THE OKLAHOMA BAR
Journal
Volume 90 — No. 5 — 3/2/2019

Court Issue

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THE OKLAHOMA BAR
Journal

Volume 90 – No. 5 – 3/2/2019

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Oklahoma Bar Association

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2019 OK 4

In re: Approval of Uniform Juvenile Deprived Parental Rights Termination Order

SCAD 2019-14. February 25, 2019

ORDER

¶1 The Court has reviewed the recommendation of the Oklahoma Supreme Court Juvenile Justice Oversight and Advisory Committee and hereby adopts the attached orders for deprived parental rights termination effective May 1, 2019.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE the 25th day of February, 2019.

/s/ Noma D. Gurich
CHIEF JUSTICE

ALL JUSTICES CONCUR.

Case No. JD

IN THE DISTRICT COURT OF COUNTY
STATE OF OKLAHOMA
JUVENILE DIVISION

IN THE MATTER OF:

DOB:)
DOB:)
DOB:)
DOB:) JD - _____
DOB:) Date: _____
DOB:)

Alleged Deprived Child(ren).

ORDER TERMINATING PARENTAL RIGHTS
ICWA COMPLIANT

NOW on this _____ day of _____, 20_____, the follow appearances were made and proceedings held:

APPEARANCES:

☐ State		☐ DHS	
☐ Mother		☐ Attorney	
☐ Father		☐ Attorney	
☐ Father		☐ Attorney	
☐ Father		☐ Attorney	
☐ Legal Guardian		☐ Attorney	
☐ Child		☐ Attorney	
☐ Child		☐ Attorney	
☐ Child		☐ Attorney	
☐ Child		☐ Attorney	
☐ Child		☐ Attorney	
☐ Child		☐ Attorney	
☐ Tribal Representative		☐ Attorney	
☐ GAL/CASA		☐ Other	
☐ Foster Parent or Placement		☐ Attorney	
☐ Interpreter for ☐ Mother ☐ Father ☐ Other		☐ Interpreter for ☐ Mother ☐ Father ☐Other	
☐ Court Reporter		☐ Other	
☐ Other		☐ Other	

Order of Termination
Page 1 of 7

FINDINGS OF THE COURT

I. MANDATORY FINDINGS

The Court has jurisdiction over the parties and the subject matter. The Uniform Child Custody Jurisdiction and Enforcement Act has been fully complied with under the facts and circumstances of this case and no other court has exercised jurisdiction over the child(ren) who are subject of this case. The State and the Federal Indian Child Welfare Acts apply to these proceedings.

A. CHILD(REN) NAMES and BIRTHDATES

The Court finds that _____ is the ☐ Mother, ☐ Father of ☐ all named child(ren)/or ☐ these specified child(ren) ___ and the child(ren)'s true name(s) and date(s) of birth is/are:_____.

B. ADJUDICATION

The Court finds that ☐ all named child(ren)/or ☐ these specified child(ren) ___ was/were adjudicated deprived on the __ day of _____, 20___.

C. INDIAN CHILD WELFARE ACT and ACTIVE EFFORTS:

C1. The Indian Child Welfare Act **does** apply to these proceedings.
The name of the Tribe is: _____. The Tribe and BIA, if tribe unknown, ☐ **has been** notified ☐ **has not** been notified.
Other _____

C2. Active efforts to provide remedial services and rehabilitative programs to prevent the breakup of the Indian family have been made and have proven unsuccessful. Active efforts provided are:_____

C3. Placement ☐ **has** ☐ **has not** been made in accordance with the placement preferences set forth in 25 U.S.C. § 1915.

If applicable, good cause exists to deviate from the placement preferences to-wit: _____

C4. Indian Child Welfare Act – Expert Testimony:

The Court finds by evidence beyond a reasonable doubt by either
☐ the testimony of at least one qualified expert witness **OR** ☐ Stipulation of the ☐ Mother, ☐ Father that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage/harm to the child.

II. TERMINATION

☐ The State, ☐ Child(ren)'s Attorney filed the Petition/Motion to Terminate on the ___ day of _____ 20___, and served on ☐ Mother _____, on the ___ day of _____, 20___, ☐ Father _____ on the ___ day of _____, 20___.

☐ The State, ☐ Child(ren)'s Attorney moved to amend the allegations of the Petition/Motion to Terminate as follows: _____ which request was ☐ **granted** ☐ **denied.** The Amended Petition was filed on the ___ day of _____, 20___ and served on ☐ Mother _____, on the ___ day of _____, 20___, ☐ Father _____ on the ___ day of _____, 20___.

A1. Failure to Appear

The ☐ Mother _____ ☐ Father _____ failed to appear after having personally received notice of the hearing date and time in open court, or by personal service or certified mail.

OR

The whereabouts of the ☐ Mother _____ ☐ Father _____ are unknown and the Court has conducted a judicial inquiry into the Petitioner's search to determine the names and whereabouts of respondents to be served herein by publication, and based on the evidence adduced, including the affidavit of due diligence filed in the Court, the Court finds that Petitioner has exercised due diligence and has conducted a meaningful search of all reasonably available sources at hand. The Court, having examined the notice and affidavit filed herein showing publication on the ___ day of _____, 20___, at least twenty-five (25) days prior to the date of the termination, approves the publication service given herein as meeting both statutory requirements and the minimum standards of state and federal due process. That the halls were called three times with no response.

AND

☐ The Court finds that the parent's failure to appear constitutes consent to the termination of parent's rights in and to ☐ all named child(ren)/or ☐ these specified child(ren) ___ .

A2. Jury Trial:

On the _____ day of _____, 20_____ a **jury** trial was had before this Court and the parties presented their evidence and rested. Having been instructed by the Court, the jury returned its verdict on the ___ day of _____, 20____, as follows: (Set out the jury verdict)

OR

A3. Non-jury Trial:

On the _____ day of _____, 20_____ a **non**-jury trial was had before this Court and the parties presented their evidence and rested. A decision was rendered on the ___ day of _____, 20____.

B. GROUNDS FOR TERMINATION. The Court finds by clear and convincing evidence that: (check all that apply)

☐ **B1. Consent 10A O.S. Section 1-4-904(B)(1)** ☐ Mother_____ ☐ Father_____ has executed a duly acknowledged written consent, voluntarily agreeing to the termination of her/his parental rights in and to ☐ all named child(ren)/or ☐ these specified child(ren) ___.

☐ **B2. Abandonment 10A O.S. Section 1-4-904(B)(2)** ☐ Mother____ ☐ Father____ has willfully abandoned ☐ all named child(ren)/or ☐ these specified child(ren) ___.

☐ **B3. Abandonment 10A O.S. Section 1-4-904(B)(3)** ☐ Mother _____ ☐ Father _____ has willfully abandoned the infant named _____.

☐ **B4. Failure to Correct Conditions 10A O.S. Section 1-4-904(B)(5)** A treatment plan designed to correct the conditions was ordered by the Court on the __ day of ___, 20__; that the ☐ Mother____ ☐ Father____ has been given not less than three (3) months to correct the conditions and that ☐ Mother____ ☐ Father____ has failed to correct these conditions: (check all that apply)

☐	possessing/using illegal drugs/addiction	☐	mental health instability
☐	abusive consumption of alcohol/addiction	☐	intellectual disability
☐	domestic violence	☐	incarceration due to criminal activity
☐	physical abuse of child(ren) or failure to protect from physical abuse	☐	failure to properly supervise child(ren)
☐	sexual abuse of child(ren) or failure to protect from sexual abuse	☐	placing child(ren) with inappropriate caregiver(s)
☐	mental/emotional abuse of child(ren) or failure to protect from mental/emotional abuse	☐	failure to maintain safe and/or sanitary home
☐	failure to protect	☐	homelessness/failure to maintain adequate housing
☐	medical, dental, mental health care of child(ren) neglect	☐	failure to maintain a substantial relationship with child(ren)
☐	nutritional neglect of child(ren)	☐	failure to provide financial support per court order
☐	personal hygiene neglect of child(ren)	☐	lack of proper parental care and guardianship
☐	educational neglect of child(ren)	☐	threat of harm
☐	Other	☐	Other

☐ **B5. Previous Involuntary Termination and Failure to Correct Conditions 10A O.S. Section 1-4-904(B)(6)** ☐ Mother's____ ☐ Father's____ parental rights were

involuntarily terminated to another child in the District Court of _____ County Case No. _____ for the failure to correct the following conditions: (list conditions)_____; and that the following conditions remain uncorrected: (list conditions)_____.

☐ **B6. Failure to Support 10A O.S. Section 1-4-904(B)(7)** ☐ Mother____, ☐ Father____ has willfully failed, refused, or neglected to support ☐ all named child(ren)/or ☐ these specified child(ren) ___ for six (6) out of the twelve (12) months immediately preceding the filing of the Petition/Motion to Terminate.

☐ **B7. Cognitive Disorder/Medical Condition 10A O.S. Section 1-4-904(B)(13)** ☐ Mother___ ☐ Father___ has a diagnosed cognitive disorder, an extreme physical incapacity, or a medical condition, to-wit:___ which renders the parent incapable of adequately and appropriately exercising parental rights, duties, and responsibilities within a reasonable time considering the age of ☐ all named child(ren)/or ☐ these specified child(ren) ___ **AND** allowing ☐ Mother ☐ Father to have custody of ☐ all named child(ren)/or ☐ these specified child(ren) ___ would cause said child(ren) actual harm or harm in the near future.

☐ **B8. Previous Adjudication and Failure to Correct Conditions 10A O.S. Section 1-4-904(B)(14)** ☐ All named child(ren)/or ☐ these specified child(ren) ___ or a sibling of the child(ren) were/was previously adjudicated deprived in the District Court of ____ County Case No. _____ for the following conditions: (list conditions) _____; that ☐ Mother____ ☐ Father____ was given an opportunity to correct the conditions in the previous case, but the following conditions (list conditions) _____ have reoccurred and remain uncorrected.

☐ **B9. Substantial Erosion of Parent/Child Relationship 10A O.S. Section 1-4-904(B)(15)** There exists a substantial erosion of the relationship between ☐ all named child(ren)/or ☐ these specified child(ren) _____, caused at least in part by the ☐ Mother's ____ ☐ Father's_____ serious or aggravated neglect of the child(ren), physical or sexual abuse or exploitation of the child(ren), a prolong and unreasonable absence of the parent from the child(ren), or an unreasonable failure by the parent to visit or communicate in a meaningful way with the child(ren) to-wit:_____

☐ **B10. Foster Care Placement Fifteen (15) out of Twenty-Two (22) Months 10A O.S. Section 1-4-904(B)(16)** ☐ All named child(ren)/or ☐ these specified child(ren) ___, being four (4) years of age or older at the time of placement, have/has been placed in foster care by the Department of Human Services for fifteen (15) of the most recent twenty-two (22) months preceding the filing of the Petition/Motion to Terminate the parent's rights AND ☐ all named child(ren)/or ☐ these specified child(ren) ___ cannot, at the time of filing of the Petition/Motion to Terminate, be safely returned to the home of the ☐ Mother__ ☐ Father___.

☐ **B11. Foster Care Placement Six (6) out of Twelve (12) Months 10A O.S. Section 1-4-904(B)(17)** ☐ All named child(ren)/or ☐ these specified child(ren) ___, being younger than four (4) years of age at the time of placement, have/has been placed in foster care

by the Department of Human Services for at least six (6) of the twelve (12) months preceding the filing of the Petition/Motion to Terminate the parent's right AND ☐ all named child(ren)/or ☐ these specified child(ren) ___ cannot, at the time of filing of the Petition/Motion to Terminate, be safely returned to the home of the ☐Mother___ ☐ Father____.

☐ **B12. OTHER GROUNDS: (List Specific Grounds as found in Title 10A Section 1-4-904).**_____

C. BEST INTEREST OF THE CHILD

☐ The Court further finds, by clear and convincing evidence, that termination of the ☐ Mother's___ ☐ Father's____ rights in and to ☐ all named child(ren)/or ☐ these specified child(ren) ___ is/are in the best interest of said child(ren).

III. ORDERS:

A. IT IS ORDERED, ADJUDGED, AND DECREED by the Court that the parental rights of ☐ Mother____ ☐ Father___ to the said child(ren) to-wit: (list names) are hereby terminated and permanently severed.

B. IT IS ORDERED, ADJUDGED, AND DECREED by the Court that ☐ Mother ___ ☐ Father ___ shall pay court costs by the ___ day of _____, 20__ or as ordered by the Court.

C. IT IS ORDERED, ADJUDGED AND DECREED by the Court that the ☐ temporary **OR** ☐ permanent custody of ☐ all named child(ren)/or ☐ these specified child(ren) ___ shall be with:

☐ Department of Human Services (DHS)
OR
☐ Other _____, ☐ **with** or ☐ **without** DHS supervision

D. ☐ The Court hereby vests DHS with the right and authority to plan for the permanent placement of ☐ all named child(ren)/or ☐ these specified child(ren) ___.

E. ☐ The Court hereby vests in ☐ DHS **OR** ☐ _____ to consent to the adoption of ☐ all named child(ren)/or ☐ these specified child(ren) ___.

F. CHILD SUPPORT: Notice to Parents. Termination of your parental rights does not terminate the duty of support of the child(ren) unless or until an adoption of the child(ren) is/are completed.

☐ Child support shall be established by separate order,
OR
☐ Pursuant to the attached child support guideline,

OR

☐ Is deferred to the child support enforcement division.

THIS IS A FINAL APPEALABLE ORDER.

Other:

_____

_____

_____

_____

_____

JUDGE OF THE DISTRICT COURT

APPROVED AS TO FORM:

_____

Assistant District Attorney

_____

Attorney for Child(ren)

_____

Attorney for Mother

_____

Attorney for Father

Case No. JD

IN THE DISTRICT COURT OF COUNTY
STATE OF OKLAHOMA
JUVENILE DIVISION

IN THE MATTER OF:

DOB:)
DOB:)
DOB:)
DOB:) JD - _____
DOB:) Date: _____
DOB:)

Alleged Deprived Child(ren).

ORDER TERMINATING PARENTAL RIGHTS

NOW on this _____ day of _____, 20_____, the follow appearances were made and proceedings held:

APPEARANCES:

☐ State		☐ DHS	
☐ Mother		☐ Attorney	
☐ Father		☐ Attorney	
☐ Father		☐ Attorney	
☐ Father		☐ Attorney	
☐ Legal Guardian		☐ Attorney	
☐ Child		☐ Attorney	
☐ Child		☐ Attorney	
☐ Child		☐ Attorney	
☐ Child		☐ Attorney	
☐ Child		☐ Attorney	
☐ Child		☐ Attorney	
☐ Tribal Representative		☐ Attorney	
☐ GAL/CASA		☐ Other	
☐ Foster Parent or Placement		☐ Attorney	
☐ Interpreter for ☐ Mother ☐ Father ☐Other		☐ Interpreter for ☐ Mother ☐ Father ☐ Other	
☐ Court Reporter		☐ Other	
☐ Other		☐ Other	

FINDINGS OF THE COURT

I. MANDATORY FINDINGS

The Court has jurisdiction over the parties and the subject matter. The Uniform Child Custody Jurisdiction and Enforcement Act has been fully complied with under the facts and circumstances of this case and no other court has exercised jurisdiction over the child(ren) who are subject of this case. Neither the State nor the Federal Indian Child Welfare Acts apply to these proceedings.

A. CHILD(REN) NAMES and BIRTHDATES

The Court finds that _____ is the ☐ Mother___ ☐ Father ____ of ☐ all named child(ren)/or ☐ these specified child(ren) ___ and the child(ren)'s true name(s) and date(s) of birth is/are:_____.

B. ADJUDICATION

The Court finds that ☐ all named child(ren)/or ☐ these specified child(ren) ___ was/were adjudicated deprived on the ___ day of _____, 20___.

II. TERMINATION

☐ The State, ☐ Child(ren)'s Attorney filed the Petition/Motion to Terminate on the ___ day of _____ and served on ☐ Mother_____, on the ___ day of _____, 20___, ☐ Father _____ on the ___ day of _____, 20___.

☐ The State, ☐ Child(ren)'s Attorney moved to amend the allegations of the Petition/Motion to Terminate as follows: _____ which request was ☐ **granted** ☐ **denied.** The Amended Petition was filed on the ___ day of _____, 20___ and served on ☐ Mother _____ on the ___ day of _____, 20___, ☐ Father _____ on the ___ day of _____, 20___.

A1. Failure to Appear

The ☐ Mother _____ ☐ Father _____ failed to appear after having personally received notice of the hearing date and time in open court, or by personal service or certified mail.

OR

The whereabouts of the ☐ Mother _____ ☐ Father _____ are unknown and the Court has conducted a judicial inquiry into the Petitioner's search to determine the names and whereabouts of respondents to be served herein by publication, and based on the evidence adduced, including the affidavit of due diligence filed in the Court, the Court finds that Petitioner has exercised due diligence and has conducted a meaningful search of all reasonably available sources at hand. The Court, having examined the notice and affidavit filed herein showing publication one time on the ___ day of _____, 20___, at least twenty-five (25) days prior to the date of the termination, approves the publication service given herein as meeting both statutory requirements and the minimum standards of state and federal due process. That the halls were called three times with no response.

AND

☐ The Court finds that the parent's failure to appear constitutes consent to the termination of parent's rights in and to ☐ all named child(ren)/or ☐ these specified child(ren) ____ .

A2. Jury Trial:

On the _____ day of _____, 20_____ a jury trial was had before this Court and the parties presented their evidence and rested. Having been instructed by the Court, the jury returned its verdict on the ___ day of _____, 20____, as follows: (Set out the jury verdict)

OR

A3. Non-jury Trial:

On the _____ day of _____, 20_____ a non-jury trial was had before this Court and the parties presented their evidence and rested. A decision was rendered on the ___ day of _____, 20____.

B. GROUNDS FOR TERMINATION. The Court finds by clear and convincing evidence that: (check all that apply)

☐ **B1. Consent 10A O.S. Section 1-4-904(B)(1)** ☐ Mother_____ ☐ Father_____ has executed a duly acknowledged written consent, voluntarily agreeing to the termination of her/his parental rights in and to ☐ all named child(ren)/or ☐ these specified child(ren) ____.

☐ **B2. Abandonment 10A O.S. Section 1-4-904(B)(2)** ☐ Mother____ ☐ Father____ has willfully abandoned ☐ all named child(ren)/or ☐ these specified child(ren) ____.

☐ **B3. Abandonment 10A O.S. Section 1-4-904(B)(3)** ☐ Mother_____ ☐ Father _____ has willfully abandoned the infant named_____.

☐ **B4. Failure to Correct Conditions 10A O.S. Section 1-4-904(B)(5)** A treatment plan designed to correct the conditions was ordered by the Court on the ___ day of ____, 20___; that the ☐ Mother____ ☐ Father____ has been given not less than three (3) months to correct the conditions and that ☐ Mother____, ☐ Father____ has failed to correct these conditions: (check all that apply)

☐	possessing/using illegal drugs/addiction	☐	mental health instability
☐	abusive consumption of alcohol/addiction	☐	intellectual disability
☐	domestic violence	☐	incarceration due to criminal activity
☐	physical abuse of child(ren) or failure to protect from physical abuse	☐	failure to properly supervise child(ren)
☐	sexual abuse of child(ren) or failure to protect from sexual abuse	☐	placing child(ren) with inappropriate caregiver(s)
☐	mental/emotional abuse of child(ren) or failure to protect from mental/emotional abuse	☐	failure to maintain safe and/or sanitary home
☐	failure to protect	☐	homelessness/failure to maintain adequate housing
☐	medical, dental, mental health care of child(ren) neglect	☐	failure to maintain a substantial relationship with child(ren)
☐	nutritional neglect of child(ren)	☐	failure to provide financial support per court order
☐	personal hygiene neglect of child(ren)	☐	lack of proper parental care and guardianship
☐	educational neglect of child(ren)	☐	threat of harm
☐	Other	☐	Other

☐ **B5. Previous Involuntary Termination and Failure to Correct Conditions 10A O.S. Section 1-4-904(B)(6)** ☐ Mother's____ ☐ Father's____ parental rights were involuntarily terminated to another child in the District Court of _____ County Case No. _____ for the failure to correct the following conditions: (list conditions) _____; and that the following conditions remain uncorrected: (list conditions) _____.

☐ **B6. Failure to Support 10A O.S. Section 1-4-904(B)(7)** ☐ Mother____ ☐ Father____ has willfully failed, refused, or neglected to support ☐ all named child(ren)/or ☐ these specified child(ren) ___ for six (6) out of the twelve (12) months immediately preceding the filing of the Petition/Motion to Terminate.

☐ **B7. Cognitive Disorder/Medical Condition 10A O.S. Section 1-4-904(B)(13)** ☐ Mother___ ☐ Father___ has a diagnosed cognitive disorder, an extreme physical incapacity, or a medical condition, to-wit:___ which renders the parent incapable of adequately and appropriately exercising parental rights, duties, and responsibilities within a reasonable time considering the age of ☐ all named child(ren)/or ☐ these specified child(ren) ___ **AND** allowing ☐ Mother ____ ☐ Father ____to have custody of ☐ all named child(ren)/or ☐ these specified child(ren) ___ would cause said child(ren) actual harm or harm in the near future.

☐ **B8. Previous Adjudication and Failure to Correct Conditions 10A O.S. Section 1-4-904(B)(14)** ☐ All named child(ren)/or ☐ these specified child(ren) ___ or a sibling of the child(ren) were/was previously adjudicated deprived in the District Court of ____ County Case No. _____ for the following conditions: (list conditions) _____; that ☐ Mother____ ☐ Father____ was given an opportunity to correct the conditions in the previous case, but the following conditions (list conditions) _____ have reoccurred and remain uncorrected.

☐ **B9. Substantial Erosion of Parent/Child Relationship 10A O.S. Section 1-4-904(B)(15)** There exists a substantial erosion of the relationship between ☐ all named child(ren)/or ☐ these specified child(ren) ___, caused at least in part by the ☐ Mother's ____ ☐ Father's_____ serious or aggravated neglect of the child(ren), physical or sexual abuse or exploitation of the child(ren), a prolong and unreasonable absence of the parent from the child(ren), or an unreasonable failure by the parent to visit or communicate in a meaningful way with the child(ren) to-wit:_____

☐ **B10. Foster Care Placement Fifteen (15) out of Twenty-Two (22) Months 10A O.S. Section 1-4-904(B)(16)** ☐ All named child(ren)/or ☐ these specified child(ren) ___, being four (4) years of age or older at the time of placement, have/has been placed in foster care by the Department of Human Services for fifteen (15) of the most recent twenty-two (22) months preceding the filing of the Petition/Motion to Terminate the parent's rights AND ☐ all named child(ren)/or ☐ these specified child(ren) ___ cannot, at the time of filing of the Petition/Motion to Terminate, be safely returned to the home of the ☐ Mother__ ☐ Father___.

☐ **B11. Foster Care Placement Six (6) out of Twelve (12) Months 10A O.S. Section 1-4-904(B)(17)** ☐ All named child(ren)/or ☐ these specified child(ren) ___, being younger than four (4) years of age at the time of placement, have/has been placed in foster care by the Department of Human Services for at least six (6) of the twelve (12) months preceding the filing of the Petition/Motion to Terminate the parent's right AND ☐ all named child(ren)/or ☐ these specified child(ren) ___ cannot, at the time of filing of the Petition/Motion to Terminate, be safely returned to the home of the ☐ Mother___ ☐ Father____.

☐ **B12. OTHER GROUNDS: (List Specific Grounds as found in Title 10A Section 1-4-904).**_____

C. BEST INTEREST OF THE CHILD

☐ The Court further finds, by clear and convincing evidence, that termination of the ☐ Mother's___ ☐ Father's____ rights in and to ☐ all named child(ren)/or ☐ these specified child(ren) ___ is/are in the best interest of said child(ren).

III. ORDERS:

A. IT IS ORDERED, ADJUDGED, AND DECREED by the Court that the parental rights of ☐ Mother____ ☐ Father___ to the said child(ren) to-wit: (list names) are hereby terminated and permanently severed.

B. IT IS ORDERED, ADJUDGED, AND DECREED by the Court that ☐ Mother__ ☐ Father___ shall pay court costs by the ___ day of _____, 20__ or as ordered by the Court.

C. IT IS ORDERED, ADJUDGED AND DECREED by the Court that the ☐ temporary **OR** ☐ permanent custody of ☐ all named child(ren)/or ☐ these specified child(ren) ___ shall be with:

☐ Department of Human Services (DHS)
OR
☐ Other _____, ☐ **with** or ☐ **without** DHS supervision

D. ☐ The Court hereby vests DHS with the right and authority to plan for the permanent placement of ☐ all named child(ren)/or ☐ these specified child(ren) ___.

E. ☐ The Court hereby vests in ☐ DHS **OR** ☐ _____ to consent to the adoption of ☐ all named child(ren)/or ☐ these specified child(ren) ___.

F. CHILD SUPPORT: Notice to Parents. Termination of your parental rights does not terminate the duty of support of the child(ren) unless or until an adoption of the child(ren) is/are completed.

☐ Child support shall be established by separate order,
OR
☐ Pursuant to the attached child support guideline,
OR
☐ Is deferred to the child support enforcement division.

THIS IS A FINAL APPEALABLE ORDER.

Other:

_____
_____
_____
_____

_____
JUDGE OF THE DISTRICT COURT

APPROVED AS TO FORM:

_____
Assistant District Attorney

_____
Attorney for Child(ren)

_____
Attorney for Mother

_____
Attorney for Father

2019 OK 5

In re: Approval of Uniform Juvenile Continuance Order

SCAD 2019-15. February 25, 2019

ORDER

¶1 The Court has reviewed the recommendation of the Oklahoma Supreme Court Juvenile Justice Oversight and Advisory Committee and hereby adopts the attached order for continuance effective May 1, 2019.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE the 25th day of February, 2019.

/s/ Noma D. Gurich
CHIEF JUSTICE

ALL JUSTICES CONCUR.

IN THE DISTRICT COURT OF _____ COUNTY
JUVENILE DIVISION, STATE OF OKLAHOMA

IN THE MATTER OF _____ DOB: _____)
_____ DOB: _____) Case Number JD-_____
_____ DOB: _____) Date: _____
_____ DOB: _____)
_____ DOB: _____)

ORDER FOR CONTINUANCE

	MOTHER			ATTORNEY	
	FATHER			ATTORNEY	
	FATHER			ATTORNEY	
	FATHER			ATTORNEY	
	STATE/ADA			COURT REPORTER	
	CHILD			ATTORNEY	
	CHILD			ATTORNEY	
	CHILD			ATTORNEY	
	TRIBE			CASA	
	DHS			OTHER	
	OTHER			OTHER	

This matter came before the court, and the court finds that good cause exists to continue the above described juvenile proceeding for the following reasons:

1. ☐ Jury Trial
2. ☐ Inclement Weather
3. ☐ Request of Counsel/Parties/DHS/ICW: _____
4. ☐ Other: _____

This case is reset for_____hearing on the _____ day of _____at _____.M. _ before Judge_____and all parties are ordered to appear.

IT IS FURTHER ORDERED THAT ALL PREVIOUS ORDERS OF THIS COURT SHALL REMAIN IN FULL FORCE AND EFFECT UNLESS MODIFED BY THIS ORDER.

OTHER:

_____

_____

The Court hereby certifies that a copy of this order has been delivered to and/or made available to all participants and attorneys at this proceeding.

_____ _____
JUDGE OF THE DISTRICT COURT **DATE**

2019 OK 6

LEE MCINTOSH, Plaintiff/Appellant, v. JAKE WATKINS, Defendant/Appellee.

No. 117,413. February 26, 2019

ON APPEAL FROM THE DISTRICT COURT OF POTTAWATOMIE COUNTY, STATE OF OKLAHOMA; HONORABLE JOHN G. CANAVAN, DISTRICT JUDGE

¶0 Appellant, Lee McIntosh, was involved in a hit-and-run accident caused by the appellee, Jake Watkins. Appellant sought treble damages against the appellee based upon the damage to his vehicle. The district court held 47 O.S. 2011, § 10-103 did not allow treble damages because the appellant also sustained injuries and granted summary judgment in favor of the appellee. We hold the treble damage provision in 47 O.S. 2011, §10-103 applies even if a victim sustains an injury.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION

Anthony F. Gorospe, Gorospe Law Group, PLLC, Tulsa, Oklahoma, for Plaintiff/Appellant.

Brad L. Roberson and Lauren N. Watson, Pignato, Cooper, Kolker & Roberson, P.C., Oklahoma City, OK, for Defendant/Appellee

COMBS, J.:

I. FACTS AND PROCEDURAL HISTORY

¶1 On October 29, 2017, the defendant/appellee, Jake Watkins, was driving under the influence of alcohol and rear-ended a vehicle owned and operated by the plaintiff/appellant, Lee McIntosh. Mr. McIntosh's vehicle was damaged and he and the former co-plaintiff, Anthony McIntosh, were injured.[1] Both vehicles pulled over to the shoulder of the road and the parties exited their vehicles to discuss the accident and to inspect the damage. At some point Mr. McIntosh stated he needed to call the police to report the accident. When Mr. Watkins heard this he returned to his vehicle and fled the scene without providing Mr. McIntosh the information required under 47 O.S. 2011, §10-104 (name, address, vehicle registration number and, upon request, show a driver license and security verification form). Mr. Watkins was later arrested and charged with two counts: 1) driving a motor vehicle while under the influence of alcohol; and 2) leaving the scene of an accident involving damage in violation of 47 O.S. 2011, § 10-103. He pled no contest to the two counts and received a deferred judgment and sentence on March 9, 2018, in Case No. CM-2017-902, Pottawatomie County, State of Oklahoma.

¶2 On June 15, 2018, Mr. McIntosh signed a settlement agreement which settled all of his bodily injury claims for the sum of $25,000.00. Mr. McIntosh was also paid $17,545.66 to fully repair his vehicle and an additional $7,000.00 for the diminution of value claim. The only remaining issue left to be decided by the trial court was whether Mr. McIntosh was entitled to receive treble damages for the damage sustained to his vehicle. Mr. Watkins filed a motion for partial summary judgment which was later converted to a motion for summary judgment considering there was only one remaining issue to be decided. On August 16, 2018, a hearing was held and the trial court ruled Mr. McIntosh was not entitled to treble damages pursuant to 47 O.S. 2011, § 10-103, due to the fact he had incurred not only property damage to his vehicle but he also sustained a nonfatal injury. Mr. McIntosh appeals the trial court's ruling on this final issue.

II. STANDARD OF REVIEW

¶3 The standard for appellate review of a summary judgment is *de novo* and an appellate court makes an independent and nondeferential review. *Nelson v. Enid Med. Assocs., Inc.*, 2016 OK 69, ¶7, 376 P.3d 212; *Carmichael v. Beller,* 1996 OK 48, ¶2, 914 P.2d 1051. That review requires examination of the pleadings and evidentiary materials submitted by the parties to determine whether there exists a genuine issue of material fact. *Carmichael,* 1996 OK 48, ¶2. When genuine issues of material fact exist, summary judgment should be denied and the question becomes one for determination by the trier of fact. *Brown v. Okla. State Bank & Trust Co.*, 1993 OK 117, ¶7, 860 P.2d 230.

¶4 Legal questions involving the district court's statutory interpretation of law are also subject to *de novo* review. *Fulsom v. Fulsom,* 2003 OK 96, ¶2, 81 P.3d 652. The primary goal of statutory construction is to ascertain and to apply the intent of the Legislature that enacted the statute. *Samman v. Multiple Injury Trust Fund,* 2001 OK 71, ¶13, 33 P.3d 302. If the legislative intent cannot be ascertained from the language of a statute, as in the cases of ambiguity, we must apply rules of statutory construc-

tion. *YDF, Inc. v. Schlumar, Inc.*, 2006 OK 32, ¶6, 136 P.3d 656. The test for ambiguity in a statute is whether the statutory language is susceptible to more than one reasonable interpretation. *In Matter of J.L.M.*, 2005 OK 15, ¶5, 109 P.3d 336. Where a statute is ambiguous or its meaning uncertain it is to be given a reasonable construction, one that will avoid absurd consequences if this can be done without violating legislative intent. *Wylie v. Chesser,* 2007 OK 81, ¶19, 173 P.3d 64. In ascertaining legislative intent, the language of an entire act should be construed with a reasonable and sensible construction. *Udall v. Udall,* 1980 OK 99, ¶11, 613 P.3d 742. Statutory construction that would lead to an absurdity must be avoided and a rational construction should be given to a statute if the language fairly permits. *Ledbetter v. Oklahoma Alcoholic Beverage Laws Enforcement Comm'n.*, 1988 OK 117, ¶7, 764 P.2d 172. The legislative intent will be 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. Any doubt as to the purpose or intent of a statute may be resolved by resort to other statutes relating to the same subject matter. *Naylor v. Petuskey,* 1992 OK 88, ¶4, 834 P.2d 439. This Court will not limit consideration to one word or phrase but will consider the various provisions of the relevant legislative scheme to ascertain and give effect to the legislative intent and the public policy underlying the intent. *YDF, Inc.*, 2006 OK 32, ¶6. Legislative purpose and intent may also be ascertained from the language in the title to a legislative enactment. *Naylor,* 1992 OK 88 ¶4; *Independent School District No. 89 of Oklahoma County v. Oklahoma City Federation of Teachers, Local 2309 of American Federation of Teachers*, 1980 OK 89, ¶17, 612 P.2d 719.

III. ANALYSIS

¶5 The parties do not dispute that Mr. Watkins collided into and damaged Mr. McIntosh's vehicle while it was operated by Mr. McIntosh. The parties do not dispute Mr. Watkins left the scene of the accident prior to fulfilling the requirements of 47 O.S. 2011, § 10-104. In Mr. McIntosh's response to the motion for summary judgment he denied Mr. Watkin's statement of undisputed material facts that Mr. McIntosh had sustained and was treated for bodily injury. However, he limited this denial only as to the relevancy of that fact to the issue presented. Both his petition and amended petition clearly stated the automobile accident caused him bodily injury. There remain no genuine issues of material fact in dispute that would prohibit summary judgment. The issue before this Court is purely a question of law concerning what damages a plaintiff is entitled to receive when he or she is involved in a hit-and-run accident involving both property damage and bodily injury.

¶6 Mr. McIntosh seeks treble property damage. Mr. Watkins was charged and pled no contest to violating 47 O.S. 2011, § 10-103 in the criminal matter regarding the subject accident. Under this statute, a person who leaves the scene of an accident where an attended vehicle is damaged and without providing requisite information shall be guilty of a misdemeanor and can also be liable in a civil action for treble damages caused by the accident. Title 47 O.S. 2011, § 10-103 provides:

> **The driver of any vehicle involved in an accident resulting only in damage to a vehicle which is driven or attended by any person shall immediately stop such vehicle at the scene of such accident or as close thereto as possible but shall forthwith return to and in every event shall remain at the scene of such accident until he has fulfilled the requirements of Section 47-10-104 of this title.** Every such stop shall be made without obstructing traffic more than is necessary. Any person failing to stop or comply with said requirements under such circumstances shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not to exceed Five Hundred Dollars ($500.00) or by imprisonment in the county jail for not more than one (1) year, or by both such fine and imprisonment. **In addition to the criminal penalties imposed by this section, any person violating the provisions of this section shall be subject to liability for damages in an amount equal to three times the value of the damage caused by the accident. Said damages shall be recoverable in a civil action.** Nothing in this section shall prevent a judge from ordering restitution for any damage caused by a driver involved in an accident provided for in this section. (Emphasis added).

Title 47 O.S. 2011, §10-104 provides in pertinent part:

A. The driver of any vehicle involved in an accident **resulting in injury to or death of any person or damage to any vehicle which is driven or attended by any person shall give his correct name, address and registration number of the vehicle he is driving, and shall upon request exhibit his driver license and his security verification form, as defined in Section 7-600 of this title, to the person struck** or the driver or occupant of or person attending any vehicle collided with, and **shall render to any person injured in such accident reasonable assistance, including the carrying, or the making of arrangements for the carrying, of such person to a physician, surgeon or hospital for medical or surgical treatment if it is apparent that such treatment is necessary or if such carrying is requested by the injured person.** Any driver who provides information required by this section which is intentionally inaccurate shall be subject to the provisions of Section 10-103 of this title. (Emphasis added).

¶7 Mr. Watkins asserts 47 O.S. 2011, § 10-102[2] (accidents involving nonfatal injuries) is the only statute applicable to the present case. This section does not provide for treble damages. In fact, the only statute that allows for an award of treble damages is 47 O.S. 2011, § 10-103, which Mr. Watkins argues applies when the hit-and-run accident results only in vehicle damage; here there was both vehicle damage and bodily injury and therefore he asserts 47 O.S. 2011, § 10-103 is not applicable. He believes the first sentence of 47 O.S. 2011, § 10-103 limits the kind of victims of hit-and-run drivers who may recover treble damages to those who only have vehicle damage and no bodily injuries.

¶8 Mr. McIntosh argues the word "only" in the first sentence of 47 O.S. 2011, § 10-103 creates ambiguity and under his interpretation the legislative intent was to place a limit on the type of treble damages (vehicle damage instead of damage related to a bodily injury) and not a limit on who can recover as long as the victim sustained vehicle damage in a vehicle he or she occupied. He also asserts Mr. Watkins pled no contest to violating 47 O.S. 2011, §10-103 and is currently on misdemeanor probation for that crime. All the elements in the statute have been met for treble damages. Therefore, under the plain language of the statute, Mr. McIntosh argues he is entitled to treble damages based upon the damage to his vehicle.

¶9 Title 47 O.S. 2011, §10-103 is susceptible to more than one reasonable interpretation and is therefore ambiguous and requires this Court to resort to rules of statutory construction to determine its intent. In determining legislative intent, we shall give the statute a reasonable and sensible construction that will avoid absurd consequences if the language fairly permits. Here, the statutory language, its history, and the act as a whole, allows for a reasonable and sensible construction.

¶10 In 1949, Senate Bill 3 was enacted and Section 2 of the bill was the precursor to 47 O.S. §§ 10-102, 10-102.1, 10-103, 10-104 and 10-105. 1949 Okla. Sess. Laws, p. 502, § 2. Section 2 of the bill was codified in Section 121.2 of Title 47 of the Oklahoma Statutes. This section provided:

(a) The driver of any vehicle involved in an accident resulting in injury to, or death of, any person shall immediately stop such vehicle at the scene of such accident, or as close thereto as possible and shall then forthwith return to, and in every event shall remain at the scene of the accident until he has fulfilled the requirements of paragraph (d). Every such stop shall be made without obstructing traffic more than is necessary.

(b) Any person wilfully, maliciously, or feloniously failing to stop, or to comply with said requirements under such circumstances, shall be guilty of a felony, upon conviction thereof, be punished by imprisonment for not less than ten (10) days nor more than one (1) year, and by a fine of not less than fifty dollars ($50.00) nor more than one thousand dollars ($1,000.00) or by both such fine and imprisonment.

(c) The driver of any vehicle involved in an accident resulting only in damage to a vehicle, which is driven or attended by any person, shall immediately stop such vehicle at the scene of such accident, or as close thereto as possible, and shall forthwith return to, and in every event shall remain at the scene of such accident, until he has fulfilled the requirements of paragraph (d). Every such stop shall be made without obstructing traffic more than is necessary.

(d) The driver of any vehicle involved in an accident shall give his correct name and address, and the registration number of the vehicle he is driving; and shall exhibit his operator's or chauffeur's license to the per-

son struck, or the driver, or occupant of, or person attending any vehicle collided with and shall render to any person injured in such accident reasonable assistance. If the driver does not have an operator's or chauffeur's license in his possession he shall exhibit other valid evidence of identification to the occupants of a vehicle, or to the person collided with.

(e) The driver of any vehicle which collides with any vehicle which is unattended shall immediately stop, and shall then and there either locate and notify the operator or owner of such vehicle of the correct name and address of the driver and the owner of the vehicle striking the unattended vehicle, or shall leave in a conspicuous place in or on the vehicle struck a written notice giving the correct name and address of the driver and of the owner of the vehicle doing the striking, and shall provide the same information to an officer having jurisdiction.

(f) The driver of any vehicle involved in an accident resulting in damages to fixtures legally upon or adjacent to a highway shall take reasonable steps to locate and notify the owner or person in charge of such property, of such fact, and of his name and address, and of the registration number of the vehicle he is driving, and shall exhibit his operator's or chauffeurs license, or if said operator's or chauffeur's license is not in his possession at that time, said driver shall exhibit other valid evidence of identification, and shall make report of such accident when and as required by law.

(g) The driver of a vehicle involved in an accident resulting in injury to or death of any person shall immediately, by the quickest means of communication, give notice of such accident to the local police department, if such accident occurs within a municipality, or to the office of the county sheriff or the nearest office of the State Highway Patrol, after complying with the requirements of paragraph (d).

Provided the provisions of this Section shall not apply to any person who is himself injured in such accident to the extent that he cannot safely and reasonably comply therewith.

It shall be deemed a misdemeanor and punishable by fine of not more than fifty dollars ($50.00) for the conviction of any person for failure to comply with the requirements of paragraphs (c), (e), (f) or (g).

The bill's title referred to this section as "establishing the requirements for drivers involved in an accident." Subsections (a) & (b) of § 121.2 provided a driver who causes an accident where there is a nonfatal injury shall stop and provide the information and assistance required in subsection (d) or they shall be guilty of a felony. Subsection (c) & (g) provided a driver who causes an accident where there is "only" vehicle damage shall stop and provide the information required in subsection (d), no assistance is required because there are no injuries, and a person who fails to do so shall be guilty of a misdemeanor. The purpose of § 121.2 was to provide requirements for drivers involved in accidents. It provided different duties based upon the type of accident as well as providing different criminal degrees of guilt for failure to provide information and/or assistance when necessary. The use of the word "only" in subsection (c) clearly limited the criminal charges to a misdemeanor if an accident only involved vehicle damage. At this time, there existed no provision for treble damages like those currently found in 47 O.S. 2011, §10-103.

¶11 In 1961, House Bill 556 created the Highway Safety Code for the State of Oklahoma. 1961 Okla. Sess. Laws, p. 315. This bill re-codified many statutes relating to public safety and created 47 O.S. §§ 10-102, 10-102.1, 10-103, 10-104 and 10-105 in a new chapter, "Chapter 10. Accidents And Accident Reports." Title 47 O.S. 1961, § 10-103 provided:

> The driver of any vehicle involved in an accident resulting only in damage to a vehicle which is driven or attended by any person shall immediately stop such vehicle at the scene of such accident or as close thereto as possible but shall forthwith return to and in every event shall remain at the scene of such accident until he has fulfilled the requirements of section 10-104. Every such stop shall be made without obstructing traffic more than is necessary. Any person failing to stop or comply with said requirements under such circumstances shall be guilty of a misdemeanor.

The bill titled this section "Accidents Involving Damage to Vehicle." The re-codification left the pertinent language, formerly found in subsections (c) and (g) of § 121.2, relatively intact. The

focus remained on establishing the duties of a driver who collides with an attended vehicle. It provided such person who fails to perform those duties will be guilty of a misdemeanor where there was only vehicle damage. The apparent purpose of the "accident resulting only in damage to a vehicle" language was to limit the degree of crime to a misdemeanor and to distinguish this crime from the felony crimes for hit-and-run accidents causing a nonfatal injury or death.

¶12 Title 47 O.S. 1961, § 10-103 has only been amended once since its enactment. HB 1458 (1987) amended § 10-103 to add a specific punishment provision, to provide the current scheme for treble damages and to authorize a court to order restitution. 1987 Okla. Sess. Laws, c. 224, § 15. The amendment is current law and provided in part, "[i]n addition to the criminal penalties imposed by this section, any person violating the provisions of this section shall be subject to liability for damages in the amount equal to three times the value of the damage caused by the accident." No other section in Chapter 10 provides treble damages.

¶13 Title 47 O.S. 2011, § 10-102[3] and § 10-102.1[4] provide the duties and penalties for drivers involved in nonfatal and fatal accidents, respectively. Both require the driver to stop and produce information as well as provide necessary assistance pursuant to 47 O.S. 2011, § 10-104. Willfully, maliciously or feloniously failing to perform such duties, upon conviction, constitutes a felony. Neither section requires a collision with another vehicle or mentions vehicle damage. Title 47 O.S. 2011, § 10-105[5] provides duties for drivers who collide with an unattended vehicle. This section contains no criminal penalties for failure to comply with these duties nor does it provide for any damages in a civil action.

¶14 The purpose behind Chapter 10 is to provide a procedural framework for those involved in an accident and to provide criminal penalties for drivers who leave the scene of an accident without performing the duties required by 47 O.S. 2011, § 10-104. The degree of crime for a violation of those duties depends on the type of damage/injury incurred. A driver who collides with an attended vehicle and leaves the scene without complying with § 10-104 shall be guilty of a misdemeanor if there was only vehicle damage. If a driver causes injury or death and does not provide the required information and/or assistance they will, upon conviction, be guilty of a felony regardless if he or she hit another vehicle. In addition, if there is vehicle damage, the driver will be subject to treble damages in a civil action based upon the damage to the vehicle. The civil action is a separate cause of action provided under 47 O.S. 2011, § 10-103.

¶15 Our interpretation of the relevant sections of Chapter 10 harmonizes those sections and avoids an absurd result. The limiting language in 47 O.S. 2011, § 10-103, "accident resulting only in damage to a vehicle," has historically been used to distinguish the degree of crime, *i.e.*, a misdemeanor when there is only vehicle damage rather than a felony when a nonfatal injury or death occurs. The later enacted treble damages provision is available when there is an accident involving damage to an attended vehicle and the driver causing the accident does not comply with 47 O.S. 2011, § 10-104. The obvious public policy behind the treble damages provision is to provide an added level of deterrence against hit-and-run drivers who damage attended vehicles. The term "nonfatal injury" is also not defined in Chapter 10. This deterrence would ring hollow if a victim was prevented from bringing a civil action for treble damages just because they also suffered an injury, no matter how minor the injury. Our interpretation avoids the absurd result of barring an award of treble damages for a hit-and-run accident involving an attended vehicle when the victim was also injured. We do not believe the legislative intent behind the later enacted treble damages provision was to limit this provision to accidents where there are no injuries.

IV. CONCLUSION

¶16 When a driver collides with an attended vehicle and fails to perform the duties required under 47 O.S. 2011, § 10-104, that driver, in a civil action, shall be liable for treble damages based upon the damage sustained to the vehicle. This is in addition to any criminal penalties which may be imposed upon such driver. This interpretation maintains the public policy behind 47 O.S. 2011, § 10-103 and avoids an absurd result. The judgment of the district court is reversed and the case is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION

¶17 Gurich, C.J., Edmondson, Colbert, Reif, Combs, JJ., concur.

¶18 Wyrick, V.C.J., dissents (writing separately), Kauger, Winchester, Darby, JJ., dissent.

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

¶1 Section 10-103 is not ambiguous. It plainly says that treble damages may be sought against "any person violating the provisions of *this* section."[1] It says nothing about violations of other sections, and those other sections say nothing about treble damages. The only relevant question is thus whether Jake Watkins violated section 10-103.

¶2 The majority never answers that question.[2] It instead assumes that Watkins violated a different section, but concludes that despite what the Legislature said, it actually meant that the treble-damages provision applies to "any person violating the provisions of this section *or any other section*."

¶3 The majority arrives at this counter-textual conclusion by employing an all-too-familiar interpretive device: when a statute doesn't say what the Court thinks it ought to say, it declares the statute ambiguous and then, under the guise of ascertaining "legislative intent," resolves the so-called ambiguity by assigning to the statute whatever meaning aligns with the Court's policy preferences.[3]

¶4 This isn't the interpretation of a statute; it's the drafting and codifying of a statute. This conflation of judicial and legislative roles raises serious separation-of-powers concerns that ought to give us pause. I respectfully dissent, and write separately to urge the Court to abandon its atextual interpretive approach.

I.

¶5 The majority declares that "§10-103 is susceptible to more than one reasonable interpretation and is therefore ambiguous,"[4] but it never quite explains how this is so, other than to point to Mr. McIntosh's entirely unsubstantiated claim that the Legislature probably intended for treble damages to be available for all hit-and-run accidents. That claim, however, tells us nothing about the clarity of the text. It is instead made in an attempt to avoid the plain text, which is neither unclear nor susceptible to more than one meaning.

¶6 The first sentences of sections 10-102, 10-102.1, and 10-103 describe the sort of accident to which each section applies. Section 10-102 applies to "accident[s] resulting in a nonfatal injury to any person."[5] Section 10-102.1 applies to "accident[s] resulting in the death of any person."[6] Section 10-103 applies to "accident[s] resulting only in damage to a vehicle which is driven or attended by any person."[7]

¶7 Each section then imposes certain duties upon a driver involved in such an accident and describes the criminal penalties available for failure to comply with those duties. Violators of section 10-103 can be charged with a misdemeanor, while violators of sections 10-102 and 10-102.1 can be charged with a felony.[8]

¶8 Section 10-103 then contains a civil remedy provision that the other two sections lack: "In addition to the criminal penalties imposed by *this section*, any person violating the provisions of *this section* shall be subject to liability for damages in an amount equal to three times the value of the damage caused by the accident. Said damages shall be recoverable in a civil action."[9] The Legislature was quite clear with the words they chose for this treble-damages provision. It applies to "any person violating the provisions of *this* section," and as explained above, "this section" is the section that applies to accidents "resulting only in damage to a vehicle,"[10] as opposed to accidents resulting in only personal injury or resulting in both damage to a vehicle and personal injury.[11] The Legislature's decision to omit this treble-damages provision from the sections governing accidents resulting in personal injury leaves no doubt that the Legislature intended it to apply only to violations of section 10-103.

¶9 Again, the majority never explains how this text is reasonably susceptible to more than one interpretation, nor can I imagine any reasonable way to read "this section" as actually saying "this section or *any other section*."[12] The majority offers a recitation of the statute's history, but everything about that history undermines, rather than strengthens, the majority's claim of ambiguity. It is true that the relevant sections of law were once combined into a single section of law that the Legislature later split into separate sections, each governing a particular type of accident – *i.e.*, accidents "resulting only in damage to a vehicle which is driven or attended by any person" (section 10-103), accidents "resulting in a nonfatal injury" (section 10-102), and accidents "resulting in the death of any person" (section 10-102.1). The fact, however, that the Legislature

added the treble damages *after* splitting the sections apart, and added the treble damages to only one section while specifying that it applied to that section only, is slam-dunk evidence that the Legislature intended treble damages to be available exclusively for violations of section 10-103.

¶10 Because section 10-103 is not ambiguous, our duty is to put aside any concerns we may have with the policy articulated by the text and to apply the statute precisely as drafted and enacted by the Legislature and as approved by the Governor.[13] If the Legislature wishes to rethink its treble-damages policy, it can do so through the procedures for making new law that are mandated by our Constitution.

II.

¶11 The majority next seeks to avoid the plain meaning of section 10-103 by declaring that the plain meaning is "absurd," a finding that the majority believes goes hand in hand with its finding of ambiguity. But it should go without saying that the text of a statute cannot simultaneously be ambiguous and absurd. An ambiguous statute, after all, is one that is susceptible to more than one *reasonable* meaning.[14] If a statute can be read one way that is quite reasonable, but another way that is quite absurd, then by definition it is not ambiguous. That is why the absurdity canon "should not be confused with a useful technique for resolving ambiguities in statutory language" because it "properly 'applies to *unambiguous* statutes.'"[15]

¶12 Even when applicable, the absurdity canon provides a very narrow exception to our duty to apply the plain meaning of a statute, "where the result of applying the plain language would be, in a genuine sense, absurd, *i.e.*, where it is quite impossible that [the Legislature] could have intended the result"[16] – conditions that are not met here. As Chief Justice John Marshall explained almost two centuries ago, "if, in any case, the plain meaning of a provision, . . . is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application."[17]

¶13 The absurdity canon is thus an escape hatch to be opened only in the rarest of cases where the text leads to "'patently absurd consequences' that [the Legislature] could not *possibly* have intended,"[18] rather than in cases where the Court merely thinks a policy embodied in a statute is unwise. An oft-cited example of a statute that would fit the bill is one that provides that the "winning party" rather than the "losing party" must pay the other side's reasonable attorney's fees.[19] As the Tenth Circuit has put it, in such a case:

> the error in the statute is so "unthinkable" that any reasonable reader would know immediately both (1) that it contains a "technical or ministerial" mistake, and (2) the correct meaning of the text. When these demanding conditions are met, a court may invoke the [absurdity] doctrine to enforce the statute's plain meaning, much as it might in cases where a modifier is misplaced or the grammar otherwise mangled but the meaning plain to any reasonable reader. Cabined in this way, the absurdity doctrine seeks to serve a "linguistic rather than substantive" function, and does not depend nearly as much on doubtful claims about legislative intentions, risk nearly as much interference with the separation of powers, or pose anything like the same sort of fair notice problems as its more virulent cousin. Instead, it aims only to enforce a meaning reasonable parties would have thought plain all along.[20]

¶14 Nothing about this case fits that bill. As its basis for declaring absurdity, the majority merely concludes that it makes sense to have treble damages available in all cases and that, as such, the Legislature could not possibly have intended to enact a statute that did anything else:

> The obvious public policy behind the treble damages provision is to provide an added level of deterrence against hit-and-run drivers who damage attended vehicles. . . . This deterrence would ring hollow if a victim was prevented from bringing a civil action for treble damages just because they also suffered an injury, no matter how minor the injury. Our interpretation avoids the absurd result of barring an award of treble damages for a hit-and-run accident involving an attended vehicle when the victim was also injured. We do not believe the legislative intent behind the later enacted treble damages provision was to limit this provision to accidents where there are no injuries.[21]

Not only is this conclusion not remotely sufficient as a basis for invoking the absurdity canon, it is also incorrect. The treble damages provision may well provide a theoretical level of deterrence to hit-and-run drivers who damage attended vehicles, and that may well be why the Legislature added the provision. But it is not true that deterrence would ring hollow if treble damages were not permitted in personal injury cases. First, the deterrent effect in property damage cases is not diminished by the unavailability of treble damages in other cases. Second, whatever deterrent effect that exists likely carries over to those other cases because a fleeing hit-and-run driver cannot know for certain whether anyone was injured. So in the world imagined by the majority where potential hit-and-run drivers are actually aware of the treble-damages provision such that it might deter them from fleeing, a rational driver would have to assume that he will be subject to treble damages until he knows for certain that he will not be. And the only way to know that is to stop, rather than run.

¶15 Nor is it true there is no rational explanation for omitting the treble-damages provision from the personal-injury sections. It is certainly possible that the Legislature declined to add the treble-damages provision to the personal-injury-accident sections because more than adequate financial deterrents are available in the personal-injury context, where the negligent driver can be sued for non-economic and punitive damages. So the deterrence wouldn't "ring hollow" in the personal injury context if treble property damages were unavailable, but rather would flow from other civil remedies that are available to the injured party.

¶16 In sum, because the majority believes that section 10-103 is ambiguous, the absurdity canon has no place in this case. But even if it did, the majority simply disagrees with the policy choice embodied by the plain language of section 10-103, and that sort of disagreement does not come close to triggering the absurdity canon.

III.

¶17 These misapplications of the ambiguity and absurdity doctrines are symptomatic of an atextual interpretive approach that repeatedly rears its head in cases where the plain meaning of a statute strikes a majority of this Court as unwise. I fear that this atextual approach invites criticism that the Court has lost its way as an institution devoted to merely saying what the law is, rather than what it ought to be.

¶18 No doubt, the Court sometimes properly emphasizes that determining the meaning of a statute "begins with the text of the statute and – absent unresolvable ambiguity – ends with the text" and that its job "is to determine the ordinary meaning of the words that the Legislature chose in the provisions of law at issue."[22] But in cases where the plain meaning of the text leads to a result the Court does not like, the Court changes the question from "What did the Legislature enact?" to "What did the Legislature intend?"[23] – a shift in interpretive approach that opens the door to the Court injecting its policy preferences under the guise of ascertaining the Legislature's intent.

¶19 The hodgepodge interpretive standard invoked by the majority demonstrates how this is so. The majority first declares that "the primary goal of statutory construction is to ascertain and to apply the *intent* of the Legislature that enacted the statute,"[24] thus shifting the inquiry away from ascertaining what law the Legislature actually enacted, in favor of ascertaining what law the Legislature intended to require. This might be less problematic if the Court simply undertook to cold-bloodedly ascertain the Legislature's intent, letting the chips fall where they may. But that is not what the Court does. It instead seeks to ascertain an intent that is "reasonable and sensible" (or not "absurd"),[25] which transforms the inquiry away from determining the *Legislature's* intent and toward determining what the *Court* would have intended were it the lawmaker.[26] And because the majority views the text of the statute as merely one of many pieces of evidence – and a piece that can seemingly be discarded altogether once a declaration of ambiguity is made – the Court finds itself entirely unconstrained in assigning to the Legislature the intent of its choosing.[27]

¶20 None of this would be possible if the Court properly focused on the text. The text is what was read aloud and debated on the legislative floor, approved by majority vote, and sent to the Governor for executive approval, all per the "single, finely wrought and exhaustively considered, procedure" our Constitution commands.[28] The text of the statute isn't mere evidence of what the law is, it *is* the law, and it is the sole legitimate expression of the *Legislature's* intent. If the law is not the words that the Legislature enacted, but rather whatever intent

resided in the minds of this legislator or that, then we need not bother with statute books because the law resides elsewhere, perhaps up in the clouds where if only we stare long enough we will see the law we want to see. But fundamental to due process is notice of what the law is. Our citizens must know where to look to find the law, and they should be able to expect that the law means what it plainly says. A system of laws that requires our citizens to read the minds of legislators (or judges) in order to know the law is a system of laws that is fundamentally incompatible with American notions of fair play and substantial justice.

¶21 Today's decision is a three-card-monte-like application of ambiguity, absurdity, and intentionalism to reach a result that was fully baked: treble damages for everyone. What this case demonstrates is that it is all too easy to craft perfectly logical and sound policies from the isolation of judicial chambers. Legislators, however, labor in protester-filled hallways, lobbyist-filled offices, and legislator-filled chamber floors, where "often and by design it is 'hard-fought compromise[ ],' not cold logic, that supplies the solvent needed for a bill to survive the legislative process."[29] As such, "[i]f courts felt free to pave over bumpy statutory texts in the name of more expeditiously advancing a policy goal, we would risk failing to 'tak[e] . . . account of' legislative compromises essential to a law's passage and, in that way, thwart rather than honor 'the effectuation of [legislative] intent.'"[30] Today's majority has done just that.

* * *

¶22 For these reasons, I respectfully dissent.

COMBS, J.:

1. Anthony McIntosh dismissed any and all causes of action with prejudice against the defendants on August 1, 2018. The plaintiffs' amended petition added Watkins Heating & Air Conditioning, Inc. as a defendant because the defendant, Watkins, was driving a company vehicle when the collision occurred. Lee McIntosh dismissed any and all causes of action with prejudice against Watkins Heating & Air Conditioning on August 1, 2018. The remaining parties are Lee McIntosh, plaintiff/appellant and Jake Watkins, defendant/appellee.

2. 47 O.S. 2011, § 10-102:

A. The driver of any vehicle involved in an accident resulting in a nonfatal injury to any person shall immediately stop such vehicle at the scene of such accident or as close thereto as possible but shall then forthwith return to and in every event shall remain at the scene of the accident until he has fulfilled the requirements of Section 10-104 of this title. Every such stop shall be made without obstructing traffic more than is necessary.

B. Any person willfully, maliciously, or feloniously failing to stop to avoid detection or prosecution or to comply with said requirements under such circumstances, shall upon conviction be guilty of a felony punishable by imprisonment for not less than ten (10) days nor more than two (2) years, or by a fine of not less than Fifty Dollars ($50.00) nor more than One Thousand Dollars ($1,000.00), or by both such fine and imprisonment.

C. The Commissioner of Public Safety shall revoke the license or permit to drive and any nonresident operating privilege of the person so convicted.

3. *See supra* note 2.

4. 47 O.S. 2011, § 10-102.1:

A. The driver of any vehicle involved in an accident resulting in the death of any person shall immediately stop such vehicle at the scene of such accident or as close thereto as possible but shall then forthwith return to and in every event shall remain at the scene of the accident until he has fulfilled the requirements of Section 10-104 of this title. Every such stop shall be made without obstructing traffic more than is necessary.

B. Any person willfully, maliciously, or feloniously failing to stop to avoid detection or prosecution, or to comply with said requirements under such circumstances, shall upon conviction be guilty of a felony punishable by imprisonment for not less than one (1) year nor more than ten (10) years, or by a fine of not less than One Thousand Dollars ($1,000.00) nor more than Ten Thousand Dollars ($10,000.00), or by both such fine and imprisonment.

C. The Commissioner of Public Safety shall revoke the license or permit to drive and any nonresident operating privilege of the person so convicted.

5. 47 O.S. 2011, §10-105:

The driver of any vehicle which collides with any vehicle which is unattended shall immediately stop and shall then and there either locate and notify the operator or owner of such vehicle of the correct name and address of the driver and owner of the vehicle striking the unattended vehicle, and provide said operator or owner with information from his security verification form, as defined by Section 47-7-600 of this title, or shall leave in a conspicuous place in the vehicle struck a written notice giving the name and address of the driver and of the owner of the vehicle doing the striking, and providing information from his security verification form, as defined by Section 47-7-600 of this title, and a statement of the circumstances thereof.

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

1. 47 O.S.2011 § 10-103 (emphasis added).

2. The question is a difficult one, but for purposes of this civil action, Watkins probably did not violate section 10-103. This seems unusual, given that in his criminal case Watkins was convicted of violating section 10-103 pursuant to his plea of no contest. Watkins, however, is not precluded from litigating the issue in this subsequent civil suit because section 513 of Oklahoma's Code of Criminal Procedure directs that nolo contendere ("no-contest") pleas "not be used against the defendant as an admission in any civil suit based upon or growing out of the act upon which the criminal prosecution is based." 22 O.S.2011 § 513. Because he is free to do so, Watkins now argues that section 10-103 is not violated when an accident involves personal injury because section 10-103 governs only "accident[s] resulting only in damage to a vehicle." In Watkins's view, his accident didn't involve "only" damage to a vehicle; therefore he cannot have violated section 10-103. This is correct. Section 10-103 is a separate and distinct offense from the offenses found in sections 102 and 102.1. The State of Oklahoma has previously argued as much with respect to this offense, *see Palmer v. State*, 1958 OK CR 70, ¶ 8, 327 P.2d 722, 725. All of these provisions are part of a model statute adopted in identical or near identical form by many other states. *See* Unif. Vehicle Code §§ 10-102 to 10-103 (Nat'l Comm. on Unif. Traffic Laws & Ordinances 1956). The only case I was able to find construing a similar statute in another state concluded that the misdemeanor offense is not a lesser included offense of the felony offense, but rather a separate and distinct offense. *State v. Sakoda*, 618 P.2d 1148, 1149 (Haw. Ct. App. 1980) (construing sections 291C-13 and -14 of the Hawai'i Revised Statutes and overturning the appellant's conviction under the law governing "an accident resulting only in damage to a vehicle or other property which is driven or attended by any person" because the accident at issue involved personal injury); *cf. Peterson v. State*, 775 So. 2d 376, 377 – 78 (Fla. Dist. Ct. App. 2000) (construing sections 316.027 and 316.061 of the Florida Statutes and reversing the appellant's conviction under the statute governing a "crash resulting only in damage to a vehicle or other property" because the verdict was inconsistent insofar as it also convicted him of violating the statute governing a "crash resulting in injury of any person"). Thus, if Watkins is correct – as all parties seem to agree – that his accident involved personal injury, he cannot as a matter of law have violated section 10-103.

3. *See, e.g., CompSource Mut. Ins. Co. v. State ex rel. Okla. Tax Comm'n*, 2018 OK 54, — P.3d — (creating an ambiguity by injecting the notion

of specific versus general references, and then reaching the desired policy goal of tax rebates that the unambiguous text would not have permitted); *In re T.H.*, 2015 OK 26, ¶¶ 9, 11, 348 P.3d 1089, 1092 (finding a statute ambiguous and then "liberally construing" the provision "to carry out its purpose" (quoting *In re BTW*, 2010 OK 69, ¶ 13, 241 P.3d 199, 205)); *Wilhoit v. State*, 2009 OK 83, ¶¶ 10 – 13, 226 P.3d 682, 685 – 86 (largely the same, concluding that a statute was ambiguous, leading the Court to "ascertain . . . the legislative intent and the public policy" to ascertain meaning); *In re J.L.M.*, 2005 OK 15, ¶¶ 7, 9 – 10, 109 P.3d 336, 338 – 40 (finding a statute ambiguous in order to look at "public policy enunciated" in other jurisdictions as a basis for a finding of "legislative intent"); *Estes v. ConocoPhillips Co.*, 2008 OK 21, ¶¶ 15 – 25, 184 P.3d 518, 525 – 27 (answering for the first time a certified federal question about whether the Standards for Workplace Drug and Alcohol Testing Act, 40 O.S. §§ 551 – 565, would equate breathalyzer tests with "laboratory services" for which an employer must use a licensed testing facility before taking disciplinary action against an employee, and then answering the question of whether the employer's failure to use a licensed facility was "willful" in the affirmative by deeming the relevant statute ambiguous and maligning any other result as "absurd"); *Cox v. Dawson*, 1996 OK 11, ¶¶ 7, 20, 911 P.2d 272, 277, 281 (concluding that a statute was "ambiguous because of what it does not say" and then supplying the statutory provision that the Court thought was needed); *Maule v. Indep. Sch. Dist. No. 9*, 1985 OK 110, ¶¶ 10 – 11, 714 P.2d 198, 202 – 03 (explaining that because the parties argued the statute is ambiguous the Court was free to find the result that was "fair and efficacious" because "inept or incorrect choice of words in a statute will not be construed and applied in a manner which would destroy the . . . purpose of the statute").

4. Majority Op. ¶ 9.

5. 47 O.S.2011 § 10-102(A).

6. *Id*. § 10-102.1(A).

7. *Id*. § 10-103.

8. *Id*. §§ 10-102(B), 10-102.1(B), 10-103.

9. *Id*. § 10-103 (emphasis added).

10. *Id*. (emphasis added).

11. *See id*. §§ 10-102 to 10-102.1.

12. Majority Op. ¶ 15 (concluding that the "accident resulting only in damage to a vehicle" language only limits the type of crime that is charged, and therefore the "treble damages provision is available when[ever] there is an accident involving damage to an attended vehicle and the driver causing the accident does not comply with 47 O.S. 2011, § 10-104," but failing to address how this can be so in light of the treble-damages provision's "violating the provision of *this* section" limiting language).

13. *Hall v. Galmor,* 2018 OK 59, ¶ 45, 427 P.3d 1052, 1070 ("[D]etermin[ing] the meaning of [a statute] . . . . begins with the text of the statute and – absent unresolvable ambiguity – ends with the text."); *Broadway Clinic v. Liberty Mut. Ins. Co.*, 2006 OK 29, ¶ 15, 139 P.3d 873, 877 ("In the absence of ambiguity or conflict with another enactment, our task is limited to applying a statute according to the plain meaning of the words chosen by the legislature . . . .").

14. *Odom v. Penske Truck Leasing Co.*, 2018 OK 23, ¶ 18, 415 P.3d 521, 528 ("The test for ambiguity in a statute is whether the statutory language is susceptible to more than one reasonable interpretation." (emphasis added) (citing *Am. Airlines, Inc. v. State ex rel. Okla. Tax Comm'n*, 2014 OK 95, ¶ 33, 341 P.3d 56, 64; *YDF, Inc. v. Schlumar, Inc.*, 2006 OK 32, ¶ 6, 136 P.3d 656, 658; *In re J.L.M.*, 2005 OK 15, ¶ 5, 109 P.3d 336, 338)).

15. *In re Taylor,* 899 F.3d 1126, 1131 n.2 (10th Cir. 2018) (emphasis added) (quoting *United States v. Husted*, 545 F.3d 1240, 1245 (10th Cir. 2008); *Robbins v. Chronister,* 435 F.3d 1238, 1241 (10th Cir. 2006) (en banc)).

16. *Small v. United States*, 544 U.S. 385, 404 (2005) (Thomas, J., dissenting) (citations omitted); s*ee also Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 565 (2005) (noting that an omission that may be deemed an "unintentional drafting gap" may seem odd, but that does not equate to the result being absurd); *Carter v. United States,* 530 U.S. 255, 263 (2000) (noting just because the interpretation results in an anomaly, that does not mean it is an absurdity which justifies statute modification); *In re Taylor*, 737 F.3d 670, 681 (10th Cir. 2013) ("The absurdity doctrine applies 'in only the most extreme of circumstances,' when an interpretation of a statute 'leads to results so gross as to shock the general moral or common sense,' which is a 'formidable hurdle' to the application of this doctrine. It is not enough to show that Congress intended a different result from the one produced by the plain language of the statute." (citations omitted)).

17. *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 202 – 03 (1819). This understanding of the doctrine has prevailed in subsequent centuries. In its 1930 decision in *Crooks v. Harrelson*, for example, the United States Supreme Court again emphasized the narrow parameters of the doctrine:

> [T]he principle is to be applied to override the literal terms of a statute only under rare and exceptional circumstances. . . . [T]o justify a departure from the letter of the law upon that ground, the absurdity must be so gross as to shock the general moral or common sense. . . .
>
> . . . It is not enough merely that hard and objectionable or absurd consequences, which probably were not within the contemplation of the framers, are produced by an act of legislation. Laws enacted with good intention, when put to the test, frequently, and to the surprise of the lawmaker himself, turn out to be mischievous, absurd, or otherwise objectionable. But in such case the remedy lies with the lawmaking authority, and not with the courts.

282 U.S. 55, 60 (1930) (citations omitted).

18. *FBI v. Abramson*, 456 U.S. 615, 640 (1982) (O'Connor, J., dissenting) (quoting *United States v. Brown*, 333 U.S. 18, 27 (1948)).

19. *Lexington Ins. Co. v. Precision Drilling Co.*, 830 F.3d 1219, 1223 (10th Cir. 2016) (Gorsuch, J.) (citing Antonin Scalia & Bryan A. Garner, *Reading Law* 237 – 38 (2012)).

20. *Id*. (citations omitted).

21. Majority Op. ¶ 15.

22. *Hall*, 2018 OK 59, ¶ 45, 427 P.3d at 1070.

23. This method of statutory interpretation is known as intentionalism. An intentionalist seeks to ascertain what the Legislature intended the law to be and views the text as only one of many indicators of legislative intent, while a textualist seeks to understand the plain meaning of the text the Legislature enacted and views that text as the only valid and reliable expression of the Legislature's intent. Because of its many flaws, intentionalism has fallen out of favor in most serious legal circles. *See* Justice Elena Kagan, The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes at 8:28 (Nov. 17, 2015), http://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation/ ("[W]e're all textualists now . . . ."); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 Colum. L. Rev. 1, 43 (2006) ("Textualism seems to have been so successful – indeed, far more successful than its defenders or detractors care to admit – that we are all textualists in an important sense."); Marjorie O. Rendell, *2003 – A Year of Discovery: Cybergenics and Plain Meaning in Bankruptcy Cases,* 49 Vill. L. Rev. 887, 887 (2004) ("W[e] are all textualists now."); William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation*, 1776 – 1806, 101 Colum. L. Rev. 990, 1090 (2001) ("[S]tatutory text (including the whole statute and related provisions) ought to be the primary source of statutory meaning. This was the English practice in the eighteenth century, the early state practice, the assumption of the Framers as well as both the defenders and opponents of the Constitution during ratification, and was the accepted view of federal judges implementing the constitutional design. But this proposition needs little defense today. We are all textualists."); Jonathan R. Siegel, T*extualism and Contextualism in Administrative Law*, 78 B.U. L. Rev. 1023, 1057 (1998) ("In a significant sense, we are all textualists now.").

24. Majority Op. ¶ 4.

25. *Id*.

26. What if both the text and whatever other sources the Court consults lead it to conclude that the Legislature intended something that the Court thinks is entirely unreasonable? Does the Court really think that it possesses the power to disregard both the text *and* legislative intent in favor of whatever policy it thinks is sensible?

27. Majority Op. ¶ 4 (explaining that the "general purpose and objectives" of the act, among other things, provide evidence of what the law is). *See generally, e.g., Johnson v. City of Woodward*, 2001 OK 85, ¶ 6, 38 P.3d 218, 222 ("The best evidence of legislative intent is the statutory language itself." (emphasis added) (quoting *Upton v. State Dep't of Corr.*, 2000 OK 46, ¶ 6, 9 P.3d 84, 86)). The significance of this minimization of the text should not be lost. The majority does so to free itself from the constraints imposed by the text – text that plainly forecloses the result the majority desires – and to allow itself to divine a legislative intent that unfailingly aligns with the Court's view of what is the most "reasonable and sensible" policy for our State.

28. *I.N.S. v. Chadha*, 462 U.S. 919, 951 (1983) (describing the federal constitution's analogous procedures). *See generally* Okla. Const. art. V, § 34 ("Every bill shall be read on three different days in each House, and no bill shall become a law unless, on its final passage, it be read at length, and no law shall be passed unless upon a vote of a majority of all the members elected to each House in favor of such law; and the question, upon final passage, shall be taken upon its last reading, and the yeas and nays shall be entered upon the journal."); *id*. art. VI, § 11 ("Every bill which shall have passed the Senate and House of Representatives, and every resolution requiring the assent of both branches

of the Legislature, shall, before it becomes a law, be presented to the Governor; if he approve, he shall sign it . . . .").

29. *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 543 (2019) (alteration in original) (quoting *Bd. of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986)).

30. *Id*. (second alteration & ellipsis in original) (quoting *Dimension Fin. Corp.*, 474 U.S. at 374).

2019 OK 7

RONALD W. MCGEE as Trustee of the WATTS RANCH, LLC; NORA ANN WATTS ENIS; JUDY R. DURANT; JOHNYE L. BARNES; THE ESTATE OF CLARA JOANN SMITH; and THE C & J WILCOX FAMILY TRUST, Plaintiffs/Appellees, v. AMOCO PRODUCTION COMPANY, Defendant/ Appellant, and TERRY J. BARKER, ROBERT LAWRENCE and JOSEPH C. WOLTS, Additional Non-Party Appellees.

No. 117,511. February 26, 2019

MEMORANDUM OPINION

COMBS, J.:

¶1 On November 6, 2018, the Defendant, Amoco Production Company (Amoco), filed a Petition in Error seeking review of a trial court Order denying Amoco's motion to disqualify Plaintiffs' counsel. On November 19, 2018, this Court placed this case on the fast track docket pursuant to Okla. Sup. Ct. R. 1.17 (III).

¶2 In the Brief in Chief, Amoco asserts the trial court's Order provides only summary holdings and provides no specific findings and conclusions for denying disqualification as required by *Miami Bus. Servs., LLC v. Davis*, 2013 OK 20, 299 P.3d 477. In *Miami*, the plaintiff moved to disqualify defendant's attorney based on past representation of the plaintiff. The trial court denied the motion. The trial court held a hearing but its order did not contain any findings of fact or conclusions of law; it at least listed the briefs and documents it reviewed to make its decision. *Miami Bus. Servs., LLC*, 2013 OK 20, ¶4. We determined it was essential that the facts relied upon by the trial court appear in a record in order to have meaningful appellate review and a trial court must follow the procedures set forth in *Piette v. Bradley & Leseberg*,[1] 1996 OK 124, 930 P.2d 183 and *Arkansas Valley State Bank v. Phillips*,[2] 2007 OK 78, 171 P.3d 899. *Miami Bus. Servs., LLC*, 2013 OK 20, ¶24. We held:

> Before ruling whether an attorney should be disqualified based on **conflict of interest** or **improper possession of confidential information,** it must hold an evidentiary hearing. The trial court **must then make a specific factual finding in its order of disqualification or its order denying disqualification that the attorney either had, or did not have, knowledge of material and confidential information.** If the ruling is appealed, we will then, when reviewing the order, review the trial court's findings of fact for clear error and carefully examine de novo the trial court's application of ethical standards.

Id. (emphasis added). We then concluded:

> The trial court is still required to submit **written findings or create a record setting forth its factual and legal support for its ruling** when making its decision to deny a motion to disqualify counsel in the same manner it would if it were granting such a motion. Otherwise, a petitioner appealing the denial of a motion to disqualify counsel is **denied any substantive basis for their appeal and no meaningful way to challenge the factual and legal findings that serve as the basis for the trial court's ruling.**

Id., ¶25 (emphasis added). The order denying disqualification of counsel was vacated and the matter was remanded for proceedings consistent with the opinion. *Id.*

¶3 Like *Miami*, a hearing was held in the present case. The Order denying disqualification of counsel made no findings setting forth its factual and legal support for its ruling. The Order merely provides that the defendant "lacks standing to move for disqualification," "has failed to present any valid grounds for disqualification," and "has identified no conflict between the interests of the [various] Plaintiffs." The transcript of the October 31, 2018, hearing, concerning the motion to disqualify counsel, does not contain the trial court's findings or indicate what legal support it will rely upon to make its later ruling. *Miami* and *Arkansas Valley State Bank* both concerned the issue of an attorney having confidential information and therefore the specific findings required in those opinions related to whether an attorney either had, or did not have, knowledge of material and confidential information. The present case concerns allegations the Appellees' attorneys have a conflict of interest between the various clients it represents in several actions. The nature of the alleged conflict of interest is based upon economic interests and not confidential information. However, this fact makes it

no less important for the trial court "to submit written findings or create a record setting forth its factual and legal support for its ruling when making its decision to deny a motion to disqualify counsel." *Id.*, ¶25. The purpose as set out in *Miami* is to avoid a situation where the "petitioner appealing the denial of a motion to disqualify counsel is denied any substantive basis for their appeal and no meaningful way to challenge the factual and legal findings that serve as the basis for the trial court's ruling." *Id*.

¶4 This Memorandum Opinion is not a ruling on the merits of the Order denying disqualification of counsel, but is intended to maintain compliance with existing precedent. The trial court's Order denying disqualification of counsel is vacated, and this cause is remanded for further proceedings sufficient to prepare a final order which makes findings setting forth the factual and legal support for the trial court's ruling. Specifically, in determining whether there exists grounds for disqualification of counsel, the trial court shall prepare an order which identifies what specific facts, if any, support the courts finding of the existence or non-existence of a conflict of interest and the legal support for such a determination. Additionally, the trial court should identify the facts and legal support for a finding that the Defendant has or does not have standing to challenge any perceived conflict of interest.

¶5 Gurich, C.J., Kauger, Winchester, Edmondson, Colbert, Reif, Combs, Darby, JJ., concur.

¶6 Wyrick, V.C.J., dissents.

1. In *Piette*, this Court issued an order wherein we held:

> The trial judge's disqualification order is summarily reversed and the cause remanded for an evidentiary hearing. If, after holding a hearing, the trial judge should determine that plaintiff's attorneys should be disqualified, its order of disqualification must include a specific factual finding that attorney Wagner had knowledge of material and confidential information.

Piette, 1996 OK 124, ¶2.

The plaintiff appealed the order disqualifying his attorney. The order was based on a conflict of interest. No other facts concerning this case are mentioned in the order.

2. In *Arkansas Valley State Bank*, a Bank moved to disqualify defendant's counsel based upon its belief he obtained privileged information by a former bank employee. The defendant's counsel, however, had never represented the Bank. The trial court granted the motion. The order was vague, but this Court interpreted it to say the court relied on "the appearance of impropriety" standard, and we held that was not the proper standard. *Arkansas Valley State Bank*, 2007 OK 78, ¶22. Another reason for reversing the order was that the order did not contain specific findings of fact as required by *Piette*. *Id.*, ¶¶ 8, 25. We held:

> Before the trial court can determine that an attorney should be disqualified based on **conflict of interest** or **improper possession of confidential information,** it must hold an evidentiary hearing and make a specific factual finding in its order of disqualification that the attorney had knowledge of material and confidential information.

Id., ¶8 (emphasis added). The matter was reversed and remanded to the trial court for new proceedings.

2019 OK CR 2

ROY LEE WHITE JR. Appellant, vs. THE STATE OF OKLAHOMA, Appellee.)

No. F-2017-343. February 14, 2019

OPINION

KUEHN, JUDGE:

¶1 Appellant, Roy Lee White Jr., was convicted by a jury in Comanche County District Court, Case No. CF-2015-642, of Count 1: First Degree Murder (21 O.S.Supp.2012, § 701.7(A)) and Count 2: Possession of a Firearm After Conviction of a Felony (21 O.S.Supp.2014, § 1283). On April 4, 2017, the Honorable Gerald Neuwirth, District Judge, sentenced him in accordance with the jury's recommendation as follows: Count 1, life imprisonment without parole; Count 2, ten years imprisonment.[1] This appeal followed.

¶2 Appellant's convictions arise from the murder of Donald Brewer, on the evening of December 3, 2015, in a room at the Super 9 Motel in Lawton. Brewer died from multiple gunshot wounds to the head and chest. The motel room had been rented by Frank Crowley; Crowley was personally acquainted with both Appellant and Brewer. According to Crowley, Brewer was visiting with him when Appellant came to the room. Crowley said he knew there was some sort of disagreement between the two men about money. Crowley testified that Appellant and Brewer briefly argued about the perceived debt before Appellant brandished a black revolver, shot Brewer (who was unarmed) several times, and then fled. Brewer died at the scene.

¶3 As soon as he thought it safe to leave the room, Crowley ran across the street, where he saw a patrol car, and frantically told the officer that his friend had just been shot. Crowley described the gunman as wearing a red sweatshirt and carrying a black backpack. As another officer was responding to the scene, he saw Appellant walking away from the Super 9 Motel, wearing a tank top. The officer found that peculiar, as it was December and the weather was cold. When the officer tried to talk to Appellant, Appellant began to run, but he was eventually apprehended.

¶4 Appellant initially told police that he was running because he had heard gunshots. He later told a detective that he had gone to the Super 9 Motel to see his friend "Short," and that he was standing in the doorway of Short's room when he heard gunshots. The detective knew Crowley, and knew that Crowley's nickname was "Short."

¶5 When police searched pathways leading away from the motel, they found a sweatshirt and backpack in the grass behind a nearby building. According to the officer who found them, they appeared to have recently been discarded there, because there was moisture on the surrounding grass but the sweatshirt and backpack were dry. The backpack contained a quantity of marijuana and a .32 caliber revolver.

¶6 At trial, Crowley testified that the revolver police found in the backpack looked like the gun Appellant used to shoot Brewer. It was the same color as the one Crowley described, and had a small loop (known as a "lanyard ring") at the bottom of the grip, as Crowley described. Crowley said that Appellant shot at Brewer until he ran out of bullets; the cylinder of the found revolver was full of empty shells. A state ballistics examiner testified that the pistol was operable, but she could not determine whether the one bullet fragment retrieved from the crime scene had been fired by that pistol, because the fragment was too damaged to make a comparison. The examiner did, however, conclude that the fragment had the same class characteristics as bullets that would fit the revolver.

¶7 Police obtained swabs from Appellant's hands and face to test for gunshot residue. They also submitted the revolver, backpack, and sweatshirt, as well as a buccal swab from the inside of Appellant's cheek, to the Oklahoma State Bureau of Investigation to attempt a DNA comparison. At trial, the criminalist who conducted the tests explained that Appellant was excluded as the donor of DNA recovered from the backpack, and that the sample obtained from the sweatshirt was simply not suitable for analysis. However, Appellant's

DNA was consistent with traces found on the revolver. The criminalist testified that the odds of finding a "random match" between the revolver sample, and an unrelated individual in the general population, were 1 in 26. The gunshot-residue (GSR) test detected particles swabbed from Appellant's face which were comprised of a mixture of lead, barium, and antimony – elements found in gunshot residue, and not normally attributable to any other source.

¶8 Appellant did not testify. The jury found him guilty as charged of First Degree Murder. After an additional proceeding where evidence of Appellant's prior convictions was introduced, the jury also found him guilty of Possessing a Firearm After Felony Conviction.

¶9 In his first two propositions of error, Appellant claims the evidence was insufficient to support either of his convictions. That Appellant is a convicted felon (a necessary element of Count 2) is not disputed; he only challenges the jury's finding that he was the person who possessed the firearm (Count 2) and used that firearm to kill Brewer (Count 1). Given that the State's evidence either tends to prove both crimes or neither, we consider these claims together. Our task is not to re-weigh the evidence to our own satisfaction, but to determine if, from the evidence presented at trial, a rational juror could have found the elements of each crime by proof beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); *Hogan v. State,* 2006 OK CR 19, ¶ 21, 139 P.3d 907, 919.[2]

¶10 Appellant claims that the physical evidence linking him to the crime was inconclusive, and that the testimony of Frank Crowley should be disregarded because he was a convicted felon whose testimony was fraught with inconsistency. We disagree. The results of the DNA comparisons were certainly not as strong here as in some other cases; only one of the three unknown samples was even suitable for comparison, and that one (from the pistol) was determined to be a mixture of DNA from more than one source, which materially affected the probative value of any comparison to Appellant's known sample. Nevertheless, the statistical evidence indicated that Appellant was 26 times more likely to have contributed DNA on the pistol than someone else, unrelated to him, chosen at random from the general population.[3] Furthermore, the GSR test revealed telltale (albeit circumstantial) evidence on Appellant's face that he had recently been in close proximity to the discharge of a firearm.[4]

¶11 Appellant takes a "divide and conquer" approach to the State's evidence, compartmentalizing it and pointing to perceived weaknesses in each category. But the jury was instructed to consider the evidence as a whole, and we must do the same. *Matthews v. State,* 2002 OK CR 16, ¶ 35, 45 P.3d 907, 919-920. Crowley's testimony was direct evidence of Appellant's guilt. When direct testimony comes from an eyewitness, the dangers of mistake or intentional falsehood are always a possibility. Any theory that Crowley innocently misidentified Appellant as the culprit is counterbalanced by the fact that he knew Appellant personally. As for the possibility that Crowley simply lied about Appellant's guilt, Crowley's status as a felon is relevant to his general credibility, but it is counterbalanced by the absence of any known motive for him to falsely accuse Appellant of murder. Crowley's credibility may also have been negatively affected by his history of mental health problems, but the issue was explored at trial.

¶12 Crowley's credibility as a whole is bolstered by how his claims meshed with other evidence, some of it (but not all) circumstantial in nature. Circumstantial evidence can be very powerful, given that its probative force is usually derived from inferences drawn from a web of unrelated facts. Weaknesses in one or more pieces of evidence may be overcome if, when all the facts are considered together, they present a unified and convincing theory of guilt.[5] Near the murder scene, police found an abandoned pistol which matched Crowley's description of the murder weapon in unique ways. Not only did Crowley describe the revolver's "lanyard ring," but the empty shells in the pistol's chamber corroborated Crowley's account that the shooter fired until he ran out of bullets. DNA retrieved from the gun could have been Appellant's, even though the statistical probabilities were not as strong as seen in some other cases. The defense made much of the fact that the sweatshirt was not the same color as the one Crowley described. But Crowley explained why he might have been mistaken about its color: "I wasn't looking at what he was wearing. I was looking at the gun." Appellant was observed running away from the motel shortly after the shooting, wearing a tank top in winter weather. His path was consistent with where the sweatshirt, backpack,

and gun were found, such that he could have deposited the items along the way.

¶13 The jury had yet another piece of direct evidence to consider: Appellant's own statements to police. Appellant admitted that he was standing in the doorway of a motel room rented by someone he called "Short" when he heard gunshots and fled. Crowley's nickname was "Short." Appellant did not admit the shooting, nor did he claim to know who the shooter was, but his unsolicited admission to actually being at the scene is certainly peculiar and raises suspicion when considered in light of all the other evidence in the case. The ultimate question is whether all of this evidence, taken together, excludes any reasonable probability that Appellant was not the shooter. We believe a rational juror could conclude, beyond any reasonable doubt, that Appellant (a felon) possessed a firearm, and that he used that firearm to kill Brewer with malice aforethought. Propositions I and II are denied.

¶14 In Proposition III, Appellant claims the trial court erred in failing to instruct the jury on Second Degree, Depraved Mind Murder as an alternative to First Degree, Malice Murder. Appellant did not request this alternative at trial, so we review this claim for plain error. *McHam v. State*, 2005 OK CR 28, ¶ 21, 126 P.3d 662, 670. Plain errors are those errors which are obvious in the record, and which affect the substantial rights of the defendant – that is, the error affects the outcome of the proceeding. *Daniels v. State*, 2016 OK CR 2, ¶ 3, 369 P.3d 381, 383. In the context of lesser-related offense instructions, relief is not warranted unless a rational juror could have rejected elements that distinguish the charged crime from the lesser alternative. *McHam*, 2005 OK CR 28, ¶ 21, 126 P.3d at 670. Appellant maintained that he was innocent of the charges. The State's evidence clearly established that the person who shot Brewer did so with the intention of killing him; Crowley testified that the assailant (whom he identified as Appellant) exclaimed, "No one told you that I was a killer" before he started shooting. When Brewer fled into the bathroom and shut the door, the assailant rebuffed Crowley's pleas to stop, saying, "I'm going to kill him" before firing through the bathroom door. Crowley said Appellant fired until he had no bullets left; Brewer sustained four gunshots to the head and torso. On these facts, no rational juror could have concluded that the shooter acted merely with a "depraved mind, regardless of human life"; evidence of malice was overwhelming. 21 O.S.2011, § 701.8(1); *Simpson v. State*, 2010 OK CR 6, ¶¶ 16-18, 230 P.3d 888, 897. Proposition III is denied.

¶15 In Proposition IV, Appellant claims he was denied a fair trial by the admission of evidence suggesting he was generally a bad person who deserved punishment. He cites the general rule against introducing evidence of his other crimes, wrongs, or bad acts to show that he acted in conformity therewith. 12 O.S. 2011, § 2404(B). Appellant did not object to these comments below, so we review them only for plain error. Appellant must show a plain or obvious deviation from a legal rule which affected his substantial rights. We will only grant relief if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings, or otherwise represents a miscarriage of justice. *Hogan,* 2006 OK CR 19, ¶ 38, 139 P.3d at 923. Crowley testified that the dispute between Appellant and Brewer had to do with a debt over bond money that one man apparently owed to the other. When explaining the disagreement, Crowley suggested that Appellant had outstanding warrants for his arrest, although he did not elaborate further. Initially, it is questionable whether this qualifies as other crimes evidence, or was merely a non-prejudicial suggestion of unspecified wrongdoing. *See Bear v. State*, 1988 OK CR 181, ¶ 22, 762 P.2d 950, 956 (references only noticeable to defense counsel do not constitute other-crimes evidence). In any event, we find this brief comment admissible as part of the *res gestae,* as it helped explain (in Crowley's estimation) the substance of the disagreement which erupted into a shooting. *Baird v. State,* 2017 OK CR 16, ¶ 38, 400 P.3d 875, 885-86. Appellant's remaining complaints pertain to testimony about possible gang affiliation which defense counsel herself elicited when cross-examining State's witnesses. We will not find plain error where it was defense counsel who deviated from the rules.[6] *Cuesta-Rodriguez v. State,* 2010 OK CR 23, ¶ 101, 241 P.3d 214, 244. There was no plain error here, and Proposition IV is denied.

¶16 In Proposition V, Appellant claims the trial court erred in admitting evidence of a gunshot-residue (GSR) test, because the swabs taken from his face and hands and used for that test were obtained without a search warrant, and therefore constitutionally prohibited. Searches for evidence conducted without a warrant are presumptively unreasonable under

the Fourth Amendment. *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967).

¶17 Appellant did not challenge the GSR procedure on these grounds below. We generally review unpreserved claims for plain error. *Mitchell v. State*, 2016 OK CR 21, ¶ 24, 387 P.3d 934, 943. Since this claim implicates the constitutional right to be free from unreasonable searches, our plain-error review is governed by *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). *Miller v. State*, 2013 OK CR 11, ¶¶ 104, 106, 313 P.3d 934, 971-72.[7] The first step in any plain-error review is to determine if a deviation from a legal rule is plain, or obvious, from the record before us. *Barnard v. State*, 2012 OK CR 15, ¶ 25, 290 P.3d 759, 767.

¶18 Because Appellant did not raise this claim below, the record is not fully developed on this issue. Challenges to the admissibility of evidence, often on constitutional grounds (*e.g.*, the voluntariness of a defendant's confession, the legality of a police search), are usually matters for the court – not the jury – to determine. 12 O.S.2011, § 2105(A). Hence they are usually considered before trial, or at *in camera* hearings during trial, and involve issues that are not always developed at the trial itself. If no timely challenge is made to the admissibility of the evidence, and an admissibility challenge is raised for the first time on appeal, then the appellate court may be forced to guess at the answers to questions that are dispositive to the analysis it is being asked to conduct.[8] Here, the circumstances surrounding the taking of the GSR swabs might establish facts relevant to our analysis, but these issues were never developed below.[9] Where the record is not sufficient to confidently resolve a claim, any alleged error is unlikely to be plain or obvious.

¶19 Nevertheless, despite the limited record here, analysis of the central issue is achievable and appropriate. Does the warrantless swabbing of an arrestee's face and hands for possible gunshot residue amount to an unreasonable search prohibited by the state and federal constitutions? We believe it does not. Appellant cites no controlling or even persuasive authority holding that such GSR swabbing techniques, applied to the surfaces of the fingers and face of an arrestee, are an unreasonable invasion of, or interference with, bodily integrity. As described in the trial record, evidence is collected by swabbing the face and hands of the suspect with special pads, and then examining the pads under an electron microscope for certain peculiar combinations of inorganic particles. The procedure employed in this case did not intrude into Appellant's body, nor did it expose any part of his body not normally exposed to public view. Furthermore, its purpose was not to collect any information *about* the suspect's body, only to harvest inert debris from its surface.[10]

¶20 The fact that Appellant was under arrest at the time the swabs were collected is of key significance here. We believe the swabbing of an arrestee's face and extremities for gunshot residue is a reasonable and proper "search incident to arrest." A number of jurisdictions have reached the same result.[11] This exception to the Fourth Amendment's preference for prior judicial approval of a search is rooted in history and practicality. When a suspect is lawfully arrested, his person and any area in his immediate control may be searched to prevent danger to the arresting officer or others (*e.g.* from hidden weapons), and to prevent the suspect from destroying evidence. *See Arizona v. Gant*, 556 U.S. 332, 339, 129 S.Ct. 1710, 1716, 173 L.Ed.2d 485 (2009); *Chimel v. California*, 395 U.S. 752, 762-63, 89 S.Ct. 2034, 2040, 23 L.Ed.2d 685 (1969); *State v. Thomas*, 2014 OK CR 12, ¶ 5, 334 P.3d 941, 943-44.

¶21 A search incident to arrest is permitted categorically; that is, it does not depend on individualized suspicion. "The fact of a lawful arrest, standing alone, authorizes a search." *Maryland v. King*, 569 U.S. 435, 449, 133 S.Ct. 1958, 1971, 186 L.Ed.2d 1 (2013) (citation omitted). However, even such routine procedures must be "reasonable" in the scope of intrusion. *See Cupp v. Murphy*, 412 U.S. 291, 295, 93 S.Ct. 2000, 2003, 36 L.Ed.2d 900 (1973) ("the scope of a warrantless search must be commensurate with the rationale that excepts the search from the warrant requirement"). In *Cupp*, the United States Supreme Court concluded that police were authorized in collecting scrapings from under the suspect's fingernails because they had probable cause to arrest him for his wife's murder. Even though the defendant in *Cupp* was not formally under arrest at the time of the search, we find the analysis in that case instructive here. As here, *Cupp* involved the mere harvesting of particles from the surface of the suspect's body.[12] We conclude that GSR swabs of a lawfully arrested suspect's body surface are permissible without regard to individualized suspicion, exigent circumstances, probable cause, or prior judicial approval. Proposition V is denied.

¶22 In Proposition VI, Appellant challenges the trial court's restitution award at sentencing. The court ordered Appellant to pay $4,966.50 to the Crime Victim's Compensation Fund. The record includes no indication as to how this figure was calculated. A restitution order may only include those losses which are determinable with reasonable certainty. *Honeycutt v. State*, 1992 OK CR 36, ¶ 31, 834 P.2d 993, 1000; 22 O.S.Supp.2014, § 991a(A)(1)(a); 22 O.S.2011, § 991f.[13] Appellant did not object to the restitution award below, so we review only for plain error. *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923. We find (and the State concedes) that the trial court plainly erred in assessing restitution without some record evidence to support the award, and we further find that Appellant was financially prejudiced by the assessment. The restitution award is therefore **VACATED**.

¶23 In Proposition VII, Appellant claims he was denied his Sixth Amendment right to reasonably effective trial counsel. His first set of complaints are based on the record made below. To obtain relief, Appellant must establish both deficient performance and a reasonable probability of resulting prejudice. In other words, he must show that counsel made an objectively unreasonable decision which undermines confidence in the outcome of the trial. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984); *Sanchez v. State,* 2009 OK CR 31, ¶ 98, 223 P.3d 980, 1012. Failure to prove either deficient performance or resulting prejudice is fatal to an ineffective-counsel claim. *Malone v. State,* 2013 OK CR 1, ¶ 14, 293 P.3d 198, 206.

¶24 Appellant claims trial counsel was ineffective for failing to preserve the complaints raised in Propositions I through VI. Propositions I and II challenged the sufficiency of the evidence supporting Appellant's convictions; trial counsel adequately preserved those challenges by demurring to the State's evidence. Counsel's failure to request instructions on Second Degree Murder (Proposition III) was not prejudicial, since neither the State's evidence nor the defense theory reasonably supported them. Counsel's failure to object to references to Appellant's outstanding warrants, and counsel's own exploration of the gang affiliations of various parties (Proposition IV), do not establish deficient performance; the former were properly admitted as part of the *res gestae*, and the latter were counsel's reasonable attempt to impeach the credibility of the State's chief witness and demonstrate his bias. Counsel's failure to challenge the taking of the GSR swabs as an unconstitutional search resulted in no prejudice; we rejected that claim on the merits in Proposition V. Counsel's failure to require evidence to support the restitution award (Proposition VI) may have been deficient performance, but the issue is moot since we have granted relief on that claim. *Miller v. State,* 2013 OK CR 11, ¶ 243, 313 P.3d 934, 1004-05.

¶25 Appellant's next set of complaints about his trial counsel involve matters outside the record, which he has provided in an Application for Evidentiary Hearing, pursuant to Rule 3.11(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2018). Our task here is not to conclusively decide whether trial counsel rendered deficient performance, but only to decide whether the materials submitted in support of that claim show, by clear and convincing evidence, a strong possibility that trial counsel was ineffective for failing to utilize or identify the evidence in question, such that further fact-finding, through an evidentiary hearing, is warranted. Rule 3.11(B)(3), *id.*

¶26 Appellate defense counsel provides video interviews and affidavits from two people who suggested that Appellant was not responsible for Brewer's murder.[14] Both interviews were conducted by law enforcement during the investigation of this case. Appellant claims that counsel should have done something with this evidence at trial. There are several problems with this argument. First, neither witness claimed to have personal knowledge of who killed Brewer, but rather reported what they had heard. Second, setting aside the hearsay problems, the two accounts of who might have been involved in the murder were not consistent with each other, and neither was particularly coherent in itself. Third, neither account is supported by corroborating evidence of any kind.[15] Finally, neither witness claims they would be willing to testify in court. In fact, appellate counsel filed their statements under seal, claiming their lives would be jeopardized if their accusations were made public. There was little, if any, practical use for defense counsel to eke out of this information.[16]

¶27 Appellant also submits crime-scene photographs provided to trial counsel in discovery which, he claims, suggest the possibility of cross-contamination of physical evidence. Police collected evidence at the motel room where Brewer was murdered; they also found a

sweatshirt, backpack, and pistol behind a nearby building. From the photographs Appellant submits, it appears that (1) police removed the pistol from the backpack, removed shells from the pistol, and photographed the pistol and shells lying on top of the sweatshirt; and (2) police took the pistol to the motel room and photographed it resting on a bed inside the room (with an evidence sack shielding the pistol from the bedspread).

¶28 Appellant claims these photographs indicate the possibility of cross-contamination of DNA material among different pieces of evidence. As for the pistol and shells lying on top of the sweatshirt, it is unclear how this could have caused any contamination. No usable DNA was retrieved from the sweatshirt, and there is no evidence that the shells themselves were even tested. As for the pistol photographed in the motel room, the implication seems to be that the DNA retrieved from it could have been picked up from the motel bed, *i.e.* in the immediate area where Brewer was shot. But Appellant never claimed any connection to the gun. Given that DNA found on the gun was consistent with Appellant's profile to some degree, a claim of possible cross-contamination between the gun and the motel bedspread could easily have backfired (so to speak), because the only way Appellant's DNA could have gotten on the bed (later to be transferred to the gun) was if he had, in fact, been exactly where the shooting occurred, as Crowley testified. In conclusion, the supplementary materials Appellant has presented to this Court do not show, by clear and convincing evidence, a strong possibility that trial counsel was ineffective, to the extent that additional fact-finding on the issue would be warranted. Rule 3.11(B), *Rules of the Oklahoma Court of Criminal Appeals; Simpson v. State*, 2010 OK CR 6, ¶ 53, 230 P.3d 888, 905-06. Appellant's request for an evidentiary hearing is DENIED, and Proposition VII is also denied.

¶29 In Proposition VIII, Appellant claims his sentences are excessive under the circumstances. He specifically claims the trial court abused its discretion when it ordered his ten-year sentence on Count 2 to be served consecutively to his sentence of life imprisonment without parole on Count 1. We disagree. The jury imposed the maximum terms available for both crimes after being properly instructed on the matter. If one believes Crowley's version of events, Appellant shot an unarmed man over a debt. The evidence did not support a conclusion that the homicide was planned in advance, but once the shooting started, it did not stop until the gun was empty. Crowley testified he tried to stop the shooting, and tried to help Brewer hide in the bathroom as the bullets flew; the gunman continued firing at the bathroom door. Considering all the facts and circumstances, we cannot say the jury's sentence recommendation is shocking to the conscience, or that the trial court abused its discretion in ordering consecutive service. *Rea v. State*, 2001 OK CR 28, ¶ 5, 34 P.3d 148, 149; *Henderson v. State,* 1985 OK CR 22, ¶ 25, 695 P.2d 879, 884. Proposition VIII is denied.

¶30 In Proposition IX, Appellant claims the cumulative effect of all errors previously raised warrants relief. We identified one plain error in Proposition VI, and have already granted the appropriate relief. *See Bell v. State,* 2007 OK CR 43, ¶ 14, 172 P.3d 622, 627. Having identified no errors in the remaining claims, we have no error to accumulate. *Sanders v. State*, 2002 OK CR 42, ¶ 17, 60 P.3d 1048, 1051. Proposition IX is denied.

DECISION

¶31 The Application for Evidentiary Hearing on Sixth Amendment Claim is **DENIED**. The District Court's restitution award is **VACATED.** In all other respects, the Judgment and Sentence of the District Court of Comanche County is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2019), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF COMANCHE COUNTY

THE HONORABLE GERALD NEUWIRTH, DISTRICT JUDGE

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

LUMPKIN, JUDGE: CONCUR IN RESULTS

¶1 I concur in affirming the Judgment and Sentence in this case but write separately. While I agree that GSR swabbings can legally be taken from a defendant as incident to a lawful arrest, I find two objections to the analysis raised in Proposition V.

¶2 First, because no objection to the GSR swabs was made at trial and no record developed to explain how and when the swabs were taken, the issue is waived for all but plain error review. If the allegation meets all of the requirements for review under the *Simpson* and *Hogan* test, a harmless error analysis may be applied. However, the plain error analysis does not begin by categorizing the type of harmless error analysis that will be applied. If a waived error satisfies all the requirements to receive plain error review, and the error is a constitutional error, then I agree that an analysis under *Chapman* applies.

¶3 Since the opinion admits no objections were made to the GSR swabs and the record was not sufficiently developed in this case to make an adjudication on the facts, then no error has been shown and the discussion in Proposition V is mere dicta and renders our opinion merely advisory. This Court has historically refused to give advisory opinions. *Canady v. Reynolds,* 1994 OK CR 54, ¶ 9, 880 P.2d 391, 394; *Matter of L.N.*, 1980 OK CR 72, ¶ 3, 617 P.2d 239, 240. Our decisions must be made on the facts of each case and not on speculation or mere opinion. For those reasons, footnote 12 should be deleted and the broad all in-compassing sentence at the conclusion to Prop. V should be refined to fit the facts set out in the opinion.

¶4 I continue to believe the law dictates that material placed in footnotes is mere dicta and cannot be a holding of the Court. *See Mathis v. State*, 2012 OK CR 1, ¶ 5, 271 P.3d 67, 79 (Lumpkin, J. concurring in result); *Taylor v. State*, 2011 OK CR 8, ¶ 3, 248 P.3d 362, 380 (Lumpkin, J., concurring in result); *Jackson v. State*, 2006 OK CR 45, ¶ 1, 146 P.3d 1149, 1168 (Lumpkin, V.P.J., concurring in result); *Cannon v. State*, 1995 OK CR 45, ¶ 2, 904 P.2d 89, 108 (Lumpkin, J., concurring in result). Setting forth the law in footnotes leads to confusion as to what is controlling precedent. Such confusion can be extinguished by properly placing the holding of the Court in the body of the opinion where it belongs.

¶5 Footnotes can be distracting and take the readers' focus away from the main issues of the case. For example, footnotes 14 and 15 in this case refer to material outside the record; material which is not proper for this Court's consideration in the resolution of this appeal. Therefore, I find footnotes 14 and 15 in particular unnecessary.

¶6 Additionally, in Proposition VI, I find that instead of merely vacating the restitution award, the assessment should be remanded to the District Court for a proper determination of restitution.

KUEHN, JUDGE:

1. The trial court ordered the two sentences to be served consecutively.

2. Appellant also asks us to consider whether the evidence for Count 1 alternatively supported a conviction for Second Degree Murder, and he asks us to consider material which was not presented to his jury. We defer consideration of those issues to Propositions III and VII, respectively; here we focus on whether the evidence presented at trial supports convictions for the charged crimes.

3. DNA experts typically give the "random match probability," which is the likelihood of finding a match between the unknown sample and an unrelated person in the general population. This ratio, by itself, contains no information and provides no inference about the suspect; it is based solely on comparing the sample to a database of genetic profiles. A more relevant piece of data is the "likelihood ratio," which assumes that the suspect's profile matches the sample. Given that the suspect has the same profile, the likelihood ratio estimates *how much more likely it is* that *he* is the source of the evidence, as opposed to some randomly selected member of the population unrelated to him. *See State v. Bander,* 208 P.3d 1242, 1250 (Wash.App. 2009) (emphasis added). In the usual case, "the likelihood ratio is the reciprocal of the probability of a random match." *Id*. (citation omitted). Here, the OSBI's DNA expert testified that the odds of finding a random match between the revolver sample, and an unrelated individual in the general population, were 1 in 26.

4. Appellant makes much of the fact that only five particles of gunshot residue were detected, but this ignores the import of the relevant expert testimony. The criminalist who analyzed the GSR swabs testified that each "stub" is examined under an electron microscope for particles comprised of three particular elements. Due to workload constraints, the examination is concluded once five particles are detected. This does not mean that only five such particles adhered to the swab.

5. In *Ex parte Hayes*, 6 Okl.Cr. 321, 118 P. 609, 614 (1911), Judge Furman described the situation this way:

> No chain is stronger than its weakest link, and will never pull or bind more than its weakest link will stand. With its weakest link broken, the power of the chain is gone; but it is altogether different with a cable. Its strength does not depend upon one strand, but is made up of a union and combination of the strength of all its strands. No one wire in the cable that supports the suspension bridge across Niagara Falls could stand much weight, but when

these different strands are all combined together they support a structure which is capable of sustaining the weight of the heaviest engines and trains. We therefore think that it is erroneous to speak of circumstantial evidence as depending upon links, for the truth is that in cases of circumstantial evidence each fact relied upon is simply considered as one of the strands, and all of the facts relied upon should be treated as a cable.

6. It appears defense counsel was attempting to impeach Crowley's credibility by showing some sort of gang-related bias. Defense counsel merely asked Crowley if he "believed" Appellant was in a criminal gang; Crowley's reply was, "I already knew he was a gang member." Counsel followed up by asking about the gang affiliations of Crowley himself, as well as of Brewer and members of Crowley's family. Defense counsel may have initially received more of an answer from Crowley than she intended, but the fact remains, she opened the door to Appellant's possible gang affiliation. Defense counsel also elicited testimony from Detective Diaz concerning the gang affiliations of others besides Appellant. In Proposition VII, Appellant faults trial counsel for not presenting evidence that he had ties to a street gang.

7. *Chapman* requires that, any error of constitutional importance, whether or not it is preserved for objection, cannot be held harmless unless the State shows that it was harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 24, 87 S.Ct. at 828.

8. In such situations, we have often declined to attempt any further analysis of the issue belatedly raised, as it is the defendant's responsibility to present this Court with sufficient record to address any claim brought on appeal. *See e.g. Ferguson v. State*, 1984 OK CR 32, ¶ 3, 675 P.2d 1023, 1025-26 (admissibility of eyewitness identification); *Dollar v. State*, 1984 OK CR 1, ¶ 7, 674 P.2d 48, 50 (declaration of mistrial); *Pierce v. State*, 1972 OK CR 82, ¶ 6, 495 P.2d 407, 409 (legality of residential search). *See also United States v. Easter,* 981 F.2d 1549, 1556 (10th Cir. 1992) ("plain error review is not appropriate when the alleged error involves the resolution of factual disputes"); *United States v. Smith,* 131 F.3d 1392, 1397 (10th Cir. 1997) (plain-error review unavailable without sufficient factual development of the issue below).

9. For example, while it appears from the record that no warrant was sought to conduct the swabs, we do not know if Appellant verbally consented to them – and a valid consent would vitiate any Fourth Amendment concerns. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S.Ct. 2041, 2047, 36 L.Ed.2d 854 (1973); *Underwood v. State*, 2011 OK CR 12, ¶ 33, 252 P.3d 221, 238. Furthermore, as Appellant concedes, "exigent circumstances" may permit the search or seizure of evidence from a suspect's body without a warrant. *See generally Missouri v. McNeely,* 569 U.S. 141, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013). But whether such exigencies were present here is unknown, because – again – there was no timely Fourth Amendment challenge, and no hearing to develop such evidence. Appellate defense counsel hints at these problems by admitting the record is not "completely clear" on the sequence of events leading up to the taking of the swabs.

10. Appellant analogizes GSR swabs to the taking of buccal swabs for DNA testing, which the United States Supreme Court has held is sufficiently invasive to constitute a "search" of the suspect's body, therefore falling under the purview of the Fourth Amendment. *See Maryland v. King,* 569 U.S. 435, 133 S.Ct. 1958, 186 L.Ed.2d 1 (2013). But even in *King*, the harvesting of identifying genetic material from an arrestee, without a warrant, was condoned. The buccal swabs in *King* were taken pursuant to a Maryland law requiring anyone arrested for a serious crime to provide a DNA sample. The Court weighed the characteristics of the intrusion against the legitimate needs of law enforcement, and concluded that while the warrantless buccal swab was indeed a "search," it was not an "unreasonable" one under the circumstances. *Id*. at 463-64, 133 S.Ct. at 1979.

11. *See e.g. Comm. v. Simonson*, 148 A.3d 792, 798-801 (Pa.Super. 2016); *Jones v. State,* 74 A.3d 802, 812-13 (Md.App. 2013) and cases cited at n.8 therein; *United States v. Johnson*, 445 F.3d 793, 795-96 (5th Cir. 2006).

12. The fact (established at trial) that gunshot residue can quickly be cast off, or brushed off, suggests a GSR swab might be permitted under the "exigent circumstances" exception to the Fourth Amendment's warrant requirement. In *Cupp*, the Supreme Court emphasized not only that the police had probable cause to arrest the suspect for his wife's murder, but also the particular exigencies of the situation: after refusing the officers' request to inspect his fingertips, the suspect began rubbing his hands together and then thrust them into his pockets, which prompted the officers to restrain him and conduct their search. *Cupp*, 412 U.S. at 296, 93 S.Ct. at 2004. If Appellant had not been under arrest at the time the swabs were taken, the exigencies of the situation might bear on our analysis – although, again, the record was not developed on this point because Appellant did not raise his constitutional challenge below. But the undisputed fact that Appellant was lawfully under arrest at the time of the swabbing is all that is needed to fulfill the "incident to arrest" exception.

13. While the law allows a victim to be compensated for up to three times his economic loss, 22 O.S.2011, § 991f, obviously that calculation must begin with some relatively concrete assessment of loss.

14. These materials also include a list of claims purportedly from a third person, but this document is neither signed nor notarized, and we decline to consider it.

15. Witness 1 was interviewed in a Texas jail at the request of Lawton authorities. He refused to divulge the name of the supposed killer. He claimed his life would be in jeopardy if he did – but then he also claimed the information was valuable, and that Lawton authorities would "make a lot of money" if he exposed the culprit. On the other hand, Witness 1 suspected Lawton authorities would just dismiss him as "some loony" because he was jailed in the "psych tank." He said Appellant and Brewer were friends, but conversely claimed Appellant voluntarily took the blame for Brewer's murder out of obligation to his (Appellant's) gang – and was willing to spend the rest of his life in prison, for a crime he did not commit, because it was safer than being on the streets with the information he knew about the real killer. At one point, Witness 1 claimed a woman (whom he also refused to name) was the mastermind of Brewer's murder. He claimed he was "more of a detective than the detectives," and said that "he had the answer." "What it all comes down to," Witness 1 said, is the Comanche County Sheriff. He began describing a vast conspiracy, a "deep intricate circle" involving the sheriff, who (he claimed) was the head of a methamphetamine distribution network. Witness 1 said he feared being killed if he testified on Appellant's behalf, and suggested he might disavow anything he had said if forced to testify.

Witness 2 had a different account, claiming she had "heard" Brewer was killed by someone other than Appellant in retaliation for Brewer's rape of the murderer's daughter. This witness, an admitted methamphetamine user who was in jail at the time of her police interview, claimed this other suspect – whom she never met until two months *after* Brewer's death – sexually assaulted her and claimed, during the assault, that he had killed Brewer. Witness 2 claimed this person admitted to "emptying the clip" into Brewer's face. The interviewing detective explained to Witness 2 that that was not how Brewer was killed (the gun used to kill Brewer was not a firearm with a "clip," and no shells were found at the scene). After the interviewing detective explained his knowledge of the same people this witness knew, and the circumstances surrounding Brewer's death, Witness 2 appeared to change her mind and believe Appellant was, in fact, the culprit. She conceded that the alternative suspect may have just been trying to scare her, and to give himself "street credibility" by claiming he had killed a man. Witness 2 also bolstered Crowley's credibility to some extent: she was personally acquainted with him, and agreed he was a de facto mediator among various gang factions in Lawton.

16. In fact, the record shows that defense counsel did the best she could with this information. The only witness presented by the defense was the lead detective on the case. After eliciting various facts to impeach the credibility of eyewitness Crowley, defense counsel questioned the detective about video interviews with people who claimed to have information about other possible suspects, even after Appellant was bound over for trial – thus attempting to show that police had concerns about whether they had the "right man," even after Appellant was formally charged.

17. Appellant claims concurrent sentencing is in order because, in the punishment stage, the jury asked the trial court, "Does the 10 years go on top of life with parole," and the trial court responded, "You have received all the evidence and instructions that apply in the case." The trial court's response was entirely proper: that decision was within the trial court's discretion, not the jury's. Appellant suggests the jurors sentenced him to life without parole because they were "confused," but there was no confusion here. It is indeed possible that, having received the court's answer, the jury wanted to make sure Appellant spent the rest of his life in prison, but that decision was not the product of any missing or erroneous information.


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Calendar of Events

March

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

7 **OBA Lawyers Helping Lawyers Discussion Group;** 6 p.m.; Office of Tom Cummings, 701 NW 13th St., Oklahoma City, OK 73012; RSVP to Jeanie Jones 405-840-0231

8 **OBA Estate Planning, Probate and Trust Section meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact A. Daniel Woska 405-657-2271

OBA Law Day Committee meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City with BlueJeans; Contact Kara Pratt 918-599-7755

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

11 **OBA Board of Governors meeting;** 5 p.m.; Oklahoma Bar Center, Oklahoma City; Contact John Morris Williams 405-416-7000

12 **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

13 **Estate Planning, Probate and Trust Section meeting;** 11:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact A. Daniel Woska 405-657-2271

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

15 **OBA Lawyers Helping Lawyers Assistance Program Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Hugh E. Hood 918-747-4357 or Jeanne Snider 405-366-5466

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

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

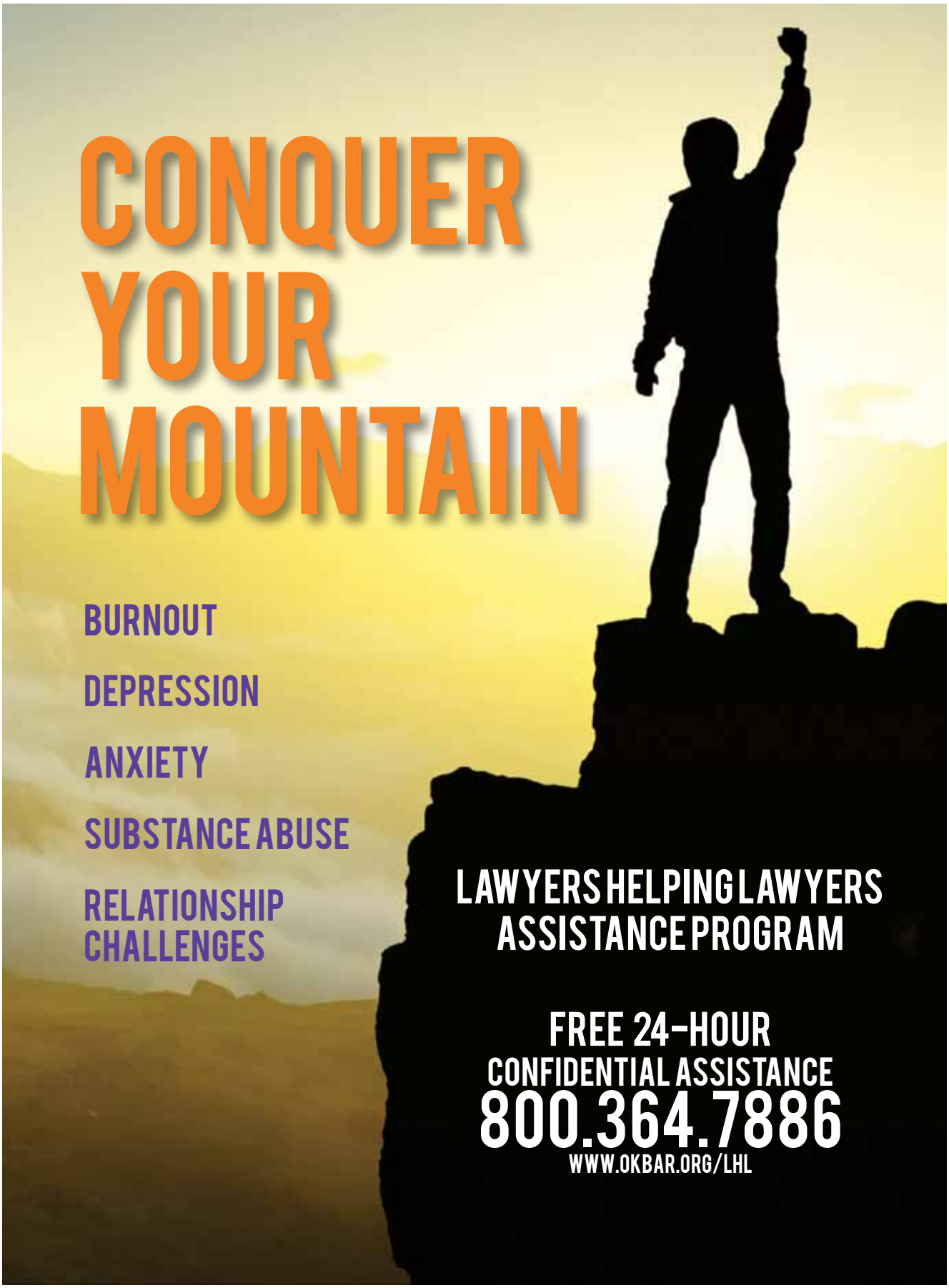
20 **OBA Indian Law Section meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Wilda Wahpepah 405-321-2027

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

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

27 **OBA Financial Institutions and Commercial Law Section meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Miles T. Pringle 405-848-4810

28 **OBA Immigration Law Section meeting;** 11 a.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Lorena Rivas 918-585-1107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2019 OK CIV APP 8

WAVELAND DRILLING PARTNERS III-B, LP, WAVELAND RESOURCE PARTNERS II, LP, WAVELAND DRILLING PARTNERS 2011-B, LP, AND WAVELAND DRILLING PARTNERS III-A, LP, Plaintiffs/Appellees, vs. NEW DOMINION, LLC, Defendant/ Appellant.

Case No. 115,629. July 20, 2018

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE PATRICIA G. PARRISH, TRIAL JUDGE

AFFIRMED

Jayne Jarnigan Robertson, JAYNE JARNIGAN ROBERTSON, P.C., Oklahoma City, Oklahoma, for Plaintiffs/Appellees,

Billy M. Croll, HARTZOG, CONGER, CARSON & NEVILLE, Oklahoma City, Oklahoma, and

Fred M. Buxton, General Counsel, Tulsa, Oklahoma, and

Stephen Q. Peters, TOMLINS & PETERS, PLLC, Tulsa, Oklahoma, for Defendant/Appellant.

Barbara G. Swinton, Presiding Judge:

¶1 Defendant/Appellant New Dominion, LLC (NDL) appeals from a temporary injunction granted in favor of Plaintiffs/Appellees Waveland Drilling Partners 2011-B, LP, Waveland Drilling Partners III-A, LP, Waveland Drilling Partners III-B, LP, and Waveland Resource Partners II, LP (Waveland) in the District Court for Oklahoma County on December 9, 2016. NDL asserts that it was denied due process by the entry of a temporary injunction without an evidentiary hearing, and that the temporary injunction was improperly granted under the facts presented. We affirm.

BACKGROUND

¶2 Waveland instituted an action against NDL seeking a money judgment and declaratory judgment related to the Restated and Amended Eight East Participation Agreement (Participation Agreement) between the parties. Under the Participation Agreement, the Eight East Participants, who include Waveland, sell gas from wells to the first purchaser of gas, who then remits payment to NDL as contract operator of the wells. NDL is required to remit the gas sales payments to the Eight East Participants, including Waveland, their royalty owners, and the State of Oklahoma for gross production taxes. In July of 2014, NDL was removed as operator of the gathering system by a majority vote of the participants. NDL continues to serve as contract operator of wells under the Participation Agreement, but was notified in January 2016 that its right "to market, collect the revenues from the Gas (including natural gas liquid hydrocarbons and oil separated at the wellhead or collected along the Gathering System) and to distribute the net proceeds therefrom" was terminated by the agreement of a majority of the Participants. NDL was also notified that the parties had agreed that Hunton would take over its obligations. Hunton then began selling condensate collected from the Gathering System to Enerfin. When NDL learned of the agreement with Enerfin, it demanded that Hunton deliver the proceeds received on condensate sales to NDL so that the proceeds could be disbursed to the participants and royalty owners.

¶3 NDL withheld from natural gas proceeds which were held in trust for Waveland $70,000.00, the amount that it estimated due for condensate sales in the month of September 2016. Waveland claimed that NDL then threatened to distribute the $70,000.00 to third parties, including other working interest owners, royalty owners, and the Oklahoma Tax Commission.

¶4 Waveland sought and obtained an emergency *ex parte* restraining order (TRO) on No-vember 20, 2016, precluding NDL from distributing the amount "offset" from Waveland proceeds and from making further offsets. NDL filed an objection and motion to vacate the TRO, and issued a notice of hearing for November 28, 2016. Hearings were held on November 28, December 2, and December 6, 2016. A temporary injunction was issued in

favor of Waveland on December 10, 2016. NDL appeals from this order.

STANDARD OF REVIEW

¶5 An action involving the grant or denial of injunctive relief is equitable in nature. An order granting an injunction will not be reversed unless the trial court abused its discretion or the decision is clearly against the weight of the evidence. *Dowell v. Pletcher,* 2013 OK 50, ¶ 5, 304 P.3d 457.

ANALYSIS

¶6 NDL argues that it was denied due process below because Waveland failed to give NDL adequate notice of their emergency *ex parte* motion for temporary restraining order; Waveland's reason for failing to give notice was "contrived"; and the TRO changed the status quo. NDL also argues that it was deprived of due process by entry of the temporary injunction, and that the temporary injunction is unsupported by law or evidence.

Temporary Restraining Order

¶7 NDL first asserts that it was not given adequate notice of the emergency *ex parte* temporary restraining order, and that Waveland's reason for failing to give notice was insufficient. Waveland argues that NDL's propositions of error relative to the TRO are improperly raised because a TRO is not an appealable order. In its brief, NDL argues that the TRO should be vacated. However, Waveland is correct in its assertion that a temporary restraining order loses its force once a temporary injunction is acted upon by the court. J*ennings v. Elliot*, 1939 OK 554, 97 P.2d 67. Further, a refusal to vacate a temporary restraining order is not an appealable order. *Clonts v. State ex rel., Dept. of Health*, 2005 OK 66, ¶ 3 fn. 2, 124 P.3d 224. Accordingly, to the extent that NDL challenges the TRO, or the court's refusal to vacate the TRO, the arguments will not be considered on appeal. 12 O.S. § 993 (A) (2).

Temporary Injunction Hearing

¶8 NDL argues that it was deprived of due process by the entry of the temporary injunction because the only matter pending before the court at the hearing on November 28, 2016 was NDL's motion to vacate. NDL also argues that the court's consideration and entry of a temporary injunction was improper because Waveland never filed a motion for temporary injunction; Waveland argues that its amended petition sought injunctive relief, and that it was not required to file a separate motion for temporary injunction.

¶9 Okla. Stat. Ann. tit. 12, § 1382 provides that when it appears from the petition "that the plaintiff is entitled to the relief demanded, . . . or when, during the litigation, it appears that the defendant is doing, or threatens, or is about to do or is procuring or suffering to be done, some act in violation of the plaintiff's rights respecting the subject of the action, and tending to render judgment ineffectual, a temporary injunction may be granted to restrain such act." Section 1383 of the same title provides that the injunction "may be granted at the time of commencing the action, or any time afterwards . . . upon its appearing satisfactorily to the court or judge, by the affidavit of the plaintiff or his agent, that the plaintiff is entitled thereto." Although 12 O.S. § 1384.1 (D) provides the procedure for the award of an injunction following the entry of a temporary restraining order, it does not explicitly require that a separate motion be filed. Rather, it sets forth the requirement that a hearing be set at the earliest possible time. Furthermore, the Oklahoma statutes regarding injunctions, 12 O.S. § 1381 *et seq.*, do not contain any provision mandating an evidentiary hearing. It is within the trial court's discretion to determine whether a temporary injunction will be decided on pleadings and affidavits. A hearing on a temporary injunction is not intended to be a full scale hearing on the merits, and the kind of evidence allowed is within the discretion of the court. *See Jennings v. Elliot*, 1939 OK 554, 97 P.2d 67.

¶10 Waveland requested injunctive relief on its claims in its amended petition. The TRO was issued on November 10, 2016. Following the issuance of the TRO, NDL filed an objection to the emergency TRO, a motion to vacate the TRO, and a notice of hearing on that response was issued by NDL on November 10, 2016 for a November 28 hearing. In its objection, NDL stated that Waveland was not "entitled to the equitable relief of a preliminary injunction," and requested that Waveland's "request for injunctive relief" be denied. At the November 28 hearing, the court announced that the parties were present on the "show cause as to whether a temporary injunction should be entered," as well as NDL's motion to vacate the TRO. No objection was made regarding the type of proceeding or issues before the court on November 28, 2016. The parties returned on

December 2, 2016 to discuss whether they had reached an agreed order, and to determine whether the court would make a ruling at that time. Likewise, no objection was made at this hearing. Finally, the parties came before the court for a third time on December 6, 2016 to finalize the issues. The parties indicated that they did not reach an agreement, and the court indicated that it would enter an injunction. NDL objected to the court's procedure at that time. A temporary injunction was entered on December 9, 2016.

¶11 A party who appears and participates in a hearing will not be heard to complain on appeal about the sufficiency of notice. *Adoption of D.M.J.*, 1985 OK 92, 741 P.2d 1386 (overruled on other grounds by *Matter of Baby Boy L.*, 2004 OK 93, 103 P.3d 1099). Further, the function of notice is to state the time, place, and purpose of the hearing to persons entitled to notice so they may attend the hearing and express their views. It must be shown that the person complaining that there was not adequate time to prepare exercised due diligence during the period which he had to prepare. *First Nat. Bank v. Oklahoma Sav. and Loan Bd.*, 1977 OK 171, 569 P.2d 993, 997. NDL issued notice for the November 28, 2016 hearing. The transcript reflects the fact that the court was considering issuing a temporary injunction following the hearing. Although it was not issued at that time, there were two additional hearings on the matter over the span of a week. It was not until the conclusion of the third hearing that NDL raised the issue of adequate notice.

¶12 The trial court's consolidation of the issues was proper under the circumstances. As noted by the Supreme Court in *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers Local No. 70 of Alameda County,* 415 U.S. 423, 94 S. Ct. 1113, 39 L.Ed.2d 435 (1974):

> Situations may arise where the parties, at the time of the hearing on the motion to dissolve the restraining order, find themselves in a position to present their evidence and legal arguments for or against a preliminary injunction. In such circumstances, of course, the court can proceed with the hearing as if it were a hearing on an application for a preliminary injunction.

Of course, it is still the burden of the party seeking injunctive relief to demonstrate that the factors justifying injunctive relief are met. *Id.* Consolidation of the issues might not be proper where it appears from the record that the parties "are not prepared and do not intend at the hearing on the motion to dissolve or modify the temporary restraining order to present their cases for or against a preliminary injunction." *Id*.[1]

¶13 We do not find that it was an abuse of the trial court's discretion to consider the issue of a temporary injunction at the November 28, 2016 hearing. Not only did NDL fail to raise the issue at the initial hearing when it was clear that a temporary injunction was being considered by the court, it also had two additional opportunities to either raise the issue, or bring forth additional evidence and/or witnesses to oppose Waveland's request. Furthermore, nothing in the record indicates that Waveland's burden to establish a right to injunctive relief was altered in any way as a result of the procedure.

The Court Did Not Err in Granting a Temporary Injunction

¶14 The purpose of a temporary injunction is to maintain the status quo; however, injunctive relief may also be granted "when the need is urgent and the right is clear." *State ex rel. State Highway Commission v. Gillam,* 1940 OK 390, 105 P.2d 773, 775. To obtain a temporary injunction, a plaintiff must show that four factors weigh in their favor: 1) the likelihood of success on the merits; 2) irreparable harm to the party seeking the relief if the injunction is denied; 3) their threatened injury outweighs the injury the opposing party will suffer under the injunction; and 4) the injunction is in the public interest. *Edwards v. Board of County Commissioners of Canadian County*, 2015 OK 58, ¶ 12, 378 P.3d 54. However, pursuant to 60 O.S. §§ 175.57 (B) (2) and (3), a trial court may enjoin a trustee from committing a breach of trust, and may also "compel the trustee to redress a breach of trust by payment of money or otherwise."

¶15 Waveland asserted below that NDL was required, under the Participation Agreement, to establish and maintain a separate account for the sole purpose of maintaining and disbursing revenues to the participants in their proportionate share of revenues. Waveland further asserts that as a custodian and fiduciary of the account for the exclusive benefit of the participants, NDL was not entitled to disburse the funds outside of the terms of the agreement. NDL argued that an injunction would change the status quo because it would allow

Hunton to distribute revenue to the Waveland entities instead of NDL. It also argues that Waveland failed to establish a probability of success on the merits and irreparable harm sufficient to warrant injunctive relief.

¶16 The trial court found that if not enjoined, NDL would distribute the revenue payments, as condensate sales proceeds, to the Participants and their royalty owners, and will pay gross production taxes on a $70,000.00 fictional sales amount. If the funds were distributed, the court noted, the owners and the State of Oklahoma would be "grossly overpaid" based upon actual sales at the sole cost of Waveland and to the confusion of all owners and the Oklahoma Tax Commission. The court further noted that these payments would be duplicative of other's payments of actual condensate sales proceeds received. The court ultimately found that Waveland had shown a likelihood of success on the merits, that there would be no harm to NDL if the order was entered, that an injunction is in the public interest and that it is necessary to safeguard Waveland's property from being used, transferred, diverted, distributed, paid or commingled without Waveland's consent and to its detriment, and that if NDL were to pay out the funds, it would be a breach of an express trust which may be enjoined under 60 O.S. § 175.57 without a showing of irreparable harm.

¶17 We disagree with NDL's contention that injunctive relief was improperly granted because it would change the status quo. Instead, as noted in *Dusabeck v. Local Bldg. & Loan Assn.*, 1936 OK 769, 63 P.2d 756, "the status quo which will be preserved by preliminary injunction is the last actual, peaceable, noncontested status which preceded the pending controversy, and equity will not permit a wrongdoer to shelter himself behind a suddenly or secretly changed status, though he succeeded in making the change before the chancellor's hand actually reached him." We reject NDL's argument in this regard.

¶18 We next consider NDL's arguments that Waveland failed to show a reasonable probability of success on the merits, and a reasonable probability of irreparable harm. However, we note that NDL has failed to present any argument or authority in support of the contention that there was no showing of a likelihood of success on the merits except for asserting a lack of evidence. NDL has argued that the court's interpretation fails to apply the entire contract, without showing where in the record this is the case. It is not the appellate court's duty to search the record for evidence to support a party's position. In interpreting the Participation Agreement, the court found that NDL proceeds as a fiduciary and in trust for Waveland, and based upon our review of the record, we cannot say that this was an abuse of discretion. *See Girdner v. Girdner,* 1959 OK 50, 337 P.2d 741; 60 O.S. § 175.6. We also agree with the trial court that NDL may be enjoined pursuant to 60 O.S. § 175.57 without a showing of irreparable harm; this section allows a trial court to enjoin a trustee from committing a breach of trust, as well as compel a trustee to redress a breach of trust by payment of money or otherwise. A statutory basis for injunctive relief is governed by the requirements of the statute, and express statutory language supersedes common-law requirements. 42 Am.Jur.2d § 25. Finally, we note that the court could have relied upon evidence of irreparable harm anyway, due to the complex accounting which would be required if NDL's actions had not been enjoined, the potential for duplicative and incorrect payments to be made, as well as a possibility of having to pursue the numerous transferees who receive the incorrect payments from NDL. *See Thompson v. North,* 1942 OK 346, 129 P.2d 1011; *Margaret Blair Trust v. Blair,* 2016 OK CIV PP 47, ¶ 20, 378 P.3d 65.

¶19 Based upon our review of the record, we do not find that the trial court's entry of the temporary injunction was an abuse of discretion or clearly against the weight of the evidence. We therefore AFFIRM the court's order.

¶20 AFFIRMED.

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

Barbara G. Swinton, Presiding Judge:

1. *See also, Anthony v. Barton,* 1945 OK 342, 196 Okla. 260, 265, 164 P.2d 642, 646, where the Oklahoma Supreme Court noted that it was within the trial court's discretion to hear more than just the motion to dissolve a temporary restraining order in one hearing by stating: "The court indicated that because of the volume of business and lack of time he was disinclined to hold several hearings in the matter and desired to dispose of it at one hearing. This was within the discretion of the court and no prejudice is shown to have resulted to defendant by such action. The findings and judgment of the court are clearly right and are sustained by the law and the evidence."

2019 OK CIV APP 9

WELLS FARGO BANK, N.A., Plaintiff, vs. PHONG LAM, Defendant/Appellee, and THANT T. PHAM; TINKER FEDERAL CREDIT UNION; HSBC BANK NEVADA, N.A.; CAPITAL ONE, N.A.; CAPITAL ONE

BANK, (USA), N.A.; OCCUPANT 1 (Real Name Unknown); OCCUPANT 2 (Real Name Unknown), Defendants, and STATE OF OKLAHOMA ex rel. OKLAHOMA TAX COMMISSION, Defendant/Appellant.

Case No. 116,440. December 7, 2018

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE ALETIA HAYNES TIMMONS, TRIAL JUDGE

AFFIRMED

Rex D. Brooks, Oklahoma City, Oklahoma, for Defendant/Appellee

Lee Pugh, GENERAL COUNSEL, Marjorie Welch, FIRST DEPUTY GENERAL COUNSEL, Mary Ann Roberts, ASSISTANT GENERAL COUNSEL, OKLAHOMA TAX COMMISSION, Oklahoma City, Oklahoma, for Defendant/Appellant

DEBORAH B. BARNES, PRESIDING JUDGE:

¶1 Defendant/Appellant State of Oklahoma ex rel. Oklahoma Tax Commission (the OTC) appeals from an order of the district court granting the motion of Defendant/Appellee Phong Lam (Lam) for sanctions against the OTC and awarding Lam's counsel "$2500.00 in attorneys fees and costs for the expenses and time expended in" seeking removal of a purported tax lien on Lam's property. We affirm.

BACKGROUND

¶2 On February 9, 2016, Plaintiff Wells Fargo Bank, N.A. filed a foreclosure petition in which it alleged Lam was in default on a purchase promissory note he executed on May 1, 2012, and alleged it was entitled to foreclose the mortgage securing payment of that note on certain real estate located in the Rock Knoll addition in Oklahoma County, Oklahoma (the subject property). Wells Fargo also alleged various entities, including the OTC, were made defendants in the foreclosure action because they may be claiming some interest in the subject property. Wells Fargo alleged: "[T]here appears of record in the office of the County Clerk of OKLAHOMA County, Oklahoma, a Tax Warrant No. ITI2011160629-00, entitled State of Oklahoma ex rel., Oklahoma Tax Commission vs. Phong Lam, in the amount of $60,196.88, filed May 20, 2011, in Book 11637, Page 22." It alleged that the OTC along with other named defendants "may be claiming some right, title, lien, estate, encumbrance, claim, assessment or interest in or to [the subject property]" that is adverse to and constitutes a cloud on Wells Fargo's title but that any such lien or interests are "subsequent, junior and inferior to the first mortgage lien" held by Wells Fargo.

¶3 The OTC filed its answer on March 14, 2016, in which it "admit[ted] an interest in the property pursuant to 68 O.S. § 231 and § 234, in the amount shown in the attached exhibit(s), together with interest and penalty according to law." The answer states, "[The OTC] prays that its tax warrants and or certificates of indebtedness be declared liens on the [subject] property described in [Wells Fargo's] Petition, and that its liens be prioritized and satisfied from the sale proceeds." The OTC requested the relief described in its answer.

¶4 Attached to the answer was a Tax Warrant numbered ITI2011160629-00, filed May 20, 2011, in Book #11637, Page #22, in Oklahoma County. The name of the taxpayer on the warrant was Phong Lam, and stated his address at Whispering Oak Road in Oklahoma City and his tax identification number as XXXXX0722S. The warrant stated the amount due at that time including penalty and interest was $60,196.88, and directed that it be filed in the same manner as a judgment.

¶5 Lam also filed an answer in March 2016, specifically denying, among other things, the allegations that the OTC and other named defendants had an interest in the subject property.

¶6 On March 18, 2016, Lam's attorney notified the OTC that the Phong Lam named in its tax warrant is not Lam, provided the OTC with Lam's full social security number, stated Lam "has been mistaken for the Phong Lam who has tax warrants on other occasions," and stated Lam has been successful in showing he is not the same Phong Lam listed on the tax warrants. Lam asked the OTC to "please withdraw [its] answer filed in [the foreclosure action] in which [it] claim[s] an interest in the real property which is the subject of the above referenced foreclosure action." The record shows no response by the OTC to Lam's request.

¶7 Four months later, on July 26, 2016, Lam's attorney sent the OTC another letter in which he enclosed a motion for sanctions against the OTC pursuant to 12 O.S. Supp. 2014 § 2011(B)(2)(3) & (C). Lam's attorney informed the OTC

he would not file the motion for twenty-one days "to give [the OTC] a chance to dismiss [its] claim for a Tax Warrant Lien on [the subject property] in [the foreclosure action] on the basis of Tax Warrant # ITI2011160629-00 against a Phong Lam with the last four digits social security number of 0722," which are not the last four digits of Lam's social security number as previously provided to the OTC in the March 2016 correspondence.

¶8 An email dated July 29, 2016, from the attorney for the OTC to the attorney for Wells Fargo and which was copied to Lam's attorney stated, as follows:

> I have attached correspondence from [Lam's attorney] which I received in regard to the [foreclosure] case. I wanted to make you aware of [Lam's attorney's] dispute as to whether you have named the OTC as a defendant in error. His letter is somewhat barking up the wrong tree as the OTC has no way of knowing who the mortgagee is or if the Phong Lam against whom the OTC has a lien is the same person as the mortgagee at issue. The OTC was named in this suit as a defendant with a tax warrant listed as required by 68 O.S. § 234. If the OTC has been improperly named, we would appreciate being dismissed from the suit.

The OTC did not, however, withdraw its answer.

¶9 On February 27, 2017, Lam filed a motion for sanctions against the OTC pursuant to 12 O.S. § 2011(B)(2)(3) & (C) and § 2011.1 "for filing a frivolous pleading by claiming frivolously that it has a Tax Warrant Lien against [Lam's] property." He asked that he be awarded attorney fees in the amount of $2,500 as a sanction against the OTC. On March 1, 2017, the OTC filed a "Withdrawal of Answer and Issuance of Disclaimer State of Oklahoma, ex rel. Oklahoma Tax Commission" in which it "disclaims its lien no. ITI2011160629-00 as it relates to the specific real estate involved in this action." It requested that it be "discharged with its costs."

¶10 A hearing on Lam's motion was held May 18, 2017.[1] In subsequent briefing ordered by the court, the OTC argued, among other matters, that its answer was not filed in violation of § 2011(B)(2) & (3) because the "OTC liens are issued in the form of a tax warrant against an individual taxpayer in the county of the last known address of the taxpayer," pursuant to 68 O.S. 2011 §§ 230 & 231. The "liens do not contain a legal description or address of a specific property, but attach to any property owned by the named taxpayer in that county." Because Lam's name is the same as the name on the tax warrant, the OTC argued that at the time it filed its answer, it "had no reason to believe that tax warrant ITI2011160629-00 was included incorrectly in the foreclosure." It argued its legal basis for filing an answer in the foreclosure proceeding is found in 68 O.S. 2011 §§ 231 & 234,[2] and there was evidentiary support for its answer because the main defendant in the foreclosure proceeding had the same name as the name on the tax warrant.

¶11 The OTC also argued that its action in filing its answer was not unreasonable because Wells Fargo asserted in its petition that the OTC may have an interest in the subject property and Wells Fargo had access to all relevant information including Lam's social security number and "chose to name the OTC" as a defendant. It argued, "The Answer of the OTC was filed in part based on the Petition of the Plaintiff, which was filed with this Court and which Defendant Phong Lam has not alleged to have been filed frivolously." This reliance on Wells Fargo's allegations and the OTC's limited resources, the OTC argued, show its actions were not in bad faith or without reason and, therefore, it should not be sanctioned.

¶12 In its order, the trial court found that after the OTC filed its answer, it was notified that the tax warrant "was on the wrong property and against the wrong person." Several months after that notice was given, the OTC was again asked to remove the lien from Lam's property and was given the statutory twenty-one days to remove the lien before sanctions would be filed. The trial court further found that two days after the sanctions motion was filed, the OTC "filed a disclaimer of the lien, but only removed it with relation to the [subject property], almost a year from the date the error was brought to [the OTC's] attention, and nine months after the proposed Motion for Sanctions was sent by counsel for [Lam]."

¶13 The trial court further found that while "the initial filing of the Tax Lien was in error, sometimes mistakes are made. What is baffling to the Court (and to which no reasonable explanation has been presented) is the extended delay in rectifying the mistake, which had and continues to have serious consequences for [Lam]." Referencing *State ex rel. Department of*

Human Services v. Hunt, 1992 OK CIV APP 115, 838 P.2d 544, the court found there was no reasonable basis for OTC's failure to remove a significant tax lien from the subject property

> and from the record of [Lam] for almost a year after [the OTC was] notified. In addition, the disclaimer filed in the case appears to still be valid against [Lam] in all respects, except for [the subject property]. There is no evidence that a Release of the Lien has ever been filed, or that the matter has been cleared up with respect to the lien's effect on other assets.

The court found the OTC's actions were unreasonable and without basis pursuant to 12 O.S. § 2011(B)(2) & (C). Based on the trial court's consideration and application of the factors in *State ex rel. Burk v. City of Oklahoma City*, 1979 OK 115, 598 P.2d 659, the court awarded Lam's counsel $2,500 in attorney fees and costs as a sanction against the OTC for the expenses and time expended in seeking to remove the lien.

STANDARD OF REVIEW

¶14 We review a sanction ruling for an abuse of discretion. To reverse for abuse of discretion, we must determine the trial court made a clearly erroneous conclusion and judgment, against reason and evidence. Although we examine and weigh any proof in the record, we abide the presumption that the lower court decision on the sanction question is legally correct and cannot be disturbed unless it is contrary to the weight of the evidence or to a governing principle of law.

Garnett v. Gov't Emps. Ins. Co., 2008 OK 43, ¶ 14, 186 P.3d 935 (footnotes omitted).

ANALYSIS

¶15 "The American Rule is firmly established in this jurisdiction" such that "each litigant bears the cost of his/her legal representation and our courts are without authority to assess and award attorney fees in the absence of a specific statute or a specific contract therefor between the parties. Exceptions to the American Rule are narrowly defined." *Eagle Bluff, L.L.C. v. Taylor*, 2010 OK 47, ¶ 16, 237 P.3d 173 (quoting *Kay v. Venezuelan Sun Oil Co.*, 1991 OK 16, ¶ 5, 806 P.2d 648). "Statutes authorizing the award of attorney's fees must be strictly construed, and exceptions to the American Rule are carved out with great caution" because liberality of attorney's fees awards" has a "chilling effect on open access to the courts." *Eagle Bluff,* ¶ 16 (citation omitted). Additionally, however, "trial courts have an inherent equitable power to award attorney's fees regardless of the fact that an award is not authorized by statute or contract, whenever overriding considerations, such as oppressive behavior on the part of a party, indicate the need for such a recovery." *McKiddy v. Alarkon,* 2011 OK CIV APP 63, ¶ 12 n.29, 254 P.3d 141 (citing *Garnett*, 2008 OK 43, ¶ 18). "[S]anctions assessed pursuant to a trial court's inherent, equitable powers are not to be awarded lightly or without fair notice and a hearing." *McKiddy,* ¶ 12 n.29 (citation omitted).

I. Court's Authority to Sanction for Violation of § 2011

¶16 The trial court specifically found the OTC's attorney violated 12 O.S. § 2011(B)(2).[3] As explained by the *Garnett* Court, § 2011

> provides a statutory basis for the award of sanctions under certain limited circumstances. Like its federal counterpart, Fed. R. Civ. P. 11, [§] 2011 requires an attorney make reasonable inquiry to assure all motions, pleadings and papers filed with a court have a factual basis, are legally tenable and are not submitted for an improper purpose. The purpose of § 2011 is to discourage presenting pleadings, written motions, or other papers to a court that are legally and/or factually frivolous, or presented for an improper purpose, such as delay. The central goal of § 2011 is to deter baseless filings. Sanctions exist to ensure the orderly and proper functioning of the legal system and serve the dual purposes of deterring and punishing offending conduct.

Garnett, ¶ 15 (footnotes omitted).[4] However, "[i]n order to levy sanctions, the trial court [is] required to follow the statutory procedure found in § 2011." *Id.* ¶ 17. In *Garnett*, the twenty-one day safe-harbor provision of § 2011(C)(a) was not followed; therefore, "the offending party [was not given the opportunity] to withdraw or appropriately correct the challenged paper[.]" *Id.* ¶ 16. Consequently, the Supreme Court concluded the trial court had no authority to impose sanctions pursuant to § 2011.

¶17 Unlike the circumstances in *Garnett*, in the present case the procedures required by § 2011(C)(a) were followed. Further, while the

trial court found the OTC made a mistake in filing the answer, the record supports the determination that the mistake was a failure to comply with the reasonable inquiry requirements of § 2011(B)(2) that the OTC's tax warrant against Lam and his property were warranted under existing law.

¶18 The OTC argues it filed its answer in good faith because it relied on Wells Fargo's allegation in its petition that the OTC might have an interest in the subject property and Wells Fargo, not it, was in possession of the information upon which that allegation was made. The OTC does not, however, assert it made any inquiry regarding Wells Fargo's allegations; it merely relied on its adversary's allegations, even though the face of the tax warrant presented two pieces of information that should have at least raised a concern about whether Lam and his property were the proper subjects of the tax warrant. First, while the petition did not state an address for the subject property, it did state the addition in which the subject property was located. No argument was provided by the OTC about why it was unable to determine if the property address listed in the tax warrant was in the addition of the subject property although it argues the tax lien was against any property owned by the taxpayer in the county. Yet, it offers no reason why the address on the warrant was not used to help identify whether Lam was the same person named as the taxpayer. The effort may have yielded no information, but no effort was ever made to identify the taxpayer according to the address on the tax warrant before it filed its pleading asserting a lien on the proceeds from the sale of the subject property. Second, the tax warrant contained a social security number. No explanation was provided by the OTC about why it was unable to attempt to properly identify the taxpayer on its warrant and Lam; that is, before asserting a claim against Lam and the subject property, the OTC made no inquiry based on information it clearly had. The OTC offered no explanation – except to assert the agency's limited resources – why it would be unreasonable for it to have attempted to make these simple inquiries prior to filing its answer. The record supports the trial court's conclusion that Lam was not the taxpayer against whom the tax warrant was issued.

¶19 The OTC argues, however, that sanctions may be imposed against it only if the filing was frivolous as defined in § 2011(E).[5] However, § 2011(B) requires all of the following from an attorney who files a pleading with the court:

> 1. It is not being presented for any improper or frivolous purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> 2. The claims, defenses and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> 3. The allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> 4. The denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

¶20 Only two of the above-referenced subsections contain the word frivolous or nonfrivolous – (B)(1) and the second clause of (B)(2). Nothing in the present case indicates the OTC was advancing an "argument for the extension, modification, or reversal of existing law or the establishment of new law[.]" In the present case, because the OTC failed to file its answer "after an inquiry reasonable under the circumstances" to determine that its tax warrant applied to Lam and the subject property, and it did not, its "claims . . . and other legal contentions therein [were not] warranted by existing law[.]" However, while the applicable clause of § 2011(B)(2) does not contain the word frivolous, it does require that the party or its attorney has an informed basis (upon reasonable inquiry) for a claim "warranted by existing law." Here the OTC's claim is unwarranted under existing law because Lam is not the taxpayer who is indebted to the State. It was the failure of the OTC to make any inquiry – to make an effort to determine the pleading had a factual basis and, thus, that the pleading was factually and legally tenable – that is evidence of bad faith.

¶21 The OTC maintained below and continues to maintain on appeal that only Wells Fargo could have corrected the harm to Lam and the cloud on the title to the subject property created by the OTC's answer. Wells Fargo, it

asserts, could and should have dismissed the OTC from the lawsuit even though the OTC was fully informed that its tax warrant was not against Lam and that, therefore, it had no interest in the subject property. It continues to make this argument even though within days of the filing of Lam's motion for sanctions, the OTC withdrew its answer. The OTC offers no reason in law or fact why, then, it was precluded from doing so earlier in the litigation even though "the error was brought to [its] attention" nearly a year earlier and "nine months after the proposed Motion for Sanctions was sent by [Lam's] counsel[.]" The trial court stated: "What is baffling to the Court (and to which no reasonable explanation has been presented) is the extended delay in rectifying the mistake, which had and continues to have serious consequences for [Lam]." The court also found that while the OTC disclaimed the lien as to the subject property, it still has not released the lien against Lam.

¶22 We conclude the trial court did not abuse its discretion in determining that § 2011(B)(2) had been violated by the OTC and in imposing sanctions against the OTC pursuant to § 2011(C).[6]

II. Court's Inherent Equitable Power to Sanction

¶23 Even if 12 O.S. § 2011 does not provide a statutory basis for the sanction award, the "trial court has the inherent authority to sanction a party or an attorney for bad faith litigation misconduct," although that power is not to be exercised lightly "or without fair notice and a hearing." *Garnett*, ¶ 18 (footnotes omitted). "There must be a finding of bad faith or oppressive behavior where the trial court has imposed sanctions on the basis of its inherent or equitable power to do so." *Walker v. Ferguson*, 2004 OK 81, ¶ 14, 102 P.3d 144 (citation omitted). In *Garnett*, the Supreme Court concluded the trial court improperly exercised its inherent authority because the improper filing – the disclosure of a settlement offer – was not made before a jury or the district court judge before whom the underlying action was heard, but rather was offered in the sanctions motion. The Court reasoned the disclosure

> could not possibly have affected the insurer's liability on the underlying claim. While [the trial judge] did conduct a hearing on the parties' motions for sanctions, the passenger was never given an opportunity to withdraw or amend his motion for sanctions. Imposition of sanctions under these circumstances was premature and excessive. Because the trial court had no authority to sanction the passenger's counsel under § 2011(C)(a) and an order of sanctions under the circumstances of the cause was an excessive extension of the trial court's inherent powers, the trial court abused its discretion by sanctioning the passenger's counsel.

Garnett, ¶ 19. *See also McKiddy*, 2011 OK CIV APP 63, ¶ 12 n.29 ("Because, among other things, 'fair notice and a hearing' regarding a party's request for attorney's fees pursuant to the trial court's 'inherent equitable power' are required, and because there is no indication of such 'fair notice and hearing' having occurred regarding Mother's request for attorney's fees upon this basis, we will not consider the trial court's inherent authority as a possible basis for the attorney's fees award in this case.") (citation omitted)).

¶24 Unlike the settlement document in *Garnett*, the trial court found the OTC's answer asserted a claim that "had and continues to have serious consequences for [Lam]."[7] Unlike the facts in both *Garnett* and *McKiddy*, the OTC had notice and an opportunity to withdraw the answer, but it was not until two days after the sanctions motion was filed that the OTC "filed a disclaimer of the lien, but only removed it with relation to the [subject property], almost a year from the date the error was brought to [the OTC's] attention, and nine months after the proposed Motion for Sanctions was sent by counsel for [Lam]." The trial court specifically found no reasonable explanation for that delay had been provided by the OTC and the extended delay "had and continues to have serious consequences for [Lam]."

¶25 Under the facts presented here, we conclude the trial court properly exercised its inherent authority to sanction the OTC for its dilatory actions that caused continuing harm to Lam.

CONCLUSION

¶26 We conclude the trial court did not abuse its discretion in awarding attorney fees to Lam's attorney as a sanction for the OTC's violation of 12 O.S. Supp. 2014 § 2011 and pursuant to its inherent authority to award sanctions. Accordingly, we affirm.

¶27 **AFFIRMED**.

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

1. At the conclusion of the hearing, the trial court ordered the parties to brief the question of the court's power to impose sanctions against a state agency. Lam argued, among other things, that the court had power to sanction the OTC pursuant to 12 O.S. 2011 § 941. Lam argued that while the OTC did not initiate the foreclosure action, the OTC affirmatively asked the trial court to declare its tax warrant as a lien on Lam's property to be satisfied from the proceeds of the sale of the property. That action, he argued, "is an action brought by [the OTC]. That is all Section 941 requires." Among other arguments, the OTC argued its answer did not come within § 941 because it was filed in the foreclosure action initiated by Wells Fargo, facts distinguishable from those in the cases upon which Lam relied.

2. Section 234(B) provides in part:

> In any action affecting the title to real estate . . . , the State of Oklahoma may be made a party defendant, for the purpose of determining its lien upon the property involved therein only in cases where notice of the lien of the state has been filed and indexed as provided in Sections 230 and 231 of this title. In any such action, service of summons upon the Oklahoma Tax Commission, by serving any member thereof, shall be sufficient service and binding upon the State of Oklahoma. In all such actions or suits, the complaint or pleading shall include the name and address of the taxpayer whose liability created the lien and the identifying number evidencing the lien.

3. The pertinent part of that subsection of § 2011 provides as follows:

> B. REPRESENTATIONS TO COURT. By presenting to the court, whether by signing, filing, submitting, or later advocating, a pleading . . . an attorney . . . *is certifying that to the best of the person's knowledge*, information, and belief, *formed after an inquiry reasonable under the circumstances:*
>
> . . . .
>
> 2. The claims, defenses and other legal contentions therein are warranted by existing law . . . [.]

(Emphasis added.)

4. The standard under Rule 11 of the Federal Rules of Civil Procedure is an objective one. For example, as discussed in *Robinson-Reeder v. American Council on Education*, 626 F. SupP.2d 11 (D.D.C. 2009):

> As this Court has previously noted, "Rule 11 sanctions protect the court from frivolous and baseless filings that are not well grounded, legally untenable, or brought with the purpose of vexatiously multiplying the proceedings." "The test [for sanctions] under Rule 11 is an objective one: that is, whether a reasonable inquiry would have revealed that there was no basis in law or fact for the asserted claim. The Court must also take into consideration that Rule 11 sanctions are a harsh punishment, and what effect, if any, the alleged violations may have had on judicial proceedings."

626 F. SupP.2d at 18 (citations omitted).

5. Subsection 2011(E) provides: "DEFINITION. As used in this section, 'frivolous' means the action or pleading was knowingly asserted in bad faith or without any rational argument based in law or facts to support the position of the litigant or to change existing law."

6. The OTC argues the trial court must have imposed sanctions against it pursuant to 12 O.S. 2011 § 941 because in its order the trial court cited *State ex rel. Department of Human Services v. Hunt*, 1992 OK CIV APP 115, 838 P.2d 544, a decision wherein the statutory basis for the fee award was § 941. However, the trial court's order only cited *Hunt* for the proposition that an award of attorney fees is appropriate if there is a "reasonable basis" for such an award. The order then set forth why such a reasonable basis was present in this case and justified an award pursuant to § 2011. Consequently, we disagree with the OTC that § 941 was the basis for the court's award.

7. No transcript of the oral argument regarding the sanctions motion was a filed nor was a narrative statement provided. Okla. Sup. Ct. R. 1.30, 12 O.S. 2011, ch. 15, app. 1. In this regard it bears noting that the burden to provide a record demonstrating alleged error falls directly and solely on the appellant. *Hamid v. Sew Original*, 1982 OK 46, 645 P.2d 496. This Court will presume the district court's decision on the sanction question is legally correct unless the record demonstrates otherwise. *State ex rel. Tal v. City of Okla. City*, 2002 OK 97, ¶ 3, 61 P.3d 234.

2019 OK CIV APP 10

YVONNE HODGE in her personal capacity and in her capacity as the Personal Representative for the Estate of LEROY HODGE, PB-2002-8, Plaintiff/Counter-Defendant/Appellant, vs. SALLY WRIGHT, Defendant/Counter-Claimant/Appellee, and THE UNKNOWN HEIRS, EXECUTORS, ADMINISTRATORS, TRUSTEES and ASSIGNS, immediate and remote of MARY RONEY, Deceased; MARGARET BELL LIVELY, WILLIAM F. LIVELY, EARL LIVELY, ED LIVELY, LOLA AMELIA HAZEL MATHIAS, LALA ROBERTA PEDERSEN, DARREL MELVIN PEDERSEN, EARL MATHIAS, OAKIE C. WELLS, FRANCIS NELSON WELLS, FRANCIS J. WELLS, MARY BLANCHE WELLS, HAZEL LOUISE CAMPBELL, a/k/a HAZEL LOUISE SEIFERT, MASON A. CAMPBELL, RONALD SEIFERT, UILA WELLS, HONORA MONTANA, EUGENE PAUL PATRICK YOUNG, JOHN FRANCIS YOUNG, MIRANDA JANE BARTLETT, a/k/a JANE BARTLEY, a/k/a JANE BARTLETT, HERBERT L. BARTLETT, ANNA MAUD BARTLETT, JO AUMAN, LLOYD C. BARTLETT, GALEN LLOYD BARTLETT, EDNA HEITMOR, BONNIE DALE BARTLETT, GEORGE STRITZEL, AXIE PIPER, a/k/a AXIE PIFFER, RALPH W. PIPER, SAMUEL PARSONS JONES, KATHERINE E. DeLAND, a/k/a KITTIE DeLAND, CHARLES DeLAND, LILLIE G. DeLAND, ALBERT WHITE, ELLIOTT DeLAND, ELLA C. DeLAND, HAROLD BLAINE LOGAN, MANNING DOCK HANKINS, JOHN EDWARD LOGAN, LILLIAN OAK JONES, WILLIAM CLARK WEDDELL, LOTA AXIE WEDDLE, a/k/a LOTA COURAGE, DUNCAN COURAGE, O.A. KISTLER, CLINTON C. WEDDLE, AUDREY ELIZABETH WEDDLE, a/k/a AUDREY ELIZABETH SPARLING, JOHN RAYMOND SPARLING, VICTOR SEWELL SPARLING, HERMAN CARL WILDERMAN, STANLEY B. ALLPER, TERRYL ELIZABETH JATON, CAPITOLA BREDE, ELMER A. BREDE, DWAYNE CLARK BREDE, AUDREY LARUE McCABE, LOUISE EUGENE McCABE, MARY GRACE HENDERSON, GEORGE ROBERT HENDERSON, HENRY JACKSON HAGEY, DAISY ORPHA HENDERSON, a/k/a DAISY ORPHA NORRIS, WILLIAM NORRIS, MARY ALICE NORRIS, a/k/a MARY ALICE GIBBONS, FRANK L. GIBBONS, GEORGIA NORRIS, JOSEPH NORRIS, VERA ELIZABETH SMITH, a/k/a VERA ELIZABETH NORRIS, NANCY JANE

FARMER, FRANK GIBBONS, MARY FREEMAN, OSCAR L. HENDERSON, a/k/a OSCAR L. HAGEY, KATHERINE HENDERSON, VIRGIL A. TUCKER, NE ROMA JANE TUCKER, THELMA RUTH FARMER, RALPH EDWIN FARMER, ADITH COLLEEN DANIEL, WAYNE D. DANIEL, WILLIAM JAMES FARMER, CLARK R. FARMER, DAVID RALPH FARMER, ALLEN K. FARMER, KRISTI S. PEDERSEN, ALLEN WINTERS, LOLA H. PEDERSEN, LOU PEDERSEN, CHARLES MATHIAS, CLARENCE LIVELY, MASON WALTER CAMPBELL, SR., WILLIAM JACKSON CLARK, MARCIA YOUNG, CATHERINE YOUNG, DOROTHY ISGRIGG, MARGARET BARLETT, JERRY OWENS, ALVIRA OWENS, THEREAS OWENS, VALERIA OWENS, MOLLY STRITZEL, JEAU ANNE STRITZEL, ROBERT STRITZEL, JUDY BERGE, CHARLES WRIGHT, CHRISTY ALLYCE WRIGHT, DAVID M. WRIGHT, MARGARET ANNE BARTLETT, JACK C. BAILES, SR., CLIFFORD W. SORVIRS, JACK C. BAILES, JR., JENNIE GOLDEN, MARY JANE BARLETT, a/k/a MARY JANE STERELY, LAURIE L. STERELY, LESTER L. STERELY, LESLIE L. STERELY, LARRY L. STERELY, EULGENE LLOETTA HOARD, ROXANNE DYER, SHANNON SPARLING, WAYNE JATON, TRUEL KEHL, GREGORY A. KEHL, ROBERT D. ROSENLUND, GREGORY STEVEN DAVIS, STEPHEN SPARLING, RAYMOND SPARLING, TERI L. LAWRENCE, HARRIET SPARLING ARNOLD, HEIDE SPARLING ARNOLD, DANIEL TIMOTHY ARNOLD, DONNA FRITZ, JANET ARMSTONG, WILLIAM J. ARMSTRONG, MARILYN LOUISE SHEEHAN, CAROL ANN HODGES, CONSTANCE JEAN SALYER, STEPHEN RICHARD McCABE, DONNA AUDREY GERREN, GREGORY MICHAEL McCABE, MARILYN LOUISE TAYLOR, DEBBIE HULOWITZ, WILLIAM FARMER, MARIAN JANE TAYLOR FARMER, ERIC CLARK FARMER, ANGIE LORRAINE CHAMPANY, MARGARET JANNETT HILL, a/k/a MARGARET JANNETT HILL, AUDREY KEDSLEY, a/k/a AUDREY FARMER, CARRIE FARMER, CLINTON FARMER, DAVID FARMER, JEFF FARMER, DOROTHY NORRIS, JAMES WILLIAM GIBBONS, ERMANILL C. NUNES, a/k/a ERMANILL C. GIBBONS, JENNIE HENDERSON, NOLE MAE TUCKER, LILLIAN TUCKER, VIRGINIA TUCKER, CRAIG D. DANIEL, KRISTI PEARL CHILDERS, GLORIA SPRALING, DONNA FRITZ, DANIEL LEWIS FRITZ, MARK FRITZ, and LINDA SUSAN McCABE, if living otherwise the Unknown Heirs, Executors, Administrators, Trustees, Assigns and Successors, Immediate and Remote, of the said individuals, and The Unknown Heirs, Executors, Administrators, Trustees and Assigns, Immediate and Remote of SYLVESTER REIMER, Deceased, SYLVIA BRALEY, LAURA VENTERS; ROBERT HALL, MICHAEL HALL; CHRISTOPHER HALL; if living otherwise the Unknown Heirs, Executors, Administrators, Trustees, Assigns and Successors, Immediate and Remote, of said individuals, GEORGE BOARDMAN, ALTON C. LAMB , Jr., RUTH C. LAMB, ROBERT CAVITT, WANDA MAE PRICE HENN, BUELAH ALICE SMITH ROWLEY, WILLARD W. McINTYRE, KATHLEEN YORK, THELMA McINTYRE, MAX L. McINTYRE, HERMAN T. McINTYRE, VIRGIL S. McINTYRE, MARTIN S. McINTYRE, EDWARDS GRENS, and EVA IDELL CASH, Defendants if living, otherwise the Unknown Heirs, Executors, Administrators, Trustees and Assigns, Immediate and Remote of said Defendants, if deceased, and THE STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, Defendants.

Case No. 116,460. January 16, 2019

APPEAL FROM THE DISTRICT COURT OF NOBLE COUNTY, OKLAHOMA

HONORABLE NIKKI G. LEACH, JUDGE

AFFIRMED IN PART, REVERSED IN PART AND REMANDED

Harlan Hentges, Edmond, Oklahoma, for Plaintiff/Appellant,

Sally Stewart, Cristyn Lane, Roswell, New Mexico, *Pro Se*.

Kenneth L. Buettner, Judge:

¶1 Plaintiff/Counter-Defendant/Appellant Yvonne Hodge appeals a judgment entered following a bench trial in Hodge's claim for title by adverse possession. The trial court denied Hodge's claim based on its finding she had not shown an ouster of her co-tenants, though no one having an interest in the property appeared

to counter Hodge's proof. The trial court concluded that Hodge's only remedy was through a partition proceeding. The trial court also denied Defendant/Counter-Claimant/Appellee Sally Stewart's claim, finding she did not prove an interest in the property. Stewart has not filed a petition in error appealing the judgment against her and that part of the judgment is final. We reverse the trial court's finding that Hodge had not shown an ouster of her co-tenants and therefore could not have gained title by adverse possession. Hodge and her predecessors paid taxes, fenced, used, and maintained the property to the exclusion of all others for more than fifteen years. The clear weight of the evidence showed Hodge had proved title by adverse possession.

¶2 In her 2014 Petition, Hodge sought to quiet title to a described quarter section in Noble County.[1] Hodge asserted she owned the property in her personal capacity and as the personal representative of the estate of her husband, Leroy Hodge. Hodge alleged that Mary Roney had owned title to the property at the time of her death in 1935 and that her son Charles Roney possessed the property until his death in 1980. Hodge asserted that when Mary Roney's estate was probated in 1956, her heirs were unknown except for Charles Roney. Hodge asserted that from 1971, Hodge's father-in-law Glen Hodge leased the property from Charles Roney. Hodge further alleged that Charles Roney's estate was distributed to his Wife and her estate was then distributed to her two brothers, Ruben Reimer and Sylvester Reimer, in 1982. Hodge alleged that Sylvester died in 1982 and his estate was not probated in Oklahoma. Hodge alleged that from 1980 until 1993 Glen Hodge and then his son Leroy Hodge leased the property from representatives of the Estate of Charles Roney, his heirs, or the estates of his heirs.

¶3 Hodge further averred that Ruben Reimer's share was distributed to his two children in 1993 and Leroy Hodge then purchased their interests. Hodge asserted she and Leroy Hodge had occupied the property without paying rent or other consideration to any party since 1993 and that in that time they paid the taxes, made improvements such as building fences and ponds, and cleared trees. Hodge asserted she continued the possession after Leroy's 1999 death. Hodge asserted she had obtained title to the property by adverse possession. Hodge asserted one group of Defendants were the unknown heirs of Sylvester Reimer, who received a 1/8th interest in the surface in the July 1982 final distribution of the estate of Charles Roney's wife. Hodge asserted the remaining Defendants were the heirs of the seven half siblings of Charles Roney. Hodge asserted Charles Roney held the property adversely to the interests of the half siblings from the 1935 death of Mary Roney until Charles's death in 1980.

¶4 In her Amended Petition, Hodge named as Defendants all potential heirs of Mary Roney's children that Hodge had discovered and asserted she had made publication notice for heirs she could not identify or locate. Hodge repeated the allegations made in her Petition and alleged she and her predecessor, Leroy Hodge, had satisfied the requirements of adverse possession for more than fifteen years.

¶5 The record shows Stewart and Defendant Christy Allyce Lane were served by mail and they filed a letter requesting time to assert an interest in the property "which we understood we would inherit." Stewart answered and denied Hodge's claim to title by adverse possession. Stewart asserted a counterclaim asking the trial court to determine her interest in the property and quiet title to that interest in her. Hodge answered and denied the claims made in Stewart's counterclaim.

¶6 The trial court entered a Journal Entry of Judgment August 17, 2016, in which it found twenty Defendants had been served and failed to answer. The trial court entered default judgment in favor of Hodge and against those Defendants. The trial court later granted default judgments against several of the remaining Defendants.[2]

¶7 Hodge then filed a motion for summary judgment against Stewart, which the trial court denied.[3] Bench trial was held September 14, 2017. The trial court entered its Journal Entry September 18, 2017, in which it found Stewart had failed to present evidence establishing an interest in the property and denied her counterclaim for quiet title.[4] The court further found that Hodge had not shown she was entitled to adverse possession because she owned legal title to a 1/8 interest and in order to obtain title by adverse possession against co-tenants, she was required to prove an ouster of the co-tenants. The court found that Hodge's remedy was through a partition proceeding.

¶8 As noted above, only Hodge appeals. A claim for title by adverse possession is an equitable proceeding and we will affirm the trial court's decision unless it is against the clear weight of the evidence or is contrary to law. *Akin v. Castleberry,* 2012 OK 79, ¶11, 286 P.3d 638. "To establish adverse possession, the claimant must show that possession was hostile, under a claim of right or color of title, actual, open, notorious, exclusive, and continuous for the statutory period of fifteen years." *Id*.

¶9 The evidence of the elements of adverse possession was undisputed. Hodge improved the property, maintained it, fenced it and locked the gate to the exclusion of all others, paid taxes on it, and used it for cattle for more than fifteen years. The trial court noted, however, that because Hodge had legal title to a 1/8 interest by virtue of a 1993 Warranty Deed from Ruben Riemer's children to Leroy Hodge, the case must be analyzed as one where a cotenant seeks title by adverse possession against his co-tenants. In such a case, the general rule has been explained as:

> . . . the tenant in possession is deemed to be holding said possession for himself and for the tenant who is not in possession. The possession of the one is constructively possession for the other. Thus it is that the *mere holding of possession, by one tenant, can never be considered adverse to his cotenant* until there is some act or conduct on his part which must give the other cotenant notice that his title has been repudiated or is disputed by the one in possession; or there must be such conduct by the tenant in possession as reasonably would put the other tenant on inquiry . . .

Preston v. Preston, 1949 OK 59, ¶20, 207 P.2d 313, 201 Okla. 555 (emphasis added, quoting *Keeler v. McNeir*, 1939 OK 25, 86 P.2d 1004, 184 Okla. 244). The cases in Oklahoma on this question are in accord that more than "mere possession" is required, but those same cases are in conflict as to what acts amount to more than mere possession and therefore give rise to adverse possession against a co-tenant. In *Tatum v. Jones*, 1971 OK 147, 491 P.2d 283, the Oklahoma Supreme Court identified several cases addressing this issue and its analysis shows the contradictory nature of the decisions, citing *Caywood v. January,* 1969 OK 87, 455 P.2d 49; *Westheimer v. Neustadt*, 1961 OK 121, 362 P.2d 110, 111 ("We . . . hold, that evidence that Max Westheimer collected the rents, paid the taxes, and represented to the lessee that he owned the property, was insufficient to place his co-tenants on notice or convey knowledge to them that he was denying their rights as co-tenants, so as to operate as an ouster or place the statute of limitations in operation"); *Preston, supra*; and *Keeler, supra*.

¶10 In *Wirick v. Nance*, 1936 OK 98, 62 P.2d 997, 178 Okla. 180, the Oklahoma Supreme Court found a co-tenant had shown the right to title by adverse possession where "the whole record conclusively shows that the possession of the defendants was at all times open, visible, continuous and exclusive with claims of absolute ownership, such as would undoubtedly constitute notice to parties seeking information upon the subject that the premises were not held in subordination to any title or claim of others, but against all claimants of title." This holding suggests that ouster of a co-tenant may be proved by the same evidence as would prove adverse possession against a stranger.

¶11 This suggestion appears also in *Preston, supra,* where the Oklahoma Supreme Court noted an earlier Oklahoma case explaining that proof of the elements of adverse possession may be proof of an ouster:

> It may be noted that in the latter case it was held that the acts of Joe Grayson, the tenant in common who there took possession of the land, and his grantees, amounted to an ouster of the other tenants in common who were out of possession. The acts specified as amounting to an ouster were: The execution of a five-year lease covering all of the land; A deed by Joe Grayson purporting to convey the whole interest; Fencing the land; The collection of rents; Other acts of absolute and unqualified possession for more than twenty years. It was held that these acts were ample as a predicate for a finding of ouster by the trial court. The decree of the trial court sustaining title by prescription was affirmed.

207 P.2d 313 at ¶23, 319, citing *Beaver v. Wilson,* 1926 OK 267, 245 P. 34, 117 Okl. 68. In *Preston,* the co-tenant remained in possession of the land for over twenty years, paid a mortgage on it, built a house and garage, paid the taxes and collected rents. During that time "no other person ever claimed or asserted any right, title or interest in said premises or demanded any of the rents or income" until the quiet title action was filed. The Oklahoma Supreme Court af-

firmed the trial court's finding that the co-tenant had obtained title from his co-tenants by adverse possession.

¶12 In this case, as in *Preston*, no other person ever appeared to claim or assert any right in the premises until Hodge filed her quiet title action. And even then, only Stewart, who could not prove an interest, appeared to claim a right. Hodge's proof showed more than mere possession of the property, and no one who could prove an interest appeared to present contrary evidence. Accordingly, the weight of the evidence supported Hodge's claim to ownership by adverse possession. We note the trial court's suggestion that Hodge could seek partition, but that would appear to be a futile action where there is no indication of anyone with an interest remaining with whom to partition the property. The purpose of a quiet title action is to determine who is the real owner of property and put to rest adverse claims. *Schultz v. Evans*, 1951 OK 61, ¶13, 228 P.2d 626, 204 Okla. 209, quoting *Home Dev. Co. v. Hankins*, 1945 OK 153, 159 P.2d 1013, 195 Okla. 632. In this case, the trial court did not make a determination that anyone is the real owner of the property in question. Based on the undisputed evidence, this was error. We therefore reverse the judgment denying Hodge's claim for quiet title and remand with directions to quiet title to the subject property in Hodge's name.

¶13 AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

BELL, P.J., and JOPLIN, J., concur.

Kenneth L. Buettner, Judge:

1. The property at issue is the SE/4 of Sec. 29-20N-1E. Hodge also sought title to 11/16ths of the minerals in the same tract, and at trial she dismissed her claim to any interest in severed minerals.

2. At the beginning of trial, Hodge asserted that the remaining parties she had been able to serve had been disposed of either through default judgments or quit claim deeds, and that the remaining parties who were served by publication had been disposed of by default judgments.

3. Hodge asserted she sought summary judgment against Stewart and Lane as Defendants/Counter-Claimants. We note that Lane did not answer or otherwise file a counterclaim. Lane joined Stewart in her letter asking for more time and Lane is named on Stewart's appellate brief.

4. Stewart testified she was a great great grandchild of Mary Roney. Her testimony indicated she would have at most a 1/132 interest in the property, but she could not show a chain of probated estates showing she had inherited any interest. Mary Roney's will directed the quarter section at issue here be devised 40 acres to Charles Roney, 20 acres to S.P. Jones, 20 acres to J.E. Jones, and 80 acres jointly to six others, one of whom was Stewart's great grandmother. The record includes a 1974 letter from Charles Roney stating that all of the other devisees in Mary Roney's will were deceased and Charles Roney had no knowledge of the existence or location of their heirs.

2019 OK CIV APP 11

JERRY NEAL HARWOOD, Petitioner, vs. ARDAGH GROUP, TRAVELERS INDEMNITY COMPANY OF AMERICA, and THE WORKERS' COMPENSATION COMMISSION, Respondents.

Case No. 116,535. July 20, 2018

PROCEEDING TO REVIEW AN ORDER OF THE WORKERS' COMPENSATION COMMISSION

AFFIRMED

John L. Harlan, JOHN L. HARLAN & ASSOCIATES, P.C., Sapulpa, Oklahoma, for Petitioner,

John A. McCaleb, FENTON, FENTON, SMITH, RENEAU & MOON, Oklahoma City, Oklahoma, for Respondents.

BRIAN JACK GOREE, VICE-CHIEF JUDGE:

¶1 Petitioner, Jerry Neal Harwood (Claimant), seeks review of the order of the Workers' Compensation Commission (Commission) which affirmed the decision of its administrative law judge (ALJ) finding that Claimant did not sustain a compensable injury. Respondents are Ardagh Group and Travelers Indemnity Company of America (collectively Employer). Claimant sustained his injuries while crossing a public highway next to Employer's place of business after clocking out and leaving work. The Commission denied the claim because the injury did not arise out of the course and scope of employment. We affirm, holding the Commission order is neither missing findings of fact essential to the decision nor affected by any other error of law.

FACTS AND PROCEDURAL BACKGROUND

¶2 Harwood was an employee of Respondent Ardagh Group working at the company's Sapulpa glass plant. The glass plant is located on the west side of Mission Street (Oklahoma Highway 66). On the east side of the highway are two employer-provided parking areas where Respondent directed Claimant to park. These parking lots are either owned or leased by Respondent Ardagh Group. There is a crosswalk on the highway with pedestrian activated overhead lights. At the time of Harwood's injury, the lights were not functioning properly. The Respondent did not own, operate or control the crosswalk on the highway.

¶3 On the night of July 16, 2016, Claimant clocked out at the end of his shift and left the glass plant to go home. While using the crosswalk on the highway which separated the plant from the parking areas Claimant was hit by a motor vehicle and was severely injured.

¶4 On March 23, 2017, a hearing was conducted before an ALJ. The parties stipulated to several facts and Harwood presented four witnesses.

¶5 On August 16, 2017, the ALJ issued her order denying compensability finding:

> [Harwood's] injury sustained in a common area adjacent to the Respondent's place of business after he had clocked out, was not an injury arising out of the course and scope of employment within the meaning of the Administrative Workers' Compensation Act. Any injury sustained by the Claimant when struck by the motor vehicle while on the public roadway which the Respondent did not own, operate or control was excluded from the definition of course and scope of employment found in 85A O.S., § 2(13) and from the definition of compensable injury set forth in 85A O.S., § 2(9).

¶6 On November 3, 2017, the parties conducted oral argument before the Oklahoma Workers' Compensation Commission En Banc and on November 6, 2017, the Commission issued its order affirming the decision of the administrative law judge. It is from this order Harwood appeals.

STANDARD OF REVIEW

¶7 The law in effect at the time of the injury controls both the award of benefits and the appellate standard of review where workers' compensation is concerned. *Brown v. Claims Mgmt. Resources, Inc.*, 2017 OK 13, ¶ 9, 391 P.3d 111. Appellate review of the Commission's order is governed by 85A O.S. § 78, which provides in pertinent part:

> C. The judgment, decision or award of the Commission shall be final and conclusive on all questions within its jurisdiction between the parties unless an action is commenced in the Supreme Court of this state to review the judgment, decision or award within twenty (20) days of being sent to the parties. Any judgment, decision or award made by an administrative law judge shall be stayed until all appeal rights have been waived or exhausted. The Supreme Court may modify, reverse, remand for rehearing, or set aside the judgment or award only if it was:
>
> 1. In violation of constitutional provisions;
>
> 2. In excess of the statutory authority or jurisdiction of the Commission;
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> 3. Made on unlawful procedure;
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> 4. Affected by other error of law;
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> 5. Clearly erroneous in view of the reliable, material, probative and substantial competent evidence;
>
> 6. Arbitrary or capricious;
>
> 7. Procured by fraud; or
>
> 8. Missing findings of fact on issues essential to the decision.

¶8 This standard of review is substantially the same as that provided for the judicial review of final agency decisions in individual proceedings under the Administrative Procedures Act (APA), 75 O.S. 2011 § 322(1). Therefore, we are guided by case law under the APA in understanding its role in appeals from the Commission. On review of an administrative decision, we may only disturb the decision if one of the statutory grounds is shown. *Young v. State ex rel. Dep't of Human Servs.*, 2005 OK CIV APP 58, ¶ 12, 119 P.3d 1279, 1284.

¶9 Harwood's assignments of errors raise questions of law. He challenges the Commission's interpretation of the statute at issue herein. Statutory interpretation presents a question of law which we review under a *de novo* standard. Such review is plenary, independent, and non-deferential. *State ex rel. Protective Health Servs. State Dep't of Health v. Vaughn*, 2009 OK 61, ¶ 9, 222 P.3d 1058, 1064. Specifically, Harwood argues there are findings of facts not included in the Commission's order that are essential to properly construe 85A O.S. § 2(13), and it should have found the injury was compensable within the meaning of the Administrative Workers' Compensation Act (AWCA) 85A O.S. § 1 et seq. Whether findings essential to a decision are in fact missing from an agency order presents a question of law. *Gillispie v. Estes Exp. Lines, Inc.*, 2015 OK CIV APP 93, ¶ 18, 361 P.3d 543, 549.

ANALYSIS

¶10 The Commission denied Harwood's claim for compensation finding the injury did not arise out of the course and scope of employment as defined in 85A O.S. § 2(13). Pursuant to the AWCA, a claim must arise out of the course and scope of employment to be a compensable injury. 85A O.S. § 2(9)(a).

¶11 The issue in this matter concerns the interpretation and application of the definition of "[c]ourse and scope of employment." 85A O.S. § (2)(13). Harwood argues that existing judicial decisions interpreting provisions of the since-repealed Workers' Compensation Act support the proposition that Harwood's claim did arise out of the course and scope of employment.[1] However, in the AWCA "[c]ourse and scope of employment" is now specifically defined in § 2(13), which provides in pertinent part:

> 13. "Course and scope of employment" means an activity of any kind or character for which the employee was hired and that relates to and derives from the work, business, trade or profession of an employer, and is performed by an employee in the furtherance of the affairs or business of an employer. The term includes activities conducted on the premises of an employer or at other locations designated by an employer and travel by an employee in furtherance of the affairs of an employer that is specifically directed by the employer. This term does not include:
>
> ***
>
> c. any injury occurring in a parking lot or other common area adjacent to an employer's place of business before the employee clocks in or otherwise begins work for the employer or after the employee clocks out or otherwise stops work for the employer[2]

¶12 Where the language of a statute is plain and unambiguous, and its meaning clear and no occasion exists for the application of rules of construction, the statute will be accorded the meaning as expressed by the language therein employed. *Cave Springs Pub. Sch. Dist. I-30, of Adair Cty. v. Blair,* 1980 OK 103, ¶ 4, 613 P.2d 1046, 1048.

¶13 The Oklahoma Supreme Court addressed the AWCA's definition of "[c]ourse and scope of employment" and whether the exception in § 2(13)(c) applies in *Legard-Bober v. Oklahoma State University*, 2016 OK 78, 378 P.3d 562 and *Brown v. Claims Management Resources Inc.*, 2017 OK 13, 391 P.3d 111.

¶14 In *Bober,* the employee sustained an injury in the employer-owned parking lot before clocking in to work. *Bober,* 2016 OK 78, ¶ 2. The Oklahoma Supreme Court in reviewing the matter defined "adjacent" as used in § 2(13)(c) in the ordinary sense of the word and determined the parking lot and sidewalk were not adjacent common areas because the parking lot and sidewalk constituted the employer's premises. *Id.* at ¶¶ 9, 11.

¶15 In *Brown,* the employee sustained an injury while descending stairs in the employer-owned building after clocking out. *Brown,* 2017 OK 13, ¶¶ 1, 16. The Commission denied compensability and the Court of Civil Appeals affirmed determining the stairwell constituted a common area adjacent to the employer's place of business. *Id.* at ¶¶ 4, 7. However, on review, the Oklahoma Supreme Court in *Brown* determined that the Commission's order was not supported by substantial evidence. *Id*. at ¶ 16. Because the record demonstrated the employer owned the building, the Court likewise did not apply the exception in § 2(13)(c) because the stairwell, as part of the building, was not a common area adjacent to an employer's place of business but was actually the employer's premises. *Id*. at ¶¶ 16-18.

¶16 The exception in § 2(13)(c) only applies once the employee leaves the employer's premises. *Bober*, 2016 OK 78, ¶ 9, 378 P.3d 562 and *Brown,* 2017 OK 13, ¶ 17, 391 P.3d 111. In the case at hand, the Commission concluded the exception applied and denied compensation.

¶17 Claimant argues the Commission order is missing findings of fact essential to the decision. Section 72(A)(4) requires that ALJs "make specific, on-the-record findings of ultimate facts responsive to the issues shaped by the evidence as well as conclusions of law on which its judgment is to be rested." In its order affirming the ALJ's decision, the Commission made no additional findings beyond those in the ALJ's order. We therefore review the ALJ decision as the order of the Commission.

¶18 The ALJ decision included the following findings:

> Essential facts are not disputed. On JULY 16, 2016, the Claimant left his place of busi-

ness at the Respondent's glass plant at the end of his shift, after clocking out, to travel home. While walking in a crosswalk across the public roadway which separated the plant from the Respondent's parking lot where the Claimant had parked, he was struck by a motor vehicle and severely injured. The parking lot was where the Claimant was directed to park. It was owned or leased, and maintained, by the Respondent. The respondent did not own, operate or control the crosswalk or the public roadway on which the injury occurred.

¶19 Claimant argues the ALJ erred by excluding from her order certain facts that were presented at the hearing.[3] At the hearing, Claimant presented at least some testimony which the ALJ concluded was not material to the determination of whether the claim arose out of the course and scope of employment. The ALJ as the trier of fact is responsible for determining the credibility of witnesses and the effect and weight to be given to their testimony. *Yocum v. Greenbriar Nursing Home*, 2005 OK 27, ¶ 8, 130 P.3d 213. The ALJ gave little weight, if any, to testimony not relevant in the disposition of this matter.

¶20 The parties stipulated to the facts that the ALJ relied on in determining that Claimant's injury was not compensable. The record demonstrates that on July 16, 2016, the Claimant clocked out and left his employer's place of business to travel home. While walking in the crosswalk on a public highway between the glass plant and employer-provided parking lot, Claimant was struck by a motor vehicle and severely injured. Claimant was directed to park in the employer-provided parking lots on the east side of the highway. The crosswalk was not owned, operated or controlled by Respondent Ardagh Group.

¶21 The parties agree that Harwood had clocked out when he was injured in the crosswalk while crossing the highway. Excepted from the definition of "course and scope of employment" is "any injury occurring in a . . . common area adjacent to an employer's place of business . . . after the employee clocks out or otherwise stops work for the employer". The language is plain and unambiguous; adjacent means lying near or close to, but not necessarily touching, not distant, nearby, or having a common endpoint or border. *Bober,* 2016 OK 78, ¶ 9, 378 OK 562, 565 (internal quotation marks omitted). "Common" is defined as "[a] legal right to use another person's property, such as an easement, . . . [a] tract of land set aside for the general public's use." *Black's Law Dictionary* (10th ed. 2014). The plain meaning of the statute's language is conclusive as to legislative intent. *See Bober*, 2016 OK 78, ¶ 11, 378 P.3d 562, 565. Harwood's injury occurred in the crosswalk of a public highway which was directly east of the glass plant where Harwood worked. The crosswalk on the highway was not the employer's premises but was instead a common area adjacent to the employer's place of business.

¶22 The order is supported by findings of fact essential to the decision and is not affected by any other error of law. The Commission's order is AFFIRMED.

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

BRIAN JACK GOREE, VICE-CHIEF JUDGE:

1. Harwood incorrectly relies on judicial interpretation of a repealed statute, 85 O.S. § 11, in *Swanson v. General Paint Company*, 1961 OK 70, 361 P.2d 842 and *Fudge v. University of Oklahoma*, 1983 OK 67, 673 P.2d 149. Relying on judicial construction of prior statutes in *Swanson* and *Fudge* to determine whether an injury arose in the course and scope of employment in this case is inappropriate. By adopting the definition of "course and scope of employment," the legislature intended to repudiate the previous judicial interpretations. *See Special Indemnity Fund v. Figgins*, 1992 OK 59, 831 P.2d 1379.

2. While this appeal was pending, the Oklahoma Supreme Court decided *Pina v. American Piping Inspection*, 2018 OK 40, P.3d. *Pina* is distinguishable from the case at hand. Whether an injury occurs on the employer's premises is relevant when applying the exception in § 2(13)(c). *Bober*, 2016 OK 78, ¶ 9, and *Brown*, 2017 OK ¶ 17. The Court in *Pina* did not consider the exception in § 2(13)(c) because it did not apply.

3. Among those facts Claimant argues that the Commission needed to include: (1) Employer instructed employees to use the crosswalk when crossing the street to get to the parking lot; (2) the crosswalk was not well illuminated on the night of July 16, 2016, making it extremely dangerous; (3) Employer created a walkway from the parking lot to the crosswalk and from the crosswalk to the plant doors; (4) the safety manager asked for police to be present at the crosswalk during the shift changes and that it was unsure whether police would be able to be present to cover the period of time; (5) police were needed for a 30 minute period to allow for "hot end" employees to take showers after working; (6) the night before the injury a supervisor saw the crosswalk as a dangerous situation and used flashlights or strobe lights to draw attention to the area; (7) the plant manager testified at the deposition but later repudiated at trial that the Employer had a duty/responsibility to make the crosswalk safe; (8) the supervisor emailed management to notify them of the crosswalk not functioning properly.

Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS
Thursday, February 14, 2019

C-2018-100 — Michael Wesley Watters, Petitioner, entered a negotiated plea of no contest in the District Court of Noble County, Case No. CF-2015-84, to Child Abuse by Injury (Count 1) and Misdemeanor Domestic Assault and Battery in the Presence of a Minor (Count 2). The Honorable Lee Turner, Special Judge, accepted Watters' plea and entered a deferred judgment against him with a five year term of deferment on each count plus costs and fees. The State filed a motion to accelerate Watters' deferred judgment. Judge Turner sustained the State's motion to accelerate and, after receipt of a presentence investigation report, sentenced Watters to twenty years imprisonment with the last ten years suspended and a $100.00 fine plus costs and fees on Count 1 and to one year in the Noble County Detention Center on Count 2. Judge Turner ordered the sentences to be served concurrently and awarded credit for time served. Watters filed a timely motion to withdraw his plea that Judge Turner denied. Watters appeals the denial of his motion to withdraw plea. The Petition for a Writ of Certiorari is DENIED. The district court's denial of Petitioner's motion to withdraw plea is AFFIRMED. The case is REMANDED to the District Court of Noble County for a determination whether Petitioner Watters is a mentally ill person as defined by 43A O.S.Supp.2017, § 1-103 and thus exempt from the assessment of the costs of incarceration under 22 O.S.2011, § 979a. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs.

F-2017-1225 — Jeremiah L. Davis, Appellant, was tried by jury for Counts 1 and 2, sexual abuse of a child under age twelve in Case No. CF-2015-4992 in the District Court of Oklahoma County. The jury returned a verdict of guilty and set punishment at life imprisonment and a $500.00 fine in each count. The trial court sentenced accordingly and ordered the sentences to be served concurrently. From this judgment and sentence Jeremiah L. Davis has perfected his appeal. The judgment and sentence is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs in results; Lumpkin, J., concurs in results; Hudson, J., concurs in results; Rowland, J., concurs in results.

F-2018-107 — On September 22, 2014, Appellant Mark Ronald Elam, represented by counsel, entered a plea of no contest to charges filed in Kay County Case No. CF-2013-106. The sentences assessed in that case were suspended, subject to terms and conditions of probation. On March 20, 2017, Elam stipulated to the State's revocation application filed in Case No. CF-2013-106. On April 24, 2017, Appellant Elam, represented by counsel, entered a blind plea to charges filed in Kay County Case No. CF-2017-9. Sentencing in Kay County Case Nos. CF-2013-106 and CF-2017-9 was deferred pending Elam's completion of the Kay County Drug Court program. On November 9, 2017, the State filed an Application to Terminate Elam from Drug Court. On January 19, 2018, the Honorable David Bandy, Associate District Judge, terminated Elam's Drug Court participation and sentenced him as specified in his plea agreement. From this judgment and sentence Elam appeals. Elam's termination from Drug Court is AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J.: Concur; Kuehn, V.P.J.: Concur; Hudson, J.: Concur; Rowland, J., Concur.

M-2017-467 — Appellant Jude Daniel DeLana was held in direct contempt in the District Court of Latimer County, Case Nos. TR-2017-25 and TR-2017-26 and was sentenced to six months in the county jail. DeLana appeals. DeLana's misdemeanor judgment and sentence is AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs.

COURT OF CIVIL APPEALS
(Division No. 1)
Friday, February 15, 2019

116,431 — Michael Armand Hammer, Plaintiff/Appellee, v. Speedsportz, LLC, and John Reaves, Defendants, and Lyons & Clark, Inc., Appellant. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Rebecca Nightingale, Trial Judge. This suit arises from a dispute regarding the ownership of three highly valuable classic cars – a 1927 Bentley, a 1959

Mercedes Benz, and a 1966 Shelby Cobra. Plaintiff Michael Armand Hammer (Hammer) filed an action against a restorative automotive shop, Speedsportz, LLC, and its owner, John Reaves, seeking a declaratory judgment that Hammer was the sole owner of the three vehicles and replevin of the vehicles. After summary judgment was granted in favor of Hammer with regard to the 1927 Bentley, Mark D. Lyons filed a motion to intervene as a matter of right on behalf of his law firm, Lyons & Clark, Inc., (the Firm), asserting that the Firm had a perfected security interest in the Bentley. The trial court denied the Firm's motion to intervene. We AFFIRM. Opinion by Buettner, J.; Joplin, P.J.,concurs and Goree, C.J., dissents.

116,463 — State of Oklahoma Ex Rel. Board of Regents for Tulsa Community College, Plaintiff/Appellee, v. Kimberly Reynolds, Defendant/Appellant. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Kirsten E. Pace, Judge. Defendant/Appellant Kimberly Reynolds seeks review of the trial court's order denying her motion to vacate after the trial court granted the motion for summary judgment of Plaintiff/Appellee State of Oklahoma, ex rel. Board of Regents for Tulsa Community College, on Plaintiff's claim to recover on a higher education account. Mainly, Defendant complains the trial court erred in granting Plaintiff's motion for summary judgment, filed more than three years after commencement of the action and without activity in the case, and without notice to her. Considering the passage of almost three years between service of the last responsive pleading and Plaintiff's filing of the motion for summary judgment, together with Plaintiff's determination of Defendant's new address in Stillwater sufficient for delivery of the order granting the motion for summary judgment to her after judgment was granted, we hold justice would be better served by vacating the order granting the motion for summary judgment and remanding the matter to the trial court to afford Defendant an opportunity to respond to the Plaintiff's motion for summary judgment. REVERSED AND REMANDED. Opinion by Joplin, P.J.; Goree, C.J., and Buettner, J., concur.

116,673 — Lizbeth Hinshaw Kurtz, Plaintiff/Appellant, v. Tyler Richey, Defendant/Appellee. Appeal from the District Court of Stephens County, Oklahoma. Honorable Kenneth J. Graham, Judge. Plaintiff/Appellant Lizbeth Hinshaw Kurtz seeks review of the trial court's order setting aside its previous decision to deny the motion for summary judgment of Defendant/Appellee Tyler Richey for lack of notice of hearing. Because the order denying the Defendant's motion for summary judgment is not a final order or final judgment, we hold §952(b)(2) does not permit an appeal from an order vacating the order denying the Defendant's motion for summary judgment. For lack of a final appealable order, this appeal is DISMISSED. Opinion by Joplin, P.J.; Goree, C.J., and Buettner, J., concur.

116,975 — Community Builders, Incorporated, Plaintiff/Appellant, v. Compsource Mutual Insurance Company, Defendant/Appellee, Service & Production Corporation, Plaintiff. Appeal from the District Court of Tulsa County, Oklahoma. Community Builders Incorporated [Plaintiff/Appellant] successfully defended a counterclaim of CompSource [Defendant/Appellee] seeking the recovery of premiums on a policy of workers' compensation insurance. Community Builders filed a motion for attorney fees and the district court denied it. First, a claim for unpaid premiums is not an action for an account stated within the meaning of 12 O.S. §936(A). Second, judicial estoppel does not support Community Builders' application for an attorney fee or preclude CompSource from opposing it. The district court's denial of attorney fees is AFFIRMED. Opinion by Goree, C.J.; Joplin, P.J. and Buettner, J., concur.

117,012 — ATC Drivetrain, Inc. and Great American Alliance Insurance Company, Petitioners, and Prime Industrial Recruiters, and CompSource Mutual Insurance Company, v. David Phi Duong and the Workers' Compensation Commission, Respondents. Proceeding to Review an Order of The Workers' Compensation Commission En Banc. Petitioners ATC Drivetrain, Inc. and Great American Alliance Insurance Co. seek review of an order of the Oklahoma Workers' Compensation Commission which found Respondent David Phi Duong sustained a compensable injury. The record shows no reversible error and we therefore SUSTAIN the order. Opinion by Buettner, J.; Joplin, P.J., and Goree, C.J., concur.

117,202 — In the Matter of the Adoption of W.I.S. and R.M.L., Minor Children: Vanessa Adelaida Sepeda, Respondent/Appellant, v. William Lee Sanders, Jr. And Jennifer Sanders, Petitioners/Appellees. Appeal from the District Court of Pottawatomie County, Oklaho-

ma. The trial court determined that, pursuant to 10 O.S. 2011 §7505-4.2(B), Mother failed to provide any support for Children for a period of twelve (12) out of the last fourteen (14) months immediately preceding the filing of the adoption petition. We reverse. Mother argues the trial court abused its discretion when it found, pursuant to §7505-4.2, that Petitioners have proven by clear and convincing evidence that Children are eligible for adoption without the Mother's consent because she spent a "minimal amount" on Children and because she never gave anything directly to Petitioners. Mother also argues the trial court abused its discretion when it found that Mother's "financial ability to contribute" to Children's support was equal to a full time minimum wage job. Title §7505-4.2 does not make any reference to the application of child support guidelines or to the imputation of minimum wage income to demonstrate a parent's financial ability to contribute. In cases where there is no child support order, the trial court may not impute a monetary obligation based on the child support guidelines. Adoption statutes must be strictly construed in favor of the rights of the natural parent. *In the Matter of the Adoption of V.A.J.*, 1983 OK 23, ¶6, 660 P.2d 139. The trial court found Children were eligible for adoption without Mother's consent because Mother spent a minimal amount on Children. Title §7505-4.2 does not impose a certain amount for the support of a child other than what the parent has the financial ability to contribute. Additionally, there is no requirement in §7505-4.2 that a parent provide support directly to the petitioner. The trial court improperly determined Mother was required to deliver support payments or in-kind payments directly to Petitioners. The trial court abused its discretion in determining that Children were eligible for adoption without Mother's consent. The Order is not supported by clear and convincing evidence that Mother willfully failed to contribute to the support of Children according to her financial ability for 12 consecutive months out of the last 14 months preceding the filing of the petition. The Order is REVERSED. Opinion by Goree, C.J.; Buettner, J., concurs and Joplin, P.J., dissents.

117,302 — Medencentive, LLC, Plaintiff/Appellant, v. State of Oklahoma, ex rel Office of Management and Enterprise Service Employees Group Insurance Department, Defendant/Appellee. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Richard C. Ogden, Judge. Plaintiff/Appellant MedEncentive, LLC, appeals from summary judgment granted to Defendant/Appellee State of Oklahoma, ex rel. Office of Management and Enterprise Services Employees Group Insurance Department (the State) in MedEncentive's breach of contract action. The record shows no dispute of material fact. The State was entitled to judgment as a matter of law. The trial court's Memorandum Opinion adequately explains its decision and we affirm by summary opinion under Oklahoma Supreme Court Rule 1.202(d). AFFIRMED. Opinion by Buettner, J.; Goree, C.J., and Joplin, P.J., concur.

117,395 — Fayette Broadcasting Corporation d/b/a WMBS Radio, Plaintiff/Appellee, v. Chris Whinery d/b/a Natural Gas Matters, Defendant/Appellant. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Caroline Wall, Judge. Plaintiff Fayette Broadcasting Corporation, d/b/a "WMBS Radio" (WMBS), brought suit against Chris Whinery, d/b/a "Natural Gas Matters" (Whinery), for breach of contract. Finding no dispute of material fact, the trial court granted summary judgment in favor of WMBS. On appeal, Whinery claims that the trial court erred in granting summary judgment because a dispute as to material fact existed regarding the terms of the contract. We disagree and affirm the order of the trial court. AFFIRMED. Opinion by Buettner, J.; Goree, C.J., and Joplin, P.J., concur.

(Division No. 2)
Friday, February 8, 2019

116,757 — Desiree Roberts, Plaintiff/Appellant, vs. Christopher Raper and ChrisFit, LLC, Defendants/Appellees. Appeal from Order of the District Court of Tulsa County, Hon. Linda G. Morrissey, Trial Judge. Plaintiff brought this action seeking damages against Defendants for injury she allegedly sustained as a result of her participation in personal training sessions. She appeals the district court's order granting summary judgment in favor of Defendants. After an in-person consultation, Plaintiff entered into a "Personal Training Agreement" with Defendant ChrisFit, LLC. On the same date, she also signed a separate document entitled "ChrisFit Private Personal Training Waiver and Release Form," under the terms of which she acknowledged that she was "voluntarily participating" in the training, instruction and use of the facility and exercise equipment "entirely at [her] own risk." She agreed to "assume all risks of injury" by doing so. The district court con-

cluded that the language of the Waiver and Release Form was valid, enforceable, read and understood by Plaintiff, and also evidenced "a clear and unambiguous intent to exonerate Defendants from liability for injury from the personal training sessions." The district court further found that the Waiver and Release did not violate public policy. After noting that Plaintiff presented no evidence contravening the validity and enforceability of the Waiver, and no evidence of any facts or circumstances that might warrant piercing the corporate veil, the district court determined that Defendants were entitled to judgment as a matter of law. Finding no reversible error, we affirm the district court's order granting summary judgment to Defendants. AFFIRMED. Opinion from Court of Civil Appeals, Division II by Fischer, P.J.; Goodman, J., and Thornbrugh, J., concur.

Tuesday, February 12, 2019

116,110 — In re the Marriage of: Mary K. Varnell, Petitioner/Appellant, vs. Landon D. Varnell, Respondent/Appellee. Proceeding to review a judgment of the District Court of Creek County, Hon. Lester D. Henderson, Trial Judge. Petitioner Mary K. Varnell appeals the denial of her motion for new trial regarding the custody, visitation, and "restraining order" provisions of a divorce decree. On review, we find the issues of custody and visitation are moot because the minor child has turned 18. We find that the court's issuance of a "protective order" regulating contact between the couple is not moot because it continues to impose a disability on Petitioner in her education and chosen future career. The only record we have of the new trial proceeding is Petitioner's verified motion, which alleges that the "protective order" provision of the agreeed decree was inserted without her agreement. Based on the limited and incomplete record presented, we find that the district court acted against the clear weight of the evidence in refusing a new trial on this issue. We therefore remand this matter for a new trial only on the question of the "restraining order(s)" issued as part of the decree. MOOT IN PART, REVERSED IN PART AND REMANDED. Opinion from Court of Civil Appeals, Division II, by Thornbrugh, J.; Fischer, P. J., and Goodman, J., concur.

116,273 — Chad Beeson, Petitioner/Appellee, vs. Ashley Arabie, Respondent/Appellant. Proceeding to review a judgment of the District Court of Pottawatomie County, Hon. Dawson Engle, Trial Judge. Respondent Ashley Arabie appeals a decision of the district court in a post-decree proceeding. Respondent argues that an award of attorney fees and costs was mandated under 43 O.S. § 111.3; that the district court erred in refusing to award "make-up" visitation time; and that the court used an improper procedure when determining not to disqualify Petitioner's counsel. It is clear that, prior to 2014, a court "may" order prevailing party fees pursuant to § 111.3. After a 2014 amendment to § 111.3, the court "shall" order reasonable fees to the prevailing party. We find that Respondent was a prevailing party pursuant to § 111.3(E), and was entitled to seek a fee award. We find no error in the district court's orders concerning visitation. We find that the court's hearing process and order on disqualification was compliant with the process set out in *Arkansas Valley State Bank v. Phillips*, 2007 OK 78, 171 P.3d 899. REVERSED IN PART, AFFIRMED IN PART AND REMANDED. Opinion from Court of Civil Appeals, Division II, by Thornbrugh, J.; Fischer, P.J., and Goodman, J., concur.

116,901 — James MacComack, an individual, Plaintiff/Appellant, vs. Oklahoma Steel & Wire, Inc., a domestic corporation, Defendant/Appellee, and Mid America Steel & Wire, a domestic corporation, Defendant. Proceeding to review a judgment of the District Court of Marshall County, Hon. Wallace Coppedge, Trial Judge. Plaintiff appeals a summary judgment of the district court, made on statute of limitations grounds, in favor of Defendant Oklahoma Steel and Wire (OS&W). This case arises from an industrial accident that occurred on July 5, 2013. Plaintiff was injured by an electrical current while cleaning a piece of equipment. Plaintiff sought workers' compensation benefits from his nominal employer, Mid America Steel and Wire (MAS&W), and received an award. On May 15, 2015, Plaintiff received an OSHA report indicating that OS&W was responsible for safety at the site, and negligence by OS&W may have caused his injuries. Plaintiff waited another year before filing suit against OS&W. Plaintiff argues that a limitations period is tolled until a party knows of both an injury and the identity of a potential tortfeasor. We agree that it is knowledge of a wrongful (i.e., tortious) injury that starts the running of a limitations period, not simply the knowledge of an injury. *See Redwine v. Baptist Med. Ctr. of Oklahoma, Inc.*, 1983 OK 55, 679 P.2d 1293. However, Plaintiff's injury clearly arose from a wrongful act from the start. In turn, this

knowledge put Plaintiff on notice of the need to make diligent attempts to discover the identity of the tortfeasor. The record appears clear that Plaintiff assumed that MAS&W was the responsible party, and made no attempt to inquire further until he received an OSHA report shortly before the limitations period expired. The applicable statute of limitations was not, therefore, tolled. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Thornbrugh, J.; Fischer, P.J., and Goodman, J., concur.

116,868 (Companion with Case No. 116,867) — Urban Oil & Gas Partners B-1, LP and Urban Fund II, LP, Plaintiffs/Appellees, vs Cimarex Energy Co., Defendant/Appellant. Appeal from an Order of the District Court of Kingfisher County, Hon. Robert E. Davis, Trial Judge, granting summary judgment and awarding attorney fees in favor of Plaintiffs in an action to quiet title to Plaintiffs' interest in the "deep formation drilling rights" of an oil and gas lease. Both parties claim an interest in the mineral leasehold rights below 9,414 feet, and both claims of title hinge on a 1991 assignment of rights from a 1957 lease. The 1991 lease indicated it was subject to an Operating Agreement that limited the depth of operations from the surface to the first 9,414 feet in depth. Upon review of the 1991 assignment in its entirety and considering its provisions as a whole, we find the document is reasonably susceptible to only one interpretation as to the extent of the interest assigned, and that it is therefore unambiguous. We further agree with the trial court that the 1991 assignment assigned the entire interest to the leasehold without reservation of the deep formation rights below 9,414 feet. The "subject to" language in the assignment served only to inform the purchaser assignee that, while the assignor's entire interest in the 1957 lease was being assigned, the lease had previously been encumbered, or qualified, by an operating agreement that limited drilling to certain depths. Nothing in the language of the 1991 assignment suggests an express reservation of a property interest in the deeper formations. We further find the trial court was correct in awarding attorney fees to Plaintiffs pursuant to the Nonjudicial Marketable Title Procedures Act, 12 O.S.2011 §§ 1141.1 through 1141.5. Considering the purpose and intent of the NMTPA, we believe the circumstances here "present the precise set of facts and circumstances in which the NMTPA authorizes an award of attorney fees and costs" in favor of Plaintiffs. *Tucker v. Special Energy Corp.*, 2013 OK CIV APP 56, ¶¶ 17-20, 308 P.3d 169. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Thornbrugh, J.; Fischer, P.J., and Goodman, J., concur.

(Division No. 3)
Friday, February 8, 2019

115,732 — Raemona Sue Perry, Individually and as Personal Representative of the Estate of Louis G. Perry, Deceased, Plaintiff/Appellee, vs. Bebe Bridges, an Individual, Defendant/Appellant. Appeal from the District Court of Carter County, Oklahoma. Honorable Thad Balkman, Trial Judge. Defendant/Appellant Bebe Bridges (Bridges) appeals from a jury verdict awarding Plaintiff/Appellee Raemona S. Perry $600,000 in damages on her claims for legal malpractice and fraud. Bridges argues that the trial court erred in denying her motion for summary judgment and motion for directed verdict. Bridges also challenges several of the court's evidentiary rulings as well as several jury instructions. Of the issues properly preserved for appeal, we find that the trial court did not err in denying Bridges' motion for directed verdict. We also see no reversible error in the trial court's evidentiary rulings and jury instructions. We AFFIRM. Opinion by Swinton, J.; Mitchell, P.J., and Bell, J., concur.

116,306 — Skyler Steven Cundiff, Petitioner/Appellee, vs. Virginia Vargas Cundiff, Respondent/Appellant. Appeal from the District Court of Payne County, Oklahoma. Honorable Katherine E. Thomas, Trial Judge. In this dissolution of marriage proceeding, Respondent/Appellant, Virginia Vargas Cundiff (Mother), appeals from the portion of the trial court's decree awarding primary legal custody of the parties' minor children to Petitioner/Appellee, Skyler Steven Cundiff (Father). The decree also awarded Mother shared parenting time. Mother contends the award was a clear abuse of discretion and contrary to the weight of the evidence of the children's best interests. The evidence demonstrates Father is a fit and proper person to have custody of the children. Father is also the most likely to encourage the children's visitation with Mother. Therefore, we hold the trial court did not abuse its discretion or hold contrary to the weight of the evidence when it awarded Father custody of the children and shared parenting to Mother. The decree is AFFIRMED AND REMANDED WITH INSTRUCTIONS. Opinion by Bell, J.; Mitchell, P.J., and Swinton, J., concur.

116,340 — Jessica Ritter, Plaintiff/Appellee, vs. Casey Brent Cox, Defendant/ Appellant. Appeal from the District Court of Comanche County, Oklahoma. Honorable Emmit Tayloe, Trial Judge. In this paternity action, Defendant/Appellant, Casey Brent Cox (Alleged Father), appeals from the trial court's order finding Alleged Father is the adjudicated father of W.R., the minor child. Petitioner/Appellee, Jessica Ritter (Mother), filed a petition against Alleged Father to determine his paternity. Alleged Father moved to dismiss the petition on the basis that Mother was married to another man at the time of the child's birth and the paternity proceeding was barred by the two year limitation period at §7700-607 of the Uniform Parentage Act, 10 O.S. 2011 §7700-101 *et seq.* (the Act). The trial court relied on genetic test results (DNA) and determined Alleged Father is the adjudicated father of the child. After *de novo* review, we AFFIRM the trial court's order determining parentage and child support obligations. Opinion by Bell, J. Swinton, J., concurs; Mitchell, P.J., dissents.

117,189 — Bryan Weatherly, Petitioner, vs. FedEx Express, Own Risk Carrier No. 16593 and The Workers' Compensation Commission, Respondents. Appeal from the Workers' Compensation Commission. Petitioner, Bryan Weatherly (Claimant), appeals from the Workers' Compensation Commission's order, which affirmed the decision of an administrative law judge (ALJ), denying Claimant workers' compensation benefits for a cumulative trauma injury. Claimant is a twenty-five (25) year old man with no history of any back problems prior to his employment with FedEx Express (Employer). He had been employed for six (6) years at the time this case arose. Claimant's employment required him to bend and stoop, and lift and transport packages of various sizes and weights daily, including lifting up to seventy-five (75) pounds by himself. Although he had endured normal stiffness and back pain before, Claimant awoke on March 15, 2017, with significant back pain which he immediately reported to his supervisor. Claimant sought medical treatment, including low back surgery, on his own after Employer denied a job-related injury. The record contains no allegation or evidence that Claimant injured his back anywhere other than at work. Claimant filed a claim for workers' compensation benefits, alleging cumulative trauma injury to his back while working for Employer. The ALJ denied the claim, holding Claimant's work duties did not satisfy the requirements of 85A O.S. Supp. 2013 §2(14). The Commission af-firmed. In light of the reliable, material, probative and substantial competent evidence, we conclude the Commission clearly erred in finding Claimant did not sustain a compensable cumulative trauma injury to his lumbar spine. Accordingly, the order of the Commission is VACATED. Opinion by Bell, J.; Mitchell, P.J., and Swinton, J., concur.

Friday, February 15, 2019

116,361 — In re the marriage of Wells: L. Wells, Petitioner/Appellant, v. M. Wells, Respondent/Appellee. Appeal from the District Court of Tulsa County, Oklahoma. Honorable J. Anthony Miller, Judge. Petitioner/Appellant L. Wells (Mother) appeals from the Decree of Dissolution of Marriage, which incorporated the Joint Custody Plan agreed to by Mother and Respondent/Appellee M. Wells (Father). Mother contends the trial court erred by ordering the parties to prepare the Joint Custody Plan. Mother also challenges the court's child support computation, property division, and support alimony award. We find the court did not abuse its discretion and AFFIRM. Opinion by Mitchell, P.J.; Bell, J., and Swinton, J., concur.

(Division No. 4)
Tuesday, February 5, 2019

116,330 — In Re the Marriage of: Steven R. Tubbs, Petitioner/Appellee, v. Janet D. Tubbs, Respondent/Appellant. Appeal from an Order of the District Court of Ottawa County, Hon. Robert E. Reavis, II, Trial Judge. The Respondent, Janet D. Tubbs (Wife), appeals a Decree of Divorce entered in an action brought by petitioner, Steven R. Tubbs (Husband). Wife raises five issues for her assignments of error. Three are procedural in nature and relate to discovery, the trial court's findings of fact, and attorney fees. Wife argues error in the support alimony award and division of certain assets. There is no error based upon the trial court's ruling denying additional discovery given the circumstances and facts made known to the trial court at the time it ruled on further discovery. The trial court did not err by requiring each party to bear their own costs in light of the sizeable estate of each party. The trial court's findings, conclusions, and Decree do not disclose that the trial court forfeited its decision-making duty rather than decide contested issues. Wife has not shown any procedural error warranting reversal. The support alimony award reasonably accounts for Wife's needs and all other relevant factors

to consider when deciding support alimony questions. Husband inherited stock from his parents. Wife maintains that this stock became joint property because it was included in a Trust formed by the parties during their marriage. However, the express language of the Trust is that separate property remains separate property. This language includes an express right to withdraw separate property and express provisions for use of the separate property for the owner, Husband. Moreover, the Record does not show that the stock was delivered. In addition, there is no transfer on the corporate books and there is a special regulatory requirement attendant to this stock as it is in a nursing home corporation. Wife has not demonstrated error regarding disposition of the nursing home stock. The trial court divided Husband's retirement account based upon the deferred payment method and awarded Wife one-half for life. Wife argues for the present value method and seeks a lump sum payment based upon her personal calculation of present value. The trial court does not have to accept her testimony. Moreover, the evidence is lacking regarding other factors affecting life expectancy aside from a statistical chart. After review, this Court concludes that the decision of the trial is not against the clear weight of the evidence, nor contrary to law. Therefore the trial court is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., and Wiseman, V.C.J., concur.

Wednesday, February 6, 2019

116,665 — McCurtain County National Bank, Plaintiff/Appellee, v. Clearcut Auto, LLC, Chad Dewayne Pratt and Nelda Butzirus, Defendants/Appellants. Appeal from the District Court of McCurtain County, Hon. Michael D. DeBerry, Trial Judge. Defendants seek review of the trial court's order denying their motion to reconsider the trial court's previous order denying Defendants' motion to vacate an order granting summary judgment to Plaintiff. Based on our review of the record and the applicable law, we conclude the trial court did not abuse its discretion in overruling Defendants' motion to vacate an order granting summary judgment to Plaintiff and in denying Defendants' motion to reconsider. We further conclude the trial court did not err as a matter of law in determining that its order granting summary judgment to Plaintiff was not void on the ground that the court lacked subject matter jurisdiction. Accordingly, we affirm. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Wiseman, V.C.J., and Rapp, J., concur.

Thursday, February 7, 2019

117,136 — In the Matter of the Adoption of M.L.L., a minor child, Robert A. Linder, III, Appellant, v. Hannelore D. Linder, Appellee. Appeal from an Order of the District Court of Payne County, Hon. Katherine E. Thomas, Trial Judge. The respondent, Robert A. Linder, III (Father) appeals an Order allowing adoption without his consent pursuant to a petition filed by Hannelore Cline Standridge (formerly Linder) (Mother) and her current Husband. This is an adoption without Father's consent case. In this appeal, the only question is whether the District Court division where the adoption petition was filed has jurisdiction when the parents had divorced in the District Court division in another county and that Decree included child custody and support provisions. The District Court in Oklahoma is structured in divisions. The district court "constitutes an omnicompetent, single-level, first-instance tribunal with 'unlimited original jurisdiction of all justiciable matters.'" Thus, any division of the District Court potentially has jurisdiction. However, not every division satisfied venue requirements imposed by the Adoption Code. Here, the District Court division where the adoption petition was filed satisfied both jurisdiction and venue requirements. The District Court division where the divorce was entered does not satisfy the venue requirement. As previously decided by this Court, the Adoption Code referral to the Uniform Child Custody Jurisdiction and Enforcement Act does not apply to intrastate cases. However, here, there is actually no competing court issue as the divorce court is hearing only a post-decree visitation enforcement matter where Father attempts to establish a defense to Mother's and her husband's claim that Father has failed to maintain and establish a relationship with the child. The mere fact that the Lincoln County District Court entered the divorce decree with its attendant child custody and support provisions does not overcome the venue requirement for a separate and distinct proceeding for adoption. The judgment that the Payne County division of the District Court has jurisdiction is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., and Wiseman, V.C.J., concur.

Wednesday, February 13, 2019

117,391 — Kevin L. Tyner, Sr., Plaintiff/Appellant, v. Hiland Dairy Foods Company, LLC & Chris Hukill, Defendants/Appellees. Appeal from an Order of the District Court of Oklahoma County, Hon. Don Andrews, Trial Judge. Trial court plaintiff, Kevin L. Tyner, Sr., (Tyner) appeals the trial court's Order sustaining the summary judgment motions of defendants, Hiland Dairy Foods Company, LLC (Hiland Dairy) and Chris Hukill (Hukill). This Court finds the trial court did not err in sustaining the summary judgment motions of defendants, Hiland Dairy and Hukill. The trial court's Order sustaining the summary judgment motions of defendants, Hiland Dairy and Hukill, is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Rapp J.; Barnes, P.J., and Wiseman, V.C.J., concur.

Thursday, February 14, 2019

116,997 — Todd Benjamin Evans, Petitioner, v. Truly Noble Services Inc., Argonaut Insurance Co. and The Workers' Compensation Court, Respondents. Proceeding to Review an Order of a Three Judge Panel of The Workers' Compensation Court, Hon. Carla Snipes, Trial Judge. Todd Benjamin Evans (Claimant) appeals the decision of the Three-Judge Panel of the Workers' Compensation Court of Existing Claims. This decision affirmed the trial court's denial of Claimant's motion to reopen his workers' compensation case based upon an allegation of a change of conditions for the worse. Truly Noble Services, Inc. (Employer) was the employer and its insurer is Argonaut Insurance Co. Claimant compromised and settled his claim for the 2011 injury. He now seeks to reopen the claim for a change of condition for the worse. He is barred from reopening the claim. There was no fraud shown. Claimant received a thorough explanation of the terms and consequences of the compromise settlement, including the bar on reopening for a change of conditions for the worse. The Record shows that he fully understood the explanation and accepted all of the benefits and consequences of the settlement. The decision of the Three-Judge Panel is sustained. SUSTAINED. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., and Wiseman, V.C.J., concur.

ORDERS GRANTING REHEARING
(Division No. 1)
Friday, February 15, 2019

116,675 — Sage Nikole Sunderland, Petitioner/Appellee, vs. Michael David Zimmerman, Defendant/Appellant. The Petition for Rehearing is *GRANTED*.

ORDERS DENYING REHEARING
(Division No. 1)
Thursday, February 14, 2019

116,785 — Wells Fargo Bank, N.A., Plaintiff/Appellee, vs. Eric L. Jackson and Donnita A. Jackson, Defendants/Appellees. Appellants' Petition for Rehearing and Reconsideration and Brief in Support, filed February 11, 2019, is *DENIED.*

(Division No. 3)
Wednesday, February 13, 2019

116,275 — Leslie Brown Jr., Leslie David Brown III, Plaintiffs/Appellants, vs. Carol McCullom, Debbie Keener, Harbor Insurance Co., and State Farm Insurance Co., Defendants/Appellees, and Tulsa Auto Salvage, Defendant, Leslie Brown Jr., Plaintiff/Appellant, vs. Insurance Auto Auctions, Inc., and Clint Smith, Defendants/Appellees. Appellant's Petition for Rehearing, filed February 4th, 2019, is *DENIED*.

(Division No. 4)
Wednesday, February 13, 2019

117,356 — Lisa McClain, Individually and as Special Administrator of the Estate of B.L.M., a minor, Plaintiff/Appellant, vs. Brainerd Chemical Company, Inc., an Oklahoma corporation, Defendant/Appellee, and Psycho Path, LLC, an Oklahoma limited liability company; Victor R. Marquez and Suzette Marquez, Individually and West Texas Drum Company, Ltd, II, a Texas limited partnership, Defendants, and Psycho Path, LLC, an Oklahoma limited liability company, Victor R. Marquez and Suzette Marquez, Individually and Brainerd Chemical Company, Inc., Third-Party Plaintiffs, vs. Robert Thomas, in Individual, Third-Party Defendant. Appellant's Petition for Rehearing is hereby *DENIED*.

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