THE OKLAHOMA BAR
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Court Issue

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ADVANCED DUI: LESSONS FROM THE NATIONAL MASTERS

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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
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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 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. WOLTZ, Additional Non-Party Appellees.

No. 117,511. March 5, 2019

CORRECTION ORDER

¶1 The opinion in the above-styled and numbered cause, entered on February 26, 2019, is hereby corrected as follows:

> The last name of the Additional Non-Party Appellee, Joseph C. Woltz, was misspelled as "Wolts" in the style of the opinion. The opinion shall hereby be amended to reflect the correct spelling, "Woltz."

In all other respects the opinion shall remain unchanged.

¶2 DONE BY ORDER OF THE SUPREME COURT this 5th day of March, 2019.

/s/ Noma D. Gurich

CHIEF JUSTICE

2019 OK 8

RE: Suspension of Credentials of Registered Courtroom Interpreters

SCAD-2019-17. March 4, 2019

ORDER

The Oklahoma Board of Examiners of Certified Courtroom Interpreters has recommended to the Supreme Court of the State of Oklahoma the suspension of the credential of the Oklahoma Registered Courtroom Interpreter listed on the attached Exhibit for failure to comply with the annual continuing education requirements for 2018 and certificate renewal requirements for 2019.

Pursuant to 20 O.S., Chapter 23, App. II, Rule 18(c), failure to satisfy the annual renewal requirements on or before February 15 shall result in administrative suspension on that date. Pursuant to 20 O.S., Chapter 23, App.II, Rule 20(e), failure to satisfy the continuing education reporting requirements on or before February 15 shall result in administrative suspension on that date.

IT IS THEREFORE ORDERED that the credentials of each of the interpreters named on the attached Exhibit is hereby suspended effective February 15, 2019.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 4th day of MARCH, 2019.

/s/ Noma D. Gurich
CHIEF JUSTICE

ALL JUSTICES CONCUR.

Interpreter Exhibit

Linda Allegro	Continuing Education
Tania Flores	Continuing Education & Renewal Fee
Alejandro Miranda	Continuing Education & Renewal Fee
Emily Salinas	Continuing Education & Renewal Fee
Jazmin Zaragoza	Continuing Education & Renewal Fee

2019 OK 9

STATE OF OKLAHOMA ex rel. OKLAHOMA BAR ASSOCIATION, Complainant, v. MATTHEW JEREMY PATTON, Respondent.

SCBD 6734. March 4, 2019

ORDER APPROVING RESIGNATION FROM OKLAHOMA BAR ASSOCIATION PENDING DISCIPLINARY PROCEEDINGS

¶1 Upon consideration of (1) Respondent's Affidavit, prepared in compliance with Rule 8.1, Rules Governing Disciplinary Proceedings, 5 O.S. 2011, Ch. 1, App. 1-A, in which Respondent, Matthew Jeremy Patton requests that he be allowed to relinquish his license to practice law and to resign from membership in the Oklahoma Bar Association, and (2) Complainant's Application for Order Approving Resignation,

¶2 THE COURT FINDS AND HOLDS:

¶3 During the pendency of disciplinary proceedings against him, Matthew Jeremy Patton offered, on February 5, 2019, to surrender his license to practice law and to resign from Bar membership.

¶4 Respondent's affidavit of resignation reflects that: (a) his resignation was freely and voluntarily made; (b) he was not subject to coercion or duress; and (c) he is fully aware of the legal consequences that will flow from his resignation.

¶5 The affidavit of resignation states Respondent's awareness that the Oklahoma Bar Association has investigated the following criminal conviction which suffices as a basis for discipline:

¶6 ***State of Oklahoma v. Matthew Jeremy Patton,*** **Washita County, Case No. CF-2017-46:** On April 19, 2017 Patton was charged with Burglary in the Second Degree (Count I) and Grand Larceny in House (Count II). On August 22, 2017, Count I was amended to a misdemeanor under 21 O.S.2011 § 22, and Count II was dismissed with prejudice. Patton entered a plea of guilty to violating 21 O.S.2011 § 22, Acts Resulting in Gross Injury. Patton received a two-year deferred sentence until August 21, 2019.

¶7 Respondent is aware that, if proven, this grievance would constitute violations of Rules 8.4 (a) and (b), Oklahoma Rules of Professional Conduct; Rule 1.3 Oklahoma Rules Governing Disciplinary Procedures; and Respondent's oath as a licensed Oklahoma lawyer.

¶8 Respondent waives any and all right to contest the allegations in a bar disciplinary proceeding.

¶9 Respondent states his awareness that a RGDP Rule 8.2 resignation pending disciplinary proceedings may be either approved or disapproved by the Oklahoma Supreme Court.

¶10 Respondent is aware and understands the implications of the Order of Immediate Interim Suspension entered on December 17, 2018. He states that he waived his right to challenge the interim suspension and that on the date of the suspension he was not engaged in the practice of law nor engaged in legal representation on behalf of any client.

¶11 Respondent agrees to comply with RGDP Rule 9.1, and acknowledges that his license to practice law may be reinstated only upon compliance with the conditions and procedures prescribed by RGDP Rule 11.

¶12 Respondent recognizes, understands, and agrees that he may not apply for reinstatement of his legal license (and of his membership in the Bar) before the expiration of five years from the effective date of this order.

¶13 Respondent acknowledges that his actions may result in claims against the Client Security Fund and agrees to reimburse the Fund for any disbursements made or to be made because of his actions, with applicable statutory interest, prior to the filing of any application for reinstatement.

¶14 Respondent states that he has surrendered his Oklahoma Bar Association membership card to the Office of the General Counsel.

¶15 Respondent states that he acknowledges and agrees to cooperate with the Office of the General Counsel in the task of identifying any active client cases wherein documents and files need to be returned or forwarded to new counsel, and in any client case where fees or refunds are owed by Respondent.

¶16 Respondent acknowledges the Oklahoma Bar Association has incurred costs in the investigation and prosecution of this matter in the amount of $8.04, and agrees he is responsible for reimbursement of these costs.

¶17 Respondent's resignation during the pendency of disciplinary proceedings is in compliance with RGDP Rule 8.1.

¶18 Respondent's name and address appear on the official Bar roster as: Matthew Jeremy Patton, O.B.A. No. 32189, 14317 Brinley Way, Oklahoma City, OK 73142.

¶19 IT IS THEREFORE ORDERED THAT the resignation of Matthew Jeremy Patton tendered during the pendency of disciplinary proceedings be approved, and the resignation is deemed effective on the date it was executed and filed in this Court, February 5, 2019.

¶20 IT IS FURTHER ORDERED that Respondent's name be stricken from the Roll of Attorneys and he may not apply for reinstatement of his license to practice law (and of his membership in the Bar) before the lapse of five years from the effective date of this order (February 5, 2019); Respondent shall comply with RGDP Rule 9.1.

¶21 IT IS FURTHER ORDERED that Complainant's request for reimbursement of costs is sustained. Respondent shall pay costs in the amount of $8.04 within thirty (30) days from the date of this order. Any consideration of any

future Rule 11 petitions is conditioned upon such payment.

¶22 DONE BY ORDER OF THE SUPREME COURT this 4th day of March, 2019.

/s/ Noma D. Gurich
CHIEF JUSTICE

ALL JUSTICES CONCUR.

2019 OK 10

RE: Suspension of Certificates of Certified Shorthand Reporters

SCAD-2019-16. March 11, 2019

ORDER

The Oklahoma Board of Examiners of Certified Shorthand Reporters has recommended to the Supreme Court of the State of Oklahoma the suspension of the certificate of each of the Oklahoma Certified Shorthand Court Reporters listed on the attached Exhibit for failure to comply with the continuing education requirements for calendar year 2018 and/or with the annual certificate renewal requirements for 2019.

Pursuant to 20 O.S., Chapter 20, App. 1, Rule 20(c), failure to satisfy the annual renewal requirements on or before February 15 shall result in administrative suspension on that date. Pursuant to 20 O.S., Chapter 20, App. 1, Rule 23(d), failure to satisfy the continuing education reporting requirements on or before February 15 shall result in administrative suspension on that date.

IT IS THEREFORE ORDERED that the certificate of each of the court reporters named on the attached Exhibit is hereby suspended effective February 15, 2019.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 11th day of MARCH, 2019.

/s/ Noma D. Gurich
CHIEF JUSTICE

ALL JUSTICES CONCUR.

Exhibit

Hope Alwardt	CSR #1883	Continuing Education & Renewal Fee
Karen Baker	CSR #1552	Continuing Education & Renewal Fee
Lorena Bishop	CSR #125	Continuing Education & Renewal Fee
Regina Goldsmith	CSR #908	Continuing Education & Renewal Fee
David Harjo	CSR # 873	Renewal Fee
Laurie Hoyt	CSR # 547	Continuing Education
Deborah Parker	CSR # 1575	Continuing Education & Renewal Fee
Connie Petrazio	CSR # 1733	Continuing Education & Renewal Fee
Elizabeth Phillips	CSR #1855	Continuing Education & Renewal Fee
Trulia Taylor	CSR # 2010	Renewal Fee
Connie Tocco	CSR #1977	Continuing Education & Renewal Fee
Jeanna Whitten	CSR #1961	Continuing Education & Renewal Fee

2019 OK 11

EMILEE ANNE MULLENDORE, Petitioner, v. MERCY HOSPITAL ARDMORE, SELF INSURED, and THE WORKERS' COMPENSATION COMMISSION, Respondents.

No. 113,560. March 12, 2019

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS, DIVISION III

¶0 Petitioner/Employee sought review of the Workers' Compensation Commission's Order *en banc*, which upheld the administrative law judge's Order Denying Compensability finding that Employee's injury to her right leg/knee was idiopathic in origin and was noncompensable under the Administrative Workers' Compensation Act. lt was *undisputed* by all parties that the 21 year old Employee: (1) had **never** suffered any prior injury to her knee; (2) had never sought prior medical treatment for her knee; and (3) she was "in the course of her employment" at the time of her injury. The Court of Civil Appeals affirmed the

Commission *en banc*. We hold that Employee's knee injury is a "compensable injury" within the meaning of the Oklahoma Administrative Workers' Compensation Act. 85 A O.S. Supp. 2018 § 2 (9)(a).

COURT OF CIVIL APPEALS OPINION VACATED; ORDER OF THE WORKERS' COMPENSATION COMMISSION *EN BANC* REVERSED; ORDER OF ADMINISTRATIVE LAW JUDGE REVERSED.

Bob Burke, 308 NW 13th, Suite 200B, Oklahoma City, OK 73103 and

John R. Colbert, P.O. Box 1421, Ardmore, OK 73402, for Petitioner, and

Janet Dech, 401 NW 63rd Street, Suite 600, Oklahoma City, OK 73116, for Respondent.

OPINION

EDMONDSON, J.:

FACTS AND PROCEDURAL HISTORY

¶1 Emilee Ann Mullendore (Petitioner) was employed as a certified nursing assistant (CNA) with Mercy Hospital in Ardmore, Oklahoma during the time relevant to this matter. One of Petitioner's duties as a CNA included providing ice and water to her assigned patients. On March 22, 2014, while working during her assigned hospital shift, Petitioner entered the fifth floor nutrition room and assembled 8 separate one pound bags of ice for the patients. She then turned to open the door out of the nutrition room, took a step into the doorway and "I felt my right foot slip out to the right and then the top part of my leg and my knee turned in to the left."[1] Petitioner immediately fell onto the floor and was unable to walk on her leg. Petitioner had worked over six hours of her shift without difficulty before her accident. At the time, Petitioner was twenty-one (21) years old.

¶2 Ms. Mullendore was evaluated in the emergency room within a few hours after the accident complaining of "right knee pain - says she just stepped and fell."[2] The physician documented she had limited range of motion to the right knee with tenderness noted at the medial and lateral joint lines.[3] The x-ray of her knee showed no acute or structural abnormalities of the right knee, specifically noting "no fracture or dislocation."[4] The emergency room physician diagnosed her with *"right knee injury, initial encounter."*[5] Petitioner testified that before this fall, she had (1) no previous injuries to the right knee and (2) she had no complaints regarding the right knee and had never sought medical treatment for this knee. All evidence before this Court reflects that Petitioner had *no prior injuries* to this knee and that *she had never previously sought medical treatment for her right knee.* The physician experts for Petitioner as well as Respondent both acknowledge Petitioner had no prior history of an injury to this right knee.

¶3 A few days after the injury, Petitioner was evaluated in the Mercy Occupational Medicine Clinic. She had pain and swelling in the knee with a diagnosis of right knee derangement. On April 1, 2014 a MRI study of the right knee was conducted with a conclusion that Petitioner had a "linear tear of the hyaline articular cartilage of the medial patellar facet which measures 0.4 cm."[6] This MRI study goes further in finding that Petitioner's "quadriceps and patellar tendons, medial and lateral collateral ligaments, ACL and PCL are normal. Normal medial and lateral menisci."[7] Based on a reasonable degree of medical certainty, the treating medical provider diagnosed Petitioner with "right knee derangement".[8] Thus, the right knee x-ray reflected no fracture or dislocation, and the MRI reflected that all structures of the knee were normal, except for the tear in the hyaline articular cartilage and the small effusion. Respondent was then given a referral for an evaluation with an orthopedic surgeon.

¶4 Petitioner filed a claim before the Oklahoma Workers' Compensation Commission seeking the recovery of medical care for the injury and requested the reservation of the issue of whether she was entitled to recover temporary total disability benefits. Petitioner claimed she sustained a compensable injury on March 22, 2014 to her right knee as a result of an unexplained fall that arose out of her performing employment related services for the hospital. Respondent denied the claim contending the injury was not work-related but was idiopathic in nature, arising out of a condition that was personal to the Petitioner. Both parties retained a physician expert who conducted an exam, reviewed medical records and issued a written report. Neither expert testified at the hearing; the ALJ was provided their respective written reports.

¶5 Petitioner's physician expert noted that there was no evidence of prior work related or

non-work related injuries to Petitioner's right knee. He noted that the MRI revealed a small joint effusion and a horizontally oriented linear tear of the hyaline cartilage of the medial patella facet. There was no abnormality in the cartilage of the lateral patellar facet. This expert also specifically noted that the MRI study of the knee revealed that the "quadriceps and patellar tendons, medial and collateral ligaments, ACL and PCL were all noted to be normal." The medial and lateral menisci were also normal.[9] Petitioner's expert opined that Ms. Mullendore's slip on the floor on March 22, 2014 is the "major cause of the injury and need for treatment to her right leg/knee."[10] This expert also expressed the opinion that Petitioner was in need of further medical treatment and recommended that "she be referred to a board-certified orthopedic specialist for further evaluation, a course of physical therapy and possible injections."[11] Petitioner's expert then concluded that "based upon the history provided by Ms. Mullendore, review of medical records, my examination as well as my experience and training, it is my opinion within a reasonable degree of medical certainty that the major cause of the injury arose out of and is the direct result of the employee's work-related accident sustained on March 22, 2014, while employed by the above employer."[12]

¶6 The physician expert for Mercy Hospital Ardmore ("Respondent") acknowledged in his report that Ms. Mullendore had no history of a prior injury to her right knee. He also discussed the MRI reflected a linear tear of the hyaline cartilage of the patellar facet of the right knee. Even though the record reflects that prior to March 22, 2014 Ms. Mullendore had (1) no prior injury to the right knee, (2) no prior complaints relating to the right knee, and (3) never sought medical treatment related to the right knee, Respondent's expert rendered the opinion that Petitioner had the following diagnoses related to her accident of March 22, 2014:

> No indication of work-related injury.
>
> The following diagnosis is unrelated, pre-existent or subsequent to her accident of 03/22/14:
>
> Patellofemoral[13] dysplasia[14] with acute subluxation[15] and relocation of the right knee, an idiopathic condition leading to an idiopathic fall. No injury occurring from the fall. All complaints related to the pre-existing patellofemoral condition.[16]

Idiopathic means something that arises spontaneously or ***from an obscure or unknown cause*** or something peculiar to the individual. [17] Respondent's expert discusses in his report that Ms. Mullendore's explanation of what happened "sounds like a patellar dislocation." [18] He attributes the tear of the right knee hyaline cartilage to "the idiopathic subluxation relocation of her kneecap, a pre-existing condition leading to an idiopathic fall."[19] Using common language, it is his opinion that Ms. Mullendore had an unexplained movement or partial dislocation of her right knee which was a "pre-existing" condition that led to in his opinion an "idiopathic" fall while she was at work.

¶7 Respondent's expert offers a discussion and the following opinions:

> Ms. Mullendore stated that her knee went into a valgus posture and then corrected itself and after that she fell. She gives a history that sounds like a patellar dislocation and she has fairly passive patellar motion, especially medially, but without any specific apprehension. Her MRI shows what the radiologist refers to as a tear of the hyalin [*sic*] cartilage, which is related to the idiopathic subluxation relocation of her kneecap, a pre-existing condition. She did not experience any injury at work. There was nothing about work that made her fall. She did not trip on any object. She did not say that her foot slipped on something on the floor or give any other such history. It is my opinion that Ms. Mullendore simply has a patellofemoral malalignment, and in adulthood this often leads to episodes of subluxation of the patella. The MRI findings are consistent with this condition and she should seek private orthopedic care for the treatment of this condition. It is my opinion that there is nothing about this episode that was a work-related injury.[20]

He stated the MRI findings are consistent with "this condition", i.e., the patellofemoral malalignment which leads to episodes of subluxation in adulthood. However, the complete MRI report has no such finding; the entire findings are as follows:

> FINDINGS: Small joint effusion with estimated volume of 5 ml.There is a horizontally oriented linear tear of the hyaline cartilage of the medial patella facet. This measures 0.4 cm. The hyaline cartilage of the lateral patellar facet is normal.

> The quadriceps and patellar tendons, medial and lateral collateral ligaments, ACL and PCL. Normal medial and lateral menisci.
>
> Normal bone marrow signal. No bone contusion or fracture.
>
> CONCLUSION: THERE IS A LINEAR TEAR OF THE HYALINE ARTICULAR CARTILAGE OF THE MEDIAL PATELLAR FACET WHICH MEASURES 0.4 cm.[21]

The report of the x-rays taken of Ms. Mullendore's knee on the date of this injury state:

> FINDINGS: The **osseous structures are intact**. No **fracture or dislocation**. No joint effusion.[22] (emphasis added).

Neither the x-ray or the MRI report include a finding or discussion relating to patellofemoral malalignment, or dislocation.

¶8 Respondent's expert finally concludes:

> A. No permanent partial impairment to the right knee from work-related accident of 03/22/14, while an employee of Mercy Memorial Hospital;
>
> B. The patient sustained an idiopathic subluxation relocation of the right knee for which she may wish to seek private medical care.[23]

¶9 Petitioner's claim for benefits went to hearing before an Administrative Law Judge (ALJ) who concluded that "Claimant has failed to prove by preponderance of the evidence that she suffered a compensable injury to her RIGHT LEG (KNEE) on March 22, 2014 within the meaning of 85A O.S., § 2 (9) (a) of the Administrative Workers' Compensation Act while employed by the Respondent."[24] In reaching this conclusion, the ALJ relied on the following findings: (1) Dr. John's findings with respect to causation that the cause of the episode to her right knee was due to a pre-existing condition, the patellofemoral dysplasia causing "subluxation and relocation of the right knee causing an idiopathic fall and not a work-related injury, (2) there was no evidence presented establishing any slip or trip obstacles in the Claimant's path, (3) Claimant's history of the fall on the date of injury was that her "knee gave out on her", and (4) Claimants history of the fall was that "she was walking out of the nutritional room when the bottom of my right knee went to the right and the top of my right knee went to the left and I felt a popping and crunching sensation that turned into sharp excruciating pain."[25]

¶10 Ms. Mullendore filed a Request for Review before the Workers' Compensation Commission. The Order issued by the ALJ was affirmed by the Workers' Compensation Commission *En Banc*. Ms. Mullendore then filed a Petition for Review; the Court of Civil Appeals affirmed the Order of the Workers' Compensation Commission *En Banc*.

STANDARD OF REVIEW

¶11 The law in effect at the time of the injury controls both the award of benefits and the appellate standard of review. *Vasquez v. Dillards, Inc.*, 2016 Ok 89, 381 P.3d 768; *Brown v. Claims Mgmt. Res. Inc.*, 2017 OK 13, ¶ 9, 391 P.3d 111, 115. Appellate review of the judgment in this matter is set forth at 85A O.S. Supp. 2013 § 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 made by an admininstrative 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;
>
> 3. Made on unlawful procedure;
>
> 4. Affected by other error of law;
>
> 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.

¶12 Mullendore alleges both legal error concerning statutory interpretation and constitutional claims. The issues of a statute's constitutional validity and of its construction are questions of law subject to *de novo* review. *Brown*, 2017 OK 13, ¶ 10, 391 P.3d at 115.

Under this standard on appeal, we assume plenary, independent, and non-deferential authority to reexamine the lower tribunal's legal rulings. *Id.; see also Lee v. Bueno*, 2016 OK 97, ¶ 6, 381 P.3d 736.

¶13 The interpretation and application of the statutes at issue in this matter, also implicates 85A O.S. Supp. 2013 § 78(c)(5). We previously noted that the language of this provision is similar to that used by this Court concerning its review of factual matters in other administrative proceedings. *Brown*, 2017 OK 13, ¶ 11, 391 P.3d at 115. Accordingly, with respect to issues of fact, the Commission's order will be affirmed if the record contains substantial evidence in support of the facts upon which it is based and is otherwise free of error. *Id.*

¶14 Petitioner also urges as error that the COCA has decided a question of substance in a way probably not in accord with applicable decisions of this Court in *Pauls Valley Travel Center v. Boucher,* 2005 OK 30, 112 P.3d 1175.

ANALYSIS

¶15 The Administrative Workers' Compensation Act defines compensable injury as follows:

> a. "Compensable injury" **means damage or harm to the physical structure of the body,** or prosthetic appliances, including eyeglasses, contact lenses, or hearing aids, **caused solely as the result of either an accident,** cumulative trauma or occupational disease **arising out of the course and scope of employment**. An "accident" means an event involving factors external to the employee that:
>
> (1) was unintended, unanticipated, unforeseen, unplanned and unexpected,
>
> (2) occurred at a specifically identifiable time and place,
>
> (3) occurred by chance or from unknown causes, and
>
> (4) was independent of sickness, mental incapacity, bodily infirmity or any other cause.

85A O.S. Supp. 2013 § 2(9)(a), (emphasis added).

¶16 The Commission affirmed the ALJ's order that Mullendore failed to establish she suffered a "compensable injury" by a preponderance of the evidence. In arriving at this decision, the ALJ relied almost exclusively on the findings of the Respondent's expert that Mullendore had a pre-existing condition, a patellofemoral malalignment, that created an instability then causing her to fall and injuring her knee while at work. These findings will be affirmed only if the record contains substantial evidence in support of such facts. *Brown,* 2017 OK 13, ¶ 11, 391 P.3d at 115.

¶17 We next examine the record to determine whether there is substantial evidence to support these findings. As defined in the AWCA, Mullendore sustained a "compensable injury" if she can establish by a preponderance of the evidence that: (1) she suffered damage to her physical body, (2) caused solely as the result of an ***accident***, cumulative trauma or occupational disease, and (3) arising out of the course and scope of employment. 85A O.S. Supp. 2013 § 2(9)(a). The record contains undisputed evidence that Mullendore suffered pain, swelling and a visible cartilage tear on the MRI study, which is clearly "damage to her physical body". The ALJ made a specific finding in her Order that "whether the injury was 'in the course of employment' was not disputed."[26] Thus, Mullendore clearly met this factor.

¶18 With respect to the requirements of "compensable injury" in §2 (9) (a), the only factor in dispute is whether Mullendore's injury was *solely* the result of an accident. [27] "Accident" is specifically defined in § 2 (9)(a) as an event that (1) was unintended, unanticipated, unforeseen, unplanned and unexpected, (2) occurred at a specifically identifiable place, (3) occurred by chance or from unknown causes and (4) was independent of sickness, mental capacity or bodily infirmity or any other cause. We next consider whether Mullendore met her burden in establishing that her injury fits the definition of "accident" under § 2(9)(a).

¶19 Respondent's expert disputed that Mullendore's injury was "solely" caused by accident, asserting that her injury was the result of a pre-existing condition that caused her knee to become unstable and cause injury. He concluded that "the patient sustained an idiopathic subluxation relocation of the right knee"[28] and this was due to a *previously unknown condition* of patellofemoral malalignment. We take note that ***no other treating physician, MRI study or X-ray study*** has found that Mullendore had this "*previously unknown*" condition, ie. patellofemoral malalignment. As earlier discussed, "idiopathic" means something that

arises spontaneously or ***from an obscure or unknown cause*** or something peculiar to the individual.[29] The very definition of "accident" in § 2(9)(a) is that an event occurs that was unplanned, unforeseen and from **unknown causes**. Thus, even Respondent's expert identifying Mullendore's knee injury as arising from unknown causes is *consistent with* the definition of "accident" as part of the definition of "compensable injury." 85A O.S. Supp. 2013 § 2(9)(a). Mullendore's injury occurred as she stepped out of the nutrition room at the hospital while performing her CNA duties, which meets the requirement of § 2(9)(a) as occurring at a "specifically identifiable time and place."

¶20 The final requirement of "accident" as set forth in § 2(9)(a), is that the event is "independent of sickness, mental incapacity, bodily infirmity, or any other cause." The only factor raised by Respondent that relates in any way to this final requirement is whether Mullendore was suffering from some type of "bodily infirmity" at the time of her fall on March 22, 2014. Respondent urged on appeal that "as with numerous other idiopathic injuries, there is a known cause – a *previously unidentified pre-existing condition*."[30] This previously unidentified pre-existing condition as stated by Respondent's expert is a patellofemoral malalignment that in adulthood "often leads to episodes of subluxation of the patella."[31] Although Respondent's expert stated in his report that this conclusion is consistent with the MRI findings, the actual findings in the MRI report offer no substantiation for this diagnosis. Respondent's argument is that Ms. Mullendore had a pre-existing condition that was unknown to her, that caused an instability in her knee and the subsequent fall causing the cartilage tear. This argument lacks credibility.

¶21 The record evidence before us reflects: (1) Mullendore had ***never*** had any complaint or problem with her right knee prior to this incident, (2) Mullendore had no prior injury to the right knee, (3) Mullendore had never sought medical treatment for the right knee prior to her fall on March 22, 2014, (4) the initial treating physician in the ER diagnosed her with a right knee injury, (5) the X-ray taken on March 22, 2014 notes there is no dislocation in the right knee, (6) the same X-ray makes no mention of a patellofemoral malalignment, (7) the MRI study reflects a tear to the hyaline cartilage, but specifically notes all other tendons, ligaments and cartilage in the right knee as normal, (8) the MRI study does not note any patellofemoral malalignment of her right knee, or any evidence of any pre-existing condition, (9) Mullendore had immediate swelling and pain following her fall. We hold that the evidence before this Court does not contain "substantial evidence" to support the Commission's order affirming the ALJ's findings that Mullendore "failed to prove by a preponderance of the evidence that she suffered a compensable injury to her RIGHT LEG (KNEE) within the meaning of 85A O.S. § 2 (9)(a) of the Administrative Workers' Compensation Act while employed by the Respondent." In fact, we hold that this conclusion is *against* the clear weight of the evidence before us. The Commission's order will be affirmed *only* if the record contains substantial evidence in support of the facts, woefully absent in the record before us. *Brown*, 2017 OK 13, ¶ 11, 391 P.3d at 115. We further hold that there is a preponderance of evidence that Mullendore suffered a "compensable injury" within the meaning of § 2 (9)(a) as set forth in the AWCA. Respondent's arguments disputing Mullendore suffered a compensable injury are not credible.

¶22 In 2011 under the former Workers' Compensation Code, the legislature enacted 85 O.S. 2011 § 308 which specifically excluded "an injury resulting directly or indirectly from idiopathic causes" from the definition of "compensable injury." When the AWCA was enacted in 2013 this language was omitted by the Legislature from the definition of "compensable injury." Before 2011 we had a long line of cases addressing the issue of whether a worker could recover for injuries that were related in part to a known pre-existing condition of the employee/claimant.

¶23 In one of the more recent of those cases, *Pauls Valley Travel Center v. Boucher*, 2005 OK 30, 112 P.3d 1175, Boucher was walking a straight path, was not carrying anything, encountered no obstacles, did not slip or exert undue physical effort, and did not fall, but her knee simply "gave way" while walking to the cash register. It was established she had a pre-existing known injury to that right knee. We were faced with the question of whether claimant's injury arose out of her employment. We found that Boucher's knee "did not give way spontaneously, rather, an untoward step precipitated the harm that ensued". *Id.* ¶ 14, 112 P.3d at 1182. We also noted that "even if employer did establish Boucher's proneness to

injure herself because of a pre-existing defect, it does not follow as a matter of law, that her on-the-job injury stems solely from idiopathic harm that is not compensable." *Id.*

¶24 Further, we have recognized that the term accidental injury is not to be given a narrow or restricted meaning but rather is to be liberally construed. *Choctaw County v. Bateman*, 1952 OK 387, 252 P.2d 465; *also see, H.J. Jeffries Truck Line v. Grisham*, 1964 OK 242, 397 P.2d 637 (internal injury produced by work-connected strain or exertion is accidental in character).

¶25 In *Halliburton Services v. Alexander,* 1976 OK 16, 547 P.2d 958, we held that "compensation benefits are not limited to perfectly healthy workmen" citing *Firemen's Fund Insurance Co. v. Standridge*, 1970 OK 49, 467 P.2d 461. In *Halliburton,* the security guard employee sought to recover benefits for a fall he sustained when he was descending stairs as part of his routine work. It was undisputed that the employee had a pre-existing arthritic condition and that he had suffered a prior injury causing weakness of the back. The fall resulted solely from the sudden onset of back pain causing his left leg to give way and causing the fall leading to injury. As in the instant matter, the employer urged that the injuries arose from risks personal to the employee, idiopathic injuries, and thus were not accidental injuries arising out of employment. We rejected this argument and we found:

> Injury occurred within course of employment at a place claimant was expected to be while performing duties he was required to fulfill. Injury resulting from the fall was contributed to by the necessity to ascend and descend stairways, which was a factor peculiar to the employment. *Where accidental injury results from a risk factor peculiar to the task performed it arises out of the employment, although the fall had its origin in idiopathy of the employee. Id.* at ¶ 10, 547 P.2d 961(emphasis added).

There is no credible evidence before this Court that Mullendore had a pre-existing injury so there is nothing before us to resolve in this respect.

¶26 Petitioner raised both legal and constitutional claims regarding the denial of her claim for workers' compensation benefits. This Court has long recognized that where relief is available on alternative non-constitutional grounds, we avoid reaching a determination on constitutional issues. *Brown*, 2017 OK 13, ¶ 26, 391 P.3d 119.[32]

¶27 The opinion of the Court of Civil Appeals is vacated. The opinion of the Workers' Compensation Commission is reversed. The opinion of the Administrative Law Judge is reversed, and the matter is remanded for further proceedings consistent with this opinion.

COURT OF CIVIL APPEALS OPINION VACATED; ORDER OF WORKERS' COMPENSATION COMMISSION REVERSED; ORDER OF ADMINISTRATIVE LAW JUDGE REVERSED; CAUSE REVERSED AND REMANDED FOR PROCEEDINGS CONSISTENT WITH TODAY'S PRONOUNCEMENT

GURICH, C.J., EDMONDSON, COLBERT, REIF, and COMBS, JJ, concur;

KAUGER, J., concurs in part; dissents in part;

WYRICK, V.C.J., (by separate writing) WINCHESTER, and DARBY, JJ., dissent.

1. Official audio recording of August 26, 2014 hearing before Patricia Sommer, Administrative Law Judge, Emilee Anne Mullendore, Employee-Claimant v. Mercy Hospital Ardmore, Employer-Respondent, Self-Insured Employer (Own Risk #17461), Insurer, Commission File No.: CM-2014-04013R, Before the Oklahoma Workers' Compensation Commission.
2. Record, p. 35, ER Records, Mercy Hospital Ardmore, 3-22-14.
3. Record, p. 37, ER Records, Mercy Hospital Ardmore, 3-22-14.
4. Record, p. 65, Mercy Clinic Ardmore, 3-25-14.
5. Record, p. 38, ER Records, Mercy Hospital Ardmore, 3-22-14.
6. Record, p. 72, Mercy Clinic Ardmore, MRI Knee WO Contrast Right, 4-1-14.
7. *Id.*
8. Record, p. 65, Mercy Clinic Ardmore, Progress Notes, 3-25-14.
9. Record, pp. 73-76, Rehabilitation Medicine of Oklahoma, M. Stephen Wilson, M.D., report dated May 19, 2014.
10. *Id.*
11. *Id.*
12. *Id.*
13. Patellofemoral is defined as of or relating to the patella and the femur; https:www.meriam-webster.com/medical/patellofemoral
14. Dysplasia is defined as an abnormal growth or development or broadly defined as an abnormal anatomical structure; https:www.meriam-webster.com/dictionary/dysplasia.
15. Subluxation is defined as a partial dislocation as in one of the bones in a joint; https:www.meriam-webster.com/dictionary/subluxation
16. Record, pp. 90 -95, Andrew C. John, M.D. PLLC, report dated July 1, 2014.
17. https://www.merriam-webster.com/dictionary/idiopathic
18. Record, pp. 90 -95, Andrew C. John, M.D. PLLC, report dated July 1, 2014.
19. *Id.*
20. *Id.*
21. Record, p. 61 MRI Knee w/o contrast right, dated 4-1-14.
22. Record, p. 41, Mercy Hospital Ardmore, x-ray right knee, 3-22-14.
23. Record, pp. 90 -95, Andrew C. John, M.D. PLLC, report dated July 1, 2014.
24. Record, pp. 26-29, Order Denying Compensability, September 26, 2014, *Emilee Anne Mullendore, Employee-Claimant v. Mercy Hospital Ardmore, Employer-Respondent, Self-Insured Employer (Own Risk #17461)*, Commission File No. CM-2014-04013B, Before the Oklahoma Workers' Compensation Commission.

25. *Id.*
26. *Id.*
27. There were no issues raised about cumulative trauma or occupational disease.
28. Record, pp. 90 -95, Andrew C. John, M.D. PLLC, report dated July 1, 2014.
29. https://www.merriam-webster.com/dictionary/idiopathic.
30. Motion to Strike Brief in Chief and Answer Brief of Respondent/Appellee, *Emilee Anne Mullendore, Petitioner, vs. Mercy Hospital Ardmore, Self Insured and The Workers' Compensation Court, sic., Respondents,* In the Supreme Court of the State of Oklahoma, No. 113,560.
31. Record, pp. 90 -95, Andrew C. John, M.D. PLLC, report dated July 1, 2014.
32. Citing, *Bd. Of County Com'rs of Muskogee County v. Lowery*, 2006 OK 31, ¶ 14, 136 P.3d 639, 649; *State ex rel. Fent v. State ex rel. Okla. Water Resources Bd.*, 2003 OK 29, ¶ 12, 66 P.3d 432, 439.

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

¶1 An administrative law judge, the Workers Compensation Commission sitting *en banc*, and a three-judge panel of the Court of Civil Appeals all reviewed the evidence in this case and unanimously concluded that Emilee Mullendore failed to prove that her knee injury was compensable. Crucial to this conclusion was that Mullendore's expert witness based his compensability conclusion on a fact that did not exist: that Mullendore "slipped on a wet floor while getting ice." That fatal flaw in the expert's conclusion left Mullendore unable to meet her burden of proof.

¶2 The majority entirely omits this critical fact from its opinion, and then misapplies the law to its abridged facts by applying the standard of review in a way that effectively shifts the burden of proof to Mullendore's employer, in contradiction of the governing statute. I respectfully dissent.

I.

¶3 The Court should have considered all the facts that support the judgment below, and not just those that support reversal. Had it done so, it would have found that the facts support the judgment of the many judges and commissioners below who concluded that Mullendore's injury was noncompensable because it involved only factors internal to her.

¶4 On March 22, 2014, twenty-one-year-old Mullendore injured her right knee while working as a certified nursing assistant at Mercy Hospital Ardmore.[1] Mullendore was carrying bags of ice from the nutrition room for her patients when her knee gave out and she fell.[2] According to her various accounts of what happened, Mullendore's knee gave out on her after her lower leg went one direction and her upper leg went the other, causing a temporary dislocation (by her own account) that somehow resolved itself (by account of the imaging that failed to reveal any dislocation).[3] Prior to this fall, Mullendore had no complaints regarding her right knee. Her right knee had suffered no previous injury, and nothing like this had ever happened before.[4]

¶5 Mullendore was asked at her hearing whether she had slipped on any substance on the floor. Mullendore agreed that she was not aware of anything on the floor and that she did not see anything on the floor; in fact, according to Mullendore, had she seen anything on the floor, she "would have picked it up or wiped it up with paper towels."[5] It was thus uncontroverted that Mullendore's fall was not caused by some slippery substance on the floor, but rather was the result of her knee giving out.

¶6 To date, the only evidence of physical damage to Mullendore's knee is a 0.4-centimeter-long tear in the cartilage of her right knee. The X-rays obtained in the ER on the date of injury showed no abnormalities.[6] At the follow-up visit on March 25th, the physician's assistant who saw Mullendore diagnosed her with "knee derangement" and ordered an MRI scan.[7] The MRI scan was conducted on April 4, 2014, and revealed the cartilage tear; everything else appeared normal in the MRI scan.[8]

¶7 Mullendore's employer has consistently argued that the injury is not compensable because it was solely caused by an idiopathic condition, which is "a disease of unknown cause,"[9] a "condition not preceded or occasioned by any other disease,"[10] and "[a] self-originated injury."[11] As defined by this Court, an "idiopathic fall" is a fall "induced by a spontaneous internal condition,"[12] or a fall "resulting from causes arising out of the mental or physical condition of the employee and not connected with the employment."[13]

¶8 An expert retained by Mullendore's employer reviewed the relevant medical records and radiographic images and interviewed and examined Mullendore. The expert concluded that Mullendore suffers from patello-femoral malalignment – a previously unidentified pre-existing condition – that can cause her right kneecap to dislocate out-of-socket and to relocate into socket. The employer's expert believes that just that sort of "subluxation and relocation" is what happened on March 22, 2014, causing the tear in her cartilage on that date.[14] The employer's expert further opined that this pre-existing condition was the sole cause of Mul-

lendore's injury and that "[t]here was nothing about work that made her fall."[15] In other words, "[t]he patient sustained an *idiopathic* subluxation relocation of the right knee."[16]

¶9 Mullendore's expert predictably disagreed, concluding that Mullendore suffered from "[a]cute traumatic injury to the right leg/knee resulting in anatomical abnormalities due to a horizontally oriented linear tear of the Hyaline cartilage of the medial patella facet."[17] In other words, to the extent he saw any abnormalities with the anatomy of her knee, Mullendore's expert thought they were the result of the fall, not the cause. The expert, however, mischaracterized the cause of her fall, stating twice in his report that "she slipped on a wet floor while getting ice."[18] As previously discussed,[19] Mullendore denied slipping on anything on the floor, thus rendering her expert's conclusion unreliable in the eyes of the administrative law judge and the Commission.

¶10 The flaw in Mullendore's expert's report proved fatal at every stage of litigation. The ALJ found that "Dr. M. Stephen Wilson's report (Claimant's Exhibit #3) stating the major cause of the Claimant's injury on March 22, 2014 and need for medical treatment of her RIGHT LEG (KNEE) was when she 'slipped on a wet floor' while getting ice for a patient *is not supported by the evidence*" and that, "[b]ased on the foregoing, . . . the Claimant has failed to prove by a preponderance of the evidence that she suffered a compensable injury."[20] That finding was unanimously affirmed by both the Workers' Compensation Commission sitting *en banc* and the Court of Civil Appeals.[21]

¶11 Despite repeatedly citing Mullendore's expert's opinion as supporting a finding of compensability, the majority inexplicably glosses over the report's flaw[22] – the very flaw that was the linchpin of the judgment below. Had the majority accounted for the expert opinion's mistake of fact, it too would have discounted the report's probative value, leaving Mullendore lacking proof that her injury was compensable.

II.

¶12 With the critical fact omitted, the majority further paves its road to reversal by misapplying the AWCA's standard of review. Section 78(C)(5) of the AWCA requires this Court to determine that the judgment below was "*clearly erroneous* in view of the reliable, material, probative, and substantial competent evidence" before reversing it.[23] Until today, the "clearly erroneous" standard of review indicated some level of deference to the judgment below.[24] The majority nods to the statutory language, but treats the standard of review as permitting a *de novo* reweighing of evidence. It does so by emphasizing the phrase "substantial competent evidence"[25]: "[t]he Commission's order will be affirmed *only* if the record contains substantial evidence in support of the facts, which are woefully absent in the record before us."[26] The majority then makes credibility determinations with respect to Mullendore's employer's evidence before concluding that "there is a preponderance of evidence that Mullendore suffered a 'compensable injury.'"[27]

¶13 Section 78 prohibits this sort of reweighing of evidence. It certainly allows *the Commission* to reverse or modify the ALJ's decision if it is "against the clear weight of the evidence,"[28] a standard of review that has historically been understood to allow some weighing of the evidence.[29] But the Court is given a quite different standard of review, as it can reverse the judgment only where it is "*clearly erroneous* in view of the reliable, material, probative, and substantial competent evidence."[30] Had the Legislature intended for this Court to conduct a reweighing of the evidence identical to that conducted by the Commission, it would have given the Court an identical standard of review, as it has done in the past. Indeed, section 78(C)(5)'s precursors – section 340(D)(4) of the Workers' Compensation Code and section 3.6(C)(4) of the Workers' Compensation Act – both authorized the Court to reverse or modify an order of the Workers' Compensation Court sitting *en banc* if the order "was against the clear weight of the evidence."[31] The Legislature abandoned that parallel construct when it drafted section 78(C)(5), indicating that it intended to abandon the old standard of review in place of a new standard of review that requires this Court to defer to findings made below.

¶14 Moreover, the standard of review must also be understood in light of the AWCA's command that "*[t]he injured employee* shall prove *by a preponderance of the evidence* that he or she has suffered a compensable injury."[32] Thus, in a case where the judgment below is in favor of the employee, the search for substantial evidence in support of that judgment might make sense. But because the employer by statute has no burden at all, review of a judgment in favor of the employer must necessarily entail review-

ing the evidence put on by the *employee,* to determine whether it was "clearly erroneous" for the court below to have concluded that the employee failed to meet their burden. By shifting the inquiry in a case from "Is there substantial evidence that this was a compensable injury?" to "Is there substantial evidence that this was a *non*-compensable injury?" the majority effectively shifts the burden of proof to Mullendore's employer, in contradiction of the statute.

¶15 Because the AWCA requires that Mullendore use "*medical evidence* supported by objective findings" to establish compensability,[33] which may include a medical opinion so long as such is stated within a reasonable degree of medical certainty,[34] we should be asking whether the judgment below was clearly erroneous in concluding that Mullendore failed to produce adequate medical evidence. Mullendore presented testimony that her knee "gave out" and a medical expert's report that was unreliable insofar as his causation opinion misstated the basic facts about how and why the fall occurred.[35] As recognized by the ALJ, Mullendore's evidence thus failed to establish by a preponderance of the evidence that her injury was compensable.[36] This was so because without her expert's conclusion that she slipped on something on the floor, she had no evidence that her injury occurred as a result of "factors external to the employee" and was "independent of . . . bodily infirmity."[37] Beyond that, Mullendore's employer presented a medical expert's report demonstrating that there was an idiopathic explanation for how and why Mullendore's injury occurred.[38] Due to Mullendore's failure to present "medical evidence" of any "factors external to the employee" that caused her injury, the majority's conclusion that her employer's expert evidence "lacks credibility" is irrelevant because her employer has no obligation to prove anything.[39] The burden of proof lies entirely with Mullendore, and if she has not met her burden of proof, she cannot win – regardless of what one thinks of her employer's rebuttal evidence.

¶16 Even relying on the majority's shorthand reference to the standard of review as requiring us to search for "substantial evidence in support of the facts upon which [the Commission's order] is based,"[40] this Court has long emphasized:

> Searching a record for substantial evidence supporting the order appealed *does not entail a comparison of the parties' evidence to determine that which is most convincing* but only that the evidence supportive of the order be considered to determine whether it implies a quality of proof inducing a conviction that the evidence furnished a substantial basis of facts from which the issue could be reasonably resolved. Substantial evidence has been additionally outlined as *something more than a scintilla*; possessing something of substance and of relevant consequence carrying with it a fitness to induce conviction, but remains such that reasonable persons may fairly differ on the point of establishing the case. A determination of substantial evidentiary support *does not require weighing the evidence* but only a measurement of the supportive points to determine whether the criterion of substantiality is present.[41]

We have thus always recognized that "substantial evidence" is a term of art that does *not* mean "more evidence than one's opponent," but rather merely requires that there be "more than a scintilla" of competent evidence supporting the judgment. Here, if the correct standard of review is applied to a full version of the facts, there undoubtedly exists "more than a scintilla" of evidence supporting the judgment. Indeed, if reasonable minds could reach the same conclusion as the ALJ – and I certainly don't think the three commissioners and three appellate judges who already affirmed the ALJ's judgment are unreasonable people – then the "clearly erroneous" standard requires that we affirm the judgment.

* * *

¶17 At first glance today's decision seems like nothing more than fact-bound error correction gone awry. But the majority's apparent adoption of a standard of review expressly rejected by the Legislature when it enacted the AWCA is indicative of a broader and more troublesome trend of decisions of this Court reverting our workers' compensation laws to what they were prior to the AWCA. The opinion of the Court may lack the usual single subject/special law/substantive due process features so typical of the Court's invalidation of the Legislature's lawsuit reforms, but it undermines those reforms no less, and is merely the latest in the Court's death-by-a-thousand-cuts dismantling of the Legislature's efforts.[42] I respectfully dissent.

1. ROA, Doc. 33, Audio Recording of Hr'g at 8:01 – :18, *Mullendore v. Mercy Hosp. Ardmore*, No. CM-2014-04013R (Okla. Workers' Comp. Comm'n held Aug. 26, 2014).

2. *Id.* at 11:04 – :53, 24:30 – :40; ROA, p. 35, Doc. 22, Excerpt of Claimant's Ex. 1, Mercy Hosp. Ardmore's ER Records at 1; ROA, p. 79, Doc. 26, Claimant's Ex. 5, Mercy Confidential Co-Worker Incident Report at 2.

3. In an incident report filled out only minutes after the fall, a supervisor documented that Mullendore's "knee felt like [it] had popcorn in it[,] then sharp pain, [at which point she] went to [the] floor." ROA, p. 79, Doc. 26, Claimant's Ex. 5, Mercy Confidential Co-Worker Incident Report, *supra* note 2, at 2; *see also* ROA, p. 80, Doc. 26, Claimant's Ex. 5, Mercy Workers' Compensation Program Supervisor Incident Evaluation at 1 ("Walking out of nutrition room, put ® [i.e., right] foot down, felt like popcorn in ® knee then sharp pain then to floor."); ROA, Doc. 33, Audio Recording of Hr'g, *supra* note 1, at 21:32 – :52 (estimating that she was finished filling out the incident report within 15 to 20 minutes of the fall).

In the emergency room records created only hours after the fall, medical personnel reported: "Patient states she was carrying bags of ice down [the] hall *when [her] knee gave out on her*. She is unsure if she fell onto it[,] but states *she felt sharp grinding/popping as it gave out on her*." ROA, p. 35, Doc. 22, Excerpt of Claimant's Ex. 1, Mercy Hosp. Ardmore's ER Records, *supra* note 2, at 1 (emphasis added); *see also* ROA, Doc. 33, Audio Recording of Hr'g, *supra* note 1, at 17:10 – :43 (estimating that she was in the ER within one hour of the fall and acknowledging that, "as far as [she] c[ould] remember," she gave the history contained in her ER Records); *id.* at 24:44 – 25:01 (acknowledging again that she provided the history of what happened and that no one else talked for her in the ER).

In a medical record from the follow-up visit three days after the fall, medical personnel recorded Mullendore's statement of what happened as follows: "I was walking out of the nutritional room *when the bottom of my right knee went to the right and the top of my right knee went to the left and I felt a popping and crunching sensation* that turned into sharp[,] excruciating pain." ROA, p. 65, Doc. 22, Excerpt of Claimant's Ex. 1, Mercy Clinic Ardmore's medical record at 2 (emphasis added); *see also* ROA, Doc. 33, Audio Recording of Hr'g, *supra* note 1, at 25:45-26:06 (acknowledging that she gave the history at her follow-up visit and that it was essentially the same as the history she provided in the ER three days earlier). At the hearing, Mullendore claimed this record did not accurately reflect what she told medical personnel, as she told them that the bottom of her right *leg* and the top of her right *leg* – not the bottom and top of her right knee – went in different directions. ROA, Doc. 33, Audio Recording of Hr'g, *supra* note 1, at 25:02-27:20.

On direct examination at the workers' compensation hearing held five months after the fall, Mullendore testified that "[she] felt [her] right foot *slip* out to the right, and then the top part of [her] leg and [her] knee turned in to the left" and that "[i]t felt like there was popcorn in [her] knee. *I've had a dislocated shoulder before, and whenever they popped it back into place, that's sort of what it felt like,* except times twelve." *Id.* at 12:27 – :39, 12:47 – :56 (emphasis added). Later during direct examination, Mullendore's attorney summarized her testimony as follows: "You told me you were walking out of the nutrition room, you took a step, your right knee felt like it had popcorn on it, you felt a sharp pain, and you went to the floor, essentially." *Id.* at 15:43 – :51. He asked her to affirm the correctness of his summary, which she did. *Id.* at 15:51 – :52.

4. ROA, Doc. 33, Audio Recording of Hr'g, *supra* note 1, at 8:47 – 9:12, 12:40 – :44; ROA, p. 65, Doc. 22, Excerpt of Claimant's Ex. 1, Mercy Clinic Ardmore's medical record, *supra* note 3, at 2 ("Previous injuries: Patient denies any.").

5. ROA, Doc. 33, Audio Recording of Hr'g, *supra* note 1, at 24:25 – :42, 27:29 – :43.

6. ROA, p. 37, Doc. 22, Excerpt of Claimant's Ex. 1, Mercy Hosp. Ardmore's ER Records, *supra* note 2, at 3; ROA, p. 41, Doc. 22, Excerpt of Claimant's Ex. 1, Mercy Hosp. Ardmore's Radiology All Orders and Results at 1 ("The osseous structures are intact. No fracture or dislocation. No joint effusion."); ROA, p. 65, Doc. 22, Excerpt of Claimant's Ex. 1, Mercy Clinic Ardmore's medical record, *supra* note 3, at 2 ("The patient went to the emergency room that day and x-rays were normal . . . .").

7. ROA, pp. 65-66, Doc. 22, Excerpt of Claimant's Ex. 1, Mercy Clinic Ardmore's medical record, *supra* note 3, at 2-3.

8. ROA, p. 72, Doc. 23, Claimant's Ex. 2, Mercy Clinic Ardmore's MRI Report at 1 ("There is a horizontally oriented linear tear of the hyaline cartilage of the medial patella facet. This measures 0.4 cm. The hyaline cartilage of the lateral patellar facet is normal. The quadriceps and patellar tendons, medial and lateral collateral ligaments, ACL and PCL are normal. Normal medial and lateral menisci. Normal bone marrow signal. No bone contusion or fracture.").

9. PDR Medical Dictionary 848 (Marjory Spraycar ed., 1995).

10. Webster's New International Dictionary 1237 (2d ed. 1959).

11. Dorland's Illustrated Medical Dictionary 660 (23rd ed. 1951).

12. *Boardman Co. v. Eddy,* 1961 OK 181, ¶ 6, 363 P.2d 821, 823.

13. *Moten v. Chandler Well Serv.*, 1961 OK 125, ¶ 7, 363 P.2d 153, 154. A classic example of an idiopathic injury is the worker who falls over dead from a heart attack while clocking out for the night. If the event was not brought on by work conditions, the event is noncompensable because work had nothing to do with it – it was just a condition peculiar to the employee that by happenstance reared its ugly head while the employee was at work rather than five minutes later when the employee was driving home.

14. ROA, pp. 93-94, Doc. 28, Resp't's Ex. 1, Dr. Andrew C. John's Expert Report at 4-5.

15. *Id.* at 93, Dr. Andrew C. John's Expert Report at 4.

16. *Id.* at 94, Dr. Andrew C. John's Expert Report at 5.

17. ROA, p. 75, Doc. 24, Claimant's Ex. 3, Dr. M. Stephen Wilson's Expert Report at 3.

18. *Id.* at 73, Dr. M. Stephen Wilson's Expert Report at 1 ("On March 22, 2014, Ms. Mullendore reported that she slipped on a wet floor while getting ice for patient and felt her knee pop."); *id.* at 75, Dr. M. Stephen Wilson's Expert Report at 3 ("Therefore, it is further my opinion that the employment-related accident Ms. Mullendore sustained on march [*sic*] 22, 2014, when she slipped on a wet floor while getting ice for a patient while employed by Mercy Memorial Health Center is the major cause of the injury and need for treatment to her right leg/knee.").

19. *See supra* note 5 and accompanying text.

20. ROA, pp. 27 – 28, Doc. 21, Order Denying Compensability at 2 – 3 (emphasis added).

21. ROA, p. 116, Doc. 32, Order Affirming Decision of Administrative Law Judge at 1; *Mullendore v. Mercy Hosp. Ardmore*, No. 113,560, slip op. at 1, 13 (Okla. Civ. App. May 2, 2016).

22. *See* Majority Op. ¶ 5 & n.10 ("Petitioner's expert opined that Ms. Mullendore's slip on the floor on March 22, 2014 is the 'major cause of the injury and need for treatment to her right leg/knee.'" (citing the entirety of Dr. Wilson's expert report)).

23. 85A O.S.Supp.2013 § 78(C)(5) (emphasis added).

24. *E.g., State v. Vaughn*, 2000 OK 63, ¶ 25, 11 P.3d 211, 217 ("Case law imposes upon the appellate courts the obligation to accord substantial deference to the exercise of discretion by the trial court, and to reverse only if the trial court made a clearly erroneous decision against reason and evidence." (citing *Abel v. Tisdale*, 1980 OK 161, 619 P.2d 608)).

25. *See* Majority Op. ¶¶ 13, 17, 20 – 21.

26. *See id.* ¶ 21 (citing *Brown v. Claims Mgmt. Res. Inc.*, 2017 OK 13, ¶ 11, 391 P.3d 111, 115).

27. *See id.*

28. § 78(A). Reversal or modification is also warranted where the decision's legal determination was "contrary to law." *Id.*

29. *E.g., Hall v. Galmor*, 2018 OK 59, ¶ 12, 427 P.3d 1052, 1061 (citing *Childers v. Childers*, 2016 OK 95, ¶ 18, 382 P.3d 1020, 1024; *White v. Adoption of Baby Boy D.*, 2000 OK 44, ¶ 36, 10 P.3d 212, 220; *Briggs v. Sarkeys, Inc.*, 1966 OK 168, ¶ 29, 418 P.2d 620, 624; *Hitt v. Hitt*, 1953 OK 391, ¶ 0, 258 P.2d 599, 599).

30. § 78(C)(5) (emphasis added).

31. 85 O.S.2011 § 340(D)(4); 85 O.S.Supp.2010 § 3.6(C)(4).

32. 85A O.S.Supp.2013 § 2(9)(e) (emphasis added).

33. § 2(9)(d) (emphasis added).

34. *Id.* § 2(31)(b).

35. *See supra* notes 3, 5, 18 – 19 and accompanying text.

36. *See supra* note 20 and accompanying text.

37. § 2(9)(a) (defining a "compensable injury" as "damage or harm to the physical structure of the body . . . caused solely as the result of … an accident . . . arising out of the course and scope of employment," and further defining an "accident" as "an event involving factors external to the employee that . . . [among other things] was independent of sickness, mental incapacity, bodily infirmity or any other cause").

38. *See supra* notes 14 – 16 and accompanying text.

39. In this respect, the majority opinion also contains troublesome dicta suggesting that the AWCA's definition of "compensable injury" might include injuries caused in part by an idiopathic condition. The AWCA's definition of "compensable injury" does no such thing, however, because it only includes injuries "caused solely as the result of …. an event involving factors external to the employee" and thereby excludes any injury involving factors internal to the employee. § 2(9)(a). The majority instead focuses on whether Mullendore's injury was "caused solely as the result of . . . an accident" as that term is defined in section 2(9)(a)(1) through (4) of the AWCA. Majority Op. ¶ 18. The majority concludes that it was, because Mullendore's injury met the statutory requirements that it be unplanned and unforeseen, occurred

from unknown causes, and occurred at a specifically identifiable time. *Id.* ¶ 19. But when addressing "[t]he final requirement . . . that the event [be] 'independent of sickness, mental incapacity, bodily infirmity, or any other cause,'" the majority refuses to acknowledge the implications that important limitation may have on determining whether an accident was the "sole cause" of injury because – disagreeing with every prior judge to look at the evidence in this case – it thinks that the evidence of Mullendore's bodily infirmity "lacks credibility." *Id.* ¶ 20 (quoting § 2(9)(a)); *see also id.* ¶¶ 21, 25 (calling Respondent's arguments "not credible" and finding "[t]here is no credible evidence before this Court that Mullendore had a pre-existing injury"). The majority then invokes pre-2011 case law that allowed a worker to "recover for injuries that were related in part to a known pre-existing condition." *Id.* ¶ 22; see also *id.* ¶¶ 23 – 25 (discussing the pre-2011 cases of *Pauls Valley Travel Center v. Boucher*, 2005 OK 30, 112 P.3d 1175, and *Halliburton Services v. Alexander*, 1976 OK 16, 547 P.2d 958). That pre-2011 case law, however, was interpreting a different statute (i.e., 85 O.S. § 3(13)), and thus tells us nothing about whether an injury *not* caused by "an event involving factors external to the employee" and *not* "independent of . . . bodily infirmity" is compensable under the new law.

40. Majority Op. ¶ 13.

41. *Sundown Energy, L.P. v. Harding & Shelton, Inc.*, 2010 OK 88, ¶ 9, 245 P.3d 1226, 1229 – 30 (emphasis added) (citations omitted) (citing *Union Tex. Petroleum v. Corp. Comm'n*, 1981 OK 86, ¶ 31, 651 P.2d 652, 662; *Cent. Okla. Freight Lines v. Corp. Comm'n*, 1971 OK 57, ¶ 15, 484 P.2d 877, 879; *Chenoweth v. Pan Am. Petroleum Corp.*, 1963 OK 108, 382 P.2d 743); *see also* Black's Law Dictionary 580 (7th ed. 1999) (defining "substantial evidence" as "[e]vidence that a reasonable mind would accept as adequate to support a conclusion; evidence beyond a scintilla").

42. *See, e.g., Strickland v. Stephens Prod. Co.*, 2018 OK 6, ¶ 15, 411 P.3d 369, 376 (declaring the last sentence of 85A O.S.Supp.2013 § 5(A) an unconstitutional special law); J*ohn v. St. Francis Hosp., Inc.*, 2017 OK 81, ¶ 1, 405 P.3d 681, 683 (declaring 12 O.S.Supp.2013 § 19.1 – which required plaintiffs who would "be required to present the testimony of an expert witness to establish breach of the relevant standard of care and that such breach resulted in harm to [them]" to consult with, and to obtain a written opinion from, an expert witness prior to filing their lawsuits – was "an impermissible barrier to court access and an unconstitutional special law"); *Gibby v. Hobby Lobby Stores, Inc.*, 2017 OK 78, ¶ 18, 404 P.3d 44, 48 (declaring 85A O.S.Supp.2013 § 57 unconstitutional because it "violates the adequate remedy provision of Article II, section 6, of the Oklahoma Constitution"); *Maxwell v. Sprint PCS*, 2016 OK 41, ¶ 27, 369 P.3d 1079, 1093 (declaring 85A O.S.Supp.2013 §§ 45(C)(5) and 46(C) unconstitutional as violative of due process and as a special law, respectively); *Vasquez v. Dillard's, Inc.*, 2016 OK 89, ¶ 36, 381 P.3d 768, 775 (declaring the Oklahoma Employee Benefit Injury Act, 85A O.S.Supp.2015 §§ 201 – 213, an unconstitutional special law); T*orres v. Seaboard Foods, LLC*, 2016 OK 20, ¶ 48, 373 P.3d 1057, 1079 (declaring the AWCA's definition of "cumulative trauma," 85A O.S.Supp.2013 § 2(14), unconstitutional as violative of due process); *Douglas v. Cox Ret. Props., Inc.*, 2013 OK 37, ¶ 12, 302 P.3d 789, 794 (declaring the Comprehensive Lawsuit Reform Act of 2009 unconstitutional in its entirety as violative of the single-subject rule); *Wall v. Marouk*, 2013 OK 36, ¶ 0, 302 P.3d 775, 776 (declaring 12 O.S.2011 § 19 – which required plaintiffs alleging professional negligence to consult with, and to obtain a written opinion from, a qualified expert in support of their claim prior to filing their lawsuits – was "a special law which violates the Okla. Const. art. 5, § 46" and also "an unconstitutional financial burden on access to the courts in violation of the Okla. Const. art. 2, § 6"); *Zeier v. Zimmer, Inc.*, 2006 OK 98, ¶ 32, 152 P.3d 861, 874 (declaring 63 O.S.Supp.2003 § 1-1708.1E – which required plaintiffs in medical malpractice tort suits to consult with, and to obtain a written opinion from, a qualified expert in support of their claim prior to filing their lawsuits – was an unconstitutional special law and monetary barrier to court access); *cf. Maxwell*, 2016 OK 41, ¶ 7, 369 P.3d at 1096 (Colbert, J. concurring in part, dissenting in part) (urging the Court to declare more of the AWCA unconstitutional and decrying the "the parade of horribles the [Court] creates in its piecemeal approach in remedying the AWCA's unconstitutional provisions").

2019 OK 12

State of Oklahoma ex rel. Oklahoma Bar Association, Complainant, v. Alexander L. Bednar, Respondent.

SCBD 6618. March 12, 2019

PROCEEDING FOR BAR DISCIPLINE

¶0 The Oklahoma Bar Association filed an eleven-count Complaint charging Alexander L. Bednar with numerous violations of the Oklahoma Rules of Professional Conduct and the Rules Governing Disciplinary Proceedings. Respondent failed to file proper responses to the grievances against him, an answer to the Complaint, or a response to the Motion to Deem Allegations Admitted. After a lengthy hearing, the Professional Responsibility Tribunal recommended disbarment. Upon *de novo* review, we agree.

RESPONDENT IS DISBARRED AND ORDERED TO PAY COSTS.

Loraine Dillinder Farabow, Oklahoma Bar Association, Oklahoma City, Oklahoma, for Complainant.

Alexander L. Bednar, Oklahoma City, Oklahoma, *Pro Se*.

PER CURIAM:

¶1 Alexander L. Bednar (Respondent) is a member of the Oklahoma Bar Association (Bar) and is licensed to practice law in Oklahoma. The Bar initiated this action under Rule 6 of the Rules Governing Disciplinary Proceedings (RGDP), 5 O.S.2011, ch.1, app. 1-A, by filing an eleven-count Complaint on December 21, 2017. Respondent did not respond to the Complaint or to the Bar's Motion to Deem Allegations Admitted. The Professional Responsibility Tribunal (Trial Panel) deemed the allegations admitted and after a two-week trial found Respondent violated the Oklahoma Rules of Professional Conduct (ORPC) 1.1, 1.3, 1.4, 1.5, 1.15, 1.16(d), 3.1, 3.2, 3.3, 3.4, 4.2, 4.4, 8.1(b), 8.2(a), 8.4(c)-(d), 5 O.S.2011, ch. 1, app. 3-A, and RGDP 1.3 and 5.2. The Trial Panel recommended Respondent be permanently disbarred and ordered to pay the costs of the proceedings.

I. STANDARD OF REVIEW

¶2 The Supreme Court of Oklahoma possesses original, exclusive, and nondelegable jurisdiction to control and regulate the practice of law, licensing, ethics, and discipline of attorneys. 5 O.S.2011, § 13; RGDP 1.1; *State ex rel. OBA v. Braswell*, 1998 OK 49, ¶ 6, 975 P.2d 401, 404. The purpose of our licensing authority is not to punish the offending lawyer but to safeguard the interests of the public, the courts, and the legal profession. *State ex rel. OBA v.*

Friesen, 2016 OK 109, ¶ 8, 384 P.3d 1129, 1133. To determine whether discipline is warranted and what sanction, if any, is to be imposed, the Court conducts a full-scale, nondeferential, *de novo* review of all relevant facts. *State ex rel. OBA v. Schraeder*, 2002 OK 51, ¶ 5, 51 P.3d 570, 574.

¶3 While accorded great weight, the report and recommendations of the Trial Panel are merely advisory in nature and carry no presumption of correctness. *State ex rel. OBA v. Boone*, 2016 OK 13, ¶ 3, 367 P.3d 509, 511; *State ex rel. OBA v. Anderson*, 2005 OK 9, ¶ 15, 109 P.3d 326, 330. Likewise, the specific rule violations listed in the complaint do not limit our discretion. *See State ex rel. OBA v. Bedford*, 1997 OK 83, ¶ 15, 956 P.2d 148, 152. The ultimate decision-making authority rests with this Court. *Anderson,* 2005 OK 9, ¶ 15, 109 P.3d at 330.

II. PRIOR DISCIPLINE

¶4 On April 2, 2013, we suspended Respondent's license to practice law for one (1) year under RGDP 7.7. *See State ex rel. OBA v. Bednar (Bednar I)*, 2013 OK 22, 299 P.3d 488. The reciprocal disciplinary proceeding resulted from Respondent's voluntary resignation from the United States District Court for the Western District of Oklahoma pending disciplinary proceedings and his one-year suspension from the United States Court of Appeals for the Tenth Circuit. *Id.* ¶¶ 5, 16, 299 P.3d at 490, 492. In that proceeding, we found Respondent engaged in witness intimidation, discovery abuse, threatening retaliatory lawsuits, a pattern of missing deadlines, improperly seeking reconsideration after adverse rulings, and fraudulent alteration of court documents, the last of which resulted in a $20,000 sanction. *Id.* ¶¶ 5, 12, 299 P.3d at 490-91.

¶5 In *Bednar I*, Respondent submitted evidence of a recent ADHD diagnosis as mitigation. *Id.* ¶ 6, 299 P.3d at 491. Respondent assured the Trial Panel then that he would continue taking prescribed medications and participating in therapeutic counseling to manage his impulsive behaviors affecting his practice of law. Complaint ¶ 155. After a hearing to determine if the matter should be treated as an RGDP 10 proceeding, which would assess his personal capacity, the Court found that Respondent's diagnosis did not alleviate him of personal responsibility. *Bednar I,* 2013 OK 22, ¶¶ 9, 14-15, 299 P.3d at 491. Declining to convert the prior discipline to RGDP 10, we did not require proof of any continuing treatment from Respondent. Instead, we specifically noted that the treatment he was receiving did not appear to curb his impulsive behaviors. *Id.* ¶ 14, 299 P.3d at 492. On July 30, 2014, Respondent filed his affidavit of reinstatement without order pursuant to RGDP 11.8.

III. CURRENT DISCIPLINARY PROCEEDINGS

A. Allegations Deemed Admitted

¶6 In response to grievances filed by former clients, the Bar investigated Respondent and on December 21, 2017, filed a formal Complaint setting forth eleven (11) counts of professional misconduct. In substance, these counts allege Respondent engaged in abusive discovery tactics, misrepresentations to courts, forgery of court documents, misappropriation of client funds, unauthorized contacts with opposing parties, a pattern of missing deadlines, untimely and improper motions for recusal, and retaliatory and frivolous lawsuits.

¶7 The Bar submitted evidence that Respondent was properly served with notice of the Complaint. On December 21, 2017, the Bar mailed copies of the formal Complaint to Respondent's official roster address and residence; Respondent signed for one copy on January 6, 2018. The Bar also hired a process server who served Respondent with the Complaint on January 10, 2018. In each of these notices, the Bar included a letter advising Respondent that RGDP 6.4 "requires an answer to be filed on your behalf with the Chief Justice within twenty (20) days of today's date[, and i]n the event you do not answer within twenty (20) days, the charges shall be deemed admitted." The Bar also enclosed copies of relevant documents serving as the bases for the grievances so that Respondent could review and address them in his response.

¶8 Respondent did not file an answer to the Complaint. Instead, he filed numerous "special appearance[s]," requests for recusal, subpoenas duces tecum, and other motions. With no timely answer from Respondent, the Bar filed a Motion to Deem Allegations Admitted on January 31, 2018. At the Scheduling Conference the same day, the Trial Panel said it would take the motion under advisement, explaining to Respondent that although he was out of time, it still believed an answer to the allegations would be "of great value to the Court." Sched. Conf. Tr. 116-17, Jan. 31, 2018. Although Respondent appeared at the Scheduling Confer-

ence and filed many motions, at no time did he file an answer to the Complaint or to the Motion to Deem Allegations Admitted.

¶9 After taking the motion under advisement for over two months, the Trial Panel issued an order on April 3, 2018, deeming the allegations of the Complaint admitted, pursuant to RGDP 6.4.[1] At the Pre-Trial Conference Hearing on April 16, 2018, the Trial Panel reiterated to Respondent that the allegations had been deemed admitted. There, and many times throughout the proceedings, the Trial Panel explained that it would hear evidence regarding the material elements of the Complaint and then, assuming those elements were established, evidence regarding appropriate discipline. Despite these notices, the transcripts reveal that Respondent spent much of the evidentiary hearing re-litigating already decided or irrelevant issues, such as his 2013 discipline.[2] After the hearing, the Trial Panel found clear and convincing evidence for ten (10) of the eleven (11) counts and concluded, "without the slightest reservation or hesitation[,] Respondent is unfit in all respects to be licensed as an attorney." Trial Panel Rep. 12.

B. Due Process Allegations

¶10 Respondent alleges the investigative process was "fraught with procedural and substantive due process violations," claiming: the grievances lacked specificity; the Bar was biased against him; and the Trial Panel improperly deemed the allegations admitted, quashed subpoenas, refused to issue a new Scheduling Order, and declined to recuse its Presiding Master. Resp't's Br. 7-10. The Bar contends that Respondent was afforded "every opportunity to participate" in the fact-finding stages of the proceedings, yet chose not to fully avail himself of those opportunities – as evidenced by his failure to respond to the Complaint or Motion to Deem Allegations Admitted, refusal to submit an exhibit or witness list even after being granted extensions, and decision to wait seven weeks after the Scheduling Order to issue over thirty (30) subpoenas, almost all of which were improperly served and sought primarily privileged or protected information.

¶11 Respondent claims "trial by ambush," arguing that the Bar had years to investigate and prepare its case-in-chief while he was afforded insufficient time. Under the Scheduling Order, Respondent was to submit his exhibit list by March 30, 2018 and complete discovery by April 6, 2018. The day before his exhibit list was due, Respondent requested an extension of time, to which the Bar agreed. Respondent also requested an extension of the discovery deadline, to which the Bar also agreed. Respondent, however, failed to comply with either extended deadline, and the Bar moved to preclude any documents Respondent sought to introduce at trial. Despite the Bar's motion, the Trial Panel permitted Respondent to submit an exhibit list as well as any documentary evidence by April 20, the Friday before the hearing was scheduled to begin on Monday, April 23. When the Trial Panel ordered him to respond to the many motions to quash filed by the witnesses he subpoenaed, Respondent complained that he could not possibly respond in the time allotted, which was the same amount of time he allowed for his intended witnesses to comply.

¶12 Additionally, Respondent claims the Bar's exhibits were not adequately identified. The record reveals that the Bar made its exhibits available to Respondent on April 6, 2018, in accordance with the Scheduling Order. Respondent, however, did not retrieve them until April 10; then at the hearing nearly two weeks later, the Bar had to assist Respondent in cutting open the exhibit boxes for the first time. Hr'g Tr. vol. 1, 88-90, Apr. 23, 2018.

¶13 The Bar states that Respondent had ample time to prepare a defense against the allegations of the Complaint, and he "engaged in every possible action to subvert the truth and delay the proceedings." The Trial Panel reports that despite receiving sufficient notice and opportunity, Respondent spent much of the hearing giving "frequent soliloquies advancing his theories of extraordinary persecution of him and bias by the bench and [B]ar." Trial Panel Rep. 5. Compliance with due process simply requires that the Bar allege facts sufficient to put the attorney on notice of the charges and allow an opportunity to respond to the allegations. *State ex rel. OBA v. Giger*, 2003 OK 61, ¶ 14 n.17, 72 P.3d 27, 34 n.17 (citing *State ex rel. OBA v. Johnston*, 1993 OK 91, ¶ 19, 863 P.2d 1136, 1143). Thorough review of the record reveals that Respondent's allegations of due process violations are without merit.

C. Burden of Proof

¶14 RGDP 6.4 mandates that if the respondent fails to answer the complaint, "the charges *shall* be deemed admitted." 5 O.S.2011, ch. 1,

app. 1-A (emphasis added). Once allegations are deemed admitted, evidence "shall be submitted for the purpose of determining the discipline to be imposed." *Id.*; *see also State ex rel. OBA v. Mirando*, 2016 OK 72, ¶ 23, 376 P.3d 232, 239-40; *State ex rel. OBA v. Smith,* 2016 OK 19, ¶ 27, 368 P.3d 810, 815; *State ex rel. OBA v. Trenary*, 2016 OK 8, ¶ 15, 368 P.3d 801, 807; *Knight*, 2015 OK 59, ¶ 19 n.16, ¶ 22 n.24, 359 P.3d at 1128 n.16, 1130 n.24. Nonetheless, admissions must be supported in the record; therefore, we still review the entire disciplinary proceeding, including the merits of the complaint, motion to deem allegations admitted, exhibits, stipulations, pleadings, and Trial Panel report. *Knight,* 2015 OK 59, ¶ 22, 359 P.3d at 1130; *State ex rel. OBA v. Mothershed*, 2011 OK 84, ¶ 69, 264 P.3d 1197, 1223; *State ex rel. OBA v. Bolton*, 1995 OK 98, ¶ 7 n.11, 904 P.2d 597, 601 n.11.

¶15 Even when allegations are deemed admitted, the Court will impose discipline only upon finding that clear and convincing evidence was presented demonstrating the misconduct. RGDP 6.12(c); *State ex rel. OBA v. Seratt*, 2003 OK 22, ¶¶ 44, 48, 66 P.3d 390, 397-98. Clear and convincing evidence is evidence sufficient, both in quality and quantity, to produce a firm conviction of the truth of the allegations. *State ex rel. OBA v. Wilcox*, 2009 OK 81, ¶ 3, 227 P.3d 642, 647. To make this assessment, we must receive a record that permits "(a) an independent on-the-record determination of the critical facts and (b) the crafting of an appropriate discipline." *Schraeder,* 2002 OK 51, ¶ 6, 51 P.3d at 574. Here, we received a voluminous record consisting of the transcripts, exhibits, Trial Panel Report, and corpus of pleadings filed. This record is sufficient for our review.

D. Complaint Facts & Findings

¶16 We review the counts in the Complaint not by numerical order, but rather by conduct increasing in severity. References are to the numbers assigned in the Complaint; we note that the Complaint did not contain a "Count X."

1. Failures to Respond to Requests for Information

¶17 In the following four counts, we address Respondent's refusals to provide requested information to the Bar – in two instances reasonably, and in two others in violation of the rules.

Count IX: Failure to Cooperate with Bar's Request for Medical Information

¶18 Investigating grievances filed against Respondent that appeared to be similar to his misconduct in the prior discipline, the Bar e-mailed Respondent on March 30, 2016, requesting that he provide any and all information regarding current medications, prescribed medications, healthcare providers, and mental and physical diagnoses. Bar Ex. 139C. The Bar explained in this correspondence that it sought this information based on a concern that Respondent's physical and/or mental health might again be affecting his practice of law. *Id.* Over the next year, Respondent refused to provide the requested information, asserting that those records were confidential.

¶19 After opening a formal investigation, the Bar deposed Respondent on March 22, 2017, wherein Respondent agreed to answer questions regarding his health status and produce the requested documentation if the Bar would agree to a protective order limiting the use and disclosure of that information. The Professional Responsibility Commission denied Respondent's request on September 22, 2017. Bar Ex. 142. The Bar submits that Respondent's request and noncompliance were unreasonable because Bar investigations remain confidential under RGDP 5.7.[3] The Trial Panel concluded that Respondent's demand for a protective order was properly refused because "Respondent himself had raised the issue" as mitigation in the 2013 discipline, and because the prior and current grievances were so similar. Trial Panel Rep. 10.

¶20 Although Respondent originally inserted his health diagnosis as mitigation in the prior discipline and attested he would continue treatment, we believe those statements were in line with a conditional waiver and relate only to those proceedings. Under title 43A, section 1-109 of the Oklahoma Statutes, mental health treatment information is considered confidential and privileged. The Bar notes the confidentiality of investigations under RGDP 5.7, but seems to ignore that formal complaints and all filings with respect thereto are public records under RGDP 6.1.[4] Likewise, while proceedings under RGDP 10 typically remain confidential, RGDP 10.12[5] makes an exception where disciplinary proceedings are involved. Further, we do not believe RGDP 10.4[6] applies because Respondent did not interject his mental health as mitigation here. Accordingly, while Respondent's refusal to submit medical records foreclosed the possibility of the Bar

proceeding under Rule 10,[7] we do not find that such a refusal amounts to professional misconduct under the circumstances.

Count I: Pike Grievance

¶21 In December 2014, Dorothy Pike hired Respondent to represent her great-grandson (Client) in a first-degree murder case and paid Respondent a $15,000 retainer fee. Pike terminated Respondent in March 2015, and hired new counsel. On March 25, 2015, Respondent faxed Pike's replacement counsel, stating that he would like to meet and go over the work performed in Client's case and that he was "[h]appy to write a check." Bar Ex. 14. The next day, replacement counsel responded that he did not believe it was necessary to meet with Respondent or to discuss any work performed. *Id.* Five days later, replacement counsel followed up, asking Respondent about the status of a refund check. *Id.*

¶22 Pike filed a grievance against Respondent on June 3, 2015, alleging Respondent had promised yet failed to refund $10,000 of her retainer fee. On June 10, the Bar notified Respondent of the grievance and requested a written response within twenty (20) days, pursuant to RGDP 5.2. Respondent timely replied on June 26, 2015, stating that he did not recall ever agreeing to refund $10,000, but would be willing to return a reasonable amount as a good-faith courtesy since Pike was related to his former wife. Bar Ex. 4. Respondent claimed that he had earned more than the $15,000 retainer prior to his termination, and he included a partial billing record for December 3 through December 29, 2014. *Id.* In this partial record, Respondent showed he had worked 67.5 hours at a rate of $250.00/hour and incurred costs of $77.00 in mileage to visit Client in jail. Based on these records, Respondent claimed Pike actually owed him $1,450.39. Respondent also claimed that the $15,000 was only a partial payment of an originally agreed upon retainer fee of $30,000.

¶23 The Bar then made multiple requests for a copy of the case file and a full accounting of work performed for the remainder of his representation. Respondent did not provide the additional information, repeatedly asserting that he was unable to comply due to his computer being broken and undergoing repair. Neither Respondent nor Pike provided a copy of any billing agreement, and at the hearing Pike testified that one did not exist. Pike further testified that although she had paid Respondent $15,000, he was handling the case *pro bono* and charging only for things that cost him money, such as a lie detector test and a rehabilitation program for Client. Hr'g Tr. vol. 2, 418-19, Apr. 24, 2018. Pike admitted that after she terminated Respondent, he never told her an exact amount for the refund he allegedly promised. The Bar's investigator testified that this Count was pursued because he didn't believe that Respondent did the work reflected in his submitted bill. Hr'g Tr. vol. 1, 177-78, Apr. 23, 2018. The Trial Panel found clear and convincing evidence that Respondent failed to respond to the Bar's requests for a full accounting of work performed and failed to refund the unearned portion of the fee.

¶24 RGDP 1.4(b) provides that controversies regarding fee amounts shall not be a basis for disciplinary charges unless the fee "is extortionate or fraudulent." 5 O.S.2011, ch. 1, app. 1-A. Respondent timely responded to the Bar with a partial accounting of work performed, showing that no refund was due. Despite the allegations, the Trial Panel did not permit Respondent to put on evidence supporting the reasonableness of his fee or the time he billed. Further, after his termination, Respondent offered to meet with replacement counsel and go over the work he performed. It is not apparent in the record that after turning down Respondent's offer, replacement counsel ever asked Respondent for a copy of the file. The record suggests confusion surrounding Respondent's willingness to issue a good-faith refund – a refund which does not actually appear to be required. Accordingly, we do not find clear and convincing evidence of professional misconduct regarding the fee disagreement or Respondent's failure to provide additional requested information.

Count VI: Withdrawn Grievance

¶25 In May 2016, the Bar received a client grievance alleging that Respondent had accepted a $3,000 retainer fee to set up a trust for the client, yet Respondent failed to perform any services and soon ceased all communication with him. The Bar informed Respondent of the grievance by letter on May 18, 2016, detailing the allegations and requesting his written response within twenty (20) days. Respondent failed to provide a timely response, and the Bar made numerous additional requests for information via certified mail, e-mail, and telephone. Bar Ex. 95.

¶26 It was not until September 21, 2016, four months after the Bar's initial inquiry, that Respondent sent a letter stating his computer was broken, and he was therefore unable to retrieve the requested information. He then stated that he had "worked extremely hard on a myriad of issues," and what existed was a fee dispute. Bar Ex. 96. Before the Bar filed its formal Complaint, the client informed the Bar that the concern had been resolved, and he no longer wished to pursue the grievance against Respondent. The Trial Panel did not find sufficient evidence to support Count VI. We agree as to the underlying grievance but disagree as to Respondent's failure to timely respond. We find clear and convincing evidence that Respondent failed to respond to the Bar's lawful demand for information in Count VI.

Count XII: Misconduct in a Deprived Child Case

¶27 Count XII arises from a juvenile proceeding in which Respondent represented the foster parents of a young child. In March 2017, Respondent filed pleadings wherein he attached confidential medical reports containing protected information about the biological parents and the child, plus a confidential report from the Oklahoma Department of Human Services, which was addressed to the District Attorney's Office. Finding that neither the foster parents nor Respondent should have ever had access to said reports, the district court ordered that all such confidential information contained in Respondent's pleading be immediately "removed and sealed." Bar Ex. 153G; *see also* Hr'g Tr. vol. 7, 1768, May 1, 2018. The court further ordered that Respondent turn in all records that he or his clients "obtained through unknown sources." Bar Ex. 153G.

¶28 Despite repeated requests during the Bar's investigation, Respondent failed to address how he obtained these confidential documents. Instead, he requested recusal of Bar counsel, alleging "flagrant constitutional violations and knowing purposeful harassment." Bar Ex. 152. Respondent claimed the grievance should be dismissed because "no sanctions were imposed by the court." *Id.* At the Trial Panel hearing, both the presiding juvenile court judge and the trial judge testified that Respondent's possession and use of these reports were improper. Hr'g Tr. vol. 7, 1768, 1772-76, May 1, 2018. No authority, however, was cited for that position. The Trial Panel stated that the "real issue in this Count" was how Respondent came into possession of the documents. At no point has Respondent answered that question. We find clear and convincing evidence that Respondent failed to respond to requests for information in Count XII. Overall, Respondent did not commit professional misconduct in Counts I or IX; however, he failed to respond to the Bar's investigation in Counts VI and XII in violation of ORPC 8.1(b)[8] and RGDP 5.2.[9]

2. Lack of Candor, Frivolous Filings, and Dilatory Practices

Count III: Goodwin & Lee Grievance

¶29 Count III relates to Respondent's conduct in *RCB Bank v. Bednar*, No. CJ-2015-192 (Okla. Cty. Dist. Ct.), a foreclosure action which arose from a delinquent loan that Respondent and his former wife executed with RCB Bank. The bank filed its petition on January 13, 2015, seeking judgment for breach of contract, foreclosure on a mortgage, and fraudulent inducement – alleging Respondent made knowingly false statements regarding his income and suspended status as a lawyer at the time of his loan application. Respondent failed to answer the petition until nearly two months later on March 11, 2015. He sought additional time from the court to answer, yet violated that allowance as well. On the day the bank's motion for summary judgment was scheduled, almost eight (8) months after filing his answer, Respondent filed counterclaims without receiving leave to do so. On that same day, Respondent sought the recusal of Judge Prince in open court,[10] failing to comply with District Court Rule 15.[11]

¶30 Following this request for recusal, attorneys for the bank, Kyle Goodwin and Edward Lee, filed a grievance against Respondent on November 30, 2015. In whole, the grievance alleges Respondent's: (1) routine failure to remit copies of pleadings he filed; (2) abusive discovery tactics; (3) failure to follow elementary rules of civil procedure; (4) bad-faith strategy of seeking recusal of judges on the eve of court dates; and (5) general unfitness to practice law. After being notified of the grievance in June 2016, Respondent failed to respond timely. In his response over three (3) months later, Respondent did not disclose relevant facts surrounding the incident; instead he pointed to the conduct and personality of his accuser, Goodwin. The Bar notified Respondent that his response did not comply with RGDP 5.2, and Respondent later filed an untimely supple-

mental response in which he continued to lodge personal attacks and shift the blame for the drawn out litigation.

¶31 Judge Prince ultimately agreed to recuse, and the case was reassigned to Judge Andrews. The bank filed an Application for Writ of Assistance to remove Respondent from the foreclosure property, and a hearing was set for February 2, 2017. Just two days before the hearing, Respondent filed a motion for recusal of Judge Andrews as well. Judge Andrews overruled Respondent's motion, and a week later Respondent filed yet another motion for recusal, raising essentially the same arguments.

¶32 The record reveals that Respondent conducted abusive and harassing discovery in the proceeding. He demanded production of, among other things, a comprehensive list of the bank's assets; insurance policies for the bank; personal insurance policies for the bank president and its attorneys; and all e-mails and text messages that referenced Respondent in any way, *including those Goodwin had with his client, RCB Bank*.[12] Additionally, Respondent sued RCB Bank, its president, other bank employees, and its attorneys personally in *Bednar v. RCB Bank*, No. CJ-2016-4321 (Okla. Cty. Dist. Ct.).

¶33 Respondent provided Goodwin with documents he purports are "exculpatory e-mails" in which he accurately disclosed his income and suspension. He claims unfairness based on lack of discovery of these e-mails and Goodwin's failure to investigate them. Lodging these claims, Respondent makes virtually no citation to the record. Testimony and exhibits presented at the hearing clearly demonstrate these contentions are false.

¶34 The bank did in fact investigate Respondent's fraud in failing to disclose his true income and suspension. Goodwin testified that the copies of "e-mails" that Respondent provided to him lacked the time and date stamp automatically generated in every e-mail sent from an RCB e-mail account. Likewise, after searching, Goodwin found no record of the purported e-mails outside the copies Respondent provided him. Goodwin stated it was his belief that Respondent manufactured the documents in a "Hail Mary" effort to conceal his fraud on the bank. The Trial Panel concluded that the purported e-mails lacked authenticity. We agree.

¶35 Further, in his briefing to this Court, Respondent misrepresents the testimony of Judge Andrews at the evidentiary hearing. Respondent claims Judge Andrews admitted to error justifying his recusal request when in fact Judge Andrews testified that he believed there was no good-faith basis for Respondent's request and that it was generally a delay tactic.[13] The Trial Panel concluded that Respondent "used every trick in the book, and some not in the book, to stall and prevent the action." Trial Panel Rep. 7. Exhibits presented, as well as the testimony of Goodwin and Judges Prince and Andrews, convince us that Respondent intentionally delayed the lawful foreclosure of his home. The record is replete with examples of Respondent's lack of candor, abusive discovery tactics, bad-faith delay attempts, and strategy of improperly seeking the recusal of judges. We find clear and convincing evidence that Respondent committed professional misconduct in Count III.

¶36 The remainder of Counts addressed in this section – Counts IV, V, VIII, and XI – came about as a result of the Bar's investigation into other allegations of misconduct. Respondent disputes the legitimacy of these grievances, arguing they did not arise from any "identified human being." Under RGDP 5.1(a), however, the Bar may "in [its] discretion, institute an investigation on the basis of facts or allegations . . . brought to their attention in any manner whatsoever." 5 O.S.2011, ch. 1, app. 1-A. Throughout the proceedings, Respondent requested that counsel for the Bar recuse herself, claiming she was conspiring with other attorneys and subtly encouraging Bar complaints against him. Evidence of Respondent's actions in these cases and comprehensive review of the Bar's investigation into them demonstrate these Counts are not the product of an antagonistic prosecutor as Respondent claims.

Count VIII: Frivolous Lawsuits Against Judges

¶37 On April 13, 2016, Respondent filed a petition in Oklahoma County District Court against Judges Barbara Swinton, Aletia Timmons, and Thomas Prince for intentional infliction of emotional distress. *Bednar v. Hon. Barbara Swinton,* No. CJ-2016-1923 (Okla. Cty. Dist. Ct.). Respondent alleged the judges abused their offices and violated judicial canons by "targeting" and "publicly humiliating" Respondent. After filing his petition, Respondent failed to serve any of the three judges as defendants. Learning about the lawsuit on their own, each of the judges moved to dismiss the case on June 8, 2016,

through private counsel and the Attorney General's Office, based on failure to state a claim and judicial immunity.

¶38 Respondent was mailed a copy of these motions and notice of the date, time, and location of the hearing on the motions, which was set for July 14, 2016. Respondent failed to file any timely response to the motions to dismiss. On the date of the hearing, *Respondent failed to appear or to provide the court with any notice or explanation for his lack of appearance*. Granting the judges' motions to dismiss with prejudice on July 14, 2016, the district court stated:

> [Respondent] has shown a complete lack of respect to this court by failing to appear without any communication with the court whatsoever. The Court Clerk of Oklahoma County is hereby ordered to contact by certified mail [Respondent] and order him to appear before this court within thirty days and explain why he should not be sanctioned.

Bar Ex. 138M.

¶39 Then on August 15, 2016, Respondent filed a Motion to Set Aside Dismissal With Prejudice, claiming that dismissal was premature because he "had not commenced his case and had not served the petition." Denying the motion on October 20, 2016, the district court plainly held: "In a single sentence 12 O.S. 2003 says otherwise." Bar Ex. 138U. The court then cited the statute directly: "A civil action is commenced by filing a petition with the court." 12 O.S.2011, § 2003.

¶40 On October 10, 2016, Respondent filed an Amended Petition in which he tried to add an additional judge-defendant *after the lawsuit had been dismissed with prejudice*. On November 23, 2016, Respondent filed a Motion to Reconsider. The court denied both by letter, stating that all pleadings by Respondent were improperly filed, and his attempt to revive the litigation by "changing the Heading and adding an additional Defendant" was done "without permission of this Court." Bar Ex. 138X.

¶41 The Bar opened its investigation by letter on January 13, 2017, and Respondent failed to comply with multiple requests for information. On February 13, 2017, the Bar subpoenaed Respondent for deposition on March 2, 2017. One day before the deposition, Respondent e-mailed the Bar investigator, claiming that the case against the judges was "on-going" and it was wrong for the Bar to punish him for "exercising his right to access the courts." Respondent was eventually deposed on March 22 and June 7, 2017. The Trial Panel summarized:

> Perhaps the most telling fact in this grievance, though there are many, is Respondent's refusal, when deposed, to provide information as to the allegedly meritorious nature of his claims of slander. He refused to answer based on attorney-client privilege even though he is *pro se*.

Trial Panel Rep. 9.

¶42 Respondent's actions stemming from Count VIII "show the continued abuse of process, . . . disregard for court rules and orders, renaming pleadings requesting the same relief, [and] filing pleadings after a case has been dismissed." Trial Panel Rep. 9. We find clear and convincing evidence that Respondent committed professional misconduct in Count VIII.

Count IV: Improperly Seeking Recusal, Impugning the Integrity of the Judiciary, Attempting to Disguise Same Legal Requests with Different Titles & Count V: Abusive Discovery Tactics and Unauthorized Contacts

¶43 Counts IV and V arise from several cases in various district courts. In support of these counts, the Bar submitted numerous exhibits as well as the testimony of Judges Bernard Jones, Aletia Timmons, Barbara Swinton, Thomas Prince, Don Andrews, Martha Oakes, Howard Haralson, Retired Judge Gary Miller, and attorneys Chris Harper and Kyle Goodwin. Testimony of these individuals as well as a bevy of court pleadings demonstrate that Respondent routinely engaged in a continuous pattern of filing frivolous motions and improperly seeking the recusal of judges on the eve of, or directly after, adverse rulings.[14] Case by case, the Complaint shows how Respondent utilized this strategy as a "procedural weapon designed to run up litigation costs and delay the effect of judgments entered." Complaint ¶ 67.[15]

¶44 The record confirms that on over thirty (30) occasions in the five (5) cases presented by the Bar, Respondent filed essentially the same motions for reconsideration, motions to vacate, or requests for recusal after a ruling had already been made.[16] Court filings and the testimony regarding each of these cases illustrate Respondent's efforts to saturate the court dockets, frustrate the litigation, and prolong the

proceedings. At the evidentiary hearing, Judge Haralson concluded:

> The way it continued on and on and on . . . it wasn't anything that happened by accident[;] it wasn't anything that happened by mistake; it was a very calculated and very continued way of behavior that is absolutely inappropriate for a licensed attorney in the state of Oklahoma.

Hr'g Tr. vol. 7, 1837, May 1, 2018. Respondent's attempts to take a second, third, or fourth bite at the proverbial apple imposed burdensome costs on courts, opposing parties, and his clients. His pattern of misconduct impugns public confidence in an impartial judiciary. We find clear and convincing evidence that Respondent committed professional misconduct in Counts IV and V.

Count XI: Misrepresentations to Judge Parrish

¶45 Count XI stems from Respondent's representation of a family in a wrongful death suit in Oklahoma County. The merits of this lawsuit purportedly turned on the medical opinion of Dr. Chestnut, who had since retired and moved to Norway. After Respondent represented that he had no way of contacting this key witness, opposing counsel spent thousands of dollars locating and serving Dr. Chestnut in Norway to obtain his deposition. Bar Ex. 146. After much discussion and difficulty among the parties, the district court ordered that Dr. Chestnut's deposition would take place on December 8, 2015, when Dr. Chestnut was scheduled to return to Oklahoma for a medical procedure.

¶46 On the day the witness was to be deposed, however, Respondent filed a motion to quash, wherein he misrepresented to the district court that he had never received notice of the deposition from opposing counsel, and based on this lack of notice he was unable to attend. Relying on Respondent's statements, the court struck the deposition. *Id.* It was later established that Respondent had in fact been notified of the deposition and had even exchanged several e-mails with opposing counsel attempting to reschedule it. After the witness did not appear for deposition, opposing counsel filed a motion for sanctions against Respondent.

¶47 During this time period, two separate purported orders quashing the deposition came to light. Bar Ex. 149G, 189. The first merely struck the deposition, whereas the second bore additional language regarding another witness. Calvin Sharpe, attorney for Dr. Chestnut, testified at the Trial Panel hearing that Respondent had shown up at his law firm on the day the deposition was quashed, while Sharpe was in court, and instructed Sharpe's legal assistant to fax the nonconforming, second order to all other parties. Hr'g Tr. vol. 7, 1714, 1718-19, May 1, 2018. Respondent later admitted that he created the second order. Bar Ex. 149L.

¶48 In February 2015, the district court, Judge Parrish presiding, found that Respondent had intentionally misrepresented facts and withheld information from the court. Based on these misrepresentations, Judge Parrish ultimately recused herself permanently from any future cases with Respondent, stating:

> I do not trust what you have told me and what you failed to tell me in your motion to quash. My ruling is going to be, Mr. Bednar, I will not hear any cases of yours from this point forward, because it would not be fair to your client because I will not take at face value anything you tell me. . . . I feel like you might be misrepresenting or not putting in all the information.

Bar Ex. 149L. Judge Parrish testified that she has never before and has "never since" found it necessary to enter such an order. Hr'g Tr. vol. 7, 1701, May 1, 2018.

¶49 In his response to the Bar's investigation, Respondent denied any professional misconduct, relying on the fact that "no sanctions were imposed." He fails to mention, however, that opposing counsel's motion for sanctions was ruled moot due to the case later settling. The Trial Panel reports that over the course of the hearing, Respondent "sought to justify his deception by all manner of explanations." Trial Panel Rep. 11. Regarding the two court orders, the Panel concluded that it "is of the firm belief that the Respondent falsified this second [o]rder and requested an employee of the opposing counsel to fax it to others from that fax machine." *Id.* We agree. We find that e-mail records, the transcripts from proceedings on December 19, 2014 and February 3, 2015, and the testimony of Judge Parrish and two attorneys provide clear and convincing evidence that Respondent committed professional misconduct in Count XI.

¶50 Respondent has abused the legal system, wasted court resources, and sought to impugn

public confidence in the judiciary through deceptive and dilatory tactics employed in Counts III, IV, V, VIII, and XI. The Trial Panel concluded:

> The evidence in this matter demonstrates clearly and convincingly that Respondent uses his license to practice law to bully and sue anyone whom he perceives might be talking badly about him or know about his prior relationship with a sitting judge, or try to force a recusal, or perhaps just to be mean. The record reflects that he files frivolous and abusive lawsuits but often neglects to have many of the hapless defendants served. He routinely engages in discovery practices which, intentional or not, harass and intimidate. The single thread in the cases and instances which are the subject of the Complaint and as to which there is overwhelming evidence before the [Trial Panel] is that there are few true facts to support the utter lack of supportive law.

Trial Panel Rep. 2-3. We find Respondent committed professional misconduct in Counts III, IV, V, VIII, and XI in violation of ORPC 1.1,[17] 1.3,[18] 3.1,[19] 3.2,[20] 3.3,[21] 3.4,[22] 4.4(a),[23] 8.1(b), 8.2(a),[24] 8.4(c)-(d),[25] and RGDP 1.3[26] and 5.2.

3. Fraud & Misrepresentation to the Court

Count II: Taylor Grievance

¶51 In October 2015, Client hired Respondent to represent her in an emergency guardianship action regarding her newborn granddaughter who was located in Washington state. Previously, Client employed another attorney, Shannon Taylor, in a separate guardianship case regarding another grandchild. Not having sufficient funds to rehire Taylor, Client hired Respondent and gave him copies of the Waiver of Notice and Consent for Guardianship forms that Taylor had prepared in the previous case.

¶52 On November 2, 2015, Respondent returned the forms to Client, indicating that he had completed them for the next steps in the guardianship action. Immediately noticing Respondent had not even changed the name of the child from the previous case, Client requested that Respondent make the correction. After Respondent made the necessary alterations, the mother and putative father then signed the forms. As required, the mother had her form notarized, but the father, not having a valid form of identification required for notarization, did not. Respondent communicated that the father should simply return the signed form without notarization. The mother's attorney e-mailed the forms to Respondent from Washington, specifically noting that the father's form was signed but had not been notarized. Respondent filed the guardianship petition that same day and filed the waiver and consent forms the following day.

¶53 After being awarded guardianship, Client hired her former attorney, Taylor, to handle the adoption proceedings. While working on the adoption, Taylor noticed that her copy of the waiver and consent from the guardianship was not file-stamped. After obtaining the file-stamped copy, Taylor was surprised to find that the father's consent form was purportedly notarized by Taylor's own legal assistant. Taylor showed the document to her assistant, who denied notarizing the form and confirmed that her seal was safely stored in her office. Taylor surmised that the image of the seal appeared to have been cut and pasted from the waiver and consent forms prepared by Taylor in the previous case – the same forms which Client had given to Respondent.

¶54 On December 1, 2015, Taylor filed a grievance against Respondent, attaching sworn affidavits from Client and Taylor's legal assistant denying any knowledge of or participation in the notarization. In an untimely response, Respondent denied altering the document and claimed instead that it was Client who had perpetrated the fraud. The Trial Panel stated that despite the "inordinate amount of time" that Respondent spent at the hearing blaming his client, he failed to ever address why he would have submitted the documents "when he knew, and had to know, that one of them could not possibly have been signed and notarized in Oklahoma that very day when the person who signed it was physically in Washington State." Trial Panel Rep. 6.

¶55 The Trial Panel summarized Respondent's conduct as "obfuscatory and deceptive," stating it was "of the opinion that the only perjury was that perpetrated by Respondent." *Id.* We are unconvinced by Respondent's attempts to blame his client. At the very least, Respondent was on notice that the form was not properly notarized, and as the attorney on the case, he is responsible for verifying the truth of pleadings he submits. Indeed, Respondent stipulates that he "did not verify their accuracy." Resp't's Br. 13. We find clear and

convincing evidence that Respondent committed professional misconduct in Count II.

Count VII: Keeney & Shaw Grievance

¶56 Count VII arises from a guardianship proceeding in which Respondent was hired in April 2016, by the children and grandchildren of Ward, an incapacitated adult. George Keeney, a certified public accountant and financial and forensics fraud examiner, was appointed co-guardian of Ward's estate and substitute trustee of Ward's trust. As one of his first actions in the case, Respondent called Keeney and attempted to interrogate him about Ward's finances. Declining to discuss the matter, Keeney informed Respondent he was represented by an attorney, James Shaw, and that Respondent should direct all questions to him. Keeney informed his attorney of the interaction, who then called Respondent directly and advised that he represented Keeney and all future communications should be directed to him, not his client.

¶57 A few weeks later, Respondent appeared unexpectedly in a conference call with co-guardians of Ward and the Ward's health care provider, Synergy. During this call, Respondent again tried to question Keeney and others regarding Ward's finances and other health care issues. Then, on May 6, 2016, Respondent telephoned Keeney again, this time falsely representing that Shaw had agreed to their communications. Hr'g Tr. vol. 6, 1321-22, 1324-25, Apr. 30, 2018. Shaw later e-mailed Respondent the following: "Mr. Bednar, I represent George Keeney, which you know. Do not communicate with him. Any communication for him should be directed to me as his counsel." Bar Ex. 108B. Despite this explicit instruction, Respondent continued to attempt communications via phone and e-mail, requesting financial records and threatening to sue Keeney and others if they did not comply.[27] Bar Ex. 108C-F.

¶58 Over the next two months, Respondent filed numerous pleadings which served only to harass opposing counsel and inflate legal costs imposed on Ward's estate.[28] On May 6, 2016, he filed for an Emergency Hearing during which he threatened to sue attorney and co-guardian Sara Murphy for "bad mouthing" his clients and announced he would sue the health care provider, Synergy. The district court ordered that Synergy was not to be terminated without further order of the court. Bar Ex. 133M. *The next day, Respondent and his clients violated the district court's order* and terminated Synergy, leaving Ward in a medically vulnerable position.[29]

¶59 After terminating Synergy, Respondent demanded that Keeney issue a check for $3,500 to pay for a replacement health care company. Shaw advised Respondent by e-mail that "Keeney had no input into the termination of Synergy" and would agree to provide the payment "based solely on his concern that without providing the payment, Ward would be without necessary care due." Respondent then falsely represented to the district court that Keeney had approved the replacement health care company. The same day that Respondent demanded payment from Keeney, Shaw again e-mailed Respondent requesting that all communications between lawyers for the parties be restricted to counsel. Bar Ex. 116. Despite this reiterated request, Respondent continued to e-mail Keeney – threatening defamation suits and claiming Keeney had no authority to perform the work he was hired to do.

¶60 On May 25, 2016, Keeney filed a grievance against Respondent, and on May 31, 2016, Shaw filed a separate grievance. On May 27, 2016, Respondent filed a civil suit against Keeney, Murphy, and Synergy on behalf of his clients and Ward's estate. Bar Ex. 134A-B. The Bar advised Respondent of Keeney's and Shaw's grievances by letter dated June 15, 2016, and requested his written response within twenty (20) days. Respondent failed to respond to either grievance for nearly three (3) months.

¶61 In his response, Respondent stated that he had "not violated any ethical duties or statutes" and asked the Bar to dismiss both complaints based on "lack of standing." Bar Ex. 103. Regarding Keeney's grievance, Respondent denied any wrongdoing and suggested the complaint was likely just a result of his attorney advising him to do so. Respondent lodged accusations of embezzlement and mismanagement of funds; he claimed Keeney "dubbed" a report from DHS and "admitted to numerous violations of his fiduciary and ethical duties." *Id.* Regarding Shaw's grievance, Respondent denied any wrongdoing and claimed Shaw's complaint was "childish, likely due to conversations he had with the unscrupulous firm Kyle Goodwin belongs to." He continued name-calling, stating that Shaw was "childish" and "unprofessional" and "has received large sums of money from billing [Ward]'s estate." *Id.*

¶62 At the hearing, the Bar presented e-mail records and testimony from Keeney, Shaw, Murphy, and Judge Welch. The testimony of these individuals demonstrates consistently how Respondent's involvement in the case imposed great financial harm on Ward and elevated the cost of litigation from "modest" to "through the roof." Hr'g Tr. vol. 6, 1337, 1345, Apr. 30, 2018.[30] Respondent submitted an hour-and-forty-minute audio recording which he claims disproves the testimony of Keeney and Murphy. Resp't Ex. 3. Respondent failed to authenticate it as required by 12 O.S.2011, § 2901. The Trial Panel concluded:

> Of all the grievances mounted against Respondent, these are perhaps the most egregious of the egregious. In both the conduct leading to the grievances as well as in the conduct of Respondent during this part of the PRT hearing, the Respondent is the embodiment of unscrupulous. From his direct disobedience of Judge Welch's clear and unambiguous Order, to his repeatedly knowingly contacting a represented party, to his insistence in the hearing that the Order he disobeyed should not have been entered, to filing abusive and baseless pleadings, *Respondent's conduct is an affront to the [B]ar and indeed to human decency.*

Trial Panel Rep. 9 (emphasis added).

¶63 Throughout the hearing and in his briefing to this Court, Respondent has not once tried to take stock of how his actions in this case were improper. Instead, he shirks all responsibility for the financial and personal harm inflicted on Ward, attempts to justify his unauthorized communications, and continues to argue that the Order he disobeyed was wrong. We find clear and convincing evidence that Respondent committed professional misconduct in Count VII. We find that Respondent's professional misconduct in Counts II and VII violates ORPC 3.3, 3.4, 8.1(b), 8.4(c)-(d) and RGDP 1.3 and 5.2. Further, Respondent violated ORPC 3.1 and 4.2[31] with his actions in Count VII.

IV. VIOLATIONS

¶64 Upon careful examination, we find that the record of disciplinary proceedings supports a finding, upon a clear and convincing standard, that Respondent violated ORPC 1.1, 1.3, 3.1, 3.2, 3.3, 3.4, 4.2 , 4.4(a), 8.1(b), 8.2(a), 8.4(c)-(d) and RGDP 1.3 and 5.2. Respondent failed to uphold his obligations to cooperate in the grievance process or properly respond to inquires throughout the disciplinary proceeding. He has repeatedly failed to act in good faith, asserted frivolous claims and issues, and demanded irrelevant and oppressive discovery. He has failed to competently represent his clients or to exercise due diligence in verifying the truth of pleadings he submitted. Respondent continually persisted in unauthorized communications with a person represented by counsel after reiterated requests to desist. He lacked candor with the court and failed to make reasonable efforts to expedite litigation or notify defendants in actions he filed. Finally, Respondent submitted fraudulent filings, directly and intentionally misrepresented facts, and knowingly disobeyed a court order. Respondent's behavior is prejudicial to the administration of justice and has caused numerous parties unnecessary pecuniary loss and personal harm.

V. DISCIPLINE

A. Mitigation and Enhancement

¶65 "In fashioning the degree of discipline to be imposed . . . the Court shall consider prior misconduct where the facts are charged in the complaint and proved and the accused has been afforded an opportunity to rebut such charges." RGDP 1.7. Consideration of prior discipline serves to aid the Court in making its decision and to enhance any discipline to be imposed. RGDP 6.2; *State ex rel. OBA v. Mothershed,* 2003 OK 34, ¶ 41, 66 P.3d 420, 428. The Bar relies on Respondent's discipline in *Bednar I* for enhancement. Respondent argues that enhancement is inappropriate because the 2013 discipline "remains to be investigated." This is wholly inaccurate. We find Respondent's prior discipline to be appropriate for enhancement.

¶66 In *Bednar I*, we declared that Respondent's actions indicated a "disturbing pattern of behavior with a key element being the lack of forthrightness." 2013 OK 22, ¶ 11, 299 P.3d at 491. While egregious on their own, Respondent's acts of misconduct today are elevated by his resolute attempts to cover up, shift blame, and deny any form of wrongdoing in the face of clear evidence to the contrary. Although we may consider mitigating circumstances to assess the appropriate measure of discipline, *State ex rel. OBA v. Durland,* 2003 OK 32, ¶ 15, 66 P.3d 429, 432, no such mitigation exists in this record that would cause our judgment to diminish.[32]

B. Appropriate Discipline

¶67 Appropriate discipline "is that which is (1) consistent with the discipline imposed upon other lawyers who have committed similar acts of professional misconduct and (2) avoids the vice of visiting disparate treatment of an offending lawyer." *Schraeder,* 2002 OK 51, ¶ 6, 51 P.3d at 574. As stated previously, the main purpose of our disciplinary authority is not to punish the offending lawyer, but to safeguard the interests of the public, the courts, and the legal profession. *Friesen,* 2016 OK 109, ¶ 8, 384 P.3d at 1133. Preservation of the public's confidence in the legal system is essential to its success, and such confidence depends on our willingness to impose severe discipline when appropriate. *State ex rel. OBA v. Gassaway,* 2008 OK 60, ¶ 80, 196 P.3d 495, 510. A second purpose of discipline is to deter the attorney from similar future conduct. *State ex rel. OBA v. Godlove,* 2013 OK 38, ¶ 22, 318 P.3d 1086, 1094.

¶68 "A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation." ORPC 8.4 cmt. 2; *Gassaway*, 2008 OK 60, ¶ 75, 196 P.3d at 509. The record shows a pattern of repeated offenses by Respondent, some minor and some egregious. The grievances cover a span of time beginning not long after Respondent was reinstated as an attorney, indicating an indifference to his legal obligation and a lack of deterrence following his prior discipline.

¶69 In *State ex rel. OBA v. Thomas*, 1995 OK 145, ¶¶ 7-8, 911 P.2d 907, 910, we disbarred an attorney who presented a forged "order" to his client in an effort to misrepresent the neglected status of the case and who failed to timely respond to the grievance against him. Thomas admitted to forging the document, but attempted to shift the blame for it being delivered to the client. *Id.* Even though Thomas never actually submitted the forgery to the court, we still found disbarment appropriate, stating: "Fraud and misrepresentation by an attorney toward his client are serious forms of misconduct. Likewise, the forging of legal documents is a serious breach of legal ethics which constitutes illegal conduct involving moral turpitude and justifies imposition of the *most severe discipline." Id.* ¶ 15, 911 P.2d at 913 (emphasis added) (citations omitted). While Respondent did not neglect a client's case like in *Thomas*, he filed a fraudulent notarization, altered other court documents, and directly violated a court order – in each instance blaming his clients or opposing counsel for the resulting harm.

¶70 Perhaps most similar, in *State ex rel. OBA v. Godlove,* 2013 OK 38, 318 P.3d 1086, we disbarred an attorney for frivolous litigation tactics and discovery abuses. Like Respondent, Godlove failed to respond to grievances or answer the formal complaint against her. *Id.* ¶¶ 4-5, 318 P.3d at 1088. We found Godlove committed misconduct in at least eighteen cases, where she filed at least twenty-four pleadings collaterally attacking final orders and at least seventeen requests for recusal of judges after adverse rulings. *Id.* ¶¶ 9, 10, 13, 318 P.3d at 1089-90. Godlove also knowingly disobeyed a direct court order by filing abusive pleadings wherein she would file motions, fail to appear, and then request to vacate the resulting adverse orders. *Id.* ¶ 17, 318 P.3d at 1091. Evaluating appropriate discipline, we noted Godlove's failure to cooperate with the Bar's investigation and continued misconduct after her former discipline and sanctions. *Id.* ¶¶ 23-25, 318 P.3d at 1094. We stated:

> For the extensive violations of the rules governing lawyers' conduct and for ignoring these proceedings, we find that disbarment is necessary to stop the abuse of the system hailed on it by Godlove's frivolous, multiple, duplicate filings and to end the disservice to her clients, to opposing parties, to opposing counsel, and to judges presiding over cases in which she is involved.
>
> There is a fine line between zealous advocacy and harassing, frivolous litigation. Godlove has not only overstepped the line, she has trampled it. We have a duty to protect against the type of frivolous litigation undertaken by Godlove.

Id. ¶¶ 26-27, 318 P.3d at 1094-95. Today we carry out this same duty. As in *Godlove,* Respondent's patterned behavior "has shown a total lack of respect for this Court and the process and rules that protect the public from errant lawyers." *Id.* ¶ 25, 318 P.3d at 1094.[33] Zealous advocacy does not necessitate, nor does it prompt, intimidation or harassment; Respondent has exhibited both in his practice of law.

¶71 We are convinced, under a clear and convincing standard, of Respondent's sustained abuse of the legal system and retaliatory harassment of opposing counsel and the courts. We see no real evidence that Respondent appreciates the seriousness of his fraud and

deceit, examples of which saturate the record. He adamantly denies his wrongdoing and attempts to justify some of the most maligning and egregious behaviors the Court has encountered. Our promulgated rules governing licensed attorneys require much more, and in fact, were fashioned to protect the public from this type of delinquency. Anything less than disbarment would invite further victimization and greater disintegration of public confidence in the legal system of this State. Likewise, to avoid disparate treatment, consistency requires that we disbar Respondent.

VI. ASSESSMENT OF COSTS

¶72 The Bar has asked this Court to assess costs in the amount of $28,298.13. RGDP 6.16 provides that where violations are proven, the costs shall be surcharged against the disciplined lawyer unless remitted in whole or in part by the Supreme Court for good cause shown. We have previously held that costs assessed against an attorney may be reduced in part where the Bar fails to prevail on all of the counts charged.[34]

¶73 Here, Respondent prevailed fully on two of the eleven counts, and in two others, we found violations only in his failure to respond. On the other hand, by filing frivolous, redundant pleadings, attempting to relitigate his prior discipline, and failing to respond to grievances as they were submitted, Respondent's behavior ballooned the costs of the proceedings exponentially. Accordingly, we reduce the costs assessed against Respondent to $20,580.48, which shall be paid within ninety (90) days of the effective date of this opinion. RGDP 6.16.

VII. CONCLUSION

¶74 Upon *de novo* review, we find clear and convincing evidence of Respondent's professional misconduct in nine of the eleven counts. We order that he be disbarred from the practice of law, his name be stricken from the roll of attorneys, and he pay the costs of this proceeding in the amount of $20,580.48. Pursuant to RGDP 9.1, Respondent is required within twenty (20) days to notify all clients, via certified mail, of his inability to represent them and the necessity to promptly retain new counsel. Respondent is also required to withdraw from all pending cases and file an affidavit stating his compliance with RGDP 9.1 and a list of clients notified with both the Clerk of the Supreme Court and the Professional Responsibility Commission.

RESPONDENT IS DISBARRED AND ORDERED TO PAY COSTS.

Wyrick, V.C.J., Winchester, Edmondson, Reif, Darby, JJ., concur;

Gurich, C.J., Combs, J., recused;

Kauger, Colbert, JJ., not participating.

1. In this order, the Trial Panel specifically considered our analysis of RGDP 6.4 in *State ex rel. OBA v. Knight*, 2015 OK 59, ¶ 20, 359 P.3d 1122, 1128, stating:

> This Tribunal does not discern any public interest relating to the merits of this proceeding which would require deviation from the mandatory language of Rule 6.4, or for consideration of evidence other than that related to determining the discipline to be imposed; provided, however, that in accordance with extant case law, on hearing of this matter, Complainant shall be required to present competent evidence as to each material allegation of the Complaint.

2. The Trial Panel recounts Respondent's conduct at the hearing as "the exemplification of unprofessional. He was frequently late[,] . . . disruptive[,] and argumentative[, and] . . . would almost without exception focus his efforts to either justifying his actions giving rise to the violations or attack witnesses personally rather than the witness'[sic] credibility." Trial Panel Rep. 4-5.

3. "Investigations by the General Counsel and the Commission shall be confidential, and the results thereof shall not be made public until authorized by the Supreme Court or as provided in Rule 6.1." RGDP 5.7, 5 O.S.2011, ch. 1, app. 1-A.

4. "Upon the expiration of the respondent's time to answer, the complaint and the answer, if any, shall thereupon be lodged with the Clerk of the Supreme Court and the complaint, as well as all further filings and proceedings with respect thereto, shall be a matter of public record." RGDP 6.1, 5 O.S.2011, ch. 1, app. 1-A.

5. "Except where disciplinary proceedings are involved (Rule 10.4), all proceedings under this Rule 10 shall remain confidential and shall not be a matter of public record, unless otherwise ordered by the Supreme Court." RGDP 10.12, 5 O.S.2011, ch. 1, app. 1-A.

6. In pertinent part, RGDP 10.4 states: "Whenever in a disciplinary proceeding brought under these rules, *the respondent interposes present mental incompetence as a ground for abating the proceeding*, the Trial Panel . . . shall determine whether the respondent is mentally incapable to defend or assist his counsel in defending against the charges." 5 O.S. 2011, ch. 1, app. 1-A (emphasis added).

7. *See State ex rel. OBA v. Leonard*, 2016 OK 11, ¶ 25, 367 P.3d 498, 507 (where attorney similarly foreclosed the Bar's opportunity to prove incapacity under RGDP 10 by refusing to fully disclose medical records).

8. [A] lawyer in connection with a . . . disciplinary matter, shall not:
. . .

> (b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

ORPC 8.1(b), 5 O.S.2011, ch. 1, app. 3-A.

9. After making such preliminary investigation as the General Counsel may deem appropriate, the General Counsel shall . . . file and serve a copy of the grievance (or, in the case of an investigation instituted on the part of the General Counsel or the Commission without the filing of a signed grievance, a recital of the relevant facts or allegations) upon the lawyer, who shall thereafter make a written response which contains a full and fair disclosure of all the facts and circumstances pertaining to the respondent lawyer's alleged misconduct unless the respondent's refusal to do so is predicated upon expressed constitutional grounds. Deliberate misrepresentation in such response shall itself be grounds for discipline. The failure of a lawyer to answer within twenty (20) days after service of the grievance (or recital of facts or allegations), or such further time as may be granted by the General Counsel, shall be grounds for discipline.

RGDP 5.2, 5 O.S.2011, ch. 1, app. 1-A.

10. Judge Prince]: So to say it was brought in good faith? He had a legitimate reason, but he waited until the eve of a hearing to ask it. He utilized a tactic I thought was improper by filing a motion to recuse in public prior to filing a Rule 15 – prior to having a Rule 15 conference. . . . [T]he fact that he did it in such a manner that it was *on the eve of a hearing and filed a motion in public prior to having a Rule 15*, it leads me to question motives.

Hr'g Tr. vol. 8, 960-61, May 2, 2018 (emphasis added).

11. This rule requires that the lawyer make an in camera request before filing any motion to disqualify a judge and provides that "if such request is not satisfactorily resolved, not less than ten (10) days before the case is set for trial[,] a motion to disqualify a judge or to transfer a cause to another judge may be filed." R. for Dist. Cts. of Okla. 15(a), 12 O.S.2011, ch. 2, app.

12. Regarding the timing of these discovery requests, Goodwin stated:

> While under the protective umbrella of Rule 15, Bednar issued the abusive discovery set forth above, knowing that Judge Prince was not free to rule upon either the foreclosure or the discovery issues. . . . [T]his conduct evinces Bednar's willingness to abuse both procedures for recusal and the discovery code as a means of staving off adverse decisions.

Bar Ex. 44.

13. [Judge Andrews]: What I believe is, when you requested my recusal from the case, that that was – there was no good-faith basis for that request. . . . I didn't believe there was any bias or prejudice on my part. . . . [G]enerally, I think it's – it's a delay tactic. If you ask for recusal, there's a suspension, a stay of all proceedings, so it's a delay tactic. I believe that was your motivation.

Hr'g Tr. vol. 4, 930, 934, Apr. 26, 1018.

14. *Liebel v. Bednar*, No. CJ-2009-11652 (Okla. Cty. Dist. Ct.): Motion To Disqualify Judge (May 19, 2015) (regarding Judge Jones); [Second] Motion To Disqualify Judge (May 20, 2015) (regarding Judge Jones); Supplement To Motion To Reassign Case In Support Of Reassignment Based On Existing Statutes (May 20, 2015) (regarding Judge Jones); Amended Motion To Withdraw Judge Timmons (Aug. 17, 2016) (where court found there was "no evidence that Rule 15 was procedurally followed").

Eaves v. Matthew, No. CJ-2014-653 (Can. Cty. Dist. Ct.): Special Appearance Of . . . Public Adjuster For Plaintiffs In Support Of Motion To Withdraw Saheb, And Notice Of Intent To File Cross Claim Against Freedom Mortgage For Employing His Own Attorney Who Has Taken An Adverse Financial Position . . . , And Also Supporting Injunctive Relief Against Freedom Mortgage (July 31, 2015); Motion To Disqualify Judge (Dec. 17, 2015) (regarding Judge Swinton and falsely claiming defamation as well as a physical assault by another district judge); Motion To Strike Judge Swinton's Minute Order Of December 18, 2015 As A Pending Motion To Recuse Was Priorly [sic] Filed And Judge Swinton Was Not Free To Proceed With The Case Until The Challenge To Her Impartiality Was Adjudicated (Jan. 22, 2015); Aid To The Court (Conclusive Evidence Demonstrating Threshold Of The Appearance Of Impropriety Has Been Reached, Supporting Recusal) (Jan. 22, 2016); Motion To Vacate Order Per Court's Inherent Powers Within Thirty Days, And Incorporation By Reference Of Outstanding Motions To Disqualify Judge And To Strike Docket Entry (Mar. 18, 2016); Motion To [sic] Leave To Amend Petition And Add Parties (Mar. 18, 2016).

Turner v. Bray, No. CJ-2015-272 (Can. Cty. Dist. Ct.): Motion To Withdraw [Defendant's Counsel] For Violations Of Title 5 And Conflicts Of Interest (July 17, 2015); Motion To Set Aside Journal Entry And Response To Motion For Fees (July 17, 2015); Application For Emergency Order To Vacate Default Judgment For Procedural Irregularity (Oct. 23, 2015); Petition To Vacate Default Judgment For Procedural Irregularity (Oct. 30, 2015); Emergency Motion To Halt Defendant's Garnishment As Premature (Nov. 30, 2015); Motion To Disqualify Judge And To Strike Minute Order Of February 5, 2016 (Feb. 9, 2016) (regarding Judge Timmons); Aid To Court Regarding Proposed Order For Motion To Disqualify The Judge (Feb. 16, 2016) (regarding Judge Timmons); *see also* Court Minute (Oct. 23, 2015) (finding Respondent repeatedly delayed the hearing on a motion to compel and disobeyed the earlier court order to produce documents).

Bednar v. Bednar, No. FD-2014-4499 (Okla. Cty. Dist. Ct): Respondent's Objection And Request To Strike September 21, 2015 Motion And Ex Parte Order Of Same Day For Failure To Include Undersigned In Ex Parte Meeting With Judge, For Misrepresentation To Court, And Procedural Violations (Sept. 23, 2015); Motion To Withdraw Attorney … From Further Representation As He Has Become A Witness And As His Client Has Divulged His Attorney Communications (Sept. 24, 2015); Motion To Set Aside Decree On Court's Own Motion To Settle And Order Of October 20, 2016 For Violation Of Rule 15 As A Court Is Not To Adjudicate Any Matter Until The Rule 15 Matter Is Exhausted, And To Move This Venue For Forum Non Conveniens (Oct. 31, 2016); Motion To Recuse Judge Haralson Due To Apparent Bias (Oct. 31, 2016); Motion To Reconsider, And For Court to Set Aside Order Pursuant To Its Inherent Powers Within Thirty Days (Dec. 15, 2016); Motion To Recuse Judge Haralson Due To Apparent Bias And To Compel Him Not To Rule On Any Issues Until After Adjudication Of The Rule 15 Matter (Dec. 30, 2015); Supplemental Motion To Recuse, And Support For Forum Non Conveniens (Jan. 4, 2017); Motion To Reconsider (Jan. 10, 2017).

Saheb v. Bednar, No. CJ-2015-472 (Okla. Cty. Dist. Ct.): Motion To Recuse Judge Swinton And For Administrative Reassignment Pursuant To Rule 15 And Local Rules (Jan. 14, 2016); Supplement To January 14, 2016 Motion To Recuse Judge Swinton (Feb. 19, 2016); Attorney Subpoena For Deposition Of Judge Swinton (Feb. 23, 2016); Aid To The Court In Support Of Special Appearance And Request To Recuse Judge Swinton From All Cases With Mr. Bednar (Feb. 26, 2016); Motion To Reconsider Order Of March 7, 2016 (Apr. 6, 2015) (filed after the case had been dismissed).

15. Below is an excerpt from the February 5, 2016 hearing in *Turner v. Bray*, No. CJ-2015-272, where Respondent filed vexatious pleadings, asked for Judge Timmons's recusal (following Judge Miller's recusal), and the court granted a $5,000 sanction against Respondent:

> The Court: No. No, this is after judgment. You can't intervene after judgment, when judgment has been rendered. So the Motion to Intervene will be denied. . . . And we've discussed this, at least, 12 times, because you filed Motions and I said you're post judgment, so these motions should not have been filed.
> [Respondent]: Judge, there's –
> The Court: Am I correct, Counsel?
> [Respondent]: You're correct.
> The Court: Okay.
> [Respondent]: Judge, just to clarify that history of the case –
> The Court: No, I don't need to clarify it. I've pulled the pleadings, I have looked at the docket sheet. I have seen that Judge Miller has ruled on these Motions repeatedly. . . The same Motions, slightly different title, same substance, ruled on over and over and over again.
> [Respondent]: Yes. But this time it's different, Judge.
> The Court: No, it's not. . . . [I]t's clear to me, based on what I have read, that you had a propensity not to serve people with notice of the hearing and then come and say you served them with no proof of that, and then we have to do Motions to Vacate, Motions to Set Aside, because you have not served people. You served the Motion for the subpoena in this case by fax, which is improper… [Judge Miller] specifically overruled that. And then you came to Oklahoma County because you requested, or Judge Miller recused because of these pleadings that are flying around that make no sense. . . . So then you filed the same Motion in front of me, November 20th, on an emergency, which I told you was not an emergency. It was post judgment. . . . I told you that.
> [Respondent]: You did, Judge. . . .
> The Court: So you filed and you set a hearing on it anyway. . . . I'm not going to resign or either disqualify myself, because this is another pattern you have of making up disqualification reasons for court personnel, for lawyers, whenever the case is not going your way. I've seen it in four cases. . . . There's no evidence, as found by Judge Miller, and again found by me. I find that the continued filing of the same motions in Canadian County and Oklahoma County is vexatious. . . . It is a pattern of conduct where you have been warned and sanctioned from one end of Federal Court to State Court on.

Bar Ex. 76QQ.

16. Regarding Respondent's improper attempt to vacate an adverse court order in *Turner v. Bray*, No. CJ-2015-272, the district court stated:

> The motion, which is disguised as an application, was filed by [Respondent] on 10/23/2015. The court had previously admonished [Respondent] to make sure he can do by motion what he is attempting to do by motion and to call it an application doesn't change the fact that it is a motion to vacate.

Bar Ex. 76A. Regarding the numerous pleadings Respondent filed in *Bednar v. Bednar,* No. FD-2014-4499, Judge Haralson testified that at every turn Respondent sought to delay the proceedings:

> Absolutely a lot of wasted time and a lot of delay. . . [Respondent] just kept filing new motions to reconsider or motion to vacate, for new trial. It was always the same – the same material, the same allegations, and it was just – it was frustrating. It took up time. It took time away from other cases, because we had to schedule time to hear and rehear things that had been heard and reheard. And that's why it became necessary for me to be very specific and enter the length and depth of explanation in the

orders that I entered, was because we needed to be clear and try to explain, but it didn't seem to help.

Hr'g Tr. vol. 7, 1834-35, May 1, 2018; *see also* Bar Ex. 81UU.

17. "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." ORPC 1.1, 5 O.S.2011, ch. 1, app. 3-A.

18. "A lawyer shall act with reasonable diligence and promptness in representing a client." ORPC 1.3, 5 O.S.2011, ch. 1, app. 3-A.

19. "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous." ORPC 3.1, 5 O.S.2011, ch. 1, app. 3-A.

20. A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client." ORPC 3.2, 5 O.S.2011, ch. 1, app. 3-A.

21. In pertinent part, ORPC 3.3, 5 O.S.2011, ch. 1, app. 3-A, provides:

> (a) A lawyer shall not knowingly:
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
> (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client . . .
> (3) offer evidence that the lawyer knows to be false. . . .
> (4) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client.
> (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. . . .
> (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer . . . whether or not the facts are adverse.

22. In pertinent part ORPC 3.4, 5 O.S.2011, ch. 1, app. 3-A, provides that a lawyer shall not:

> (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. . . .
> (b) falsify evidence, counsel or assist a witness to testify falsely…
> (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
> (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
> (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence.

23. "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person." ORPC 4.4(a), 5 O.S.2011, ch. 1, app. 3-A.

> 24. A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

ORPC 8.2(a), 5 O.S.2011, ch. 1, app. 3-A.

25. "It is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation[, or] (d) engage in conduct that is prejudicial to the administration of justice." ORPC 8.4(c)-(d), 5 O.S.2011, ch. 1, app. 3-A.

26. In pertinent part, RGDP 1.3, 5 O.S.2011, ch. 1, app. 1-A, provides:

> The commission by any lawyer of any act contrary to prescribed standards of conduct, whether in the course of his professional capacity, or otherwise, which act would reasonably be found to bring discredit upon the legal profession, shall be grounds for disciplinary action, whether or not the act is a felony or misdemeanor, or a crime at all.

27. Regarding these unauthorized communications, Keeney testified:

> [T]here were at least 40, if not 50, e-mails, most of which dealt with matters that, to someone who had not had my level of experience, would have been very intimidating, threats of litigation, threats of defamation claims, anticipated litigation against Synergy, against Sara Murphy, against me. Just – it was just an ongoing onslaught of emails that were [sic] totally inappropriate.

Hr'g Tr. vol. 6, 1325-26, Apr. 30, 2018.

28. *E.g.*, Bar Ex. 108A, Motion To Quash Subpoenas And For Protective Order (May 23, 2016) (wherein Respondent falsely represented to the court that Keeney and Shaw threatened the guardians of Ward with criminal prosecution).

29. Respondent later claimed he "did not understand" the order of the court. Regarding this, Judge Welch testified:

> I like Mr. Bednar, I think of him as a friend, so it pained me then and it pains me now to suggest. *He knew what the order of the Court was and he didn't like the order of the Court, and he then proceeded to do what he intended to do in spite of and contrary to the order of the Court.*

Hr'g Tr. vol. 5, 1261-62, Apr. 27, 2018 (emphasis added).

30. Attorney Murphy testified:

> [T]here are bad lawyers that don't do research and show up late or don't answer phone calls, but this went above and beyond anything I've ever experienced. This not only was damaging to my practice, it – it took time and money away from all the people involved. But, most importantly, this hurt [Ward,] who was incapacitated and could not make decisions for herself and I believe cost her literally hundreds of thousands of dollars. . . . Before [Respondent] got involved, the case was going smoothly. . . . [T] he moment he became a part of this, it was pure chaos.

Hr'g Tr. vol. 6, 1611-12, Apr. 30, 2018.

31. ORPC 4.2 mandates that "a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." 5 O.S.2011, ch. 1, app. 3-A.

32. Previously, we considered Respondent's diagnosis as mitigation regarding ORPC 3.2. *Bednar I*, 2013 OK 22, ¶ 17, 299 P.3d at 492. Respondent chose, however, not to provide evidence toward that end; therefore we do not consider it here. Additionally, representing himself as a *pro se* litigant, Respondent is held to the same standard as a licensed attorney. *L'ggrke v. Sherman*, 2009 OK 80, ¶ 8, 223 P.3d 383, 385. Plus, of course, at all times while acting as his own counsel, Respondent *was a licensed attorney*.

33. We note that, unlike *Godlove,* Respondent participated in the Trial Panel hearing and did not fail to update his address with the Bar. These distinctions, however, do not overcome the abundance of Respondent's additional misconduct – filing fraudulent pleadings, altering court documents, and directly misrepresenting facts to district courts.

34. *See, e.g., Gassaway*, 2008 OK 60, ¶¶ 86-87, 196 P.3d at 511 (where we reduced costs after attorney prevailed on nine out of fifteen counts, but we also considered attorney's actions in increasing costs and disproportionate evidence in certain counts); *State ex rel. OBA v. Funk,* 2005 OK 26, ¶ 78, 114 P.3d 427, 441 (where we reduced costs by two-thirds after attorney prevailed on two of three counts); *State ex rel. OBA. v. Israel*, 2001 OK 42, ¶ 32, 25 P.3d 909, 916 (same).

2019 OK CR 3

R. JAY THOMPSON, Appellant, v. THE STATE OF OKLAHOMA, Appellee.

Case No. F-2017-727. February 28, 2019

OPINION

ROWLAND, JUDGE:

¶1 Appellant R. Jay Thompson appeals his Judgment and Sentence from the District Court of Pontotoc County, Case No. CF-2015-37, for one count of Kidnapping (Count 1) in violation of 21 O.S.Supp.2012, § 741, one count of Forcible Sodomy (Count 2) in violation of 21 O.S.2011, § 888, two counts of First Degree Rape (Counts 3 & 4) in violation of 21 O.S.2011, §§ 1114 & 1115, one count of Aggravated Assault and Battery (Count 5) in violation of 21 O.S.2011, §§ 646 & 647, and one count of Pattern of Criminal Offenses (Count 6) in violation of 21 O.S.2011, § 425, each after former conviction of three felonies.[1] The Honorable C. Steven Kessinger, District Judge, presided over Thompson's jury trial and sentenced him, in accordance with the jury's verdict, to 20 years imprisonment on each of Counts 1 and 2 and to life imprisonment on each of Counts 3, 4, 5, and 6 with credit for time served.[2] Judge Kessinger imposed costs and fees and ordered the sentences on each count to run consecutively to each other and consecutive to Thompson's sentence in CF-2014-579.

¶2 Thompson raises three issues:

(1) whether his constitutional right to confrontation was violated by the admission of A.T.'s statements to the sexual assault nurse examiner (SANE);

(2) whether his constitutional right to confrontation was violated by the admission of A.T.'s statements to her grandmother; and

(3) whether the district court erred in admitting A.T.'s statements to her grandmother under the hearsay exception for excited utterances.

¶3 We find relief is not required and affirm the Judgment and Sentence of the district court.

Facts

¶4 A.T. lived with her grandmother, Charlsie Wilson, in Ada, Oklahoma in January 2015. The two watched television together on January 8, 2015, and A.T. appeared fine and had no visible injuries. A.T. received a telephone call and went outside, but quickly came back inside for some unknown reason. She then went back outside, but this time she did not return. Nor did she take her purse or cell phone like she normally did when she left the house. A.T. telephoned her grandmother the next morning; she returned home later that day. When A.T. came inside, she immediately locked the door behind her. She pressed her back against the door and slid down the door to her feet. She had visible injuries, including a black eye and many scratches and scrape-type injuries. She was crying and screaming and appeared under a great deal of stress. She told her grandmother that Appellant Thompson abducted her and would not let her go. She said he took her to Seminole and raped her inside his vehicle and then took her to his camper trailer near Coalgate and raped her two more times. According to A.T., he beat her, held a knife to her throat, and threatened to kill her if she told anyone. Wilson took A.T. to the hospital for medical treatment for her injuries and a sexual assault examination.

¶5 The medical staff admitted A.T. to the emergency room and focused on managing her pain, postponing the sexual assault exam until the next morning (January 10th) because of A.T.'s discomfort. The exam performed by the Sexual Assault Nurse Examiner (SANE) served to treat A.T.'s injuries and to begin the investigation into her rape allegations. The SANE nurse documented A.T.'s narrative that included naming Thompson as her rapist and a detailed account of the alleged crimes he perpetrated against her. The SANE nurse noted in the examination that A.T. had bruises on her face, neck, arms and buttocks. A.T. also had numerous abrasion-type injuries. She told the SANE nurse that Thompson raped her three times, penetrated her anus with his fingers, forced his penis into her mouth, punched her in the face and chest, and strangled her. A.T.'s physical injuries were consistent with her nar-

rative account and included a fractured eye socket, bruising on her neck indicative of strangulation, and discoloration of her vaginal wall and anal area indicating injury.

¶6 Law enforcement arrested Thompson and executed search warrants on his vehicle, cell phone and his camper trailer. Thompson also voluntarily participated in two videotaped police interviews. He claimed that he and A.T. had been in a dating relationship for a few months and that the sex between them was consensual.[3] He denied causing any of her injuries; he claimed that some of the injuries occurred when A.T. got into a brief skirmish with some unknown woman and that the others were self-inflicted by A.T. hitting herself in the face because she wanted drugs. His accounts in the two interviews contained several inconsistencies. Police retrieved a text message from A.T. to Thompson sent on January 8, 2015, telling him that she loved him but was not in love with him. This text provided a possible motive for Thompson's assault on A.T.

¶7 A.T. delivered her cell phone to a detective with the Ada Police Department on January 15, 2015. She was visibly distraught. Within an hour of leaving the police station, A.T. was unconscious in a hotel room from an apparent methamphetamine overdose. She never regained consciousness and was in a vegetative state for nearly a year. She died on January 11, 2016.

1. Confrontation Clause and Statements A.T. Made to SANE Nurse

¶8 The question in this case is whether the Sixth Amendment's Confrontation Clause prohibited the prosecution from introducing A.T.'s statements to the SANE nurse because A.T. was unavailable and Thompson never had an opportunity to cross-examine her. Without this testimonial hearsay evidence, Thompson contends that the State's evidence was insufficient for conviction. Defense counsel objected to the introduction of this evidence on constitutional grounds, preserving this claim of error for review on appeal. *See Pullen v. State*, 2016 OK CR 18, ¶ 10, 387 P.3d 922, 927. We review a district court's constitutional ruling on the Confrontation Clause as a question of law without any deference to the district court's ruling. *Tryon v. State*, 2018 OK CR 20, ¶ 38, 423 P.3d 617, 632; *Hanson v. State*, 2009 OK CR 13, ¶ 8, 206 P.3d 1020, 1025.

¶9 The district court found that A.T.'s statements to the SANE nurse were non-testimonial and were provided for the primary purpose of medical diagnosis and treatment, making the statements admissible under the medical treatment hearsay exception at 12 O.S.2011, § 2803(4). The district court noted in its ruling that the challenged testimony satisfied the two-pronged test for admission under Section 2803(4) previously adopted by this Court. *Kennedy v. State*, 1992 OK CR 67, ¶ 11, 839 P.2d 667, 670 (holding in deciding whether proffered hearsay statements were reasonably pertinent to diagnosis or treatment, courts should consider (1) was the declarant's apparent motive consistent with receiving medical care; and (2) was it reasonable for the physician to rely on the information in diagnosis or treatment).

¶10 The Confrontation Clause guarantees an accused the right to confront the witnesses against him. U.S. Const. amend VI. In *Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354, 1374, 158 L.Ed.2d 177 (2004), the Supreme Court held the Sixth Amendment prohibits the introduction of testimonial statements by a non-testifying witness, unless the witness is unavailable to testify and the defendant had a prior opportunity for cross-examination. Post *Crawford*, the Court "labored to flesh out what it means for a statement to be 'testimonial.'" *Ohio v. Clark*, ___U.S.___, 135 S.Ct. 2173, 2179, 192 L.Ed.2d 306 (2015). Under current Confrontation Clause jurisprudence, however, admissibility of A.T.'s out-of-court statements to the SANE nurse hinges on whether the statements were testimonial under what is known as the "primary purpose" test. *See id.; Whorton v. Bockting*, 549 U.S. 406, 420, 127 S.Ct. 1173, 1183, 167 L.Ed.2d 1 (2007)(the Confrontation Clause has no application to out-of-court non-testimonial statements under *Crawford*). A reviewing court must determine whether, in light of all the circumstances, viewed objectively, the "primary purpose" of the conversation was to create an out-of-court substitute for trial testimony. *Clark*, 135 S.Ct. at 2180. Admission of an out-of-court statement does not violate the Confrontation Clause unless its primary purpose was testimonial. *Id.*

¶11 SANE nurses perform both a medical and investigatory function in almost every interaction with an alleged sexual assault victim. These nurses are specially trained and carry out the dual role of providing medical treatment to alleged victims of sexual assault and collecting evidence for possible use in a criminal prosecution. It is the duality of the

SANE nurse's role that calls into question the primary purpose of the sexual assault examination.

¶12 This Court has yet to decide in a published case whether out-of-court statements made by an alleged sexual assault victim to a SANE nurse describing the assault are admissible at trial where the declarant/alleged victim is unavailable to testify.[4] Other courts considering the issue are divided. Many courts have found a victim's statements made to medical personnel, including sexual assault examiners, describing the attack and naming the perpetrator were non-testimonial because the primary purpose of the exam was for medical treatment. *E.g. Ward v. State,* 50 N.E.3d 752, 760-64 (Ind. 2016);[5] *United States v. Chaco*, 801 F.Supp.2d 1200, 1213 (D.N.M. 2011); *State v. Miller,* 264 P.3d 461, 490 (Kan. 2011); *State v. Harper,* 770 N.W.2d 316, 322-23 (Iowa 2009); *People v. Garland,* 777 N.W.2d 732, 737-38 (Mich.App.1 2009); *State v. Slater,* 939 A.2d 1105, 1117-19 (Conn. 2008); *State v. Krasky,* 736 N.W.2d 636, 640-42 (Minn. 2007); *State v. Stahl*, 855 N.E.2d 834, 838-46 (Ohio 2006); *People v. Vigil*, 127 P.3d 916, 921-26 (Colo. 2006); *Commonwealth v. DeOliveira*, 849 N.E.2d 218, 225-26 (Mass. 2006); *Hobgood v. State,* 926 So.2d 847, 852 (Miss. 2006); *State v. Vaught*, 682 N.W.2d 284, 290-93 (Neb. 2004). Other courts, however, have found that a victim's statements to a sexual assault examiner were testimonial based upon evidence of the examiner's relationship with police or involvement of the police in the exam process and the absence of any need for, or provision of, medical treatment during the exam. *Hartsfield v. Commonwealth*, 277 S.W.3d 239, 244-45 (Ky. 2009); *People v. Vargas,* 100 Cal.Rptr.3d 578, 588-89 (Cal. Ct.App. 2009); *State v. Romero*, 156 P.3d 694, 698-99 (N.M. 2007); *State v. Cannon,* 254 S.W.3d 287, 304-06 (Tenn. 2008); *United States v. Gardinier,* 65 M.J. 60, 65-66 (C.A.A.F. 2007); *Medina v. Nevada*, 143 P.3d 471, 476 (Nev. 2006).

¶13 For this case, we must decide whether, considering all circumstances viewed objectively, the "primary purpose" of A.T.'s statements to the SANE nurse was to create an out-of-court substitute for trial testimony based on the SANE nurse's investigatory role or whether the primary purpose of the statements was for the provision of medical treatment based on the SANE nurse's role as a medical professional. Courts considering the issue have focused on various factors that are relevant to the primary purpose determination, including *inter alia*: 1) the objective intent of the SANE nurse and the alleged victim; 2) the classification of the SANE nurse as either a medical professional or a law enforcement agent; 3) the setting of the exam; 4) whether the alleged victim's statement contained specific accusations; 5) the amount of time that elapsed between the exam and the assault; 6) whether the SANE nurse participated in the medical treatment of the victim; 7) whether a law enforcement officer was present; 8) the primacy of medical purpose; and 9) the intention underlying the victim's answers.

¶14 The SANE nurse in this case testified the primary purpose of the medical portion of any sexual assault exam is to treat the patient medically and the purpose of the medical forensic exam is to collect evidence. She explained that she first obtains consent to conduct the sexual assault exam and goes over the exam process with the patient. Once consent is given, she begins the exam by getting the patient's medical history and vital signs. She also performs a full nursing assessment. As part of the exam, she asks the patient what happened and offers any needed prophylactic medicines. She said that she treats each patient the same way and collects evidence regardless of whether or not the patient wants to make a report to law enforcement. She further explained the importance of the patient's answers about the sexual assault because those answers help identify the location of injuries and assist in developing the nursing diagnosis and assessing the need for referrals and prophylactic medication as well as evaluating the patient's pain level. She maintained that the purpose of the answers is for medical diagnosis and treatment.

¶15 The SANE nurse described in detail A.T.'s sexual assault exam. She followed protocol and first obtained A.T.'s consent and then her narrative in the emergency room. She conducted the actual exam in the "sexual assault room." She described A.T.'s visible injuries and demeanor. She went through A.T.'s narrative of what happened and specifically explained the importance of A.T.'s statements for treatment purposes about hair pulling, oral sodomy, arm twisting, blows to her head and chest, strangulation, and vaginal and anal penetration because of the risk of injury and disease associated with those actions. She also explained the areas she photographed and swabbed for evidence collection, but reiterated that the primary purpose of

the sexual assault exam was to provide medical treatment.

¶16 When the relevant circumstances are considered, the balance tips in favor of finding that A.T.'s statements – that Thompson raped her, penetrated her anus with his fingers, forced his penis into her mouth, punched her in the face and chest and strangled her – were made for the primary purpose of medical treatment rather than creating evidence for Thompson's prosecution. The exam was performed in the emergency room once A.T.'s pain was under control. Although the SANE nurse was not involved in A.T.'s initial medical treatment and stabilization, a portion of the exam was devoted to treating the issues associated with the assault including disease and prophylaxis. Law enforcement was not involved in the exam. In fact, A.T. provided inconsistent answers on the consent form concerning whether she gave permission to report the event to law enforcement. The SANE nurse was a medical professional whose exam involved evidence collection as a secondary purpose. The primacy of the exam that she described was for medical treatment. Based on this record, we find that despite the existence of an investigative component, the sexual assault exam served the primary purpose of furnishing medical care, making A.T.'s statements about the attack – including the identification of her attacker – admissible under the medical-diagnosis hearsay exception, and non-testimonial for purposes of the Confrontation Clause.[6] Therefore, introduction of A.T.'s statements at trial did not violate Thompson's right to confrontation. For these reasons, the district court did not err in admitting A.T.'s hearsay statements to the SANE nurse under the medical treatment hearsay exception. 12 O.S.2011, § 2803(4).

2. Confrontation Clause and Statements A.T. made to her grandmother

¶17 The much simpler question is whether the Sixth Amendment's Confrontation Clause prohibited the prosecution from introducing A.T.'s statements to her grandmother because A.T. was unavailable and Thompson never had an opportunity to cross-examine her. Without this hearsay evidence, Thompson contends again that the State's evidence was insufficient for conviction. The district court overruled defense counsel's evidentiary and constitutional objections to the evidence and found that A.T.'s statements to her grandmother were non-testimonial and admissible under the hearsay exception for excited utterances. 12 O.S.2011, § 2803(2). This issue has been preserved for appellate review. *See Pullen*, 2016 OK CR 18 ¶ 10, 387 P.3d at 927. Our review of the district court's ruling is again *de novo. Tryon,* 2018 OK CR 20 ¶ 38, 423 P.3d at 632; *Hanson*, 2009 OK CR 13 ¶ 8, 206 P.3d at 1025.

¶18 This claim likewise hinges on whether A.T.'s statements were testimonial under the "primary purpose" test. We must decide whether, in light of all the circumstances, viewed objectively, the "primary purpose" of A.T.'s conversation with her grandmother was to create an out-of-court substitute for trial testimony. *Clark*, 135 S.Ct. at 2180. A.T.'s statements were obviously not testimonial. The statements were not made in any sort of formal capacity, and an objective witness would not have reasonably believed that such statements would be used for later prosecution. *Tryon,* 2018 OK CR 20 ¶¶ 41-42, 423 P.3d at 633. The content and circumstances of the statements show that A.T., distraught from her ordeal with Thompson, immediately informed her grandmother during an informal conversation about the physical and sexual abuse he inflicted on her. There is nothing in the record that remotely suggests the primary purpose of the conversation was to create an out-of-court substitute for trial testimony, making the statements non-testimonial for purposes of the Confrontation Clause. Hence, introduction of A.T.'s statements to her grandmother did not violate Thompson's right to confrontation. This claim is denied.

3. Excited Utterance

¶19 Thompson argues the district court erred in admitting the hearsay statements A.T. made to her grandmother under the hearsay exception for excited utterances. The statements, Thompson claims, were too remote in time to the alleged startling events to exclude the possibility of fabrication. The district court overruled defense counsel's evidentiary hearsay objection to the evidence and found that A.T.'s statements to her grandmother fit within the excited utterance hearsay exception. 12 O.S. 2011, § 2803(2). This issue has been preserved for appellate review and we review the district court's ruling on the admissibility of evidence for an abuse of discretion. *See Pullen,* 2016 OK CR 18 ¶ 10, 387 P.3d at 927. "An abuse of discretion has been defined as a conclusion or judgment that is clearly against the logic and

effect of the facts presented." *State v. Hooley*, 2012 OK CR 3, ¶ 4, 269 P.3d 949, 950.

¶20 "An excited utterance must meet three foundational requirements: (1) a startling event or condition; (2) a statement relating to that startling event or condition; (3) made while the declarant is under the stress of excitement caused by the startling event or condition." *Martinez v. State*, 2016 OK CR 3, ¶ 50, 371 P.3d 1100, 1113. The Court in *Martinez* explained:

> We examine both the timing of the statement and its spontaneity on a case-by-case basis. "Whether a statement qualifies as an excited utterance depends not on a fixed time but on the facts and circumstances." An excited utterance "need not be substantially contemporaneous with the startling event or condition ... so long as the declarant is under the stress of excitement at the time the statement is made."

Id. at ¶ 51 (citations omitted).

¶21 Thompson argues A.T.'s statements were too remote in time to qualify as excited utterances because the alleged crimes occurred during either the evening of January 8, 2015 or the morning of January 9, 2015, and A.T. spent the day of January 9th with Thompson without complaint during her phone call to her grandmother or to anyone else she encountered. A.T.'s failure to voice any complaints about her circumstances during the phone call to her grandmother or to anyone else is not dispositive as she was in the presence of, or under the control of, her attacker who had threatened her harm if she told anyone of the abuse. Once she was free from him, a visibly injured A.T. broke down and immediately described her ordeal to her grandmother. Her demeanor showed she was under the stress of excitement caused by the recent physical and sexual abuse. Based on this record, we find the district court did not abuse its discretion in admitting A.T.'s statements to her grandmother as an excited utterance. This claim is denied.

DECISION

¶22 The Judgment and Sentence of the district court 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 delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF PONTOTOC COUNTY

THE HONORABLE C. STEVEN KESSINGER, DISTRICT JUDGE

APPEARANCES AT TRIAL

Ryan Rennie, Attorney at Law, 118 N. Chickasaw St., Pauls Valley, OK 73075, Counsel for Defendant

Tara Portillo, Asst. District Attorney, 105 W. 13th, Ada, OK 74820, Counsel for State

APPEARANCES ON APPEAL

Nancy Walker-Johnson, Appellate Defense Counsel, P.O. Box 926, Norman, OK 73070, Counsel for Appellant

Mike Hunter, Oklahoma Attorney General, Amber Masters, Asst. Attorney General, 313 N.E. 21st St., Oklahoma City, OK 73105, Counsel for Appellee

OPINION BY: ROWLAND, J.
LEWIS, P.J.: Concur
KUEHN, V.P.J.: Concur
LUMPKIN, J.: Concur in Result
HUDSON, J.: Concur

1. Thompson had a prior jury trial that ended in a mistrial on the basis of juror misconduct.

2. Under 21 O.S.Supp.2014, § 13.1, Thompson must serve 85% of the sentence imposed on Counts 2, 3, and 4 before he is eligible for parole consideration.

3. The exact nature of their relationship was unclear. Thompson said he picked up A.T. one night and ultimately paid her for sex. He estimated they had 25 to 30 dates.

4. In *Kelley v. State*, Case No. F-2015-963 (unpublished)(July 13, 2017), this Court held a SANE nurse's testimony "recounting [the victim's] account of Appellant inserting the beer bottle into her vagina" was admissible under the medical treatment hearsay exception in 12 O.S.2011, § 2803(4) and the remainder of the SANE nurse's testimony was offered for impeachment rather than for the truth of the matter asserted. It does not appear the appellant in *Kelley* raised a confrontation challenge.

5. The identity of the perpetrator is pertinent to diagnosis and treatment in deciding how to discharge the patient. Assessing patient safety and referring the victim for additional treatment or services is part of the overall exam. Patient safety is part of the comprehensive standard of care for treating victims of sexual assault. *See Ward*, 50 N.E.3d at 760-63.

6. This is not to say that every statement made by an alleged sexual assault victim to a SANE nurse is non-testimonial. District courts must review the challenged statements in light of the "primary purpose" test and the factors cited above.

Calendar of Events

March

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

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

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

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

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

April

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

4 **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

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

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

9 **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

16 **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

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

2019 OK CIV APP 12

AMY REEVES, Plaintiff/Appellant, vs. CITY OF DURANT, Defendant/Appellee, and OKLAHOMA GAS AND ELECTRIC COMPANY, Defendant.

Case No. 116,778. August 2, 2018

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE RICHARD C. OGDEN, TRIAL JUDGE

AFFIRMED

Jack S. Dawson, MILLER DOLLARHIDE, P.C., Oklahoma City, Oklahoma, for Plaintiff/Appellant

David Kirk, Robert Ray Jones, Chantel James, LYTLE SOULÉ & CURLEE, P.C., Oklahoma City, Oklahoma City, for Defendant/Appellee City of Durant

and

Jennifer Castillo, OKLAHOMA GAS AND ELECTRIC COMPANY, Oklahoma City, Oklahoma, for Defendant Oklahoma Gas and Electric Company

KEITH RAPP, JUDGE:

¶1 Plaintiff, Amy Reeves, appeals a trial court Journal Entry of Judgment sustaining the Motion to Dismiss of defendant, City of Durant. This appeal proceeds under the accelerated docket pursuant to Oklahoma Supreme Court Rule 1.36, 12 O.S. Supp. 2017 ch. 15, app. 1. After review of the record on appeal and applicable law, this Court affirms.

BACKGROUND

¶2 On November 23, 2014, Plaintiff was injured when she was struck by a vehicle driven by Jason Schaming while crossing a street in Durant, Oklahoma. Plaintiff alleges inadequate street lighting at the intersection caused the accident. Plaintiff claims Mr. Schaming was unable to see Plaintiff crossing the street because of the inadequate street lighting and could not avoid the collision.

¶3 Plaintiff filed a First Amended Petition[1] on December 29, 2016, alleging a cause of action for negligence against defendants, City of Durant and Oklahoma Gas and Electric Company (OG&E), for failure to keep the streetlight lit. Plaintiff alleged "the accident was caused in whole or in part by inadequate lighting due at the intersection." Plaintiff further alleged Defendant had a duty to install and maintain street lighting and once it undertook this duty, it had to do so in a manner that complied with industry standards for lighting.

¶4 Defendant City of Durant filed a Motion to Dismiss pursuant to 12 O.S. 2011 § 2012(B)(6).[2] Defendant argued it had "no duty to install or maintain streetlights" and, therefore, Plaintiff could not establish a negligence claim. In the alternative, Defendant argued the Oklahoma Supreme Court in *Ochoa v. Taylor,* 1981 OK 120, 635 P.2d 604, held that the installation and maintenance of streetlights is a discretionary act and a city is exempt from liability under the GTCA, specifically 51 O.S. Supp. 2017 § 155(5).

¶5 In response, Plaintiff argued Defendant is not exempt from liability under the discretionary exemption of the GTCA because the duty to maintain streetlights that have already been installed is an operational function, not a discretionary one. Plaintiff further alleged that once Defendant had notice of the defective streetlight, it had a duty to fix the defective streetlight.

¶6 On September 27, 2017, Plaintiff filed a Motion to Certify Order of Dismissal for Immediate Appeal. In response, Defendant asked the trial court to deny Plaintiff's request to certify because all of Plaintiff's claims against the defendants arise out of the same transaction or occurrence. In addition, Defendant alleged Plaintiff had not shown the second element of certification, "no just reason for delay."

¶7 The trial court entered a Journal Entry of Judgment on January 19, 2018, sustaining Defendant's Motion to Dismiss and overruling OG&E's Special Appearance and Motion to Dismiss. The trial court also found "there is no just reason for delay, and this Journal Entry shall constitute a final judgment, decree or order as to the City of Durant" per 12 O.S.2011 § 994.

¶8 Plaintiff appeals.

STANDARD OF REVIEW

¶9 This Court reviews a trial court's order granting a motion to dismiss *de novo. Wilson v. State ex rel. State Election Bd.*, 2012 OK 2, ¶ 4, 270 P.3d 155, 157. In a traditional motion to dismiss, the trial court "must take as true all of the challenged pleading's allegations together with all reasonable inferences which may be drawn from them." *Tuffy's Inc. v. City of Oklahoma City,* 2009 OK 4, ¶ 6, 212 P.3d 1158, 1162. Motions to dismiss are generally disfavored. *Id.* at 1163. "The purpose of a motion to dismiss is to test the law that governs the claim (in litigation), not the underlying facts." *May v. Mid-Century Ins. Co.*, 2006 OK 100, ¶ 10, 151 P.3d 132, 136 (footnote omitted).

ANALYSIS

¶10 First, this Court notes Defendant argues the trial court erred in certifying the order as a final order and one ripe for immediate appeal. However, Defendant did not appeal this issue and this Court will, therefore, not address it.

¶11 On appeal, Plaintiff argues the trial court erred in finding maintenance of a streetlight is a discretionary function, and not an operational or ministerial one, and that Defendant was exempt from liability under the GTCA. Plaintiff also argues the trial court erred in holding that Defendant did not have a duty to maintain the streetlight.

¶12 Subject only to the GTCA's specific limitations and exceptions, the GTCA waives the immunity of governmental entities for torts. *Tuffy's, Inc. v. City of Oklahoma City*, 2009 OK 4 ¶ 7, 212 P.3d at 1163. These exemptions are narrowly construed. *Nguyen v. State of Oklahoma*, 1990 OK 21, ¶ 4, 788 P.2d 962, 964. Defendant maintains that it falls under the discretionary function exemption from liability provided in 51 O.S. Supp. 2017 § 155(5) because installation and maintenance of the streetlights is a discretionary function. Plaintiff claims Defendant is not immune from liability because maintenance of the streetlight is an operational or ministerial function.

¶13 "Whether an act is discretionary or ministerial for purposes of application of the [GTCA] is a legal issue." *Walker v. City of Moore*, 1992 OK 73, ¶ 13, 837 P.2d 876, 879. "[D]iscretionary immunity must be narrowly construed." *Robinson v. City of Bartlesville Bd. of Educ.*, 1985 OK 39, ¶ 11, 700 P.2d 1013, 1016.

¶14 Section 155(5) provides that a governmental entity will not be liable for a loss or claim resulting from "[p]erformance of or the failure to exercise or perform any act or service which is in the discretion of the state or political subdivision or its employees." This specific exemption is referred to as the discretionary function exemption.

¶15 Defendant relies on *Ochoa v. Taylor,* 1981 OK 120, 635 P.2d 604, to support its argument that it is exempt from liability under the GTCA.

¶16 The Oklahoma Supreme Court in *Ochoa* decided the issues before this Court ((1) whether the installation and maintenance of street or area lighting is a discretionary act or a ministerial one; and (2) whether a municipality has a duty to install and/or maintain streetlights. In *Ochoa,* the Oklahoma Supreme Court held "that the installation and maintenance of street or area lighting is a discretionary act or service of a political subdivision and therefore exempt from liability under 51 O.S. Supp. 1979 § 155(5)." *Ochoa*, 1981 OK 120 ¶ 15, 635 P.2d at 608. The Oklahoma Supreme Court further held the City in *Ochoa* "owed no common law or statutory duty to install and maintain street lighting." *Ochoa,* 1981 OK 120 ¶ 10, 635 P.2d at 607.

¶17 This Court is bound by the holding in *Ochoa. Wimberly v. Buford*, 1983 OK 25, 660 P.2d 1050; *see also Bays Exploration, Inc. v. Jones,* 2010 OK CIV APP 28, ¶ 14, 230 P.3d 907, 910 ("It is axiomatic the Court of Civil Appeals cannot overrule an opinion of the Oklahoma Supreme Court and we are thus bound by its previous decisions.") Although the Supreme Court has focused its analysis in other factual situations on the dichotomy between discretionary functions and ministerial or operational functions, it has not disturbed its holdings in *Ochoa* that (1) the political subdivision did not have a duty to install and maintain street lighting; and (2) installation and maintenance of street or area lighting is a discretionary act, not a ministerial act.[3]

¶18 Pursuant to the Oklahoma Supreme Court's holding in *Ochoa,* this Court finds the City's installation and maintenance of the streetlight near the intersection involved in the accident was a discretionary function and City is thus exempt from liability under 51 O.S. Supp. 2017 § 155(5). This Court further finds City did not have a duty to maintain the street-

light. Therefore, the trial court did not err in finding Plaintiff failed to state a claim against Defendant and in sustaining Defendant's motion to dismiss.

¶19 **AFFIRMED**.

GOODMAN, J., concurs by reason of stare decisis, and BARNES, P.J., dissents.

BARNES, P.J., dissenting:

¶1 I respectfully dissent. I agree with the Majority that the policy-level decision of a municipality to illuminate an intersection with a streetlight constitutes a shielded discretionary act; however, I disagree that the day-to-day maintenance or operation of a streetlight in the execution of that policy-level decision is also a discretionary function under 51 O.S. 2011 & Supp. 2017 § 155(5). Such a construction of § 155(5) results in an absurdity because it categorizes as discretionary the actions of lower-level employees carrying out the commands of a political body. Such a construction also runs contrary to the Oklahoma Supreme Court's admonition that "[i]mmunity for discretionary acts . . . must be narrowly construed." *Gunn v. Consol. Rural Water & Sewer Dist. No. 1, Jefferson Cnty.*, 1992 OK 131, ¶ 11, 839 P.2d 1345 (footnote omitted).

¶2 Indeed, the Majority appears to agree that § 155(5) only exempts a governmental entity from liability from initial policy-level or planning decisions. The Majority acknowledges that "the Supreme Court has focused its analysis" in recent decades "on the dichotomy between discretionary functions and ministerial or operational functions[.]" For example, the Supreme Court has noted that "a governmental entity has discretion in determining whether to perform a public work or to make an improvement; but once the work is ordered, the duty to perform it is ministerial or operational and must be done with reasonable care and in a non-negligent manner." Gunn, ¶ 11 n.31 (internal quotation marks omitted) (citation omitted). In addition,

> the layout of a street and its traffic markings are discretionary acts, but maintenance of existing pavement markings is an operational and ministerial function outside the § 155(5) exception. Initial policy-level or planning decisions are typically considered discretionary and exempt from liability; on the other hand, operations-level decisions made in the execution of policy are viewed as nonexempt ministerial duties.

Id. (emphasis added) (citation omitted). *See also Gilmore v. Bd. of Comm'rs of Logan Cnty.*, 2006 OK CIV APP 125, ¶ 11, 147 P.3d 296.

¶3 Nevertheless, the Majority concludes this otherwise established analysis does not apply to this case because of the holding in *Ochoa v. Taylor*, 1981 OK 120, 635 P.2d 604. While I agree that certain language found in *Ochoa* appears, at first glance, to undercut and render inapplicable the discretionary/ministerial dichotomy to the circumstances of the present case, I believe a closer reading of the *Ochoa* opinion in its entirety and in light of its particular facts shows it to be consistent with the more recent Supreme Court opinions. As pointed out by the Majority, the *Ochoa* Court did state "that the installation and maintenance of street or area lighting is a discretionary act or service of a political subdivision and therefore exempt from liability under [§ 155(5)]"; however, immediately following this sentence the *Ochoa* Court provided the following clarification: "the question whether the street shall be lighted is left to the discretion of the municipality." *Ochoa*, ¶ 15 (emphasis added). Importantly, the plaintiff in *Ochoa* appears to have been complaining that the municipalities in question failed altogether "to install and maintain" any street lighting. *Ochoa*, ¶ 2 ("*Ochoa* alleged that the Cities . . . were negligent because of their failure, at the accident location, . . . to install and maintain street and area lighting.").[4] In other words, the plaintiff was attacking the discretionary, policy-level decisionmaking of the municipalities (*i.e.*, their decision to not "install and maintain" lighting, or their failure to even consider "installing and maintaining" lighting), not the ministerial execution of the political subdivision's previous decision to install and maintain lighting.

¶4 Moreover, a position similar to that taken by the Majority in the present case was taken by the municipality in *Walker v. City of Moore*, 1992 OK 73, 837 P.2d 876, but rejected by the Oklahoma Supreme Court. In *Walker,* the municipality argued "that the § 155(5) exemption applies to both the maintenance and installation of traffic signs, citing *Ochoa*[.]" *Walker*, ¶ 11. However, the Supreme Court disagreed with this reading of *Ochoa*, stating:

> [T]he maintenance of the markings on the roadway is distinguishable from the discre-

> tionary decision to regulate the traffic through the use of road signs or pavement markings.
>
> The initial decisions as to the layout of N.W. 27th Street and the traffic markings were discretionary acts of the City of Moore. However, once the decisions were made, the City of Moore had an obligation to exercise ordinary care and diligence in maintaining the markings on the roadway so as to keep the street in a reasonably safe condition. Maintaining the existing pavement markings, the purpose of which is to warn that two lanes are merging into one lane, is operational and a ministerial function. Negligence in the performance of that ministerial function subjects the City to liability. That is, the maintenance of the existing pavement markings is not within the discretionary exemption of the Governmental Tort Claims Act.

Walker, ¶¶ 11-12 (footnote omitted).

¶5 I agree it is possible that, at the policy or planning level, a political subdivision might decide, for example, to illuminate only some of its existing streetlights and not others, or even to stop turning on any of its existing streetlights. Such decisions might be made at the planning or policy level to, for example, cut costs. A political subdivision might also decide not to install lighting in a certain area, or may fail altogether to even consider installing lights in a certain area. Damage resulting from such decisions (or indecision) of a political body would be exempt under § 155(5). However, if existing streetlights are not functioning because of the negligent execution at the ministerial or operational level of a policy-level decision, I disagree that such negligence constitutes a policy-level discretionary act shielded under § 155(5).

¶6 In the present case, Plaintiff alleges she was "crossing the street at [an] intersection" when she was struck by a vehicle "because the street light was out at the intersection and [the driver of the vehicle] could not see Plaintiff in enough time to avoid hitting her." It is unclear at this, the pleading stage of the case, precisely why the streetlight was out. However, "[m]otions to dismiss are generally disfavored and granted only when there are no facts consistent with the allegations under any cognizable legal theory or there are insufficient facts under a cognizable legal theory." *Wilson v. State ex rel. State Election Bd.*, 2012 OK 2, ¶ 4, 270 P.3d 155 (citation omitted).

¶7 In my opinion, the Majority has misread *Ochoa* and should apply the analysis found in analogous Oklahoma Supreme Court decisions, such as *Walker*, decisions which hinge on the dichotomy between discretionary and ministerial functions. I would reverse the trial court's order granting the motion to dismiss of the City, and remand for further proceedings.

KEITH RAPP, JUDGE:

1. The trial court dismissed Plaintiff's Petition without prejudice with leave to amend and ordered Plaintiff to file an Amended Petition within twenty days of the date of the order dismissing the Petition. Plaintiff's Petition did not set forth the requisite facts necessary to demonstrate compliance with the Oklahoma Governmental Tort Claims Act (GTCA), 51 O.S.2011 and Supp. 2017 §§ 151-200.

2. Defendant OG&E filed a Motion to Dismiss on January 18, 2017. OG&E's Motion to Dismiss is not included in the appellate record and is not a part of this appeal.

3. This Court is aware of *Ritson v. Bd. of County Comm'rs*, Case No. 143,795, an unpublished Opinion of this Court interpreting the language in *Ochoa*, in light of subsequent Oklahoma Supreme Court cases discussing the deferential/ministerial analysis, to mean that the initial decision to install and maintain lighting is a discretionary function, "but the execution of that initial decision *i.e.*, the actual maintenance and operation of the lighting, a ministerial act – is not exempt as a discretionary act under the GTCA." This Court does not follow the rationale in *Ritson* because it is bound by the Oklahoma Supreme Court's holding in *Ochoa*.

BARNES, P.J., dissenting:

4. It appears that the confusing phrase "installation and maintenance" in paragraph fifteen of *Ochoa* was merely taken from the argument of the plaintiff, who argued, as quoted above, that the municipalities "were negligent because of their failure, at the accident location, . . . to install and maintain street and area lighting."

Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS
Thursday, February 21, 2019

F-2017-999 — Kathryn Lynn Hicks, Appellant, was tried by jury for the crime of Murder in the First Degree - Malice Aforethought in Case No. CF-2015-149 in the District Court of Washita County. The jury returned a verdict of guilty and set as punishment life without parole. The trial court sentenced accordingly. From this judgment and sentence Kathryn Lynn Hicks has perfected her appeal. AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., specially concurs; Lumpkin, J., concurs; Hudson, J., concurs.

C-2018-447 — Dashun Noble Mack, Petitioner, entered un-negotiated pleas to the following crimes in Case No. CF-2016-4094 in the District Court of Tulsa County: Count 1 - Robbery with a Firearm; Counts 2-5 - Robbery with a Firearm; Count 6 - Robbery with a Dangerous Weapon; Counts 7-8 - Attempted Robbery with a Dangerous Weapon; Count 9 - Forcible Sodomy; Count 10 - First Degree Rape; Count 11 - Forcible Sodomy; Count 12 - First Degree Rape; Count 13 - First Degree Burglary; and Count 20 - Concealing Stolen Property. The District Court sentenced him as follows: 20 years imprisonment in Count 1; 15 years in Counts 2-5; 20 years in Count 6; 10 years in Counts 7-8; 20 years in Count 9; 25 years in Count 10; 20 years in Count 11; 25 years in Count 12; 20 years in Count 13 and five years in Count 20. The District Court ordered certain groups of counts to be served concurrently and some consecutively, resulting in an effective cumulative sentence of 145 years. On April 9, 2018, Petitioner filed a *pro se* motion to withdraw his guilty pleas. Conflict counsel was appointed, and at a hearing held April 25, 2018, the request was denied. From the denial of his motion to withdraw guilty pleas, Dashun Noble Mack has perfected his certiorari appeal. Petitioner for Certiorari DENIED. Opinion by: Kuehn, V.P.J.; Lewis, P.J., concur; Lumpkin, J., concur; Hudson, J., concur; Rowland, J., concur.

RE-2017-1204 — In the District Court of Delaware County, Case No. CF-2013-213, Appellant, Henry Douglas Barnes, Jr., while represented by counsel, was sentenced on May 18, 2014, to concurrent terms of two (2) years imprisonment for Conspiracy to Commit Burglary in the Second Degree and Encouraging Criminal Street Gang Activity, all suspended under written conditions of probation. On November 15, 2017, the Honorable Alicia Littlefield, Special Judge, revoked the suspension order in full on finding that Appellant had violated his probation. Appellant appeals that final order of revocation. AFFIRMED. Opinion by: Lumpkin, J., Lewis, P.J., Concur; Kuehn, V.P.J., Concur; Hudson, .J, Concur in Results; Rowland, J., Concur.

F-2017-1308 — On May 11, 2017, Appellant entered a plea of guilty to Second Degree Burglary in Mayes County District Court Case No. CF-2016-363. The trial court deferred sentencing for five years. On September 8, 2017, the State filed an application to accelerate. The Honorable Rebecca J. Gore, Special Judge, accelerated Appellant's deferred sentence and sentenced him to five years imprisonment. Appellant appeals. The acceleration of Appellant's sentence is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J.: Dissent; Lumpkin, J.: Concur; Hudson, J.: Concur; Rowland, J.: Concur.

Thursday, February 28, 2019

M-2016-1081 — Following a jury trial ending on November 11, 2016, Appellant Shannon James Kepler was found guilty of two counts of Reckless Conduct with a Firearm in Tulsa County District Court Case No. CF-2014-3952. Appellant was convicted and sentenced to six months imprisonment for each count. Appellant appeals from the Judgment and Sentence imposed. The Judgment and Sentence of the trial court is AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J.: Concur; Kuehn, V.P.J.: Recuse; Lumpkin, J.: Concur; Rowland, J.: Concur.

RE-2017-741 — On November 12, 2015, Appellant Aviante D. Whatley, represented by counsel, entered a guilty to Count 1, Possession of a Controlled Dangerous Substance with Intent to Distribute and Count 2 Assault and Battery Upon a Police Officer in Oklahoma

County Case No. CF-2015-7792. Whatley was sentenced to eight (8) years for Count 1 and five (5) years for Count 2, with all but the first 120 days suspended, subject to rules and conditions of probation. On May 10, 2017, the State filed an Application to Revoke Whatley's suspended sentence alleging he committed probation violations, including the new offense of Assault and Battery with a Deadly Weapon and Domestic Abuse as charged in Oklahoma County Case No. CF-2017-694. On July 11, 2017, the District Court of Oklahoma County, the Honorable Cindy Truong, District Judge, revoked Whatley's suspended sentences in full. The revocation of Whatley's suspended sentences in Oklahoma County Case No. CF-2015-7792 is AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs; Rowland, J, Concurs.

C-2017-958 — Kevin Lee Crawford, Petitioner, was charged in the District Court of Tulsa County, in Case No. CF-2016-380, with Count 1 – Child Neglect, After Former Conviction of Two or More Prior Felonies; Count 2 – Possession of Controlled Dangerous Substance, After Former Conviction of Two or More Prior Felonies; and Count 3 – Possession of Paraphernalia. Crawford entered a blind plea of guilty to the charges before the Honorable William D. LaFortune, District Judge. The trial court accepted Crawford's plea. After a hearing, Judge LaFortune sentenced Crawford to life imprisonment on Count 1; fifteen years imprisonment on Count 2; and one year in the county jail on Count 3. The trial court ordered that Counts 1 and 2 be served consecutively, with Count 3 running concurrent to Count 2. Crawford was given credit for time served. Judge LaFortune further imposed various fines, costs and fees. Crawford then filed an application to withdraw his guilty plea and after a hearing Judge LaFortune denied the motion. Crawford now seeks a Writ of Certiorari. The Petition for Writ of Certiorari is DENIED. The Judgment and Sentence of the District Court is AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs in Results; Rowland, J., Concurs.

RE-2017-885 — In the District Court of Oklahoma County, Case No. CF-2016-7762, Appellant, James Anthony Pruiett, while represented by counsel, was sentenced on December 29, 2016, to eight (8) years imprisonment for Domestic Abuse by Strangulation, After Former Conviction of Two or More Felonies. In accordance with a plea agreement, the Honorable Larry Shaw, Special Judge, suspended the execution of that term under written conditions of probation. On August 22, 2017, the Honorable Cindy H. Truong, District Judge, revoked the suspension order in full on finding that Appellant had violated his probation. Appellant appeals that final order of revocation. AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs; Rowland, J., Concurs.

F-2018-297 — Jimmy Dale Stone, Appellant, was convicted at a bench trial for the crimes of three counts of Lewd Acts with a Child Under 16, After Conviction of Two Felonies in Case No. CF-2016-370 in the District Court of Garvin County. The trial court sentenced him to life imprisonment on all three counts and ordered the terms to be served concurrently. From this judgment and sentence Jimmy Dale Stone has perfected his appeal. AFFIRMED. Opinion by: Kuehn, V.P.J.; Lewis, P.J., Concur; Lumpkin, J., Concur in Results; Hudson, J., Concur; Rowland, J., Concur.

C-2018-55 — Joshua Tony Codynah, Petitioner, entered a blind plea to the crimes of Count I - Felony Murder in the First Degree, Count II - First Degree Burglary, Count III - Child Neglect and Count IV - Assault and Battery with a Deadly Weapon in Case No. CF-2016-479 in the District Court of Comanche County. After a sentencing hearing, the Honorable Emmit Tayloe sentenced Petitioner to life imprisonment on Count I, 20 years, all suspended, and a $1,000.00 fine on each of Counts II and III, and 15 years on Count IV. The sentences in Count I and IV were ordered to run consecutively to one another and Counts II and III to run concurrently with one another. Petitioner timely filed a motion to withdraw his pleas which was denied after a hearing. From the denial of his motion to withdraw plea, Joshua Tony Codynah has perfected his certiorari appeal. Petition for Certiorari GRANTED; case REMANDED for an evidentiary hearing with conflict-free counsel on the Motion to Withdraw Plea. Petitioner's Application for Evidentiary Hearing on Sixth Amendment Claim is DENIED. Opinion by: Kuehn, V.P.J.; Lewis, P.J., concur in results; Lumpkin, J., concur in results; Hudson, J., concur; Rowland, J., concur.

M-2017-137 — Appellant Jerrad Sterling Nunamaker entered negotiated pleas to Count 1, Possession of a Controlled Dangerous Substance (CDS), Count 2, Unlawful Possession of

Drug Paraphernalia and Count 3, Speeding in Excess of Lawful Limit in Lincoln County Case No. CF-2016-221A. The District Court of Lincoln County, the Honorable Cynthia Ferrell Ashwood, found Nunamaker guilty and deferred his sentencing for five (5) years. In addition, the court imposed a fine of $200.00 each for Counts 1 and 2, and $50.00 for Count 3, and a Victim Compensation Assessment in the amount of $100.00 each for Counts 1 and 2, and $35.00 for Count 3. Nunamaker appeals. The fine assessed for Count 3 is MODIFIED to $20.00 and the Victim Compensation Assessment for Count 3 is VACATED. Opinion by: Kuehn, V.P.J.; Lewis, P.J., concur; Lumpkin, J., concur; Hudson, J., concur; Rowland, J., concur.

RE-2017-354 — In the District Court of Oklahoma County, Case No. CF-2011-3536, Appellant, Jonathan L. Suggs, while represented by counsel, was sentenced to ten (10) years imprisonment for Possession of a Controlled Dangerous Substance (Marijuana) with Intent to Distribute. After Appellant had served approximately nine (9) months of that sentence, the Honorable Cindy H. Truong, District Judge, on judicial review occurring on November 1, 2013, suspended execution of the remainder of Appellant's term of imprisonment under written conditions of probation. On March 29, 2017, Judge Truong revoked her suspension order in full on finding that Appellant had violated his probation. Appellant appeals that final order of revocation. AFFIRMED. Opinion by: Kuehn, V.P.J.; Lewis, P.J., concur; Lumpkin, J., concur; Hudson, J., concur; Rowland, J., concur.

COURT OF CIVIL APPEALS
(Division No. 1)
Thursday, February 28, 2019

116,477 — Marcus DeShawn Woodson, Petitioner/Appellant, v. State of Oklahoma. Defendant/Appellee. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Thomas E. Prince, Judge. Marcus Woodson, Appellant, seeks review of the district court's September 25, 2017 order dismissing without prejudice Woodson's Petition for Name Change, pursuant to 12 O.S. Supp.2014 §1631. The district court stated in its order that Woodson was not a resident of Oklahoma County at the time he filed the petition and made his request of the court and therefore could not file his action in Oklahoma County. The appellate court will review the district court's order dismissing a case under a *de novo* standard of review. *Hug v. James*, 2008 OK CIV APP 93, ¶8, 197 P.3d 22, 24. 12 O.S. §1631 makes clear the Petition for Name Change is to be filed in the county in which the person has been a resident for more than thirty (30) days. However, Woodson was not a resident of Oklahoma County at the time he filed his petition. Like the district court, this court is unable to find any authority removing the requirement to file the petition in one's county of residence when seeking a name change under 12 O.S. §1631. For this reason, Woodson must file his Petition for Name Change in his county of residence, according to the provisions of §1631. We do not find error in the district court's September 25, 2017 order dismissing Appellant-Woodson's petition without prejudice. AFFIRMED. Opinion by Joplin, P.J.; Goree, C.J., and Buettner, J., concur.

116,521 — Wells Fargo, National Association, as Trustee for Certificate Holders of Bear Stearns Asset Backed Securities I L.L.C., Asset-Backed Certificates, Series 2007-AC3 a/k/a Wells Fargo Bank, National Association, as Trustee for Bear Stearns Asset Backed Securities I Trust 2007-AC-3, Asset-Backed Certificates, Series 2007-AC3, Plaintiff/Appellee, v. Cherie Bass, a/k/a Cherie D. Bass, Defendant/Appellant, and John Doe, Spouse of Cherie Bass a/k/a Cherie D. Bass, if married, Occupants of the Premises; First Pryority Bank; The Vintage at Verdigris Homeowners Association; Portfolio Recovery Association; Portfolio Recovery Associates, L.L.C. Defendants. Appeal from the District Court of Rogers County, Oklahoma. Honorable Sheila A. Condren, Judge. Appellant, Cherie Bass (Bass), appeals the district court's October 11, 2017 order granting Plaintiff's (Wells Fargo) summary judgment motion. Wells Fargo sought summary judgment against Bass for nonpayment and default on a promissory note which Bass entered into on January 26, 2007, agreeing to pay monthly installments, including loan principal, interest, taxes, special assessments, and insurance premiums, until the debt on the Rogers County residential property was paid in full. Wells Fargo asserts Bass owed payment on November 1, 2008, as per the terms of the note and mortgage and failed to make payment at that time or any time thereafter. Wells Fargo filed its petition for foreclosure on October 1, 2014, electing to declare the entire balance due and payable. Wells Fargo's motion for summary judgment was filed on November 18, 2015 and the appealed from order was granted by the district court on October 11, 2017. Appeal of the

district court's grant of summary judgment is reviewed on appeal using a *de novo* standard of review. *Carmichael v. Beller,* 1996 OK 48, ¶2, 914 P.2d 1051, 1053; *Bank of America, NA v. Kabba,* 2012 OK 23, ¶2, 276 P.3d 1006, 1007-08. "To commence a foreclosure action in Oklahoma, a plaintiff must demonstrate it has a right to enforce the Note and, absent a showing of ownership, the plaintiff lacks standing. *Gill v. First Nat. Bank & Trust Co. of Oklahoma City,* 1945 OK 181, 195 Okla. 607, 159 P.2d 717." *J.P. Morgan Chase Bank Nat'l Ass'n v. Eldridge,* 2012 OK 24, ¶8, 273 P.3d 62, 66. The entity attempting to foreclose, here Wells Fargo, must meet the requirements outlined in 12A O.S. 2001 §3-301 in order to enforce the instrument. Wells Fargo established it was holder of the note, and that Bass had not made any payments or partial payments since November 2008. Bass had also made no tender to reinstate the note, nor had the note been extended or renewed. Bass has not been able to contest the validity of the mortgage. In the present case, Bass has failed to show evidence of payment since November 2008 or any evidence that she was not in default. She also failed to contravene Wells Fargo's undisputed facts, including the note and mortgage. Based on the record support of these findings by the district court, we do not find the district court's grant of summary judgment in favor of Appellee, Wells Fargo, to be in error. AFFIRMED. Opinion by Joplin, P.J.; Goree, C.J., Buettner, J., concur.

(Division No. 2)
Friday, February 22, 2019

116,331 — In the Matter of K.G., Adjudicated Deprived Child: Keith Edwards, Appellant, vs. State of Oklahoma, Appellee. Appeal from Order of the District Court of Oklahoma County, Hon. Lydia Y. Green, Trial Judge. Father appeals the trial court's judgment, entered on jury verdict, terminating his parental rights to the minor child KG. There is no record support for Father's claim of denial of due process. We conclude the trial court's judgment entered on the jury verdict terminating the parental rights of Father to KG is supported by the requisite clear and convincing evidence. AFFIRMED. Opinion from Court of Civil Appeals, Division II by Fischer, P.J.; Goodman, J., and Thornbrugh, J., concur.

Monday, March 4, 2019

116,943 — Bank of America, N.A., Plaintiff/Appellee, vs. Daniel Robb Cole, Defendant/Appellant, and Cassie Batson Cole aka Cassie Batson; Spouse, if any, of Cassie Batson Cole; John Doe, Occupant and Capital One Bank (USA), N.A., Defendants. Proceeding to review a judgment of the District Court of Cleveland County, Hon. Jeff Virgin, Trial Judge. Daniel Robb Cole appeals the denial of his motion to vacate and motion for sanctions against Bank of America (BOA), following a mortgage foreclosure by summary judgment. We find insufficient evidence to justify summary judgment in this case because no valid copy of the note foreclosed upon was authenticated in accordance with 12 O.S.2011 § 2056(E) which provides, in part: "If a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit." The affidavit in the present summary judgment record refers to the note, but does not swear to the accuracy of the copy in the record. Nor do we find any indication that the copy provided in the record is certified. Even if it were, the copied note provided is admittedly not the note actually sued on. The court's refusal to vacate the summary judgment is reversed and the motion to vacate is granted. VACATED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division II, by Thornbrugh, J.; Fischer. P.J., and Goodman, J, concur.

116,170 — Bernadin Y. Nugraha, Petitioner/Appellee, vs. Matthew J. Jarvis, Defendant/Appellant. Proceeding to review a judgment of the District Court of Washington County, Hon. Russell Vaclaw, Trial Judge. Matthew J. Jarvis appeals the entry of a protective order by the district court. Appellant relies on a narrative statement of the events at trial, but his failure to follow the statutory requirements for consideration of a narrative statement prevents us from considering it on appeal. *See Klassen v. Lazik,* 2004 OK CIV APP 46, ¶ 7, 91 P.3d 90 (failure to obtain the trial judge's signature invalidates narrative statement). Appellant was subject to an agreed protective order for some 13 weeks. Within 24 hours of this order expiring, Appellant chose to resume contact with Appellee. It is a fair inference that Appellant was waiting for the expiration of the protective order, and resumed unwanted contact with Appellee at the first legal opportunity. We find no error in the imposition of a further protective order for a period of five years. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Thornbrugh, J.; Goodman, J, concurs, and Fischer. P.J., concurs in result.

116,403 — Wiggin Properties, LLC, an Oklahoma limited liability company, Plaintiff/Appellant, vs. Arco Building, LLC, an Oklahoma limited liability company, Defendant/Appellee, and James F. Hawkins, Jr., an Individual, Third-Party Defendant/Appellee. Proceeding to review a judgment of the District Court of Tulsa County, Hon. Dana Kuehn, Trial Judge. Wiggin Properties, LLC (WP), appeals the result of a bench trial granting Arco Building, LLC (ARCO), the rescission of a real estate purchase agreement between ARCO and WP, and denying WP's claim for specific performance of the agreement. WP and ARCO executed an agreement on June 30, 2012, with the intent of closing in November 2012. Before closing, ARCO discovered that defendant Hawkins was a party to the purchase. ARCO then re-fused to consummate the sale on the grounds of Hawkins' concealed involvement. In this case, Hawkins/WP knew that the identity of the buyer was highly material to ARCO, and took steps to actively conceal it. We find that sufficient to justify rescission in this case. It is well established that a return of the parties to the prior status quo by restoring to each other everything of value received under contract is required as part of a rescission. We therefore interpret the district court's order as inherently requiring a return of the earnest money paid by WP in this case. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Thonrbrugh, J.; Goodman, J. and Barnes, J. (sitting by designation), concur.

116,206 — Vicki Wilson, Plaintiff/Appellee, vs. Winery of the Wichitas, LLC, an Oklahoma limited liability company, Defendant/Appellant. Appeal from Order of the District Court of Comanche County, Hon. Kenny Harris, Trial Judge. Plaintiff filed this premises liability action against Defendant Winery of the Wichitas, seeking damages for injuries sustained as a result of a fall while returning to her parked vehicle after attending a performance held at Winery's premises. The jury found in favor of Wilson, but determined she was forty percent contributorily negligent and Winery was sixty percent negligent. Winery appeals, asserting that the trial court erred in overruling its motion for directed verdict and motion for judgment notwithstanding the verdict. Winery also asserts that the trial court erred in denying its requested jury instruction on the issue of assumption of the risk. We find no reversible error. AFFIRMED. Opinion from Court of Civil Appeals, Division II by Fischer, J.; Thornbrugh, C.J., concurs, and Wiseman, P.J., concurs in part and dissents in part.

(Division No. 3)
Friday, February 22, 2019

115,605 — Daniel J. Parker, Petitioner/Appellee, v. Stefanie M. Shriver, Respondent/Appellant. Appeal from The District Court of Oklahoma County, Oklahoma. Honorable Barry L. Hafar, Judge. Respondent/Appellant Stefanie M. Shriver (Mother) appeals from the court's order of modification, which denied Mother's motion to modify custody, visitation and child support but granted the motion to modify filed by Petitioner/Appellee Daniel J. Parker (Father). Father retained sole custody of the parties' child, and the court reduced Mother's visitation to every other weekend with one additional overnight per week. Mother has not convinced us that the court's modification was against the clear weight of the evidence or otherwise not in the child's best interest. We AFFIRM. Opinion by Mitchell, P.J.; Bell, J., and Swinton, J., concur.

116,041 — In re the Marriage of Leslie Little (now Staubus), and Chad Garrett, Leslie Little (now Staubus), Petitioner/Appellant, v. Chad Garrett Little, Respondent/Appellee. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Tammy Bruce, Judge. In this post-dissolution of marriage proceeding, Petitioner/Appellant, Leslie Little, now Staubus (Mother), appeals from the trial court's order denying her request to terminate the agreed joint child custody arrangement and award her sole custody, denying Mother's relocation request, and awarding, Respondent/Appellee, Chad Garrett Little (Father), attorney fees. Mother also appeals from the trial court's conduct of trial, evidentiary rulings, factual findings, and its calculation of child support. We cannot find the trial court abused its discretion in its conduct of trial or rulings, or when it implemented a modified joint custody arrangement. These rulings are affirmed. We also affirm the trial court's attorney fee award and its child support calculation with directions to the trial court to enter a child support computation form as required by 43 O.S. 2011 § 120 (A). AFFIRMED WITH DIRECTIONS. Opinion by Bell, J.; Mitchell, P.J. and Swinton, J., concur.

116,104 — John D. Fitch, Plaintiff/Appellant, v. Mayling Koval, Defendant/Appellee. Appeal from the District court of Choctaw County, Oklahoma. Honorable Bill Baze, Judge. Plain-

tiff/Appellant, John D. Fitch, appeals from the trial court's judgment in favor of Defendant/Appellee, Mayling M. Koval, in this action concerning the purchase of ranch property. The parties were in a long-term relationship. Plaintiff placed the winning bid on an 870 acre ranch. He thereafter assigned his interest in the ranch to Defendant and Defendant consummated the sale with her name alone appearing on the mortgage and note. After the parties' relationship ended, Plaintiff sued for common law divorce, and filed a separate suit to enforce a purported agreement to purchase half the ranch from Defendant, and sought damages for fraud and intentional infliction of emotional distress. The trial court dismissed the common law divorce petition and ruled in favor of Defendant regarding Plaintiff's other claims. We hold Plaintiff failed to prove fraud or raise the issue of an alleged business venture in the trial court; any alleged oral agreement to purchase real property was invalid pursuant to the Statute of Frauds; Plaintiff's claim for any other monetary relief was properly denied; and Plaintiff failed to demonstrate the trial judge was biased or that he was denied a fair trial. AFFIRMED. Opinion by Bell, J.; Mitchell, P.J. and Swinton, J., concur.

116,375 — ATC Drivetrain, Inc., and Great American Alliance Ins. Co., Petitioners, v. Jose Herrera, and The Workers Compensation Court of Existing Claims, Respondents. Proceeding To Review an Order of a Three-Judge Panel of The Workers' Compensation Court of Existing Claims. Petitioners ATC Drivetrain, Inc. and Great American Alliance Ins. Co. (collectively Respondent) appeal the August 27, 2017 order of the three judge panel affirming the trial court's decision awarding benefits to Respondent Jose Herrera (Claimant). Respondent asserts that the order improperly identifies the incorrect insurance carrier, that the Court of Existing Claims does not have jurisdiction over the matter, that the trial court's credibility findings were erroneous, that the trial court's denial of post-trial discovery was improper, and that the three judge panel should not have considered briefs of the Claimant submitted at oral argument. Claimant agrees that the incorrect insurance carrier was identified in the trial court's order, but denies that the order is erroneous in any other respect. Based upon our review of the record, the trial court's order is supported by competent evidence. We also see no reversible error in the trial court's ruling denying Respondent's request for a continuance, or in the three judge panel's rulings concerning briefs filed by the Claimant. The parties both agree that the correct name of the insurance carrier is Great American Alliance Insurance Company, instead of Great American Insurance Co. of New York, as listed in the orders. Accordingly, on remand, the court should enter an order reflecting the correct insurance carrier. The order is affirmed in all other respects. WE AFFIRM IN PART, VACATE IN PART, and REMAND WITH INSTRUCTIONS. Opinion by Swinton, J.; Mitchell, P.J., and Bell, J., concur.

116,594 — In re the Marriage of Sloan: Lesha Sloan, Petitioner/Appellant, v. Bobby J. Sloan, Respondent/Appellee. Appeal from the District Court of Canadian County, Oklahoma. Honorable Jack D. McCurdy II, Judge. Petitioner/Appellant Lesha Sloan, now Lesha Thompson, appeals from the trial court's order denying her application for attorney fees and costs related to modification of child support. We find no abuse of discretion by the trial court in denying her request for attorney fees and costs. We AFFIRM. Mitchell, P.J.; Bell, J., and Swinton, J., concur.

Friday, March 1, 2019

116,786 — Michael Bonin, Petitioner, v. Tulsa County Sheriffs Department, Tulsa County own risk #11247, and The Workers' Compensation Commission, Respondent. Petitioner Michael Bonin (Claimant) seeks review of an order of the Workers' Compensation Commission affirming the Administrative Law Judge's order denying compensability. We find the record contains substantial evidence Claimant did not sustain injuries to his neck and back as a result of the work-related accident March 30, 2016. SUSTAINED. Opinion by Mitchell, P.J.; Swinton, J., concurs, and Bell, J., dissents.

116,818 — Hamid Frazaneh, Petitioner/Appellee, v. Hester Anne Brown, Respondent/Appellant. Respondent/Appellant Hester Anne Brown (Mother) appeals from the court's journal entry ordering the court's previous emergency temporary restraining order against Mother to remain in effect. Mother's primary contention on appeal is that she was not given notice or an opportunity to be heard at the hearing following the entry of the emergency order. Mother's attorney, however, entered an appearance and requested a continuance at the hearing and did not challenge the court's *in personam j*urisdiction of Mother or allege that

service of process had been defective. Accordingly, Mother waived her objection to any defects in the service of process. We AFFIRM. Opinion by Mitchell, P.J.; Bell, J., and Swinton, J., concur.

(Division No. 4)
Tuesday, February 19, 2019

116,948 — In re the Marriage of: Aeric Wynn Creekmore II, Petitioner/Appellee, v. Sindi Hart Creekmore, Respondent/Appellant. Appeal from an Order of the District Court of Hughes County, Hon. B. Gordon Allen, Trial Judge. The Respondent, Sindi Hart Creekmore (Wife), appeals from a Decree of Dissolution of her marriage to the Petitioner, Aeric Wynn Creekmore II (Husband). The primary contention in this appeal pertains to Wife's propositions that the trial court erred by awarding legal custody and primary physical custody of the parties' children to Husband. In this case, the trial court was faced with the need to decide which parent would have physical and legal custody because these parents were not able to avail themselves of the alternatives. Clearly, the trial court weighed all factors and considered all of the evidence appropriate to the decision. This Court finds that the trial court's custodial decision is not against the clear weight of the evidence. Therefore, the custodial decision is affirmed. Wife has not shown that Husband owes money for interim child support. However, Wife's evidence shows that the child support calculation is incorrect. The cause is remanded to the trial court for recalculation of permanent child support. Wife has not demonstrated error due to the award to Husband of the children's tax exemptions. Wife lists approximately eighty instances where she claims that the trial court erred regarding evidentiary rulings. However, Wife merely urges a retrial and points to no specific aspect of the proceeding. Wife has accepted the property provisions of the Decree, including receipt of money, with one exception. She does not object to the grant of a divorce. It is presumed that a judge disregards incompetent evidence in a bench trial and Wife has not shown that the trial judge relied upon incompetent evidence for any aspect of the decision rendered. Wife challenged the $1,500.00 judgment against her for missing property. Wife's challenge is supported by the Record and Husband did not respond to the issue. The judgment against Wife for $1,500.00 is reversed and vacated. Wife has not demonstrated error based upon the trial court's ruling that each party bear their own costs and attorney fees. The trial court's ruling is affirmed. AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., and Wiseman, V.C.J., concur.

Wednesday, February 20, 2019

117,232 — Jorge Antonio Cardenas Najera, Plaintiff/Appellee, v. David Stanley Chevrolet, Inc., Defendant/Appellant. Appeal from the District Court of Oklahoma County, Hon. Aletia Haynes Timmons, Trial Judge. This is the second appeal in this case. As we explained at greater length in the first appeal – *Najera v. David Stanley Chevrolet, Inc.*, 2017 OK CIV APP 62, 406 P.3d 592 – Plaintiff purchased three trucks from Defendant and signed various agreements at the time of each sale. Defendant then repossessed the three trucks on the purported basis that Plaintiff provided an incorrect Social Security number. Plaintiff filed suit alleging, among other things, that Defendant was the one that affixed a false Social Security number, and Plaintiff asserted various theories against Defendant, including breach of contract, conversion, and fraud. Defendant filed a motion to compel arbitration. The first appeal arose from the trial court's denial of this motion on the basis that the parties' Retail Installment Sale Contracts, which did not contain arbitration clauses, constituted the parties' only agreement. We reversed the trial court's order in the first appeal, but, because the trial court had not yet addressed the additional issues raised in Plaintiff's response to the motion to compel, we remanded this case to the trial court for further proceedings. On remand, the trial court concluded the arbitration provisions in the parties' purchase agreements are not unconscionable; however, the trial court concluded the contracts as a whole are invalid on the basis that they were fraudulently induced. The determination of whether the contract as a whole is void as a result of fraud must, in this case, be left to the arbitrator. *See, e.g., Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17 (2012) (per curiam); *Wells Fargo Bank, Nat'l Ass'n v. Apache Tribe of Okla.*, 2015 OK CIV APP 10, ¶ 38, 360 P.3d 1243. We therefore reverse the trial court's order and remand this case to the trial court with instructions to enter an order compelling arbitration. REVERSED AND REMANDED WITH INSTRUCTIONS.

Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Wiseman, V.C.J., and Thornbrugh, J. (sitting by designation), concur.

Monday, February 25, 2019

117,122 — The Queens, LLC; Cherokee Queen, LLC; and Larry Steckline, Plaintiffs/Appellees, v. The Seneca-Cayuga Nation, formerly known as the Seneca-Cayuga Tribe of Oklahoma; William L. Fisher; Jerry Crow; Sarah Sue Channing; Sallie White; Lisa Spano; Geneva Fletcher; and Calvin Cassidy, Defendants/Appellants. Appeal from the District Court of Delaware County, the Hon. Robert G. Haney, Trial Judge. In this action to foreclose real property and for replevin, Defendant/Appellant The Seneca-Cayuga Nation (SCN or the Tribe) appeals from an order of the district court granting summary judgment to Plaintiffs/Appellees The Queens, LLC and Cherokee Queen, LLC (collectively, the Queens). SCN asserts summary judgment for the Queens was inappropriately granted because the Tribe did not waive its sovereign immunity. In an agreement executed by the Queens and SCN, among other things, SCN expressly limited its waiver of sovereign immunity to a lawsuit in Oklahoma state courts if a federal court first determined it did not have jurisdiction to enforce the parties' agreement. Because no such determination has yet been made by a federal court, we conclude the district court was without subject matter jurisdiction to decide any matter in this case; thus, the court erred as a matter of law in granting summary judgment to the Queens. Accordingly, we reverse the trial court's judgment and remand the case to the court with instructions to enter an order dismissing the case without prejudice. REVERSED AND REMANDED WITH INSTRUCTIONS. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Wiseman, V.C.J., and Rapp, J., concur.

116,700 — Joseph Clinton and Candy Clinton, husband and wife, Plaintiffs/Appellees, vs. Samuel McGill, an individual, Defendant/Appellant. Appeal from Order of the District Court of Rogers County, Hon. J. Dwayne Steidley, Trial Judge. The defendant, Samuel McGill (McGill), appeals an Order where the trial court denied his Motion to Vacate a judgment in an action brought by Joseph Clinton and Candy Clinton (Clintons). The original action involved Clintons' quiet title claim, McGill's claim for damages, and whether McGill had an easement for access to his property. The trial court rendered judgments by way of a partial summary judgment and a judgment after a trial. Relevant here are the trial court's rulings regarding the easement issue. This Court holds that if circumstances have substantially and materially changed so as to warrant modification of the location of an implied easement based upon prior use, the trial court has authority to modify the location. The change of circumstances must be substantial and material. Mere inconvenience to the servient estate is insufficient justification to interfere with the rights of the dominant estate. Moreover, modification does not mean elimination of an existing easement when such easement is necessary for ingress and egress. A modification sought by the subservient estate owner is to be at that owner's expense, and the balancing guide discussed in *Sullivan v. Woods,* 895 N.Y.S.2d 578, 580 (N.Y. App. Div. 2010), is to serve as a meaningful guide. A modification must require the servient estate to continue to function for the original purpose for which it was used. The modification should not materially and substantially have adverse effects on either the servient estate or the dominant estate. This Court emphasizes that this Court's ruling regarding modification of an implied easement based upon prior use, applies solely to a relocation modification of necessity easement at servient's expense and not to modifications regarding the nature of the uses of the easement. Thus, this Court does not adopt the Restatement's "impossibility of accomplishment of purpose" as the sole criterion. If the circumstances pertaining to location meet the substantial and material change of circumstances threshold, the court has the power to modify the location on the servient estate of the easement based upon prior use, but nevertheless retaining the purpose of the implied easement based upon prior use. Because such prior uses represent a property interest with value, a modification raises a potential of a constitutional requirement for compensation for loss of that value, if any. The court hearing the case must consider whether, as a result of the modification, the dominant estate is entitled to compensation for the modification of the implied easement based upon prior use. The Record here does not reflect that consideration, assuming that the trial court found an implied easement based upon prior use. Therefore, this Court finds that the trial court did not err by denying the motion to vacate and that judgment is affirmed. The modified location to one

similar to an easement by necessity is not disturbed. However, the cause must be remanded to the trial court for the purpose of reopening the cause in order to obtain from the trial court a definitive ruling of whether the judgments are for an implied easement based upon prior use or an implied easement based upon necessity in accord with n.18 (provisions of Restatement (Third) Property § 7.10), and if the former, whether McGill is entitled to compensation for the modification. AFFIRMED AND REMANDED FOR FURTHER PROCEEDINGS IN ACCORDANCE WITH THIS OPINION. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Wiseman, V.C.J., and Barnes, P.J., concur.

Monday, March 4, 2019

117,119 — In the Matter of the Sales Tax and Use Tax Protest of Lowe's Home Centers, LLC: Lowe's Home Centers, LLC, Protestant/Appellant, vs. State of Oklahoma, ex rel. Oklahoma Tax Commission, Respondent/Appellee. Appeal from Order of the Oklahoma Tax Commission. The Protestant, Lowes Home Centers, LLC (LHC), appeals an Order of the Oklahoma Tax Commission (OTC) denying its protest of a sales tax assessment and rulings related to that denial. This case involves a statute, 68 O.S. 2011, § 1366, which is plain and straightforward. LHC seeks to take sales tax credit for bad debts attributable to credit card sales transactions. However, the accounting for these transactions does not exclude interest and other charges as commanded by Section 1366. Moreover, Section 1366 does not make exceptions for credit card or third party creditors' application method of payments. OTC collects and remits sales taxes levied by the State, cities and counties. LHC has stores in several locations in the State and is subject to multiple sales tax assessments. When a vendor seeks a sales tax credit for bad debt transactions, OTC requires detailed information to enable it to account to the cities and counties for credits to their sales taxes. The OTC rejected LHC's accounting method. This Court concludes that Section 1366 plainly states its purpose and intent. OTC has not incorrectly interpreted or administered the statute regarding exclusion of interest and other charges in this case. Under the standard of review, OTC's rejection of LHC's proof regarding allocation of bad debt to cities and counties is not disturbed. The Order of OTC is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division IV by Rapp, J.; Wiseman, V.C.J., and Barnes, P.J., concur.

116,439 — Casey Spracklin and Sherry Spracklin, Husband and Wife, Plaintiffs/ Appellants, vs. City of Blackwell, a political subdivision of the State of Oklahoma, Defendant/ Appellee. Appeal from an Order of the District Court of Kay County, Hon. Philip A. Ross, Trial Judge. Casey Spracklin and Sherry Spracklin (collectively, "Spracklins") appeal an order denying their motion to reconsider, motion to vacate, and/or motion for new trial requesting the court reconsider its ruling that City was not negligent in the design, maintenance, and/or repair of its sewer system. We find the Spracklins' evidentiary material is insufficient to withstand summary judgment. The Spracklins have failed to present any evidentiary material that City had actual or constructive notice of a defective condition in the sewer line near the Spracklins' building within a reasonable time of the Spracklins' backup. Accordingly, we conclude summary judgment was properly granted to City. The trial court's order denying the Spracklins' motion to reconsider, motion to vacate, and/or motion for new trial is therefore affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Goodman, J.; Barnes, P.J., and Rapp J., concur.

ORDERS DENYING REHEARING
(Division No. 3)
Tuesday, February 26, 2019

114,511 — James Hugh Hembree, Jr., and Joleta Hembree, Husband and Wife, Plaintiffs/ Appellees, Counter-Appellants, vs. George Sauer and Kaye Sauer, Husband and Wife, Defendants/Appellants, Counter-Appellees, and Karen Rodenberger and Don Blake, Defendants. Appellees' Petition for Rehearing, filed February 12th, 2019, is *DENIED.*

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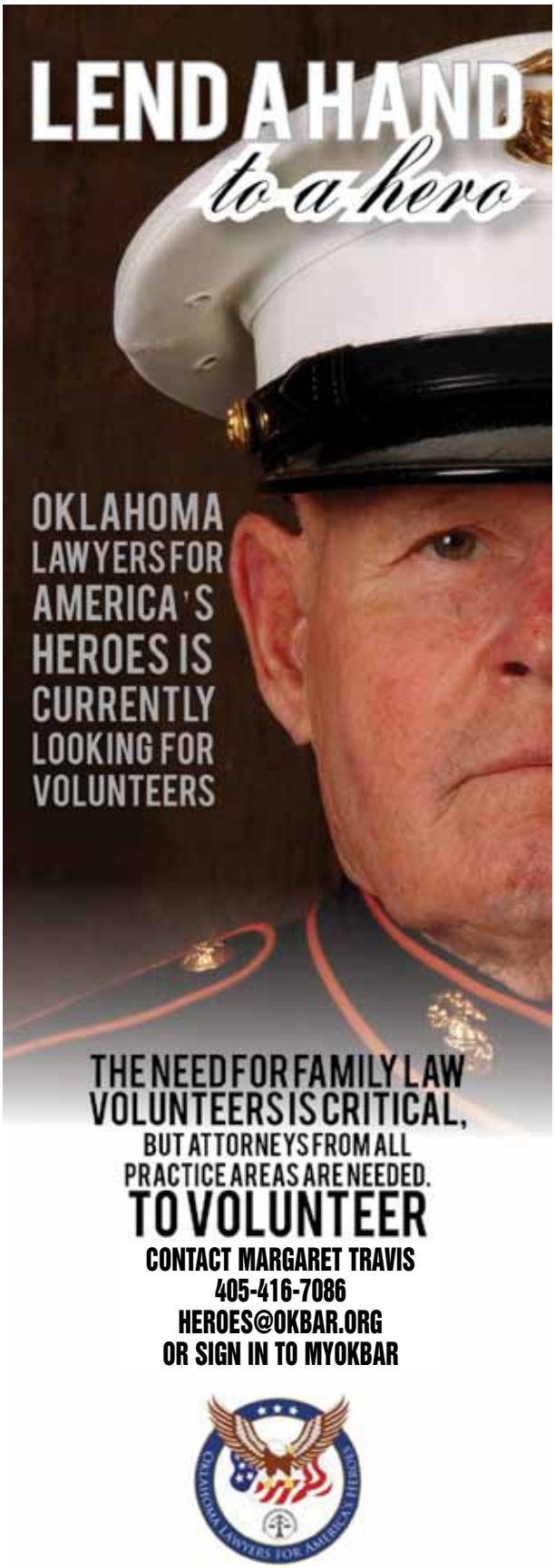

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