SCM ever being able to live alone. Mother also presented testimony from SCM's supervisor concerning his ability to work and his income from working. The trial court also heard testimony concerning both Mother and Father's income.

¶57 Father presented limited evidence concerning the Section 112.1A factors. In fact, Father did not present any evidence to refute Mother's evidence regarding SCM's monthly expenses and he presented limited evidence regarding SCM's ability to be self-sufficient.⁸

¶58 As previously discussed, the trial court is the sole arbiter of the witnesses' credibility and the weight to be given to their testimony and credibility. Thus, this Court finds the trial court did not err in its decision to award Mother adult child support for SCM pursuant to Title 43 O.S.2001 § 112.1A.

¶59 Father's final argument is the trial court erred in awarding Mother attorney's fees. Father argues there was not a contract or statute allowing an award of attorney's fees and, therefore, the trial court erred in awarding attorney's fees to Mother. In response, Mother contends her Motion for Parental Support was a modification of the original child support award and she is entitled to an attorney's fee award pursuant to Title 43 O.S.2001 § 110(E).9

¶60 In Oklahoma, the right of a party to recover attorney's fees is governed by the American Rule. *Barnes v. Oklahoma Farm Bureau Mut. Ins. Co.*, 2000 OK 55, ¶ 46, 11 P.3d 162, 178-79. The American Rule provides that "courts

are without authority to award attorney fees in the absence of a specific statute or a contractual provision allowing the recovery of such fees, with certain exceptions." Id. (citations omitted). These exceptions to the American Rule are narrowly construed. Id. One exception to the American Rule is "that where a litigant has acted in bad faith, wantonly or for an oppressive reason, the trial court, in exercise of its equitable power, may award attorney fees." Christian v. American Home Assur. Co., 1977 OK 141, ¶ 36, 577 P.2d 899, 906. Whether a litigant comes within this exception is a question for the trial court after presentation of pleadings and evidence. "[T]he inherent equitable power of a court to award attorney fees for abusive litigation practices ... emanated from the inherent authority of courts to manage their affairs so as to achieve the orderly and timely disposition of cases." Barnes v. Oklahoma Farm Bureau *Mut. Ins. Co.*, 2000 OK 55, ¶ 50, 11 P.3d 162, 180.

¶61 In her request for attorney's fees and costs, Mother alleged:

[Mother] spent 17 months and over \$14,000.00 in an effort to secure her son [SCM] the financial support he needs and deserves. The attorney fees [Mother] incurred were exacerbated tremendously by [Father's] unreasonable conduct, unconscionable arguments, frivolous filings, repeated delays, and refusal to sign orders.

The Court must then consider the parties' litigation conduct. In reviewing the overall conduct of the litigation, the Court should consider whether either party unnecessarily complicated or delayed the proceedings, or made the subsequent litigation more vexatious than necessary. Unfortunately, [Father's] strategy in this case appears to have been delay at all costs. . . . [Father] tried to have [Mother's] attorney disqualified by filing a ridiculous "Motion to Recuse" that had absolutely no intelligent or reasonable support. [Father] refused to sign Court orders requiring ongoing litigation to settle the journal entry.

¶62 Here, in its Order on Petitioner's Application for Attorney Fees, the trial court partially granted Mother's request for attorney's fees and costs. The court stated:

1. The Court finds that the delays and complications that arose prior to trial were well beyond those expected, even considering the busy schedules of the trial attorneys and litigants.

2. The Court finds that [Father's] conduct created additional attorney fees for Petitioner.

¶63 The trial court "considered the evidence, the statements and arguments of counsel, the docket sheet, pleadings, and procedural history of this matter" and was familiar with the proceedings and activities involved. After a thorough review of the appellate record, this Court finds the trial court did not err in exercising its equitable power and awarding Mother attorney's fees and costs incurred due to litigation-related misconduct in this action. The trial court's Order on Petitioner's Application for Attorney Fees is affirmed.¹⁰

CONCLUSION

¶64 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 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 in the amount of \$7,788.36 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.

¶65 AFFIRMED IN PART, REVERSED IN PART AND REMANDED, AND VACATED IN PART.

BARNES, P.J., and GOODMAN, J., concur. KEITH RAPP, JUDGE:

- 1. Transcript, July 31, 2017, p. 9, lines 2-9.
- 2. Transcript, July 31, 2017, pp. 88-89. 3. Title 43 O.S.2011 § 112.1A provides:

A. In this section:

- 1. "Adult child" means a child eighteen (18) years of age or older. 2. "Child" means a son or daughter of any age.
- B. 1. The court may order either or both parents to provide for the support of a child for an indefinite period and may determine the rights and duties of the parents if the court finds that:
- a. the child, whether institutionalized or not, requires substantial care and personal supervision because of a mental or physical disability and will not be capable of self-support, and
- b. the disability exists, or the cause of the disability is known to exist, on or before the eighteenth birthday of the child.

- 2. A court that orders support under this section shall designate a parent of the child or another person having physical custody or guardianship of the child under a court order to receive the support for the child. The court may designate a child who is eighteen (18) years of age or older to receive the support directly. C. 1. A suit provided by this section may be filed only by:
- a. a parent of the child or another person having physical custody or guardianship of the child under a court order, or

b. the child if the child:

- (1) is eighteen (18) years of age or older,
- (2) does not have a mental disability, and
- (3) is determined by the court to be capable of managing the child's financial affairs.
- 2. The parent, the child, if the child is eighteen (18) years of age or older, or other person may not transfer or assign the cause of action to any person, including a governmental or private entity or agency, except for an assignment made to the Title IV-D
- D. 1. A suit under this section may be filed:
- a. regardless of the age of the child, and
- b. as an independent cause of action or joined with any other claim or remedy provided by this title.
- 2. If no court has continuing, exclusive jurisdiction of the child, an action under this section may be filed as an original suit.
- 3. If there is a court of continuing, exclusive jurisdiction, an action under this section may be filed as a suit for modification pursuant to Section 115 of this title.
- E. In determining the amount of support to be paid after a child's eighteenth birthday, the specific terms and conditions of that support, and the rights and duties of both parents with respect to the support of the child, the court shall determine and give special consideration to:
- 1. Any existing or future needs of the adult child directly related to the adult child's mental or physical disability and the substantial care and personal supervision directly required by or related to that disability;
- 2. Whether the parent pays for or will pay for the care or supervision of the adult child or provides or will provide substantial care or personal supervision of the adult child;
- 3. The financial resources available to both parents for the support, care, and supervision of the adult child; and
- 4. Any other financial resources or other resources or programs available for the support, care, and supervision of the adult
- F. An order provided by this section may contain provisions governing the rights and duties of both parents with respect to the support of the child and may be modified or enforced in the same manner as any other order provided by this title.
- 4. Father's argument also ignores that "[u]nder the State's constitution, the district court - in all of its division - constitutes an omnicompetent, single-level, first-instance tribunal with 'unlimited original jurisdiction over all justiciable matters." Broadway Clinic v. Liberty Mul. Ins. Co., 2006 OK 29, ¶ 25,139 P.3d 873, 880 (citing Okla. Const. art. 7, § 7(a)). As this Court in In re Adoption of S.W., 2002 OK CIV APP 26, ¶ 19, 41 P.3d 1003, 1007-08, elaborated:

There is only one District Court in Oklahoma. Dockets are established for administrative purposes. 20 O.S. Supp. 2000, 91.2(A). Thus, there is no jurisdictional conflict between divisions or dockets of the District Court.

- 5. Answer Brief of Petitioner/Appellee, filed June 25, 2018, p. 24, n.32.
 - 6. Section 118I(A)(3) provides:
 - 3. An order of modification shall be effective upon the date the motion to modify was filed, unless the parties agree to the contrary or the court makes a specific finding of fact that the material change of circumstance did not occur until a later date.
- 7. Order for Parental Support of a Disabled Adult Child, filed on October 5, 2017, R. 125.
- 8. Father presented testimony from his sister, Amy Morgan, who testified that it was possible for SCM to live independently with training and assistance. Unlike Mother's witnesses, Ms. Morgan has not received a formal education in disabilities/psychological. Instead, she based her assessment on work experience.
 - 9. Section 110(E) provides:
 - E. The Court may in its discretion make additional orders relative to the expenses of any such subsequent actions . . . for the enforcement or modification of any interlocutory or final orders in the dissolution of marriage action made for the benefit of either party or their respective attorneys.
- 10. Father did not appeal the reasonableness of the attorney's fee award and, therefore, this issue is waived.

2019 OK CIV APP 6

IN THE MARRIAGE OF: MICHELLE J. BRISCOE, Petitioner/Appellee, vs. MICHAEL R. BRISCOE, Respondent/ Appellant.

Case No. 116,515. November 29, 2018

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

> HONORABLE MARTHA OAKES, TRIAL JUDGE

AFFIRMED

Rachel Bussett, Ashley Weyland, BUSSETT LEGAL GROUP, PLLC, Oklahoma City, Oklahoma, for Respondent/Appellant

Edward Goldman, GOLDMAN LAW, PLLC, Oklahoma City, Oklahoma, for Petitioner/ Appellee

DEBORAH B. BARNES, PRESIDING JUDGE:

¶1 This appeal arises from the parties' postdivorce proceedings. Michael R. Briscoe (Father) appeals from the trial court's order awarding attorney fees to Michelle J. Briscoe (Mother). Prior to awarding attorney fees to Mother, the trial court, in August 2017, entered an order sustaining the motion of Mother to require Father "to Pay his Share of Health Insurance Premium." In particular, the trial court ordered Father to pay Mother "\$136.50 per month as his share of the children's health insurance premium commencing August 1, 2017 " Mother then filed an application for attorney fees and costs expended in relation to this health insurance issue. Following a hearing on Mother's application for attorney fees, the trial court entered an order in October 2017 awarding Mother \$2,282.50 in attorney fees. 1 This award is equivalent to the total amount of fees sought by Mother for 8.3 hours billed at \$275 per hour.

¶2 Based on our review, we affirm.

STANDARD OF REVIEW

¶3 The fundamental question raised on appeal concerns the proper construction of the attorney fee statute at issue - 43 O.S. 2011 § 110(D) & (E). Questions of statutory construction "are questions of law that we review de novo and over which we exercise plenary, independent, and non-deferential authority. The primary goal of statutory construction is to ascertain and follow the intent of the Legislature." Welch v. Crow, 2009 OK 20, ¶ 10, 206 P.3d 599 (footnotes omitted).

ANALYSIS

¶4 On appeal, Father argues the trial court misapplied § 110(D) & (E) by, among other things, failing to "weigh the judicial equities." To the extent Father is arguing the trial court altogether failed to undertake a judicial balancing of the equities,² there is no indication in the record that the trial court failed in this regard, and error is not presumed on appeal.³ In fact, the record demonstrates that a judicial balancing of the equities properly occurred. As set forth in Mother's application for attorney fees, Mother expressly sought fees

pursuant to Title 43 O.S. [§ 110(D) & (E)] and *Kerby v. Kerby*, [2007 OK 36,] 164 P.3d 1053 ..., wherein it states that attorney fees may be awarded to the party "who qualifies for the benefit through the process of a judicial balancing of the equities."

Moreover, at the attorney fee hearing, it was counsel for Father, not Mother, who objected to the presentation of argument and evidence relevant to the *Finger* factors.⁴ For example, Mother's counsel stated at the hearing that Father's "joint tax return showed \$61,366 as wages" for the previous year, and counsel for Father objected on the basis that Father's wages have no bearing on the attorney fee request. Counsel for Mother responded by stating, "It has to do with ability to pay and the balancing of the equities," and the trial court overruled Father's objection.

¶5 Although Father asserts on appeal that "[Mother] never cited these factors and/or argued these factors" and, therefore, "the Court did not have any way to balance the equities and award attorney fees," a review of the record reveals that Mother cited appropriate authority and presented argument and evidence directly relevant to a judicial balancing of the equities. Therefore, to the extent Father is arguing the trial court altogether failed to undertake a judicial balancing of the equities, we find Father's argument to be without merit.

¶6 Father also argues the trial court's determination is not "in accordance with *Finger* and *Burk*." Indeed, Father spends a great deal of time in his appellate brief discussing the interplay and significance of *Finger* and *Burk*, and he asserts the trial court erred in failing to apply all of the "almost 15-18 factors between

the two cases." Father asserts, "The Burk factors are one of the most important piece[s] of law in assessing an attorney fee request and [Mother] failed to address this standard in any pleading or hearing." However, a review of the Oklahoma Supreme Court decisions addressing challenges to § 110 attorney fee awards over the past two decades reveals that the *Burk* factors play a somewhat different role in such cases than they play in the context of determining an appropriate fee award under mandatory prevailing party fee statutes.⁶ The distinctive analysis applied in these cases stems from the distinctive statutory language at issue. As indicated, the applicable statutory provisions in the present case are found in 43 O.S. 2011 § 110, and read as follows:

D. Upon granting a decree of dissolution of marriage, annulment of a marriage, or legal separation, the court may require either party to pay such reasonable expenses of the other as may be just and proper under the circumstances.

E. The court may in its discretion make additional orders relative to the expenses of any such subsequent actions, including but not limited to writs of habeas corpus, brought by the parties or their attorneys, for the enforcement or modification of any interlocutory or final orders in the dissolution of marriage action made for the benefit of either party or their respective attorneys.

¶7 By way of contrast, 43 O.S. 2011 § 111.1(C) (3), for example, provides as follows:

Unless good cause is shown for the noncompliance, the prevailing party shall be entitled to recover court costs and attorney fees expended in enforcing the order and any other reasonable costs and expenses incurred in connection with the denied child support or denied visitation as authorized by the court.

¶8 The attorney fees in this case were awarded under § 110(D) & (E), not under a mandatory prevailing party fee statute like § 111.1(C) (3). Under such circumstances, a "judicial balancing of the equities" has consistently controlled both the initial determination as to whether one party is entitled to attorney fees under § 110, and the ultimate determination of what is "just and proper under the circumstances." In our view, the *Burk* factors persist under § 110, but only in a circumscribed intermediate role between these two determina-

tions; that is, the factors set forth in Burk become relevant and should be applied in the context of a § 110 attorney fee request when a party specifically challenges the reasonableness of the total fee sought by the party entitled to fees.7 See Smith v. Smith, 2013 OK CIV APP 54, ¶ 9, 305 P.3d 1054 (*Burk* must be applied in the context of a § 110 attorney fee request "[w] hen . . . issues are raised as to amount of time spent and complexity of the case " (emphasis added)).8 However, under § 110, the trial court is charged with ultimately awarding only such reasonable expenses "as may be just and proper under the circumstances," and thus the ultimate determination should be based on equitable factors such as the economic resources of the parties and the parties' behavior with regard to the welfare of their children - factors which would not be applied in the context of awarding fees pursuant to a mandatory prevailing party attorney fee statute.9

¶9 Here, because Father did not specifically challenge the reasonableness of the total fee sought by Mother, we reject Father's argument that the trial court erred as a matter of law in failing to apply the *Burk* factors.¹⁰ *Cf. Smith*, 2013 OK CIV APP 54, ¶ 9 (Because such a specific challenge was made in *Smith*, the *Smith* Court reversed and remanded for a hearing "including, but not limited to the *Burk* criteria[.]").

¶10 As to the *Finger* factors and related equitable considerations, even Father admits the "outcome of the [underlying] case" and the "means and property of the [Father]" were forwarded below in support of the attorney fee request. Moreover, in addition to evidence presented showing Father has some ability to pay, counsel for Mother stated at the attorney fee hearing that "this [i.e., the underlying proceeding involving the insurance issue] was such a simple case," yet "[Father] has not been at all economical in this entire case" - "[i]t's been a waste of my client's time and money and mine too." The trial court agreed, stating, "[T]he Court will find that [Father] . . . delayed it," and the trial court further stated,

Bottom line is the insurance plan, the numbers speak for themselves, and it was just an unnecessary process to just look at the insurance plan. And it sets out what the different plans are, the costs, and what the costs is for employee, employee plus children, and it has it separated out, it's clear on its face[.]¹¹

¶11 The trial court in this case properly undertook a judicial balancing of the equities consistent with § 110(D) & (E).¹² Consequently, we affirm the trial court's order.

CONCLUSION

¶12 Under § 110(D) & (E), the determination as to entitlement to fees, and the determination of the ultimate amount that is "just and proper under the circumstances," are equitable determinations that require a judicial balancing of the equities. However, the ultimate determination as to the proper amount of reasonable fees to be awarded to one party – although an equitable determination – cannot be properly made if the trial court is equipped only with an uncertain and disputed amount of total reasonable fees from which to make the equitable award. For this reason, we agree that Burk retains the role under § 110 specified herein. However, because Father did not specifically challenge the reasonableness of the fee sought by Mother, no error occurred in failing to apply the Burk factors in advance of the ultimate equitable determination. Accordingly, we affirm.

¶13 **AFFIRMED**.

RAPP, J., and GOODMAN, J., concur. DEBORAH B. BARNES, PRESIDING JUDGE:

- 1. Mother was also awarded costs resulting in a total award of \$2,409.14.
- 2. As explained by the Oklahoma Supreme Court, "In determining whether to award attorney fees, the trial court should consider what is just and equitable after taking into account the means and property of each party. A party should be awarded attorney fees only if they qualify for the benefit through a judicial balancing of the equities." Childers v. Childers, 2016 OK 95, ¶ 29, 382 P.3d 1020 (footnotes omitted). See also Boatman v. Boatman, 2017 OK 27, ¶ 17, 404 P.3d 822 ("In matrimonial litigation, a party should be awarded attorney fees only if they qualify for the benefit through a judicial balancing of the equities considering the means and property of each party." (footnote omitted)).

 3. "On appeal, this Court will not presume error. The appellant
- 3. "On appeal, this Court will not presume error. The appellant must affirmatively show the alleged error from the record on appeal. Otherwise, this Court will presume that no prejudicial error was committed by the trial court." Fleck v. Fleck, 2004 OK 39, ¶ 12, 99 P.3d 238 (citation omitted).
- 4. See Finger v. Finger, 1996 OK CIV APP 91, 923 P.2d 1195, where this Court explained:

In considering what is just and proper under the circumstances, the court in the exercise of its discretion should consider the totality of circumstances leading up to, and including, the subsequent action for which expenses and fees are being sought. Such circumstances should include, but not be limited to: the outcome of the action for modification; whether the subsequent action was brought because one of the parties had endangered or compromised the health, safety, or welfare of the child or children; whether one party's behavior demonstrated the most interest in the child or children's physical, material, moral, and spiritual welfare; whether one party's behavior demonstrated a priority of self-interest over the best interests of the child or children; whether either party unnecessarily complicated or delayed the proceedings, or made the subsequent litigation more vexatious than it needed to be; and finally, the means and property of the respective parties.

Id. \P 14. Finger was cited with approval in Abbott v. Abbott, 2001 OK 31, \P 11, 25 P.3d 291.

5. State ex rel. Burk v. City of Okla. City, 1979 OK 115, 598 P.2d 659.

6. In fact, over the past twenty years the Oklahoma Supreme Court has consistently avoided any mention of, or citation to, Burk in the context of reviewing challenges to § 110 attorney fee awards. See Childers v. Childers, 2016 OK 95, 382 P.3d 1020; Foshee v. Foshee, 2010 OK 85, 247 P.3d 1162; Nichols v. Nichols, 2009 OK 43, 222 P.3d 1049; Kerby v. Kerby, 2007 OK 36, 164 P.3d 1053; King v. King, 2005 OK 4, 107 P.3d 570 (Burk cited in dissent only); Fulsom v. Fulsom, 2003 OK 96, 81 P.3d 652; McCabe v. McCabe, 2003 OK 86, 78 P.3d 956; Merritt v. Merritt, 2003 OK 68, 73 P.3d 878; Casey v. Casey, 2002 OK 70, 58 P.3d 763; Jackson v. Jackson, 2002 OK 25, 45 P.3d 418; Daniel v. Daniel, 2001 OK 117, 42 P.3d 863; Abbott v. Abbott, 2001 OK 31, 25 P.3d 291; Jackson v. Jackson, 1999 OK 99, 995 P.2d 1109; Larman v. Larman, 1999 OK 83, 991 P.2d 536; and Stepp v. Stepp, 1998 OK 18, 955 P.2d 722. Interestingly, the sole exception to these cases is a recent Supreme Court decision addressing this issue -Boatman v. Boatman, 2017 OK 27, 404 P.3d 822. However, the Boatman Court mentioned *Burk* only in the process of setting forth the arguments of the parties. The Boatman Court stated:

In a separate companion case, Mother argues that the trial court erred because it "summarily addressed" the awarding of fees from the bench without holding a *Burk* hearing. *State ex rel. Burk v. City of Oklahoma City*, 1979 OK 115, ¶ 3, 598 P.2d 659, involved the "equitable fund doctrine," which posits that attorneys who succeed in creating or preserving a fund [through] litigation have a right to receive fees paid from the fund. It set out criteria to help judges determine the reasonableness of attorney fees. Mother culled a line from the opinion which stated that "the trial court should set forth with specificity the facts, and computation to support his award," and seems to argue that anytime a judge does not make findings on the record regarding hours spent and reasonable hourly rates in a "*Burk* hearing," reversal is warranted.

Boatman, ¶ 15 (footnotes omitted). In the remainder of its analysis, the Boatman Court neither mentioned nor cited Burk, and, at least impliedly, appears to have rejected the party's arguments that, as a matter of law, a Burk hearing must be held in determining § 110 fee requests and that Burk findings must be made. See Boatman, ¶¶ 16-17.

7. After all, § 110 allows only for "such reasonable expenses of the other[.]" (Emphasis added.)

8. See also Robert G. Spector & Carolyn S. Thompson, The Law of Attorney Fees in Family Law Cases, 69 Okla. L. Rev. 663, 679-82 (Summer 2017), and Robert G. Spector, Oklahoma Family Law – The Handbook 179-182 (2018).

Citing Finger, a United States Bankruptcy Appellate Panel for the Tenth Circuit articulated the law in Oklahoma as follows:

An award of attorney fees in a divorce proceeding depends on what is just and proper under the circumstances, including, but not limited to, the outcome of the action, the reason for the action, the parties' behavior with regard to the welfare of their children, whether either party unnecessarily complicated or delayed the proceedings or made the litigation more vexatious than it needed to be, and the means and property of the parties.

In re Lowther, 266 B.R. 753, 758-59 (B.A.P. 10th Cir. 2001), aff'd, 321 F.3d 946 (10th Cir. 2002).

10. Father did argue below to the effect that the absence of any analysis of the Burk factors in Mother's motion, by itself, constituted error. Father argued at the hearing that the "attorney fee motion is facially invalid" because it "does not address the Burk factors, which are required by law to determine reasonableness." However, although this argument raises a legal question as to the proper application of § 110, it does not constitute a specific challenge under the *Burk* factors to the reasonableness of the total fee sought by Mother. Father also argues that Mother was awarded attorney fees for "issues that [Mother's] counsel created." At first glance, this argument appears to constitute a challenge under Burk to the reasonableness of the total number of hours sought by Mother. However, even taking Father's assertions as true in this regard - that a hearing date had to be continued in order to avoid a statutory or constitutional violation - Father framed this challenge as an equitable argument at the hearing below, stating, "I think it's inequitable to bill him for that." Moreover, at the end of this section of Father's appellate brief, he states: "The hearing was moved, and [Mother] did *not* this time seek the fees associated with moving the hearing." Br.-in-chief at 22 (emphasis added).

11. As to whether Father unnecessarily delayed the proceedings, we note that this factor was analyzed below in the context of a judicial balancing of the equities. It was not made under the rubric of a trial court's inherent equitable power to sanction a party for "vexatious and wanton behavior" as suggested by Father in his appellate brief.

12. Of course, as set forth above, the trial court awarded Mother *all* of her requested fees. This determination is not, as a matter of law, inconsistent with a judicial balancing of the equities. To the extent Father is raising more than this legal issue pertaining to the proper

interpretation of § 110, and is also attacking the factual basis of the award, the trial court is granted discretion in this regard and its decision will not be overturned unless "its decision has no rational basis in evidence." *Childers*, 2016 OK 95, ¶ 28 (footnote omitted). The following equitable factors weigh in favor of awarding attorney fees to Mother: whether either party unnecessarily complicated or delayed the proceedings or made the subsequent litigation more vexatious than it needed to be; the means and property and ability of Father to pay; the outcome of the underlying action; and the totality of circumstances leading up to and including the subsequent action for which expenses and fees are being sought. *Finger*, ¶ 14. We conclude the trial court's decision to award Mother all of the reasonable attorney fees expended in these proceedings is supported by the equities and is not without any rational basis in the evidence.

2019 OK CIV APP 7

MISTA BURGESS, Plaintiff/Appellant, vs.
THE STATE OF OKLAHOMA, ex rel
OKLAHOMA DEPARTMENT OF
ENVIRONMENTAL QUALITY, and THE
STATE OF OKLAHOMA, ex rel
OKLAHOMA MERIT PROTECTION
COMMISSION, Defendants/Appellees.

Case No. 115,428. May 16, 2018

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE DON ANDREWS, TRIAL JUDGE

AFFIRMED

Mark Hammons, Leah Roper, HAMMONS, GOWENS, HURST & ASSOCIATES, Oklahoma City, Oklahoma, for Plaintiff/Appellant

Mike Hunter, OKLAHOMA ATTORNEY GENERAL, Kimberly Heaton, Gary Henry, ASSISTANT ATTORNEYS GENERAL, Oklahoma City, Oklahoma, for Defendants/Appellees

JERRY L. GOODMAN, JUDGE:

¶1 Mista Burgess (Burgess) appeals from a September 28, 2016, order of the district court affirming an order of the Oklahoma Merit Protection Commission (MPC). Based on our review of the facts and applicable law, we affirm.

BACKGROUND

¶2 Burgess was a 16-1/2 year unclassified employee of the Oklahoma Department of Environmental Quality (DEQ) when she was discharged from employment on May 15, 2014. Prior to discharge, Burgess had received "Exceeds Standards" on seven of her last ten Performance Evaluations and was deemed "multitalented and very competent." However, General Counsel Martha Penisten (Penisten) and Deputy General Counsel Sarah Penn (Penn) assert that for some time prior to Burgess' discharge there was a strained working relation-

ship, noting Burgess undermined them by going around them to the Executive Director Steve Thompson and Deputy Director Jimmy Givens. Burgess was apparently close or favored by the Executive Director Steve Thompson, Deputy Director Givens, and Director of Administrative Services, Wendy Caperton, a known close friend.

¶3 Steve Thompson subsequently retired and in December of 2013, Scott Thompson (Thompson) was appointed as Executive Director. Thompson reassigned Burgess to a new division, the Land Protection Division, and demoted Caperton.¹ Prior to her demotion, and in her previous role as agency liaison on budgetary matters, Caperton had become friends with Representative Don Armes, a member of the House Appropriations and Budget Committee and chairman of its subcommittee on Natural Resources and Regulatory Services, under which appropriations subcommittee DEQ fell. As a result of Caperton's close friendship, Burgess got to know Representative Armes as well.

¶4 Beginning in December of 2013, Burgess and Caperton began communicating with Representative Armes about DEQ's budget for the fiscal year 2014-2015. Burgess asserts she revealed to Representative Armes that the DEQ Water Quality Division had misrepresented in the 2013-2014 budget the number of full-time employees (FTEs) needed to implement the Public Water Supply Program (PWS), that the number was intentionally inflated, and that DEQ had no intention of hiring the number of personnel budgeted.

¶5 DEQ disputes 1) that it misrepresented or inflated the funding or number of FTEs in the 2013-2014 budget; and 2) that Burgess never mentioned the FTE issue to Representative Armes, citing her own statement: "[t]hey were talking to me about the PWS fees and the only thing I ever said was that they don't need that extra 1.5 million in extra appropriation. That's all I ever said." Rather, DEQ asserts Burgess, Caperton, and Representative Armes were involved in a plan to obtain extensive budget cuts to DEQ's 2014-2015 budget to exact revenge for their demotion, transfer, salary cuts, and other perceived slights. A DEQ investigator tape recorded conversations with Burgess where they discussed communications with Representative Armes and cuts to DEQ's budget. These cuts included a \$12.5 million cut that would be over and above the standard cuts other agencies were going to receive.2 Burgess made the comment that she "thought we were fighting for one or two million dollars to be taken," "[t]o help, what, bring down the house?," "They've stolen . . . Don [Armes] is screwing over DEQ. He's screwing them hard and royal. This is his last hoorah," and "that would be sweet revenge for me if that were just – if I could work for [the Oklahoma Municipal League], I don't think there'd be a better place for me – I mean, this just couldn't be a better place to perfect my revenge."

¶6 On or about May 7, 2016, Burgess' supervisors recommended her termination to Thompson. DEQ asserts they terminated Burgess for dishonest, insubordinate, inappropriate, and disruptive behavior after her transfer to the new division.³ Burgess was discharged on May 15, 2014. After her discharge, DEQ found a January 17, 2014, email, with a scanned copy of handwritten notes, from Burgess to Representative Armes with questions that he could ask Thompson and Water Quality Division Director Chard-McClary during a budget hearing with Representative Armes to discredit and hurt the agency. It also included unflattering personal characterizations of them to "knock [them] off kilter" during the hearing.

¶7 Burgess appealed her discharge to the MPC, asserting she was unlawfully terminated in violation of the Oklahoma Whistleblower Act, 74 O.S.2011, § 840-2.5. The case was assigned to an administrative law judge (ALJ). A hearing was held on September 22, 23, and October 6 and 7, 2015. By order issued on January 7, 2016, the ALJ issued findings of fact and conclusions of law. The ALJ found:

- 1. There is insufficient evidence to find that [Burgess] communicated to Rep. Armes her belief that DEQ had intentionally budgeted for more FTE in FY 2013-2014 than they intended to hire.
- 2. The evidence is sufficient to find that [Burgess] was involved in a conspiracy with Wendy Caperton and Rep. Don Armes to harm DEQ by imposing deep budgetary cuts in FY 2014-2015.
- 3. There is insufficient evidence to find that [Burgess'] communications to Rep. Armes were protected activities as provided by the Whistleblower Act.
- 4. There is insufficient evidence to find [Burgess'] discharge was the result of

- any protected communications in violation of the Whistleblower Act.
- 5. There is insufficient evidence to find that the discharge of [Burgess] by Scott Thompson for loss of confidence and loss of trust is a pretext to cover up a prohibited activity by [DEQ].

¶8 The ALJ ultimately denied Burgess' petition and upheld her discharge from employment. Burgess filed a petition for review in the Oklahoma County District Court on February 1, 2016. By order entered on September 28, 2016, the district court affirmed the MPC order. Burgess appeals.

STANDARD OF REVIEW

¶9 An appellate court may not disturb an order of an administrative agency unless it is erroneous under 75 O.S.2011, § 322. *Oklahoma Corp. Comm'n v. Bauer*, 1997 OK CIV APP 83, ¶ 5, 951 P.2d 124, 126. Title 75 O.S.2011, § 322(1) provides a court may set aside, modify, or reverse an administrative order if it "determines that the substantial rights of the appellant or petitioner for review have been prejudiced because the agency findings, inferences, conclusions or decisions, are":

- (a) in violation of constitutional provisions; or
- (b) in excess of the statutory authority or jurisdiction of the agency; or
- (c) made upon unlawful procedure; or
- (d) affected by other error of law; or
- (e) clearly erroneous in view of the reliable, material, probative and substantial competent evidence, . . . including matters properly noticed by the agency upon examination and consideration of the entire record as submitted; but without otherwise substituting its judgment as to the weight of the evidence for that of the agency on question of fact; or
- (f) arbitrary or capricious; or
- (g) because findings of fact, upon issues essential to the decision were not made although requested.

Section 322(3) provides that "the reviewing court shall affirm the order and decision of the agency, if it is found to be valid and the proceedings are free from prejudicial error to the appellant."

¶10 In *Tulsa Area Hosp. Council, Inc. v. Oral Roberts Univ.*, 1981 OK 29, ¶ 10, 626 P.2d 316, 320, the Oklahoma Supreme Court stated:

Great weight is to be accorded the expertise of an administrative agency, and a presumption of validity attaches to the exercise of expertise when the administrative agency is reviewed by the judiciary. A court of review may not substitute its own judgment for that of an agency, particularly in the area of expertise which the agency supervises If the facts determined by the administrative agency are supported by substantial evidence, and the order is otherwise free of error, the decision of the agency must be affirmed.

"On appeal from an administrative decision, the appellate courts, whether the District Court, the Court of Civil Appeals or the Supreme Court, apply the same standards of review directly to the administrative record." *Bauer*, 1997 OK CIV APP 83, at ¶ 5, 951 P.2d at 126.

ANALYSIS

¶11 On appeal, Burgess contends the district court erroneously affirmed the MPC, asserting the ALJ made various legal and factual errors in the January 7, 2016, order. Those assertions of error will be combined and discussed as follows

1. General Discussions with Representative Armes

¶12 Burgess contends she had general communications with Representative Armes that are protected under Oklahoma's Whistleblower Act. Burgess maintains protection is not limited to specific statements under the Act. Title 74 O.S.2011, § 840-2.5 provides:

- A. This section shall be known and may be cited as the "Whistleblower Act". The purpose of the Whistleblower Act is to encourage and protect the reporting of wrongful governmental activities and to deter retaliation against state employees for reporting those activities. No conviction of any person shall be required to afford protection for any employee under this section.
- B. For purposes of this section, "agency" means any office, department, commission or institution of the state government. No officer or employee of any state agency shall prohibit or take disciplinary action against employees of such agency, whether

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subject to the provisions of the Merit System or in unclassified service, for:

- Disclosing public information to correct what the employee reasonably believes evidences a violation of the Oklahoma Constitution or law or a rule promulgated pursuant to law;
- Reporting a violation of the Oklahoma Constitution, state or federal law, rule or policy; mismanagement; a gross waste of public funds; an abuse of authority; or a substantial and specific danger to public health or safety;
- 3. Discussing the operations and functions of the agency, either specifically or generally, with the Governor, members of the Legislature, the print or electronic media or other persons in a position to investigate or initiate corrective action; or
- 4. Taking any of the above actions without giving prior notice to the employee's supervisor or anyone else in the employee's chain of command.

¶13 Burgess notes the ALJ found she "had discussions and other communications with Rep. Armes concerning the agency's budget for fiscal year 2014-2015." However, she contends the ALJ erroneously found there was insufficient evidence that these communications were protected activities under the Act. Burgess maintains the ALJ erroneously construed § 840-2.5(B)(3) of the Act, as it is clear she was discussing the operations and functions of the agency with a member of the Legislature. Burgess contends § 840-2.5(B)(3) does not require that the discussions with the Legislature be about an illegal action, misuse of funds, or any other specific misconduct. Rather, the Act protects general discussions with Legislators.

¶14 DEQ disagrees, asserting the Act must be construed as a whole. DEQ notes the purpose of the Act is "to encourage and protect the reporting of wrongful governmental activities and to deter retaliation against state employees for reporting those activities." *Id.* at § 840-2.5(A). Thus, DEQ maintains that to be entitled to protection under the Act, one must be engaged in the reporting of wrongful governmental activities. DEQ asserts that Burgess was not reporting wrongful governmental activity to Representative Armes but rather was engaged in a plan with Representative Armes and Caperton to damage DEQ's budget.

¶15 Statutory construction presents a question of law. Blitz U.S.A., Inc. v. Oklahoma Tax Commission, 2003 OK 50, ¶ 6, 75 P.3d 883, 885. "The goal of any inquiry into the meaning of a legislative act is to ascertain and give effect to the intent of the legislature." *Id.* at ¶ 14, 75 P.3d at 888. The Legislature "is presumed to have expressed its intent in a statute's language and to have intended what the text expresses." *Id.* Intent is ascertained from the whole act in light of its general purpose and objective considering relevant provisions together to give full force and effect to each. Keating v. Edmondson, 2001 OK 110, ¶ 8, 37 P.3d 882, 886. The Court presumes that the Legislature expressed its intent and that it intended what it expressed. Id. Statutes are interpreted to attain that purpose and end, championing the broad public policy purposes underlying them. Id. "Where a statute is plain and unambiguous, it will not be subject to judicial construction, but will be given the effect its language dictates." Blitz U.S.A., Inc., at ¶ 14, at 888. "Only where the intent cannot be ascertained from a statute's text, as occurs when ambiguity or conflict (with other statutes) is shown to exist, may rules of statutory construction be employed." *Id*.

¶16 Title 74 O.S.2011, § 840-2.5 is the Legislature's pronouncement on Oklahoma's public policy regarding whistleblowers. The plain, clear, unmistakable, unambiguous, and unequivocal language of § 840-2.5 clearly provides that the stated purpose of the Act is to encourage and protect the reporting of wrongful governmental activities and to deter retaliation against state employees for reporting these activities. Id. at § 840-2.5(A). Therefore, general discussions, even those with a Legislator, which do not report wrongful governmental activities, are not protected by the Act. Accordingly, the ALJ correctly found Burgess' general discussions with Representative Armes are not protected communications under the Act.

2. Specific Discussions with Representative Armes

¶17 For her next assertion of error, Burgess contends the ALJ erred in limiting consideration of her protected communication to a single statement. Burgess further contends the ALJ erroneously required her to corroborate her testimony, imposing unequal standards on her evidence as compared to DEQ's. DEQ disagrees, asserting the ALJ weighed the evidence and determined Burgess did not meet her burden of proof.

¶18 Specifically, Burgess argues she was terminated for having discussions with Representative Armes regarding DEQ's budget or the FTE issue. Burgess testified she had general communications with Representative Armes concerning DEQ's budget as well as specific communications regarding the inaccurate FTE numbers submitted by DEQ in its 2013-2014 fiscal year budget. Burgess asserted DEQ requested 10 new FTE's to implement the PWS program, that the number was intentionally inflated, and that it had no intention of hiring the number of personnel budgeted.

¶19 DEQ, conversely, asserts it terminated Burgess for dishonest, insubordinate, inappropriate, and disruptive behavior after her transfer to the new division. DEQ presented evidence that it had not presented inaccurate FTE numbers to the Legislature and had in fact only requested 4 new FTE's in the budget. In addition, Thompson specifically denied knowledge of the FTE issue or the specific content of the alleged protected statement Burgess made to Representative Armes. Finally, DEQ presented evidence that Burgess, Representative Armes, and Caperton were involved in a plan to harm DEQ and to obtain extensive budget cuts to DEQ's 2014-2015 budget to exact revenge for their demotion, transfer, salary cut, and other perceived slights.

¶20 The ALJ specifically found that "there [was] insufficient evidence to find that [Burgess] communicated to Rep. Armes her belief that DEQ had intentionally budgeted for more FTE in FY 2013-2104 than they intended to hire." The ALJ's order does reference that Burgess presented no corroborative evidence to support her assertion that she informed Representative Armes of the FTE issue. However, a review of the order provides the ALJ carefully reviewed and weighed the evidence presented. The ALJ noted Burgess never mentioned the FTE issue during her conversations with a DEQ investigator, instead expressing concerns that she did not have a bigger role in the \$12.5 million budget cut, in "hurting" the agency, in "bringing down the house," in "screwing over DEQ," and her "sweet revenge" against DEQ. Further, the ALJ found the evidence supported Thompson's testimony that he had no knowledge of any issue with the FTE count in the 2013-2014 budget until after Burgess was discharged or that Burgess informed Representative Armes of any issue.

¶21 We find no error. After reviewing the appellate record, we cannot find the ALJ's rulings were clearly erroneous in view of the evidence produced at the hearing. Although there was conflicting evidence on issues of fact, there is substantial evidence supporting the ALJ's findings. "An appellate court may not substitute its judgment for that of the agency on the latter's factual determinations," and "[a]n agency's order will be affirmed if the record contains substantial evidence in support of the facts upon which the decision is based, and if the order is otherwise free of error." Oklahoma Department of Public Safety v. McCrady, 2007 OK 39, ¶ 10, 176 P.3d 1194, 1200-1201 (footnotes omitted). The ALJ may draw reasonable inferences and can refuse credence to any portion of testimony deemed unworthy of belief. Under the APA, this Court may set aside the ALJ's decision only if we determine one or more of the grounds listed in 75 O.S.2011, § 322 are shown, and we may not disturb the decision "unless our review leads us to a firm conviction (the agency) was mistaken." Carpenters Local Union No. 329 v. State ex rel. Dept. of Labor, 2000 OK CIV APP 96, ¶ 3, 11 P.3d 1257, 1259. Based upon our review of the record, we do not find any of the grounds listed in § 322 to be present. This assertion of error is therefore denied.

3. Causation

¶22 Burgess further argues the ALJ erred in failing to apply the proper analysis of causation. Initially, Burgess contends O.A.C. 455:10-3-6(b) (3) sets forth the correct standard of causation to be used by the ALJ. This section provides:

Sufficient evidence or information shall be provided which causes the Executive Director to believe there is a causal connection between the alleged protected activity and the disciplinary action. For purposes of this section, causal connection means such evidence or information which shows that the disciplinary action was taken in relationship to the alleged protected activity.

¶23 This section specifically addresses the standard of review the Executive Director of the MPC applies in determining whether sufficient evidence exists to conclude a violation may have occurred and to permit an appeal to proceed through the MPC system. As the ALJ correctly noted, this is similar to a preliminary hearing.

¶24 Burgess further contends the ALJ wrongly believed retaliation needed to be the sole factor instead of simply one factor, a significant factor. Burgess relies on several Oklahoma cases which utilize the significant factor test to determine whether an employer's actions were retaliatory. See e.g., Vasek v. Board of Cnty. Comm'rs., 2008 OK 35, 186 P.3d 928. We, however, do not believe it is necessary to engage in lengthy analysis regarding causation, because our task is to determine whether there is substantial evidence supporting the ALJ's conclusion that Burgess' discharge was not the result of a protected communication.

¶25 In the present case, Burgess had the burden of proving she made a protected communication under the Act, that she was disciplined, and was disciplined as a result of making that protected communication. *See* 74 O.S.2011, § 840-2.5; O.A.C. 455: 10-9-2(f)(2). Burgess essentially asks this Court to adopt a new test, *i.e.*, whether the protected communication was a significant factor in her discipline. We decline to do so. This is a function of the Legislature.

¶26 In the present case, the ALJ found the evidence supported Thompson's loss of trust and confidence in Burgess to be based upon information received from the DEQ investigator. The investigator first came to Thompson in January of 2014 with information that Caperton and Representative Armes planned to use his position to ravage DEQ's budget as revenge for Caperton's demotion and salary cut. The investigator subsequently learned of Burgess' involvement in the plan. Based on the evidence presented, the ALJ found there was sufficient evidence to find that Burgess was involved in a conspiracy with Caperton and Representative Armes to harm DEQ's budget. Accordingly, the ALJ found "[t]here [was] insufficient evidence to find that [Burgess'] discharge was the result of any protected communications in violation of the Whistleblower Act." She further found there was "insufficient evidence to find that the discharge of [Burgess] by Scott Thompson for loss of confidence and loss of trust [was] a pretext to cover up a prohibited activity by [Burgess]."

¶27 We find no error. After reviewing the appellate record, we cannot find the ALJ's ruling was clearly erroneous in view of the evidence produced at the hearing. The ALJ's findings and conclusions are thorough and supported by the evidence. This assertion of error is therefore denied.

4. Defenses

¶28 Finally, Burgess contends the ALJ erroneously found a conspiracy, a defense not recognized under the Act. Burgess contends the defenses to liability are set forth in § 840-2.5(C).⁴

Any person who has authority to take, direct others to take, recommend or approve any personnel action shall not take or fail to take any personnel action with respect to any employee for filing an appeal or testifying on behalf of any person filing an appeal with the Oklahoma Merit Protection Commission. This section shall not be construed as prohibiting disciplinary action of an employee who discloses information which the employee:

- 1. Knows to be false;
- 2. Knowingly and willfully discloses with reckless disregard for its truth or falsity; or
- 3. Knows to be confidential pursuant to law.

¶29 DEQ disagrees, noting it did not plead a conspiracy defense. Rather, the ALJ, after reviewing the totality of the evidence, determined that Burgess was conspiring with Representative Armes and Caperton to harm DEQ and its budget.

¶30 We have reviewed the record. We do not find that the ALJ relied on an improper defense. Rather, upon her review of the evidence, the ALJ determined that Burgess did not meet her burden of proving she had a protected communication with Representative Armes and that she was discharged as a result of that communication. Rather, the evidence established that Burgess was involved in a plan to harm DEQ and its budget. As we have previously discussed, there is substantial evidence in the record to support the ALJ's determination.

¶31 Having reviewed the record in totality, we find no basis upon which to reverse the MPC's order. Accordingly, the district court's September 28, 2016, order affirming the MPC's order is proper and is affirmed.⁵

¶32 AFFIRMED.

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

JERRY L. GOODMAN, JUDGE:

1. Under the prior executive director, Burgess had worked on the agency's annual budget and was responsible for coordinating with all DEQ divisions and pulling together the needed funding and personnel

positions required for the agency's 2013-2014 fiscal year budget. Thompson did not assign Burgess to work on the 2014-2015 budget.

- 2. The State budget was released on May 16, 2014, and DEQ's budget was cut by over 20%, including \$1.5 million appropriation previously received to allow DEQ to administer the PWS program, a 5.5% budget cut received by most agencies, and an additional \$12 million taken from the agency's revenue account.
- 3. Some of these behaviors included: 1) Burgess insisted on preparing a Notice of Violation even though instructed by Thompson to

prepare an Order, and bypassed her supervisor to convince Deputy Director Givens this was the correct course; and 2) Burgess attempted to sabotage a fellow attorney.

- 4. Burgess further raises the "same result defense," asserting it is also an improper defense under the Act. However, Burgess acknowledges that DEQ did not plead and the ALJ did not rely on this defense in its order. Accordingly, this defense will not be discussed.
 - 5. Burgess' request to strike DEQ's answer brief is denied.



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Professional Responsibility Tribunal Annual Report

January 1, 2018 – December 31, 2018 SCBD No. 6745

INTRODUCTION

The Professional Responsibility Tribunal (PRT) was established by order of the Supreme Court of Oklahoma in 1981, under the Rules Governing Disciplinary Proceedings, 5O.S. 2011, ch. 1, app. 1-A (RGDP). The primary function of the PRT is to conduct hearings on complaints filed against lawyers in formal disciplinary and personal incapacity proceedings, and on petitions for reinstatement to the practice of law. A formal disciplinary proceeding is initiated by written complaint filed with the Chief Justice of the Supreme Court. Petitions for reinstatement are filed with the Clerk of the Supreme Court.

COMPOSITION AND APPOINTMENT

The PRT is a 21-member panel of Masters, 14 of whom are lawyers and 7 whom are non-lawyers. The lawyers on the PRT are active members in good standing of the OBA. Lawyer members are appointed by the OBA President, with the approval of the Board of Governors. Non-lawyer members are appointed by the Governor of the State of Oklahoma. Each member is appointed to serve a three-year term, and limited to two terms. Terms end on June 30th of the last year of a member's service.

Pursuant to Rule 4.2, RGDP, members are required to meet annually to address organizational and other matters touching upon the PRT's purpose and objective. They also elect a Chief Master and Vice-Chief Master, both of whom serve for a one-year term. PRT members

receive no compensation for their services, but they are entitled to be reimbursed for travel and other reasonable expenses incidental to the performance of their duties.

The lawyer members of the PRT who served during all or part of 2018 were: Angela Ailles Bahm, Oklahoma City; Murray E. Abowitz, Oklahoma City; M. Joe Crosthwait, Jr., Midwest City; Melissa G. DeLacerda, Stillwater; Thomas W. Gruber, Oklahoma City; John B. Heatly, Oklahoma City; Gerald L. Hilsher, Tulsa; Douglas Jackson, Enid; Jody R. Nathan, Tulsa; Linda M. Pizzini, Yukon; Mary Quinn-Cooper, Tulsa; Rodney D. Ring, Norman; Theodore P. Roberts, Norman; Michael E. Smith, Oklahoma City; Jeffery G. Trevillion, Jr., Oklahoma City; Noel K. Tucker, Edmond; Roy D. Tucker, Muskogee; and Dale Kenyon Williams, Jr., Tulsa.

The non-lawyer members who served during all or part of 2018 were: Nicole Beam, Edmond; Matthew Burns, Edmond; James W. Chappel, Norman; Linda C. Haneborg, Oklahoma City; Donald Lehman, Tulsa; Kirk V. Pittman, Seiling; and Clarence Warner, Norman.

The annual meeting was held on June 28, 2018, at the Oklahoma Bar Association offices. Agenda items included a presentation by Gina Hendryx, General Counsel¹ of the Oklahoma Bar Association, recognition of new members and members whose terms had ended, and discussions concerning the work of the PRT. Rodney D. Ring was elected Chief Master and Dale Kenyon Williams, Jr. was elected Vice-Chief Master, each to serve a one-year term.

GOVERNANCE

All proceedings that come before the PRT are governed by the RGDP. However, proceedings and the reception of evidence are, by reference, governed generally by the rules in civil proceedings, except as otherwise provided by the RGDP.

The PRT is authorized to adopt appropriate procedural rules which govern the conduct of the proceedings before it. Such rules include, but are not limited to, provisions for requests for disqualification of members of the PRT assigned to hear a particular proceeding.

ACTION TAKEN AFTER NOTICE RECEIVED

After notice of the filing of a disciplinary complaint or reinstatement petition is received, the Chief Master (or Vice-Chief Master if the Chief Master is unavailable) selects three (3) PRT members (two lawyers and one non-lawyer) to serve as a Trial Panel. The Chief Master designates one of the two lawyer-members to serve as Presiding Master. Two of the three Masters constitute a quorum for purposes of conducting hearings, ruling on and receiving evidence, and rendering findings of fact and conclusions of law.

In disciplinary proceedings, after the respondent's time to answer expires, the complaint and the answer, if any, are then lodged with the Clerk of the Supreme Court. The complaint and all further filings and proceedings with respect to the case then become a matter of public record.

The Chief Master notifies the respondent or petitioner, as the case may be, and General Counsel of the appointment and membership of a Trial Panel and the time and place for hearing. In disciplinary proceedings, a hearing is to be held not less than 30 days nor more than 60 days from date of appointment of the Trial Panel. Hearings on reinstatement petitioners are to be held not less than 60 days nor more than 90 days after the petition has been filed. Extensions of these periods, however, may be granted by the Presiding Master for good cause shown.

After a proceeding is placed in the hands of a Trial Panel, it exercises general supervisory control over all pre-hearing and hearing issues. Members of a Trial Panel function in the same manner as a court by maintaining their independence and impartiality in all proceedings.

Except in purely ministerial, scheduling, or procedural matters, Trial Panel members do not engage in *exparte* communications with the parties. Depending on the complexity of the proceeding, the Presiding Master may hold status conferences and issue scheduling orders as a means of narrowing the issues and streamlining the case for trial. Parties may conduct discovery in the same manner as in civil cases.

Hearings are open to the public and all proceedings before a Trial Panel are stenographically recorded and transcribed. Oaths or affirmations may be administered, and subpoenas may be issued, by the Presiding Master, or by any officer authorized by law to administer an oath or issue subpoenas. Hearings, which resemble bench trials, are directed by the Presiding Master.

TRIAL PANEL REPORTS

After the conclusion of a hearing, the Trial Panel prepares a written report to the Oklahoma Supreme Court. The report includes findings of facts on all pertinent issues, conclusions of law, and a recommendation as to the appropriate measure of discipline to be imposed or, in the case of a reinstatement petitioner, whether it should be granted. In all proceedings, any recommendation is based on a finding that the complainant or petitioner, as the case may be, has or has not satisfied the "clear and convincing" standard of proof. The Trial Panel report further includes a recommendation as to whether costs of investigation, the record, and proceedings should be imposed on the respondent or petitioner. Also filed in the case are all pleadings, transcript of proceeding, and exhibits offered at the hearing.

Trial Panel reports and recommendations are advisory. The Oklahoma Supreme Court has exclusive jurisdiction over all disciplinary and reinstatement matters. It has the constitutional and non-delegable power to regulate both the practice of law and legal practitioners. Accordingly, the Oklahoma Supreme Court is bound by neither the findings nor the recommendation of action, as its review of each proceeding is *de novo*.

ANNUAL REPORTS

Rule 14.1, RGDP, requires the PRT to report annually on its activities for the preceding year. As a function of its organization, the PRT operates from July 1 through June 30. However, annual reports are based on the calendar year.

Therefore, this Annual Report covers the activities of the PRT for the preceding year, 2018.

ACTIVITY IN 2018

At the beginning of the calendar year, six (6) disciplinary and five (5) reinstatement proceedings were pending before the PRT as carry-over matters from a previous year. Generally, a matter is considered "pending" from the time the PRT receives notice of its filing until the Trial Panel report is filed. Certain events reduce or extend the pending status of a proceeding, such as the resignation of a respondent or the remand of a matter for additional hearing. In matters involving alleged personal incapacity, orders by the Supreme Court of interim suspension, or suspension until reinstated, operate to either postpone a hearing on discipline or remove the matter from the PRT docket.

In regard to new matters, the PRT received notice of the following: Seven Rule 6, RGDP matters; Three Rule 7, RGDP matters; Four (4) Rule 8, RGDP matters; and Eight (8) Rule 11, RGDP reinstatement petitions. Trial Panels conducted a total of fifteen (15) hearings; eight (8) in disciplinary proceedings and seven (7) in reinstatement proceedings.

On December 31, 2018, a total of nine matters, six disciplinary and three reinstatement proceedings, were pending before the PRT.

CONCLUSION

Members of the PRT demonstrated continued service to the Bar and the public of this State, as shown by the substantial time dedicated to each assigned proceeding, The members' commitment to the purpose and responsibilities of the PRT is deserving of the appreciation of the Bar and all its members, and certainly is appreciated by this writer.

Dated this 31st day of January, 2019.

PROFESSIONAL RESPONSIBILITY TRIBUNAL

By: Rodney D. Ring, Chief Master

1. The General Counsel of the Oklahoma Bar Association customarily makes an appearance at the annual meeting for the purpose of welcoming members and to answer any questions of PRT members. Given the independent nature of the PRT, all other business is conducted in the absence of the General Counsel.

Proceeding Type	Pending Jan. 1, 2018	New Matters In 2018	Hearings Held 2018	Trial Panel Reports Filed	Pending Dec. 31, 2018
Disciplinary	6	14	81	7	6
Reinstatement	5	8	72	8	3

^{1:} In 2018, eight (8) disciplinary hearings were held over a total of twenty (20) days

^{2:} In 2018, seven (7) reinstatement hearings were held over a total of eight (8) days



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CALENDAR OF EVENTS

February

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

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

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

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

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

OBA General Practice/Solo and Small Firm Section meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Frank A. Urbanic 405-633-3420

OBA Awards Committee meeting; 2:30 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Kara Smith 405-923-8611

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

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

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

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



March

- OBA Government and Administrative Law Section meeting; 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Melissa L. Blanton 405-521-6600
- 7 **OBA Lawyers Helping Lawyers Discussion Group;** 6 p.m.; Office of Tom Cummings, 701 NW 13th St., Oklahoma City, OK 73012; RSVP to Jeanie Jones 405-840-0231
- OBA Law Day Committee meeting; 12 p.m.;
 Oklahoma Bar Center, Oklahoma City with BlueJeans;
 Contact Kara Pratt 918-599-7755
- **OBA Board of Governors meeting;** 5 p.m.; Oklahoma Bar Center, Oklahoma City; Contact John Morris Williams 405-416-7000
- **OBA Day at the Capitol;** 9:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact John Morris Williams 405-416-7000

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

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

Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS Thursday, January 24, 2019

F-2016-743 — Thorsten Gunter Rushing, Appellant, was tried by jury for the crimes of Count 1: Conspiracy to Commit First Degree Murder, Count 2: Murder in the First Degree and Count 3: Murder in the First Degree, in Case No. CF-2014-53, in the District Court of Comanche County. The jury returned a verdict of guilty and recommended as punishment ten years imprisonment plus a \$5,000.00 fine on Count 1 and life imprisonment without the possibility of parole on Counts 2 and 3. The Honorable Gerald Neuwirth, District Judge, sentenced accordingly. From this judgment and sentence Thorsten Gunter Rushing has perfected his appeal. AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Specially Concurs; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs; Rowland, J., Concurs.

F-2017-895 — Derick Andre Fields, Appellant, was tried by jury for the crime of possession of firearm after former conviction of a felony in Case No. CF-2014-173 in the District Court of Garvin County. The jury returned a verdict of guilty and set punishment at five years imprisonment. The trial court sentenced accordingly. From this judgment and sentence Derick Andre Fields has perfected his appeal. The Judgment and Sentence is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs in results; Hudson, J., concurs; Rowland, J., concurs.

Thursday, January 31, 2019

RE-2018-52 — On December 28, 2017, the District Court of Pontotoc County, the Honorable Greg Pollard, Special Judge, revoked Appellant Daryl Wayne Johnson's suspended sentences in full in Pontotoc County Case Nos. CF-2014-13, CF-2014-591, CF-2015-631, CF-2015-749, CF-2015-763, CF-2016-11 and CF-2016-12. The revocation of Johnson's suspended sentences in Pontotoc County Case Nos. CF-2014-13, CF-2014-591, CF-2015-631, CF-2015-749, CF-2015-763, CF-2016-11 and CF-2016-12 is AFFIRMED. Opinion by: Kuehn, V.P.J.; Lewis, P.J., concur; Lumpkin, J., concur; Hudson, J., concur; Rowland, J., concur.

F-2017-1053 — On October 13, 2015, Appellant Kasondra D. Greenwood, represented by counsel, stipulated to the State's acceleration application filed in Atoka County Case No. CF-2014-145. That same date she entered a plea of no contest to a charge of Possession of CDS-Methamphetamine in Atoka County Case No. CF-2015-201 and a guilty plea to Possession of Paraphernalia in Atoka County Case No. CM-2015-217. Sentencing in all three cases was deferred pending Greenwood's completion of the Atoka County Drug Court program. On August 31, 2017, the State filed an Application to Terminate Greenwood from Drug Court. On October 4, 2017, the Honorable Preston Harbuck, Associate District Judge, terminated Greenwood's Drug Court participation and sentenced her as specified in her plea agreement. However, Judge Harbuck also assessed a \$500.00 fine in Case No. CF-2015-201 which was not part of the Drug Court plea agreement in that case. From this judgment and sentence Greenwood's termination from Drug Court is AFFIRMED. The matter is REMANDED to the District Court for entry of an Amended Judgment and Sentence in Case No. CF-2015-201 to vacate the fine assessment. Opinion by: Hudson, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs; Rowland, J., Concurs.

F-2017-350 — Amber Leann Pelton, aka Amber Leann Kirk, Appellant, appeals from an order of the District Court of Delaware County, entered by the Honorable Robert G. Haney, District Judge, terminating Appellant from drug court participation and sentencing her in accordance with the plea agreement in Case Nos. CF-2013-16, CF-2013-226, CF-2013-227 and CF-2013-304. AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs in results; Lumpkin, J., concurs; Hudson, J., concurs; Rowland, J., concurs.

Thursday, February 7, 2019

F-2017-857 — Dusty Lee Hill, Appellant, was tried by jury for the crime of assault with a dangerous weapon in Case No. CF-2015-159 in the District Court of Lincoln County. The jury returned a verdict of guilty and set punishment at twenty years imprisonment. The trial

court sentenced accordingly. From this judgment and sentence Dusty Lee Hill has perfected his appeal. The judgment and sentence is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs; Rowland, J., concurs.

F-2017-870 — Pedro Gaeta, Appellant, was tried by jury for the crime of first degree murder in Case No. CF-2009-5511 in the District Court of Tulsa County. The jury returned a verdict of guilty and set punishment at life imprisonment. The trial court sentenced accordingly. From this judgment and sentence Pedro Gaeta has perfected his appeal. The judgment and sentence is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs in results; Rowland, J., concurs.

C-2018-178 — Mary Lou Phillips, Petitioner, entered a guilty plea in Pottawatomie County District Court, Case No. CF-2012-651, before the Honorable John G. Canavan, Jr., District Judge, to Uttering Two or More Bogus Checks Exceeding \$500, After Former Conviction of Two or More Felonies. Judge Canavan accepted this plea and passed sentencing so Petitioner could make partial restitution. Thereafter Petitioner failed to do so. Judge Canavan sentenced Petitioner to a split twenty year sentence of imprisonment with the last ten years suspended. Petitioner was further ordered to pay restitution in the amount of \$15,282.91. Petitioner filed a motion to withdraw plea and after a hearing Judge Canavan denied the motion. Petitioner 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.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs; Lumpkin, I., Concurs; Rowland, I., Concurs.

F-2017-950 — Terry Lyn Elkins, Appellant, was tried by jury for the crimes of Count 1 – Possession of Methamphetamine, After Conviction of Two or More Felonies and Count 3 – Resisting an Officer in Case No. CF-2016-318 in the District Court of Comanche County. The jury returned a verdict of guilty and recommended as punishment 40 years imprisonment on Count 1 and a \$500 fine on Count 3. The trial court sentenced accordingly. From this judgment and sentence Terry Lyn Elkins has perfected his appeal. Judgment AFFIRMED; case REMANDED FOR RESENTENCING on

Count 1. Opinion by: Kuehn, V.P.J.; Lewis, P.J., concur; Lumpkin, J., concur in part/dissent in part; Hudson, J., concur in result; Rowland, J., concur.

F-2017-758 — Appellant, Shawn Conrad Freeman, was tried by jury and convicted of Kidnapping (Counts 1, 4, 9 and 15), Forcible Sodomy (Counts 2, 5, 7, 10, and 17), Rape in the First Degree (Counts 3, 6, 8, and 11), and Robbery in the First Degree (Count 16) in District Court of Tulsa County Case Number CF-2015-6211. The jury recommended as punishment imprisonment for twenty (20) years and a \$10,000.00 fine, each, in Counts 1-2, 4-5, 7, 9-10, 15 and 17; imprisonment for life and a \$10,000.00 fine, each, in Counts 3, 6, 8, and 11; and imprisonment for five (5) years and a \$1,000.00 fine in Count 16. The trial court sentenced Appellant in accordance with the jury's recommendation and ordered the sentences to run consecutively. It is from this judgment and sentence that Appellant appeals. The Judgement and Sentence of the District Court is hereby AFFIRMED. This matter is REMAND-ED to the District Court with instructions to enter an order nunc pro correcting the Judgment and Sentence in Count 16 to accurately reflect the \$1,000.00 fine imposed at sentencing. Opinion by: Lumpkin, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur; Hudson, J., Concur; Rowland, J., Concur.

F-2017-726 — Amber Marie Andrews, Appellant, was tried by jury for the crimes of Count I - First Degree Murder, Count II - Desecration of a Corpse and Count III - Conspiracy to Commit a Felony in Case No. CF-2015-148 in the District Court of Garvin County. The jury returned a verdict of guilty and recommended as punishment life imprisonment without parole on Count I, seven years imprisonment on Count II and 10 years on Count III. The trial court sentenced accordingly and ordered the sentences to run consecutively with credit for time served. From this judgment and sentence Amber Marie Andrews has perfected her appeal. Judgment and Sentence AFFIRMED; Notice of Extra-Record Evidence Supporting Propositions III and X of Brief of Appellant And/Or Alternatively Application for Evidentiary Hearing on Sixth Amendment Claims DENIED. Opinion by: Kuehn, V.P.J.; Lewis, P.J., concur; Lumpkin, J., concur in results; Hudson, J., concur; Rowland, J., concur.

COURT OF CIVIL APPEALS (Division No. 2) Wednesday, January 23, 2019

116,265 — Lawrence Harris, Plaintiff/Appellant, vs. Oklahoma City Blue, Defendant/Appellee. Appeal from Order of the District Court of Tulsa County, Hon. Daman H. Cantrell, Trial Judge. Plaintiff appeals the trial court's order granting summary judgment in favor of Defendant. Defendant argued it was entitled to judgment in its favor because Plaintiff's claims for harassment and false advertisement were (1) barred by claim preclusion and had already been litigated on the merits in prior lawsuits; (2) not recognized under oklahoma law; (3) barred by the statute of limitations; and (4) barred by the enforceable release he signed. Plaintiff's response to Defendant's motion for summary judgment did not comply with Okla. Dist. Ct. R. 13(b), 12 O.S. Supp. 2018, ch. 2, app. Plaintiff merely stated that *he* was "moving for the summary judgment" and requested that this case be set for trial. The fact that a lawsuit and subsequent appeal are conducted pro se does not relieve Plaintiff of the responsibility "to conform [his] actions to the rules of pleadings, evidence or appellate practice." Funnell v. Jones, 1985 OK 73, ¶4, 737 P.2d 105. Plaintiff has failed to demonstrate any ground for reversal. AFFIRMED. Opinion from Court of Civil Appeals, Division II by Fischer, P.J.; Goodman, J., concurs, and Thornbrugh, J., concurs specially.

Thursday, January 24, 2019

115,993 — In re the Estate of Jean R. Maxeiner, Deceased. Mary M. Hargrave, Appellant, vs. Janice Maxeiner, Appellee. Appeal from Order of the District Court of Tulsa County, Hon. Kurt G. Glassco, Trial Judge. Appellant Mary Maxeiner Hargrave appeals the district court's order finding that her mother, Jean Maxeiner, lacked capacity to contract and that she was unduly influenced by Mary. Mary also appeals the district court's imposition of a constructive trust and the appointment of a thirdparty representative of the estate. We find that the district court's determination that Mrs. Maxeiner lacked capacity to contract is consistent with the weight of the evidence. We further find the district court's determination that a presumption of undue influence arose in this case is reasonable and Mary failed to present any evidence which would mitigate the presumption. The district court's imposition of a constructive trust and a third-party representative of the estate were necessary to preserve the assets of the family trust. The order of the district court is affirmed. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Fischer, P.J.; Goodman, J., and Thornbrugh, J., concur.

116,318 — In re Estate of Jean R. Maxeiner, Deceased. Mary M. Hargrave, Appellant, vs. Janice Maxeiner, Appellee. Appeal from Order of the District Court of Tulsa County, Hon. Kurt G. Glassco, Trial Judge. Appellant Mary Hargrave appeals the district court's order awarding attorney fees in favor of Appellee Janice Maxeiner in the underlying probate action. Mary claims that the district court erred by hearing Janice's motion for attorney fees while Mary's appeal of the underlying action was still pending. We find that the district court possessed the requisite jurisdiction and authority to consider the motion for attorney fees. Consequently, the order awarding attorney fees is affirmed. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Fischer, P.J.; Goodman, J., and Thornbrugh, J.,

114,015 — Greenway Park Commercial Owners Association, Inc. an Oklahoma not-forprofit corporation and Greenway Park, LLC, an Oklahoma limited liability company, Plaintiffs/Counterclaim Defendants/Appellants/ Counter-Appellees, vs. R.T. Properties, LLC, an Oklahoma limited liability company, Defendant/Counterclaimant/Cross-Claimant/Appellee/Counter-Appellant, and Rodney D. Thornton, Cross-Claimant/Appellee/Counter-Appellant, vs. Phillip R. Parker, Additional Defendant on Cross-Claim. Proceeding to review a judgment of the District Court of Cleveland County, Hon. Jeff Virgin and Lori Walkley, Trial Judges. Greenway Park Commercial Owners Association, Inc., (Association), Greenway Park, LLC, (GWP) and Dr. Robert Parker, appeal numerous decisions of the court in the above-captioned case. R.T. Properties, LLC, and Rodney D. Thornton (collectively RTP), counter-appeal. A jury found that Parker/GWP had slandered RTP's title by filing a declaration of covenants which implied that GWP owned RTP's property. We find no error in this decision. RTP appeals the district court's grant of a directed verdict to Parker on the issue of his personal liability, and the availability of punitive damages. Pursuant to Smoot v. B & J Restoration Servs., Inc., 2012 OK CIV APP 58, 279 P.3d 805, the record does contain evidence that could show: (1) Parker knew that the declara-

tion he filed was incorrect, and that GWP did not own all the lots the declaration covered; (2) Parker may have acted maliciously in filing the declaration; and (3) Parker refused to withdraw or correct the declaration. From these facts, a jury could find that Parker breached an individual duty, rather than simply performed a corporate act. Therefore, a directed verdict on Parker's individual liability was inappropriate in this case, and we reverse that decision of the district court. We affirm, however, the court's decision that a punitive damages instruction was not appropriate in this case. AFFRIMED IN PART AND REVERSED IN PART. Opinion from Court of Civil Appeals, Division II, by Thornbrugh, C.J.; Fischer J., concurs; and Wiseman, P.J., concurs in part and dissents in part.

(Division No. 3) Friday, January 25, 2019

114,511 — James Hugh Hembree, Jr., and Joleta Hembree, Husband and Wife, Plaintiffs/Appellees/Counter-Appellants, vs. George Sauer and Kaye Sauer, Husband and Wife, Defendants/Appellants/Counter-Appellees, and Karen S. Rodenberger and Don Blake, Defendants. Appeal from the District Court of McClain County, Oklahoma. Honorable Charles Gray, Trial Judge. Defendants/Appellants/ Counter-Appellees George and Kaye Sauer (collectively Sauers) appeal from a jury verdict in favor of Plaintiffs/Appellees/Counter-Appellants James and Joleta Hembree (collectively Hembrees) in the amount of \$650.00 in an action for trespass, and the trial court's award of attorney fees and costs to the Hembrees. The Hembrees appeal from the trial court's award of attorney fees and costs. Because the Hembrees could not establish that a trespass occurred as a matter of law, the court should have granted the Sauers' motion for directed verdict. We REVERSE. Opinion by Swinton, J.; Mitchell, P.J., and Bell, J., concur.

116,821 — Tambra Bulstrode, Individually, and on Behalf of All Wrongful Death Beneficiaries of Edwin Bulstrode, III, Deceased, Plaintiff/Appellant, vs. BNSF Railway Company, Defendant/Appellee, and Philip Haws and Mark Burkes, Defendants. Appeal from the District Court of Garfield County, Oklahoma. Honorable Paul K. Woodward, Trial Judge. Plaintiff/Appellant, Tambra Bulstrode, on behalf of herself and other beneficiaries of Edwin Bulstrode, III, deceased, appeals from the trial court's grant of summary judgment in favor of

Defendant/Appellee, BNSF Railway Company, in this wrongful death action. Edwin Bulstrode, III, was killed in 2014 when the vehicle he was driving southbound on North 42nd Street in Enid was struck by a westbound BNSF train. The crossing was equipped with reflectorized crossbucks and the collision was captured by a video camera installed on the lead locomotive. Bulstrodes's widow, Appellant, sued BNSF alleging negligence. The trial court granted summary judgment to BNSF. We agree with the trial court's findings that Mr. Bulstrode violated 47 O.S. 2011 §§11-801(A) & (E) and 11-701(A)(4) and that such violations constituted negligence per se, the supervening cause of the collision, and the proximate cause of his death. Upon *de novo* review of the instant record, we conclude there exists no disputed issue of material fact and BNSF is entitled to judgment as a matter of law. AFFIRMED. Opinion by Bell, J.; Mitchell, P.J., and Swinton, I., concur.

(Division No. 4) Tuesday, January 22, 2019

116,963 — In the Matter of D.P., E.P., and J.B., Jr.: Jacob Brown, Appellant, v. State of Oklahoma, Appellee. Appeal from the District Court of Tulsa County, Hon. Doris Fransein, Trial Judge. In this termination of parental rights case, Jacob Brown (Father), the natural father of the minor child J.B. Jr., appeals from an order of the trial court sustaining the State of Oklahoma's motion to terminate his parental rights to J.B. Jr. upon a jury verdict. Father argues State failed to prove by clear and convincing evidence that it is in the minor child's best interest to terminate his parental rights and argues he was denied the effective assistance of counsel. Based on our review of the record, State's evidence was clear and convincing – and Father does not challenge on appeal – that sexual abuse was perpetrated by Father against J.B. Jr.'s sibling and that the abuse was shocking and heinous. The evidence was also clear and convincing that it is in J.B. Jr.'s best interest that Father's parental rights be terminated. Further, the record demonstrates Father was not denied the effective assistance of counsel. Consequently, the trial court did not err in granting State's motion to terminate Father's parental rights to J.B. Jr. upon the verdict of the jury. Accordingly, we affirm. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Rapp, J., and Goodman, J., concur.

Friday, January 25, 2019

116,850 — Cherry Alabi, Plaintiff/Appellant, v. Hannah Robertson, John Doe, a business entity; and Jane Doe, an individual, Defendants/Appellees. Appeal from an Order of the District Court of Tulsa County, Hon. Mary Fitzgerald, Trial Judge. The plaintiff, Cherry Alabi (Alabi), appeals the trial court's denial of a trial continuance and a dismissal with prejudice in her tort action against the defendant, Hannah Robertson (Robertson). Alabi sued to recover damages from an automobile collision. Although the case was actively prosecuted, Alabi did not appear when the trial court called the case for jury trial. Her attorney advised the trial court that he was having communication problems and had not been able to contact his client. The trial court dismissed the action with prejudice based upon a finding that Alabi abandoned the cause. The element of an intention to abandon can only be inferred from Alabi's absence and apparent failure to communicate with her attorney. The second element, an external act whereby such intention is carried into effect, clearly is shown by her unexplained failure to appear for trial. This Court finds that the trial court did not err by its dismissal with prejudice based upon abandonment of the litigation by Alabi. It is reasonable to infer that she intended to abandon the action and she carried out that intent by failing to appear. The dismissal with prejudice is affirmed. Also, the trial court's denial of the continuance is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., and Wiseman, V.C.J., concur.

Friday, February 1, 2019

116,334 — Brenda Sue Towe, Petitioner/Appellee, vs. David Ray Towe, Respondent/Appellant. Appeal from an order of the District Court of Comanche County, Hon. Michael C. Flanagan, Trial Judge, denying Husband David Ray Towe's motion to modify support alimony. After review of the record before us, the evidence leads us to the same conclusion as the trial court: that Husband has not shown, as he must to justify modification, "changed circumstances relating to the ability to support that

are substantial and continuing so as to make the terms of the decree unreasonable to either party." *Garcia v. Garcia*, 2012 OK 81, ¶ 5, 288 P.3d 931. The trial court's decision does not cause injustice, is justified by the clear weight of the evidence, and is affirmed. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, V.C.J.; Barnes, P.J., and Rapp, J., concur.

116,540 — Patricia Rice, Plaintiff/Counterclaim Defendant/Appellant, v. Gulfstream Capital Corporation, Defendant/Third Party Plaintiff/Counterclaim Plaintiff/Appellee, and Rutledge Road Associates, LLC, Defendant/ Appellee, and Joel Berkowitz, Kenneth Gregory Jackson Sr., Robert S. Walters, Defendants, and Stephen D. Rice, Third Party Defendant/ Appellant. Appeal from the District Court of Tulsa County, Hon. Dana Kuehn, Trial Judge. We conclude the Tulsa County District Court did not abuse its discretion in reaching the conclusion under 12 O.S. Supp. 2014 § 140.3 – the codification in Oklahoma of the doctrine of forum non conveniens - that this case should be refiled in North Carolina state court. However, we reverse the district court's determination that this case should be dismissed under § 140.3. We remand this case to the trial court with instructions to enter an order staying this action pursuant to § 140.3 pending proceedings in North Carolina state court which confirm the availability of the proposed alternate forum. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUC-TIONS. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Wiseman, V.C.J., and Rapp, J., concur.

ORDERS DENYING REHEARING (Division No. 2) Wednesday, February 6, 2019

116,856 — Kevin L. Quinnelly, Deceased, Caryn Quinnelly, Deceased, Claimant, Petitioners, vs. Gerdau Ameristeel US, Inc., Indemnity Insurance Company of North American, and the Oklahoma Workers' Compensation Court of Existing Claims, Respondents. Petitioners' Petition for Rehearing is hereby DENIED.

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ASSISTANT PROFESSOR/DIRECTOR. The University of Tulsa College of Law invites applications for the position of assistant clinical professor of law and director of the Terry West Civil Legal Clinic beginning with the 2019-20 academic year. The Terry West Civil Legal Clinic is a new addition to the University of Tulsa College of Law in-house clinical education programs. The successful candidate will create, direct, teach and oversee all aspects of the clinic, including teaching a bi-weekly seminar, supervision of and responsibility for student casework, client selection and day-to-day administration of the clinic. This full-time contract appointment is annually renewable and is also dependent upon continued funding after an initial four-year period. Candidates must possess a J.D. or comparable law degree and be admitted to, or able to satisfy the requirements for admission to the Oklahoma bar. A distinguished record of clinical teaching or practice-related experience and a demonstrated capacity for excellence in teaching, supervision and assessment is required. Please submit letters and résumés to The University of Tulsa College of Law, 3120 E. 4th Place, Tulsa, OK 74104, or email to robert-butkin@utulsa.edu or website: https://bit.lv/ 2GpZfwT. The University of Tulsa seeks to recruit and retain talented students, faculty and staff from diverse backgrounds. The University of Tulsa is an affirmative action/equal opportunity employer and encourages qualified candidates across all group demographics to apply. The university does not discriminate on the basis of personal status or group characteristics including, but not limited to race, color, religion, national or ethnic origin, age, sex, disability, veteran status, sexual orientation, gender identity or expression, genetic information, ancestry or marital status.

POSITIONS AVAILABLE

THE CITY OF OKLAHOMA CITY IS CURRENTLY ACCEPTING APPLICATIONS for an assistant municipal counselor II. Qualified applicants will possess an Oklahoma license to practice law and be eligible for admission to practice in federal court. This is a mid-level position which provides legal representation and guidance to the city, its officers, departments and trusts to ensure that all city operations are performed in a manner consistent with the requirements of federal and state laws and city ordinances. This position is located in the Litigation Division of the Office of the Municipal Counselor. Trial experience is required with a preference of at least 3 years of federal litigation experience. Applications and resumes will be accepted through March 1, 2019. Apply online at www.okc.gov/jobs. Additional information may be obtained at Jobline: 405-297-2419 or TDD (Hearing Impaired) 405-297-2549. EEO.

STATEWIDE LAW FIRM WITH OFFICES IN TULSA AND OKLAHOMA CITY IS SEEKING ATTORNEYS for both offices with 8-20 years of experience wanting a collaborative environment to expand your litigation and/or transactional practice. Compensation DOE. Excellent benefits, support and atmosphere. Submit confidential resume and compensation requirements to hr@dsda.com.

A MEDIUM-SIZED AV RATED, WELL ESTABLISHED OKLAHOMA CITY LAW FIRM with a diversified civil practice is seeking to expand. We are looking for an attorney with an established client base to join our law firm. Send resumes to "Box AA," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

THE OKLAHOMA TAX COMMISSION is accepting applications for the position of general counsel. This position oversees legal services provided by attorneys employed by the agency. Applicants must be licensed to practice law in Oklahoma. The ideal candidate should have at least 5 years of relevant experience and strong communication skills. Submit cover letter, resume and writing sample to applicants@tax.ok.gov. The OTC is an equal opportunity employer.

THE OKLAHOMA TAX COMMISSION, LEGAL DIVISION is seeking several attorneys for openings in its OKC office, Protests/Litigation Section. Applicants must be licensed to practice law in Oklahoma. Preference will be given to candidates with administrative hearing and/or litigation experience, but all applicants will be considered. Submit cover letter, resume and writing sample to applicants@tax.ok.gov. The OTC is an equal opportunity employer.

POSITIONS AVAILABLE

THE SEMINOLE NATION OF OKLAHOMA IS SEEK-ING TO APPOINT THREE DISTRICT COURT JUDG-ES to serve a four-year term. Candidates will be nominated by the chief and confirmed by the general council. Salary: \$500 per court docket; \$250 for meetings, \$250 for administrative days \$62.50 per hour for emergency phone hearings, reviewing documents by email and writing orders/opinions. Minimum qualifications: A judge of the district court shall be a licensed attorney who is an enrolled member of a federally recognized Indian tribe; is in good standing with the licensing authorities where licensed; possesses a demonstrated background in tribal court practice; have demonstrated moral integrity and fairness in his business, public and private life; have never been convicted of a felony or an offense punishable by banishment, whether or not actually imprisoned or banished, and have not been convicted of any offense, except traffic offenses, for a period of 10 years next preceding his appointment. For more information regarding qualifications and duties, please visit www.sno-nsn.gov/govern ment/codeoflaws under Title 5 Court Administration Code. Please submit resume to Valentina Tiger, General Council Secretary, P.O. Box 1498 Wewoka, OK 74884 or gcsecretary@sno-nsn.gov.

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Thousands of past attendees have rated this seminar 4.8 on a 5.0 scale and described the content as "eye-opening," "engaging," and "riveting." This investigations training has been featured in the Wall Street Journal and New Yorker magazine.

THE SCIENCE OF WORKPLACE INVESTIGATIONS

APRIL 4, 2019 9 A.M. - 3:35 P.M.

Oklahoma Bar Center

FOR DETAILS AND TO REGISTER. GD TO WWW.DKBAR.ORG/CLE ENTER 2019SPRING AT CHECKOUT FOR \$10 DISCOUNT

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MCLE CREDIT 6/0

FEATURED PRESENTER: Michael Johnson, CEO, Clear Law Institute

When investigating a "he said/she said" case of sexual harassment or other alleged misconduct, are you and your clients using scientificallyvalidated methods to interview witnesses, assess their credibility, and reach a defensible conclusion?

In this seminar from former U.S. Department of Justice attorney Michael Johnson, you will learn about the hundreds of research studies that scientists have conducted on how to best interview witnesses and assess credibility.

By examining videos and case studies, you will learn:

- · How to utilize the "cognitive interview," which is the most widely researched interviewing technique in the world
- How many common beliefs about spotting deception are incorrect
- · How to apply research-based methods for detecting signs of deception and truthfulness
- The legal requirements for workplace investigations
- · A 6-step process for writing clear and concise investigative reports

TUITION: \$225.00 thru March 29th

\$250.00 March 30 - April 3rd \$275.00 Walk-ins

\$50 Audit

INCLUDES: continental breakfast and networking lunch



ESTATE PLANNING FOR THOSE WITH MENTAL ILLNESS

"MY CLIENT IS NOT INSANE. MY CLIENT HAS A MENTAL ILLNESS"

MARCH 1, 2019 9 A.M. - 2:50 P.M.

Gaylord-Pickens Museum, Home of the Oklahoma Hall of Fame Bennett-McClendon Great Hall, 4th Floor 1400 Classen Drive, Oklahoma City, OK 73106

FOR DETAILS AND TO REGISTER, GO TO WWW.OKBAR.ORG/CLE ENTER 2019SPRING AT CHECKOUT FOR \$10 DISCOUNT

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CO-SPONSORED BY THE OBA HEALTH LAW SECTION

PROGRAM PLANNER:

Donna J. Jackson.

Donna J. Jackson & Associates, PLLC, OKC

TOPICS COVERED:

- Guard-railing Against Mental Illness: **Utilizing Strategic Partnerships**
- Support for Students with Intellectual Disability: High School, Transitional **Education and Inclusive College Programs**
- Drafting Estate Plans and Adult **Guardianships to Protect Clients** with Mental Illness
- Ethics: Working with Clients with **Diminished Capacity**

TUITION: \$150 thru Friday, February 22, 2019

\$175 February 23 - February 28, 2019

\$200 Walk-ins

\$75 Members licensed two years or less

\$50 Audit

INCLUDES: Continental breakfast and lunch