THE OKLAHOMA BAR
Journal
Volume 90 — No. 7 — 4/6/2019

Court Issue

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continuing legal education

MCLE CREDIT 6/1

ADVANCED DUI: LESSONS FROM THE NATIONAL MASTERS

APRIL 19, 2019
9 A.M. - 3:10 P.M.
Oklahoma Bar Center

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PROGRAM PLANNER/MODERATOR:
Brian K. Morton,
OBA Board of Governors, Oklahoma City

LEARN FROM MEMBERS OF THE NATIONAL COLLEGE OF DUI DEFENSE

TOPICS COVERED:
- **Drug Recognition Evidence: What the Science & Studies Really Support**
- **The ABC's of DUI: SCRAM, IID, UA and EtG**
- **Ethics: It's All About Vices and Virtues**
- **Twelve Steps to a DUI Arrest: Examining DRE Evaluations**
- **What if Alcoholism is Not a Disease? Other Ways of Dealing with Addicted Clients**
- **Are Radical New DUI Laws Coming?**

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THE OKLAHOMA BAR
Journal

Volume 90 – No. 7 – 4/6/2019

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Legal Aid Services of Oklahoma, Inc.
presents

A SPRING SEMINAR FOR OKLAHOMA ATTORNEYS

Tuesday, May 7, 2019

Conference Center, OSU Tulsa, 700 North Greenwood, Room 150
MCLE Credit of 6 Hours, including One hour of Ethics

FREE for Oklahoma Attorneys
To register, go to: www.probono.net/ok/cle

AGENDA

8:30 a.m.	Registration
9:00 - 9:50	"How to Handle a Family Law Case if the Opposing Party is Unrepresented," Family Law Attorneys with Legal Aid Services
9:50-10:05	BREAK
10:05-10:55	"The Impact of Taxes on Low-Income Clients" Brette Gollihave, Legal Aid Services
10:55 - 11:10	BREAK
11:10 – 12:00	"The Challenges of Unrepresented Litigants/Ethical Duties if Unrepresented Litigant is Involved in Your Case" OBA Ethics Counsel Joseph Balkenbush
12.00 – 1:00	LUNCH (on your own)
1:00 – 1:50	"Criminal Law for Civil Lawyers" Shena Burgess, Smiling, Smiling & Burgess
1:50 – 2:00	BREAK
2:00 – 2:50	"A Review of ICWA Guardianship Law and Procedures" C. Steven Hager at Oklahoma Indian Legal Services, Inc.
2:50-3:00	BREAK
3:00 – 4:00	"The Best and Worst Way to Interact With Pro Se Litigants" Judge Lara Russell, Rogers County, Judge Stephen Clark, Tulsa County, and Judge Terry Bitting, Tulsa County

Oklahoma Bar Association

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Index to Opinions of Court of Civil Appeals

2019 OK 4

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

SCAD 2019-14. February 25, 2019

ORDER

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

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

/s/ Noma D. Gurich
CHIEF JUSTICE

ALL JUSTICES CONCUR.

Case No. JD

IN THE DISTRICT COURT OF COUNTY
STATE OF OKLAHOMA
JUVENILE DIVISION

IN THE MATTER OF:

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

Alleged Deprived Child(ren).

ORDER TERMINATING PARENTAL RIGHTS
ICWA COMPLIANT

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

APPEARANCES:

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

Order of Termination
Page 1 of 7

FINDINGS OF THE COURT

I. MANDATORY FINDINGS

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

A. CHILD(REN) NAMES and BIRTHDATES

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

B. ADJUDICATION

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

C. INDIAN CHILD WELFARE ACT and ACTIVE EFFORTS:

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

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

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

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

C4. Indian Child Welfare Act – Expert Testimony:

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

II. TERMINATION

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

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

A1. Failure to Appear

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

OR

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

AND

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

A2. Jury Trial:

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

OR

A3. Non-jury Trial:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. BEST INTEREST OF THE CHILD

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

III. ORDERS:

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

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

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

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

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

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

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

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

OR

☐ Is deferred to the child support enforcement division.

THIS IS A FINAL APPEALABLE ORDER.

Other:

_____

_____

_____

_____

_____

JUDGE OF THE DISTRICT COURT

APPROVED AS TO FORM:

_____

Assistant District Attorney

_____

Attorney for Child(ren)

_____

Attorney for Mother

_____

Attorney for Father

Case No. JD

IN THE DISTRICT COURT OF COUNTY
STATE OF OKLAHOMA
JUVENILE DIVISION

IN THE MATTER OF:

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

Alleged Deprived Child(ren).

ORDER TERMINATING PARENTAL RIGHTS

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

APPEARANCES:

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

FINDINGS OF THE COURT

I. MANDATORY FINDINGS

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

A. CHILD(REN) NAMES and BIRTHDATES

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

B. ADJUDICATION

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

II. TERMINATION

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

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

A1. Failure to Appear

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

OR

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

AND

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

A2. Jury Trial:

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

OR

A3. Non-jury Trial:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. BEST INTEREST OF THE CHILD

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

III. ORDERS:

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

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

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

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

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

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

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

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

THIS IS A FINAL APPEALABLE ORDER.

Other:

_____
_____
_____
_____

_____
JUDGE OF THE DISTRICT COURT

APPROVED AS TO FORM:

_____
Assistant District Attorney

_____
Attorney for Child(ren)

_____
Attorney for Mother

_____
Attorney for Father

2019 OK 5

In re: Approval of Uniform Juvenile Continuance Order

SCAD 2019-15. February 25, 2019

ORDER

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

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

/s/ Noma D. Gurich
CHIEF JUSTICE

ALL JUSTICES CONCUR.

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

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

ORDER FOR CONTINUANCE

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

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

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

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

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

OTHER:

_____

_____

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

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

2019 OK 13

RE: Reinstatement of Certificate of Certified Shorthand Reporter

SCAD-2019-23. Monday, March 25, 2019

ORDER

Pursuant to 20 O.S. Chapter 20, §1503.1(B)(3), the Oklahoma Board of Examiners of Certified Shorthand Reporters has determined that good cause exists for granting an exemption for 2018 continuing education for Certified Shorthand Court Reporter Jeanna Whitten, CSR #1961. The Oklahoma Board of Examiners of Certified Shorthand Reporters has recommended to the Oklahoma Supreme Court that the certificate of the named Certified Shorthand Reporter be reinstated.

IT IS HEREBY ORDERED that the certificate of Jeanna Whitten, CSR #1961, shall be reinstated effective March 14, 2019 from the suspension earlier imposed by this Court.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 25TH day of MARCH, 2019.

/s/ Noma D. Gurich
CHIEF JUSTICE

ALL JUSTICES CONCUR.

2019 OK 15

BRIAN MCCLANAHAN, Petitioner, v. CITY OF TULSA, OWN RISK #10435, and THE WORKERS'COMPENSATION COMMISSION, Respondents.

No. 115,802. April 2, 2019

MEMORANDUM OPINION

COMBS, J.:

¶1 This is an appeal of an Order Affirming Decision of Administrative Law Judge by the Oklahoma Workers' Compensation Commission En Banc filed on February 21, 2017. Petitioner suffered a compensable injury after the effective date of the Administrative Workers' Compensation Act (AWCA) (Title 85A). The Administrative Law Judge (ALJ) awarded Petitioner Permanent Partial Disability (PPD). The ALJ also determined the City of Tulsa was entitled to a credit from the PPD award in the sum of $9,758.27, pursuant to 85A O.S. § 89. The Petitioner challenged the constitutionality of several sections of the AWCA which mandate the exclusive use of the latest edition of the American Medical Association's Guide (AMA Guide) to evaluate and award PPD. In addition, he challenged the constitutionality of the credit against PPD awards provided by 85A O.S. § 89. The ALJ found the use of the AMA Guide as well as the credit against PPD awards to be constitutional. The Oklahoma Workers' Compensation Commission En Banc affirmed. The dispositive issues on appeal concern the constitutionality of the sections of the AWCA which mandate the use of the AMA Guide as well as the employer credit against PPD awards. This cause was assigned to this office on March 28, 2018.

¶2 Upon review of the record and briefs of the parties, this Court has determined the issues raised in this appeal have already been decided in our recent opinions, *Hill v. American Medical Response,* 2018 OK 57, 423 P.3d 1119 and *Braitsch v. City of Tulsa*, 2018 OK 100, ____ P.3d_____, 2018 WL 6617141. In *Hill* this Court held the required use of the AMA Guide in the AWCA was constitutional. In *Braitsch*, this Court held the credit provided under 85A O.S. § 89 was constitutional. The Order of the Oklahoma Workers' Compensation Commission En Banc is affirmed.

¶3 Wyrick, V.C.J., Winchester, Combs and Darby, JJ., concur.

¶4 Edmondson, J., concurs by reason of stare decisis.

¶5 Kauger, J., concurs in part; dissents in part;

Kauger, J., concurring in part and dissenting in part

> I am concurring in part and dissenting in part for the reasons I expressed in *Hill v. American Medical Response*, 2018 OK 57, 423 P.3d 1119.

¶6 Gurich, C.J., Colbert and Reif, JJ., dissent.

2019 OK 16

CHRISTOPHER FORREST, Petitioner, v. CITY OF TULSA, OWN RISK #10435, and THE WORKERS'COMPENSATION COMMISSION, Respondents.

No. 115,803. April 2, 2019

MEMORANDUM OPINION

COMBS, J.:

¶1 This is an appeal of an Order Affirming Decision of Administrative Law Judge by the Oklahoma Workers' Compensation Commission En Banc filed on February 21, 2017. Petitioner suffered a compensable injury after the effective date of the Administrative Workers' Compensation Act (AWCA) (Title 85A). The Administrative Law Judge (ALJ) awarded Petitioner Permanent Partial Disability (PPD). The ALJ also determined the City of Tulsa was entitled to a credit from the PPD award in the sum of $1,095.20, pursuant to 85A O.S. § 89. The Petitioner challenged the constitutionality of this credit. The ALJ found the credit against PPD awards was constitutional. The Oklahoma Workers' Compensation Commission En Banc affirmed. The dispositive issue on appeal concerns the constitutionality of the employer credit against PPD awards. This cause was assigned to this office on March 28, 2018.

¶2 Upon review of the record and briefs of the parties, this Court has determined the issues raised in this appeal have already been decided in our recent opinion in *Braitsch v. City of Tulsa*, 2018 OK 100, ____P.3d_____, 2018 WL 6617141. In *Braitsch*, this Court held the credit provided under 85A O.S. § 89 was constitutional. The Order of the Oklahoma Workers' Compensation Commission En Banc is affirmed.

¶3 Wyrick, V.C.J., Kauger, Winchester, Combs and Darby, JJ., concur.

¶4 Edmondson, J., concurs by reason of stare decisis.

¶5 Gurich, C.J., Colbert and Reif, JJ., dissent.

Notice of Judicial Vacancy

The Judicial Nominating Commission seeks applicants to fill the following judicial office:

District Judge
Fifteenth Judicial District, Office 1 • Muskogee County

This vacancy is due to the untimely passing of the Honorable Mike Norman on February 25, 2019.

To be appointed to the office of District Judge, Fifteenth Judicial District, Office 1, one must be a legal resident of Muskogee County, at the time (s)he takes the oath of office and assumes the duties of office. Additionally, prior to appointment, such appointee shall have had a minimum of four years experience as a licensed practicing attorney, or as a judge of a court of record, or both, within the State of Oklahoma.

Application forms can be obtained on line at www.oscn.net, click on Programs, then Judicial Nominating Commission or by contacting Tammy Reaves at (405) 556-9300. Applications must be submitted to the Chairman of the Commission at the address below **no later than 5:00 p.m., Friday, May 10, 2019. If applications are mailed, they must be postmarked by midnight, May 10, 2019.**

Mike Mordy, Chairman
Oklahoma Judicial Nominating Commission
Administrative Office of the Courts
2100 N. Lincoln Blvd., Suite 3
Oklahoma City, Oklahoma 73105

Judicial Nominating Commission Elections: Nomination Period Opens

THE SELECTION OF qualified persons for appointment to the judiciary is of the utmost importance to the administration of justice in this state. Since the adoption of Article 7-B to the Oklahoma Constitution in 1967, there has been significant improvement in the quality of the appointments to the bench. Originally, the Judicial Nominating Commission was involved in the nomination of justices of the Supreme Court and judges of the Court of Criminal Appeals. Since the adoption of the amendment, the Legislature added the requirement that vacancies in all judgeships, appellate and trial, be filled by appointment of the governor from nominees submitted by the Judicial Nominating Commission.

The commission is composed of 15 members. There are six non-lawyers appointed by the governor, six lawyers elected by members of the bar, and three at large members, one selected by the Speaker of the House of Representatives; one selected by the President Pro Tempore of the Senate; and one selected by not less than eight members of the commission. All serve six-year terms, except the members at large who serve two-year terms. Members may not succeed themselves on the commission.

The lawyer members are elected from each of the six congressional districts as they existed in 1967. (As you know, the congressional districts were redrawn in 2011.) Elections are held each odd-numbered year for members from two districts.

2019 ELECTIONS

This year there will be elections for members in Districts 3 and 4. District 3 is composed of 22 counties in the south and southeastern part of the state. District 4 is composed of 12 counties in the central and the southwestern part of the state, plus a portion of eastern Oklahoma County. (See the sidebar for the complete list.)

Lawyers desiring to be candidates for the Judicial Nominating Commission positions have until Friday, May 17, 2019, at 5 p.m. to submit their Nominating Petitions. Members can download petition forms at www.okbar.org/jnc. Ballots will be mailed on June 7, 2019, and must be returned by June 21, 2019, at 5 p.m.

It is important to the administration of justice that the OBA members in the Third and Fourth Congressional Districts become informed on the candidates for the Judicial Nominating Commission and cast their vote. The framers of the constitutional amendment entrusted to the lawyers the responsibility of electing qualified people to serve on the commission.

OBA PROCEDURES GOVERNING THE ELECTION OF LAWYER MEMBERS TO THE JUDICIAL NOMINATING COMMISSION

1. Article 7-B, Section 3, of the Oklahoma Constitution requires elections be held in each odd numbered year by active members of the Oklahoma Bar Association to elect two members of the Judicial Nominating Commission for six-year terms from Congressional Districts as such districts existed at the date of adoption of Article 7-B of the Oklahoma Constitution (1967).

2. Ten (10) active members of the association, within the Congressional District from which a member of the commission is to be elected, shall file with the Executive Director a signed petition (which may be in parts) nominating a candidate for the commission; or, one or more County Bar Associations within said Congressional District may file with the Executive Director a nominating resolution nominating such a candidate for the commission.

3. Nominating petitions must be received at the Bar Center by 5 p.m. on the third Friday in May.

4. All candidates shall be advised of their nominations, and unless they indicate they do not desire to serve on the commission, their name shall be placed on the ballot.

5. If no candidates are nominated for any Congressional District, the

Board of Governors shall select at least two candidates to stand for election to such office.

6. Under the supervision of the Executive Director, or his designee, ballots shall be mailed to every active member of the association in the respective Congressional District on the first Friday in June, and all ballots must be received at the Bar Center by 5 p.m. on the third Friday in June.

7. Under the supervision of the Executive Director, or his designee, the ballots shall be opened, tabulated and certified at 9 a.m. on the Monday following the third Friday of June.

8. Unless one candidate receives at least 40 percent of the votes cast, there shall be a runoff election between the two candidates receiving the highest number of votes.

9. In case a runoff election is necessary in any Congressional District, runoff ballots shall be mailed, under the supervision of the Executive Director, or his designee, to every active member of the association therein on the fourth Friday in June, and all runoff ballots must be received at the Bar Center by 5 p.m. on the third Friday in July.

10. Under the supervision of the Executive Director, or his designee, the runoff ballots shall be opened, tabulated and certified at 9 a.m. on the Monday following the third Friday in July.

11. Those elected shall be immediately notified, and their function certified to the Secretary of State by the President of the Oklahoma Bar Association, attested by the Executive Director.

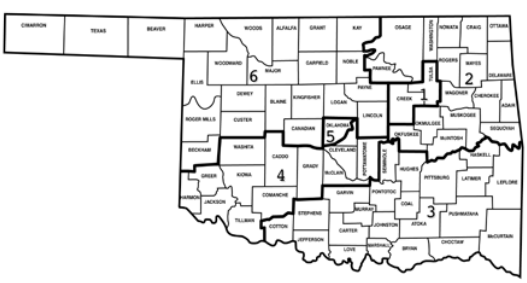
12. The Executive Director, or his designee, shall take possession of and destroy any ballots printed and unused.

13. The election procedures, with the specific dates included, shall be published in the *Oklahoma Bar Journal* in the three issues immediately preceding the date for filing nominating resolutions.

NOTICE

Judicial Nominating Commission Elections Congressional Districts 3 And 4

Nominations for election as members of the Judicial Nominating Commission from Congressional Districts 3 and 4 (as they existed in 1967) will be accepted by the Executive Director until 5 p.m., Friday, May 17, 2019. Ballots will be mailed June 7, 2019, and must be returned by 5 p.m. on June 21, 2019.



District No. 3
Atoka
Bryan
Carter
Choctaw
Coal
Cotton
Garvin
Haskell
Hughes
Jefferson
Johnston
Latimer
LeFlore
Love
Marshall
McCurtain
Murray
Pittsburg
Pontotoc
Pushmataha
Seminole
Stephens

District No. 4
Caddo
Cleveland
Comanche
Grady
Greer
Harmon
Jackson
Kiowa
McClain
Oklahoma (Part)*
Pottawatomie
Tillman
Washita

*Part of Oklahoma County
Including:
Choctaw
Harrah
Luther
Midwest City
Newalla
Nicoma Park
Spencer
South of 89th Street

Calendar of Events

April

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

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

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 video-conference; Contact Amy E. Page 918-208-0129

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

OBA Clients' Security Fund Committee meeting: 2 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Micheal C. Salem 405-366-1234

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

19 **OBA Board of Governors meeting;** 10 a.m.; Ponca City; Contact John Morris Williams 405-416-7000

20 **OBA Young Lawyers Division meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Brandi Nowakowski 405-275-0700

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

24 **OBA Immigration Law Section meeting;** 11 a.m.; Oklahoma Bar Center, Oklahoma City with video-conference; Contact Lorena Rivas 918-585-1107

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

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

May

2 **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

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

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

10 **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

2019 OK CIV APP 13

KENNETH RAY JOHNSON, individually; and RICHARD BALDWIN, individually, Plaintiffs/Appellants, vs. GEO GROUP, INC., STATE OF OKLAHOMA, ex rel., OKLAHOMA DEPARTMENT OF CORRECTIONS, a state political subdivision, Defendants/Appellees.

Case No. 116,098. June 15, 2018

APPEAL FROM THE DISTRICT COURT OF COMANCHE COUNTY, OKLAHOMA

HONORABLE GERALD NEUWIRTH, TRIAL JUDGE

AFFIRMED IN PART, VACATED IN PART AND REMANDED FOR FURTHER PROCEEDINGS

Lauri J. Miller, MILLER LAW FIRM, P.C., Oklahoma City, Oklahoma, for Plaintiffs/Appellants

Thomas G. Ferguson, Jr., WALKER, FERGUSON & FERGUSON, Oklahoma City, Oklahoma, for Defendant/Appellee GEO Group, Inc.

Kindanne C. Jones, OFFICE OF ATTORNEY GENERAL, Oklahoma City, Oklahoma, for Defendant/Appellee State of Oklahoma, ex rel., Oklahoma Department of Corrections

JOHN F. FISCHER, JUDGE:

¶1 Kenneth Ray Johnson sued the GEO Group, Inc., GEO Care, and their employees Kirk Smith and Connie Wood (the GEO parties) concerning two alleged assaults while he was in the custody of the Department of Corrections and incarcerated at GEO's Lawton Correctional Facility. Johnson further alleged that he was denied medical care for the injuries he suffered as a result of the assaults. Johnson also sued the DOC alleging that he continued to be denied medical care after he was transferred from GEO's facility back to a DOC facility. Richard Baldwin sued the DOC alleging it improperly disclosed his medical, psychological and juvenile criminal records to counsel for GEO. Johnson and Baldwin appeal the district court's judgment in favor of the defendants granting their motions for summary judgment. The appeal has been assigned to the accelerated docket pursuant to Oklahoma Supreme Court Rule 1.36(b), 12 O.S. Supp. 2013, ch. 15, app. 1, and the matter is submitted without appellate briefing.

¶2 We affirm the judgment in favor of the DOC as to Baldwin's claim because the undisputed facts in this record show that the DOC did not disclose Baldwin's medical, psychological or juvenile criminal records. As to Johnson's claim against the DOC, we affirm that portion of the judgment regarding Johnson's tort claims because the DOC is immune from suit for those alleged torts. However, the DOC is not immune to the extent that it denied medical care for Johnson's serious medical needs in violation of his rights protected by Article 2, section 9 of the Oklahoma Constitution. We vacate that portion of the district court's judgment and remand that aspect of Johnson's claim for further proceedings.

¶3 We vacate the judgment in favor of the GEO parties because Johnson complied with the notice provisions of the Governmental Tort Claims Act, 51 O.S.2011 §§ 151 to 172, and filed his action within the applicable statute of limitations, and there are issues of fact concerning when Johnson's cause of action accrued. That aspect of this case is also remanded for further proceedings.

BACKGROUND

¶4 At the time the events precipitating Johnson and Baldwin's claims occurred, both men were in the custody of the DOC. Pursuant to a contract between the DOC and the GEO Group, they were incarcerated at GEO's Lawton Correctional Facility, a private prison. Johnson alleges that he was physically assaulted on two occasions by a GEO correctional officer and that he was denied medical care for his injuries after the assaults. The alleged assaults occurred in late March and early April of 2012. Shortly thereafter, Johnson was transferred back to a DOC facility where he stayed until he was released in March of 2013. After his return to a DOC facility, Johnson sued the GEO Group and its correctional officer in federal court regarding the alleged assaults. Johnson's federal court complaint was filed on April 19, 2012, and alleged that the GEO Group failed to

properly train and supervise its correctional officer and that its medical personnel refused to provide treatment for the injuries Johnson suffered as a result of the assaults. Johnson's claim against the GEO parties in this case is based only on the alleged denial of medical care. Johnson's amended petition states: "No federal causes of action are sought at this time by Plaintiffs."

¶5 Baldwin claims to have been a witness to one of the alleged assaults and his deposition was taken in conjunction with Johnson's federal suit. Baldwin's claim is based on an alleged improper and unauthorized disclosure of his medical, psychological and juvenile criminal records which were then used as the basis for questioning him during his deposition.

¶6 Johnson and Baldwin filed their petition in the Comanche County district court on April 4, 2014. They named the DOC, several of its employees and the GEO parties as defendants. On February 9, 2015, Johnson and Baldwin dismissed the DOC defendants without prejudice. Both plaintiffs filed essentially the same claim against the DOC defendants in the district court for Oklahoma County on May 28, 2015; however, they only issued summons for and obtained service on the DOC. Johnson and Baldwin then filed an amended petition in the Comanche County case on June 1, 2015, naming only the GEO parties as defendants. The two cases proceeded independently until the DOC voluntarily agreed to have the Oklahoma County case consolidated with the Comanche County case. The transcript of the Oklahoma County case pleadings was filed in the Comanche County case on January 27, 2016.

¶7 Prior to the consolidation of the cases, the GEO parties filed a motion to dismiss in the Comanche County case. On January 20, 2016, the district court denied GEO's motion as to Johnson's claim but granted that motion as to Baldwin's claim. Baldwin did not seek leave to amend nor did he file an amended petition. Further, Baldwin did not appeal the order dismissing his claim. Therefore, Baldwin's claim against the GEO parties has been terminated in their favor and is not an issue in this appeal.

¶8 After the Oklahoma and Comanche County cases were consolidated, all of the defendants filed motions for summary judgment. Johnson and Baldwin appeal the district court's May 12, 2017, Journal Entry of Judgment granting those motions and entering judgment in favor of the defendants.

STANDARD OF REVIEW

¶9 Title 12 O.S.2011 § 2056 governs the procedure for summary judgment in this case. A motion for summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." 12 O.S.2011 § 2056(C). When deciding a motion for summary judgment, the district court considers factual matters but the ultimate decision is purely legal. *Carmichael v. Beller*, 1996 OK 48, ¶ 2, 914 P.2d 1051. The *de novo* standard controls an appellate court's review of a district court order granting summary judgment. *Id. De novo* review involves a plenary, independent, and non-deferential examination of the trial court's rulings of law. *Neil Acquisition, L.L.C. v. Wingrod Invest. Corp.*, 1996 OK 125, n.1, 932 P.2d 1100.

ANALYSIS

¶10 We address the plaintiffs' appeals of the judgments in favor of the GEO parties and the DOC separately.

I. Baldwin's Claim against the DOC

¶11 Baldwin alleges that his juvenile criminal record was unlawfully disclosed to counsel for the GEO parties and used at his deposition. Baldwin claimed to be a witness to one of the alleged assaults on Johnson at GEO's facility. Baldwin's deposition was taken on October 29, 2013, after he was released from incarceration. During the deposition, GEO's counsel asked Baldwin if he had any criminal history prior to the conviction for which he had been incarcerated at GEO's facility. Baldwin answered "juvenile." A series of nine questions and answers followed, which appear to have been redacted later at the request of Baldwin's counsel. Baldwin sued the DOC alleging it unlawfully provided GEO's counsel his Texas juvenile records, which were used as the basis for these questions at his deposition.

¶12 In its motion for summary judgment, the DOC conceded that it provided some of Baldwin's records to GEO's counsel but argued that "no juvenile records nor medical/psychological records were requested or produced to [GEO's counsel]." The quoted statement is contained in an affidavit supporting the DOC's motion for summary judgment. In his response, Baldwin stated that he was unable to admit or deny the statement in the affidavit. Nonethe-

less, Baldwin argued: "Some how [GEO's] counsel while representing Defendant GEO in the Federal Court litigation had access to Baldwin's juvenile records and asked him specific questions."

> When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must, by affidavits or as otherwise provided in this rule, set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

12 O.S.2011 § 2056(E).

> Once defendant has introduced evidentiary materials indicating that there is no substantial controversy as to one fact material to plaintiff's cause of action and that this fact is in defendant's favor, plaintiff then has the burden of showing that evidence is available which would justify a trial of the issue.

Runyon v. Reid, 1973 OK 25, ¶ 13, 510 P.2d 943. The DOC's motion for summary judgment affirmatively established that if Baldwin's medical and juvenile records were improperly released, the DOC did not do so. Baldwin submitted no evidentiary material that would "justify a trial of [that] issue." *Id.* The district court's judgment in favor of the DOC as to Baldwin's claim is affirmed.

II. Johnson's Appeal of the Judgment in Favor of the DOC

¶13 Johnson's claim against the DOC is based on the alleged assaults at GEO's facility. Johnson alleges that the DOC "failed to take proper and immediate action" after the assaults, and after he was transferred back to a DOC facility, DOC healthcare providers continued to deny him medical care. Johnson alleged that the DOC's conduct constituted various State torts including assault and battery, civil conspiracy, negligence, breach of fiduciary duty, fraud and intentional infliction of emotional distress. Johnson also alleged that this conduct violated his civil rights protected by Okla. Const. art. 2, §§ 9 and 30.

¶14 With respect to the latter, Johnson contends that he is asserting a "*Bosh* claim." In *Bosh v. Cherokee County Governmental Building Authority*, 2013 OK 9, 305 P.3d 994, the Oklahoma Supreme Court held that pre-trial detainees have a private right of action pursuant to Article 2, § 30 of the Oklahoma Constitution to redress the use of excessive force. This is not a Bosh case. Johnson was incarcerated as the result of a prior conviction at the time he was allegedly assaulted. Johnson's claim is governed by Okla. Const. art. 2, § 9. *Bosh*, 2013 OK 9, ¶ 22 (citing *Washington v. Barry*, 2002 OK 45, 55 P.3d 1036, and noting its holding that a private action for excessive force exists pursuant to Article 2, § 9 for incarcerated persons).

¶15 As related to that claim, Johnson's petition alleges that the DOC failed to take immediate action after the alleged assault to provide proper medical care, and that when he was transferred back to DOC's facility, DOC healthcare providers not only knew about the injury he suffered at the GEO facility but also intentionally denied him needed medical care. Johnson's petition alleges that they continued to deny him medical care until he was released in March of 2013. In his response to the DOC's motion for summary judgment, Johnson relied on his deposition testimony stating that DOC medical personnel not only ignored his request for medical care but also told him "to deal with the injury when he got out."

¶16 The DOC's reply to Johnson's response does not offer evidence contradicting Johnson's testimony or the affidavit of the physician who treated Johnson after he was released from the DOC's facility. That treating physician stated that he could not rule out the possibility that Johnson's post-incarceration injury resulted from the lack of medical care Johnson alleged while he was in DOC custody. The DOC did not offer evidence contradicting Johnson's evidence, but even if it had, that would only have created an issue of fact precluding summary judgment. Summary judgment is only proper where "there is no genuine issue as to any material fact." 12 O.S.2011 § 2056(C). *See Winston v. Stewart & Elder, P.C.*, 2002 OK 68, ¶ 10, 55 P.3d 1063 (noting that the district court is required to rule out all theories of liability fairly comprised within the evidentiary materials).

¶17 Further, and contrary to the DOC's argument, Johnson has not just sued the DOC for acts or omissions committed by its contractor, the GEO Group or the GEO Group's employees. Johnson's claim against the DOC is based on the DOC's alleged failure to act while he

was in DOC custody and incarcerated in GEO's facility, as well as for the DOC's failure to provide medical care after he was transferred back to a DOC facility. The record shows that Johnson was transferred from the GEO facility to a DOC facility on April 13, 2012, shortly after the alleged assaults, and that he was released from custody by the DOC on March 25, 2013. As a result, Johnson's claim against the DOC is not, as the DOC argues, based on acts that occurred prior to April 19, 2012, the date on which he filed his federal court case. The last date on which Johnson alleges that he was denied medical care by the DOC was March 25, 2013, the date he was released by the DOC.

¶18 Rather than challenging the merits of Johnson's claim, the DOC's motion for summary judgment raised three essentially jurisdictional arguments: (1) Johnson's suit is barred because he failed to comply with the notice provisions of the Governmental Tort Claims Act; (2) the DOC is immune from suit for the conduct that Johnson alleges occurred; and (3) the district court did not have jurisdiction because Johnson failed to exhaust his administrative remedies.

A. The Notice Argument

¶19 The DOC first argues that Johnson's suit must be dismissed because he failed to comply with the notice requirements of the Tort Claims Act. 51 O.S.2011 §§ 151 to 172. "Compliance with the statutory notice provisions of the [Tort Claims Act] is a jurisdictional requirement to be completed prior to the filing of any pleadings." *Hall v. The GEO Group, Inc.*, 2014 OK 22, ¶ 13, 324 P.3d 399. Section 156(B) of the Tort Claims Act provides:

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

The last date on which Johnson could have been denied medical care was March 25, 2013, the date he was released from the DOC facility. The record contains a Notice of Tort Claim dated February 5, 2014, from Johnson's attorney to the DOC. The DOC does not argue that this notice was defective. And, this notice was clearly provided "within one (1) year after the loss occurs." *Id.* Consequently, Johnson complied with the one year requirement of section 156(B) of the Tort Claims Act.

¶20 Also in the record is a letter from the Oklahoma Office of Management and Enterprise Services denying Johnson's February 2014, tort claim. That letter states that Johnson's claim was denied as of March 14, 2014, and that he had one hundred and eighty days within which to file suit. Section 157(B) of the Tort Claims Act provides: "No action for any cause arising under this act . . . shall be maintained unless valid notice has been given and the action is commenced within one hundred eighty (180) days after denial of the claim as set forth in this section." Johnson's Comanche County lawsuit was filed on April 4, 2014, and named the DOC as a defendant. Johnson's Comanche County petition satisfied the filing requirements of section 157(B).

¶21 However, Johnson voluntarily dismissed his Comanche County case against the DOC on February 9, 2015. He did not sue the DOC again until May 28, 2015, when he filed his Oklahoma County action. That case was filed more than one hundred and eighty days after Johnson's tort claim was denied on March 14, 2014. Consequently, Johnson's Oklahoma County case is barred by the limitation period in section 157(B), unless Johnson is entitled to the benefit of his Comanche County filing. We hold that he is.

> If any action is commenced within due time, and . . . if the plaintiff fail in such action otherwise than upon the merits, the plaintiff . . . may commence a new action within one (1) year after the . . . failure although the time limit for commencing the action shall have expired before the new action is filed.

12 O.S.2011 § 100. "Section 100 permits the refiling of a governmental tort claims action only where the court's power has been invoked by the original action." *Cruse v. Bd. of Cnty. Comm'rs of Atoka Cnty.*, 1995 OK 143, ¶ 18, 910 P.2d 998. Johnson's original Comanche County case properly invoked the district court's jurisdiction and his Oklahoma County action was filed within one year after the dismissal of his Comanche County case. Consequently, Johnson has satisfied the notice and filing requirements of sections 156 and 157 of the Tort Claims Act, and the DOC is not entitled to judgment on that basis.

B. The Immunity Argument.

¶22 The DOC next argues, citing 51 O.S. Supp. 2016 § 155 of the Tort Claims Act, that it is immune from Johnson's suit: "The state or a political subdivision shall not be liable if a loss or claim results from: . . . [p]rovision, equipping, operation or maintenance of any prison, jail or correctional facility . . . ." 51 O.S. Supp. 2016 § 155(25). Although the DOC is correct in some respects, the Tort Claims Act "cannot be construed as immunizing the state completely from all liability for violations of the constitutional rights of its citizens." *Bosh v. Cherokee Cnty. Governmental Bldg. Auth.*, 2013 OK 9, ¶ 23, 305 P.3d 994 (construing the identical exemption, then numbered as section 155(24), regarding claims filed by pretrial detainees). Nonetheless, Johnson's Oklahoma tort claims, which include assault and battery, civil conspiracy, breach of fiduciary duty, intentional infliction of emotional distress and fraud, relate to the operation of a correctional facility and the DOC is immune from suit for those claims. 51 O.S. Supp. 2016 § 155(25). The district court's judgment in favor of the DOC regarding Johnson's State tort claims is affirmed. The judgment regarding Johnson's constitutional claim is vacated.

C. The Exhaustion Argument

¶23 In addition to his tort claims, however, Johnson also alleges that by denying him medical care, the DOC violated his Oklahoma Constitutional rights pursuant to Article 2, § 9, which prohibits cruel and unusual punishment. As this Court held in *Edelen v. Board of Commissioners of Bryan County*, Johnson's allegation that the DOC knowingly denied him care for a serious medical need would "establish a violation of Okla. Const. art. 2, § 9." Edelen, 2011 OK CIV APP 116, ¶ 8, 266 P.3d 660 (*cert. denied*, October 24, 2011).[1] In doing so, we relied on *Washington v. Barry*, 2002 OK 45, 55 P.3d 1036, in which the Oklahoma Supreme Court recognized that convicted and incarcerated individuals have a private right of action pursuant to Article 2, § 9's prohibition of cruel and unusual punishment to redress the use of excessive force.

¶24 However, the holding in *Washington v. Barry* was limited to the use of excessive force and the Supreme Court did not address the full scope of Article 2, § 9 or whether it encompassed medical claims. Therefore, in *Edelen*, this Court also relied on *Estelle v. Gamble*, 429 U.S. 97, 97 S. Ct. 285 (1976), in which the United States Supreme Court held that prisoners have a claim pursuant to the Eighth Amendment to the United States Constitution for deliberate indifference to serious medical needs. We did so for two reasons.

¶25 First, in the absence of controlling State authority: "Federal case law provides a logical framework for determining the scope of the protection guaranteed by Oklahoma constitutional law." *Gaylord Entertainment Co. v. Thompson*, 1998 OK 30, n.50, 958 P.2d 128. And, following this principle, the Washington Court had relied on United States Supreme Court Eighth Amendment precedent when it determined that Oklahoma prisoners have a private right of action for the use of excessive force pursuant to Article 2, § 9 of Oklahoma's Constitution. Article 2, § 9 is the Oklahoma counterpart to the Eighth Amendment.

¶26 Second, the Oklahoma Supreme Court followed *Estelle v. Gamble in Estate of Crowell v. Board of County Commissioners of the County of Cleveland*, 2010 OK 5, ¶¶ 24-25, 237 P.3d 134, finding a federal constitutional claim for denial of medical care pursuant to the Eighth Amendment. We conclude that the Oklahoma Supreme Court would reach the same result that we reached in *Edelen* regarding Johnson's constitutional claim against the DOC. The deliberate denial of care for a prisoner's serious medical needs would violate Article 2, § 9.

¶27 The DOC does not address whether Johnson has an Article 2, § 9 claim in this case, but contends that the district court would not have jurisdiction of any such claim because Johnson failed to comply with the administrative exhaustion requirements in Title 57 of the Oklahoma statutes. Section 564 of Title 57 requires a prisoner in the custody of the DOC to "completely exhaust all administrative remedies on all potential claims" before filing suit. 57 O.S.2011 § 564. Section 566.3 requires an inmate to have "exhausted all the remedies as provided in the grievance procedure" of the DOC before the district court may entertain the suit. 57 O.S.2011 § 566.3(G)(2). Finally, "full and complete exhaustion of all administrative and statutory remedies on all potential claims against . . . the Department of Corrections . . . is a jurisdictional requirement and must be completed prior to the filing of any pleadings." 57 O.S.2011 § 566.5. Whether the exhaustion requirement applies to Johnson's constitutional claim has not been previously decided by the Supreme Court. *See Washington v. Barry*, 2002 OK 45, n.3 (stating that "exhaustion of administrative

remedies is not an issue in this appeal," but noting the federal exhaustion requirement applicable to claims for a violation of constitutional rights filed by a prisoner pursuant to 42 U.S.C. § 1983).

¶28 However, we find some guidance on this issue in *Bosh v. Cherokee County Governmental Building Authority*, 2013 OK 9, 305 P.3d 994. "The Okla. Const. art. 2, § 30, provides a private cause of action for excessive force, notwithstanding the limitations of the Oklahoma Governmental Tort Claims Act . . . ." *Id.* ¶ 33. And, in "*Washington v. Barry* . . . this Court held that a private cause of action may exist for inmates to recover for excessive force under the provisions of the Okla. Const. art. 2, § 9 and the 8th Amendment of the United States Constitution – despite the provisions of the [Tort Claims Act]." *Id.* ¶ 18 (footnotes omitted). But, exhaustion of the DOC's grievance procedure was not an issue in *Washington* or *Bosh*. And, in *Hall v. The GEO Group, Inc.*, 2014 OK 22, 324 P.2d 399, the Court specifically refused to express an "opinion on the exhaustion of administrative remedies as applied to GEO's grievance procedure." *Id.* n.30.

¶29 The DOC argues that Johnson did not satisfy the exhaustion requirement because he did not initiate or complete the DOC grievance process. This argument ignores traditional rules of statutory construction. Both sections 564 and 566.5 of Title 57 require exhaustion of administrative "remedies," not exhaustion of an administrative "process." "[T]he general rule is that nothing may be read into a statute which was not within the manifest intention of the legislature as gathered from the language of the act." *Stemmons, Inc. v. Universal C.I.T. Credit Corp.*, 1956 OK 221, ¶ 19, 301 P.2d 212. "The law-making body is presumed to have expressed its intent in a statute's language and to have intended what the text expresses." *Yocum v. Greenbriar Nursing Home*, 2005 OK 27, ¶ 9, 130 P.3d 213 (footnote omitted).

¶30 Second, this construction is consistent with the express language of section 566.3(G)(2), which also only requires exhaustion of "all the **remedies** as provided in the grievance procedure" of the DOC. 57 O.S.2011 § 566.3(G)(2) (emphasis added). The Legislature did not require a prisoner to file a grievance and complete the grievance "process" before filing suit. The Legislature required a prisoner to exhaust pursuit of "all available administrative remedies. . . ." 57 O.S.2011 § 564.

¶31 Finally, this construction is consistent with federal law on this issue. In the appellate record is the Report and Recommendation of the federal magistrate judge filed in Johnson's federal case. That Report considered the GEO Group's motion for summary judgment arguing that Johnson's case should be dismissed for failure to exhaust administrative remedies available through the DOC's grievance process which GEO Group was required to adopt and follow. The Report states that exhaustion of available administrative remedies is required before a prisoner can sue in federal court, citing 42 U.S.C. § 1997e(a) (2006). The Report also states that Johnson did not exhaust the administrative process but concludes that "he had no obligation to do so" because the GEO Group did not identify any remedies that would have been available to Johnson if he had completed the grievance process. The Report recommended that the GEO Group's motion for summary judgment be denied. The federal district court adopted that recommendation and denied the GEO Group's motion for summary judgment on that basis.

¶32 Johnson sued the DOC for actual and punitive damages. Absent some form of immunity, monetary damages are an appropriate remedy for the violation of constitutional rights. *Gay Activists Alliance v. Bd. of Regents of Univ. of Okla.*, 1981 OK 162, ¶ 39, 638 P.2d 1116. The DOC's Inmate/Offender Grievance Process provides at paragraph II.B.4, that: "Grievances shall not be submitted requesting monetary compensation." Therefore, no remedy was available to Johnson for the monetary damages he seeks for the alleged violation of his Article 2, § 9 rights. The DOC's grievance process was not even available to him. If no administrative remedy is available, there is no administrative process to exhaust.

¶33 We hold that sections 564 and 566.5 of Title 57 only prevent a court from obtaining jurisdiction of a prisoner's Okla. Const. art. 2, § 9 claim if the DOC's grievance procedure would provide a remedy comparable to that available through an action in district court. In this case, it does not.

¶34 Consequently, Johnson was not required to initiate or complete the DOC's Inmate/Offender Grievance Process with respect to his constitutional claim for the denial of medical care prior to suing the DOC. The district court had jurisdiction of that portion of Johnson's petition. The judgment in favor of the DOC

regarding Johnson's Article 2, § 9 claim is vacated, and that aspect of this case is remanded for further proceedings.

III. Johnson's Appeal of the GEO Parties' Judgment

¶35 Johnson's Amended Petition in the Comanche County case alleges that he was physically assaulted on two occasions by a correctional officer employed by the GEO Group. From the record, it appears that the assaults occurred on April 5, 2012, and "about two weeks" before that. The individual that Johnson alleges committed these assaults is not named as a defendant in this case. However, Johnson did name him and the GEO Group as defendants in his April 2012 federal case. In this case, Johnson alleges that the GEO Group and GEO Care failed to provide medical care after the assault. Johnson's amended petition also alleges that GEO employees, Smith and Wood, were employed as medical personnel. But, the body of the petition does not allege any specific wrongdoing by either of these defendants.

¶36 Johnson claims that by denying him medical care, the GEO parties violated the rights guaranteed to him pursuant to Okla. Const. art. 2, § 9. He also alleges that the GEO parties have committed associated State torts including assault and battery, civil conspiracy, negligence, breach of fiduciary duty, fraud and intentional infliction of emotional distress. Like the DOC's motion, the GEO parties' motion for summary judgment does not principally rely on undisputed substantive facts, but raises essentially jurisdictional arguments.

A. Failure to Comply with Tort Claims Notice

¶37 The GEO parties argue that they are entitled to judgment because Johnson failed to comply with the notice provisions of the Tort Claims Act, citing 57 O.S.2011 § 566.4(B)(2): "No tort action or civil claim may be filed against any … private correctional company … until all of the notice provisions of the Governmental Tort Claims Act have been fully complied with by the claimant." *See also* 57 O.S.2011 § 566.5:

> In any legal proceeding filed by an inmate, full and complete exhaustion of all administrative and statutory remedies on all potential claims against the state, the Department of Corrections, private entities contracting to provide correctional services . . . is a jurisdictional requirement and must be completed prior to the filing of any pleadings.

The section 566.5 requirement for complete exhaustion of "statutory remedies" includes the notice provisions of the Tort Claims Act. *Hall v. The GEO Group, Inc.*, 2014 OK 22, ¶ 13, 324 P.3d 399. This is a jurisdictional requirement that must be satisfied before any suit can be filed against a private correctional facility. *Id.*

¶38 The central question in this aspect of Johnson's appeal is, what did the Legislature intend when it imposed these notice requirements on certain prisoner suits? The answer to that question requires construction of the relevant provisions of the Tort Claims Act, guided by the general principle that "the primary goal of statutory construction is to ascertain and follow the intention of the legislature and in construing statutes relevant provisions must be considered together, where possible, to give force and effect to each." *Ledbetter v. Okla. Alcoholic Beverage Laws Enf't Comm'n,* 1988 OK 117, ¶ 7, 764 P.2d 172 (footnotes omitted).

¶39 Unlike the DOC, the GEO parties are not protected by the State's sovereign immunity adopted in the Tort Claims Act. "The State of Oklahoma does hereby adopt the doctrine of sovereign immunity. The state, its political subdivisions, and all of their employees . . . shall be immune from liability for torts." 51 O.S.2011 § 152.1(A). None of the GEO parties is the State of Oklahoma, a political subdivision of the State or an employee of either. *See* 51 O.S. Supp. 2014 §§ 152 (11) and 152(13). And, we cannot add language to extend sovereign immunity to the GEO parties when the Legislature has not chosen to do so. "[T]he general rule is that nothing may be read into a statute which was not within the manifest intention of the legislature as gathered from the language of the act." *Stemmons, Inc. v. Universal C.I.T. Credit Corp.*, 1956 OK 221, ¶ 19, 301 P.2d 212.

¶40 Further, the Tort Claims Act does not provide a private right of action against the State for Johnson's claim against the GEO parties. "The state or a political subdivision shall not be liable if a loss or claim results from: An act or omission of an independent contractor or consultant or his or her employees . . . ." 51 O.S. Supp. 2016 § 155(18). Cf., 51 O.S.2011 § 153.1 ("Nothing in the Governmental Tort Claims Act shall be construed as allowing an action or recovery against this state . . . due to the housing of federal inmates or inmates from another

state in facilities owned or operated by private prison contractors."). Consequently, it is clear that the Legislature did not intend to create any new cause of action. It appears that the Legislature intended to impose nothing more than a procedural requirement that must be satisfied before any suit can be filed against a private correctional facility. Pursuant to this construction, the GEO parties' jurisdictional argument is limited to the notice provisions of the Tort Claims Act.

¶41 The notice section of the Tort Claims Act provides: "A claim against the **state** shall be in writing and filed with the Office of the Risk Management Administrator of the Office of Management and Enterprise Services . . . ." 51 O.S. Supp. 2012 § 156(C) (emphasis added). Section 156(D) of the Tort Claims Act sets out the requirements for filing a notice of tort claim against **a political subdivision** of the State and provides that the claim shall be "filed with the office of the clerk of the governing body." 51 O.S. Supp. 2012 § 156(D) (emphasis added). There is no provision in the Tort Claims Act requiring the submission of a notice of tort claim to a non-governmental entity like the GEO Group. And, there is no entity identified in the Tort Claims Act as the person designated to receive a notice of tort claim on behalf of a non-governmental entity like the GEO Group. The only notice required by the Tort Claims Act is notice to the State's risk manager or the clerk of its governing body of its political subdivisions.

¶42 Consequently, there is clear inconsistency between the literal direction in the exhaustion provisions of Title 57 and the notice provisions of the Tort Claims Act. "When a strict literal construction leads to an inconsistent or incongruent result between provisions, we will utilize rules of statutory construction to reconcile the discord and ascertain the legislative intent." *Hogg v. Okla. Cnty. Juvenile Bureau*, 2012 OK 107, ¶ 7, 292 P.3d 29 (citation omitted). In *Hall v. The GEO Group, Inc.*, 2014 OK 22, 324 P.3d 399, a prisoner in the custody of the DOC sued the private prison in which he was incarcerated for the alleged negligence of its ambulance driver. The prisoner did not file any notice or otherwise attempt to comply with the notice provisions of the Tort Claims Act before filing his suit. In affirming dismissal of the prisoner's case for lack of jurisdiction, the Supreme Court held that compliance with the notice provisions of the Tort Claims Act was required "prior to the filing of any pleadings." *Id.* ¶ 13. But, the Court did not address what notice was required or to whom it was to be submitted because the plaintiff had not submitted any notice. Therefore, what Johnson was required to do before filing suit against the GEO parties has not yet been settled.

¶43 As discussed in Part II(A) of this Opinion, Johnson did satisfy the notice requirements of the Tort Claims Act as to his claim against the DOC. Johnson's tort claim notice was submitted on February 6, 2014, less than one year after the date he was allegedly last denied medical care. *See* 51 O.S. Supp. 2012 § 156(B). And, Johnson's Comanche County suit was filed on April 4, 2014, within one hundred and eighty days after his tort claim was denied on March 12, 2014. *See* 51 O.S.2011 § 157(B). Those are all of the "notice provisions" of the Tort Claims Act available to Johnson or with which he could have complied. 57 O.S.2011 § 566.4(B)(2). We find no authority supporting the GEO parties' argument that the filing period for Johnson's notice of tort claim should have begun on April 13, 2012, the last date on which Johnson was incarcerated in their facility. This may have been the date on which the GEO parties last denied Johnson medical care, but that does not resolve the Tort Claims Act notice issue. The GEO parties' argument fails to consider the effect of the notice requirement on the accrual of Johnson's cause of action against them.

¶44 Although we find no provision in the Tort Claims Act requiring Johnson to notify any of the GEO parties of his claim against them, Johnson was clearly required to notify someone. *See* 57 O.S.2011 §§ 566.4 and 566.5. Even though Johnson was incarcerated at GEO's Lawton facility when these events occurred, he remained in the custody of the DOC. And, the DOC was responsible for selecting the GEO Group's facility as the location of Johnson's incarceration. Even if the DOC might ultimately be able to avoid liability for the acts or omissions of the GEO parties, *see* 51 O.S. Supp. 2016 § 155(18) and (25), the DOC should still be notified when prisoners in its custody have been harmed. It appears that is what the Legislature intended when it required a prisoner to comply with the notice provisions of the Tort Claims Act before suing a private correctional company under contract with the DOC.

¶45 As previously discussed, Johnson complied with the notice provisions of the Tort Claims Act available to him according to the

literal language of the statute. "The law-making body is presumed to have expressed its intent in a statute's language and to have intended what the text expresses." *Yocum v. Greenbriar Nursing Home*, 2005 OK 27, ¶ 9, 130 P.3d 213. The GEO parties have not directed us to any other Tort Claims Act notice procedure available to Johnson. Summary judgment in favor of the GEO parties was not available on the basis that Johnson failed to comply with the notice provisions of the Tort Claims Act.

B. GEO's Statute of Limitations Argument

¶46 Next, the GEO parties argue that Johnson's "*Bosh* claim" is barred by 12 O.S. Supp. 2017 § 95(11), the statute of limitations referencing suits based on facts that occurred while the plaintiff was a prisoner. Again, we note that Johnson's constitutional claim here is not based on the Article 2, § 30 claim recognized in *Bosh v. Cherokee County Governmental Building Authority*, 2013 OK 9, 305 P.3d 994. Johnson's claim is based on Article 2, § 9 of the Oklahoma Constitution. Nonetheless, the substance of the GEO parties' argument is that the events giving rise to Johnson's claim against them occurred, at the latest, by April 13, 2012, when he was transferred back to the DOC. Because Johnson's suit was not filed until April 4, 2014, they contend that Johnson's suit is barred by the one-year limitation period in 12 O.S.2011 § 95(11).

¶47 The applicable provision of section 95 provides:

> A. Civil actions … can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards:
>
> 11. All actions filed by an inmate or by a person based upon facts that occurred while the person was an inmate in the custody of one of the following:
>
> a. the State of Oklahoma,
>
> b. a contractor of the State of Oklahoma, or
>
> c. a political subdivision of the State of Oklahoma,
>
> … shall be commenced within one (1) year after the cause of action shall have accrued….

12 O.S.2011 § 95(11). However, in *Brown v. Creek County*, 2007 OK 56, 164 P.3d 1073, the Supreme Court held that the one-year period in section 95(11) did not extend the one hundred and eighty-day time limit governing suits filed pursuant to the Tort Claims Act. *Id.* ¶ 9. And, "limitations within the [Tort Claims] Act control over general statutory law." *Rout v. Crescent Pub. Works Auth.*, 1994 OK 85, ¶ 8, 878 P.2d 1045. The Tort Claims Act provides: "No action for any cause arising under [the Tort Claims Act] shall be maintained unless valid notice has been given and the action is commenced within one hundred eighty (180) days after denial of the claim . . . ." 51 O.S.2011 § 157(B). But *Brown* is distinguishable on this point. Brown's suit was based on acts that occurred while he was incarcerated in the Creek County jail. And, Brown sued Creek County, a political subdivision of the State. Consequently, Brown's suit was one "arising under" the Tort Claims Act. 51 O.S.2011 § 157(B). Johnson's claim does not arise under the Tort Claims Act, nor was a waiver of sovereign immunity necessary before Johnson could recover from the GEO parties.

¶48 Section 157 only controls when an otherwise applicable limitation period provides a different or inconsistent period in which to file suit.

> The laws and statutes of the State of Oklahoma and the Rules of Civil Procedure, as promulgated and adopted by the Supreme Court of Oklahoma insofar as applicable and to the extent that such rules are not inconsistent with the provisions of this act, shall apply to and govern all actions brought under the provisions of [the Tort Claims Act].

51 O.S.2011 § 164. There is no limitation period in the Tort Claims Act applicable to Johnson's claim against the GEO parties. Section 157(B) requires the commencement of a suit within one hundred and eighty days after the claim is denied but only as to suits "against the state or a political subdivision . . . ." 51 O.S.2011 § 157(A). As previously established, none of the GEO parties is either. Therefore, as to Johnson's claim against the GEO parties, section 95(11) is not "inconsistent" with the limitation provision of the Tort Claims Act.

¶49 However, we find that *Brown* is controlling to the extent that it establishes the time when Johnson's cause of action accrued. **"[A] cause of action does not accrue until the claim can be maintained."** *Brown v. Creek Cnty.*, 2007 OK 56, ¶ 5 (emphasis in original). For one who is required to comply with the notice provisions of the Tort Claims Act, "the right to sue

does not attach until the claim has been denied . . . ." *Id.* ¶ 7. Therefore, merely submitting a notice of tort claim does not trigger the accrual of a cause of action. Until a notice of tort claim has been denied, **"a plaintiff has no access to the courts . . . ."** *Id.* ¶ 6 (emphasis in original). We find no reason why this holding in *Brown* should not apply to prisoners in the custody of the DOC but incarcerated in a private prison. "[B]y extending the notice provisions of the GTCA to private prisons, the Legislature has ensured equal treatment between plaintiffs who are or were confined in state owned prisons with those who are or were confined in private prisons . . . ." *Hall v. The GEO Group, Inc.*, 2014 OK 22, ¶ 14, 324 P.3d 399. To hold otherwise would deprive the notice recipient of an opportunity to respond, and render the notice requirement meaningless.

¶50 We hold that Johnson was legally prohibited from filing his suit against the GEO parties "until all of the notice provisions of the Governmental Tort Claims Act have been fully complied with . . . ." 57 O.S.2011 § 566.4(B)(2). Johnson complied when he submitted his notice of tort claim to the DOC on February 5, 2014. But, until that claim was denied, his cause of action did not "accrue." *Brown*, 2007 OK 56, ¶ 7. Johnson's tort claim was denied on March 25, 2014. He filed his Comanche County petition on April 4, 2014, within the applicable limitations period.[2] The GEO parties are not entitled to summary judgment regarding their statute of limitations argument.

¶51 Even if the accrual of Johnson's claim is not controlled by the holding in *Brown*, summary judgment is not appropriate. In his summary judgment response, Johnson argued that the denial of medical care after an assault like he suffered can result in a chronic condition or permanent injury. He contended that his condition was diagnosed as chronic and potentially permanent, a fact he did not discover until late 2013 when he was released from prison and finally able to see a physician. Attached to Johnson's response is a portion of the transcript from the deposition of Johnson's treating physician, which supported Johnson's argument. "The discovery rule allows the limitation period in certain tort cases to be tolled until the injured party knows or, in the exercise of reasonable diligence, should have known of the injury." *Digital Design Group, Inc. v. Information Builders*, 2001 OK 21, ¶ 17, 24 P.3d 834 (footnote omitted).

¶52 The GEO parties did not file a reply to Johnson's summary judgment response or argue that the discovery rule was inapplicable. They merely argued that Johnson must have been aware of his injury by April 19, 2012, the date he filed his federal lawsuit based on the same injury. Consequently, a question of fact exists as to when Johnson knew of his injury. That dispute precludes summary judgment. "Only if the court should conclude that there is no material fact in dispute and the law favors the movant's claim or liability-defeating defense is the moving party entitled to summary judgment in its favor." *Copeland v. The Lodge Enters., Inc.*, 2000 OK 36, ¶ 8, 4 P.3d 699 (footnote omitted). If Johnson's cause of action accrued in late 2013, when he contends that he discovered the permanent nature of his injury, then his suit was filed within the one-year limitation period of section 95(11), the limitation period that the GEO parties argue is applicable. Summary judgment in favor of the GEO parties was not available on this basis.

C. Exhaustion of GEO's Grievance Process

¶53 The GEO parties also argue that they are entitled to judgment as a matter of law because Johnson failed to exhaust GEO's facilities' grievance procedure while he was incarcerated in their facility. According to the Special Report submitted by GEO's warden in Johnson's federal case, GEO "abides by the policy and procedure of the Oklahoma Department of Corrections regarding grievance procedures …." GEO conceded in the federal case that no real remedy was available to Johnson. And, the federal court ruled against GEO on that issue, a ruling that may have preclusive effect as discussed in the following section of this Opinion. If not, our discussion of the grievance exhaustion requirement in Part II(C) of this Opinion may dispose of GEO's exhaustion argument, a matter to be resolved on remand.

D. The Medical Affidavit Issue

¶54 The GEO parties also argue that Johnson failed to file an affidavit from a medical expert with his petition as required by 12 O.S. Supp. 2013 § 19.1(A). That statute applies in "any civil action for negligence wherein the plaintiff shall be required to present the testimony of an expert witness to establish breach of the relevant standard of care . . . ." *Id.* In those cases, the statute requires that the plaintiff submit an affidavit, filed with the petition stating that the plaintiff has consulted with an expert and has

obtained a written opinion that the plaintiff's claim is meritorious. *Id.* Johnson argues that an affidavit was not required because his is not a medical negligence case, but a claim based on the complete denial of medical care. The GEO parties did not respond to this argument or otherwise demonstrate the applicability of section 19.1 to this case.

¶55 Johnson also points out that GEO has taken the deposition of his medical expert and obtained the expert's opinion. The district court denied the GEO parties' motion to dismiss on this basis, and they did not seek immediate review of that decision. The GEO parties have failed to show that granting the relief they request at this point in the litigation would "secure the just, speedy, and inexpensive determination of [this] action." 12 O.S.2011 § 2001. The remedy for failure to comply with section 19.1 is a ninety-day extension within which to submit the missing affidavit. Summary judgment in favor of the GEO parties on this basis is not appropriate.

E. The Preclusive Effect of the Federal Court Judgment

¶56 The GEO parties' final argument is that Johnson's claim is precluded by the decision of the United States District Court for the Western District of Oklahoma in the related case that Johnson filed on April 19, 2012. In that case, Johnson sued the GEO Group and the correctional officer that he alleged committed the assaults. Johnson alleged that the GEO Group failed to properly supervise the officer and failed to provide adequate medical care after the assaults in violation of Johnson's federal constitutional rights. The GEO Group filed a motion for summary judgment, which the federal district court granted as to Johnson's claims for failure to supervise and failure to provide adequate medical care. The federal court entered judgment in favor of the GEO Group on November 5, 2013, noting that the case would proceed against the individual defendant. Ultimately, the case was dismissed after Johnson settled his claim against the GEO correctional officer. There is no evidence in this record showing that Johnson appealed the judgment in favor of the GEO Group.

¶57 Claim preclusion bars relitigation of issues by the same parties which either were or could have been litigated in a prior action that resulted in a judgment on the merits. *State ex rel. Tal v. City of Oklahoma City*, 2002 OK 97, ¶ 20, 61 P.3d 234. "The doctrine of [claim preclusion] is triggered when a judgment rendered by a court of competent jurisdiction upon a question involved in one suit is conclusive upon that question in any subsequent litigation between the same parties." *Reed v. JP Morgan Chase Bank*, 2011 OK 93, ¶ 9, 270 P.3d 140 (citation omitted). The issues that Johnson asserts against the GEO Group in this case appear to be the same as the issues that were resolved by the federal court judgment in favor of the GEO Group, but with one fundamental difference. Johnson's claim in federal court was based on the Eighth Amendment to the United States Constitution. His claim in this case is based on Okla. Const. art. 2, § 9. To apply claim preclusion, there must be an identity of subject matter. *Dearing v. State ex rel. Comm'rs of Land Office*, 1991 OK 6, ¶ 8, 808 P.2d 661. Although we have held that Johnson had an Oklahoma constitutional right to care for serious medical needs similar to his Eighth Amendment rights, the GEO Group has not shown or even argued that the Eighth Amendment right it litigated against Johnson in federal court is sufficiently identical to his state constitutional right such that the federal court judgment precludes litigation of Johnson's Article 2, § 9 right in this case. *Cf., Taylor v. City of Bixby*, 2018 OK CIV APP 18, ¶ 24, ___ P.3d ___ (citing *Bosh v. Cherokee Cnty. Governmental Bldg. Auth.*, 2013 OK 9, 305 P.3d 994 (*cert. denied* February 26, 2018)). If the moving party has not addressed all material facts, summary judgment is not proper. *Spirgis v. Circle K Stores, Inc.*, 1987 OK CIV APP 45, 743 P.2d 682 (approved for publication by the Oklahoma Supreme Court).

¶58 Further, GEO Care, Smith and Wood were not parties to the federal court litigation. Claim preclusion only applies to litigation in which there is an identity of "parties or their privies." *Erwin v. Frazier*, 1989 OK 95, ¶ 16, 786 P.2d 61. However, Johnson alleges that GEO Care is an affiliate of GEO Group and responsible for providing medical care to prisoners incarcerated in GEO Group's facilities. As to Smith and Wood, Johnson alleges that they were employees of the GEO Group and/or GEO Care and responsible for providing medical care to prisoners incarcerated in GEO Group's facilities. They also appear to be GEO Group affiliates, who could be protected by the claim preclusion doctrine and the judgment in the federal case unless it is alleged they engaged in some act or omission that was not litigated in the federal case. Johnson has not alleged

specific conduct against Smith and Wood on which he bases his claim in this case.

¶59 But we cannot resolve these issues on the basis of this summary judgment record. We are unable to do so because the GEO parties did not include the judgment roll from the federal case in the record in this case.

> While an appellate court can take judicial notice of its own records in litigation interconnected with a case before it, it cannot take judicial notice of records in other courts. Those who rely on a judgment for its issue-preclusive force (or for any other consequence consistent with an earlier adjudication's legal efficacy) are duty-bound to produce – as proof of its terms, effect and validity – the entire judgment roll for the case which culminated in the decision invoked as a bar to relitigation.

Salazar v. City of Okla. City, 1999 OK 20, ¶ 11, 976 P.2d 1056 (holding that failure to include the entire federal court judgment roll prevented giving preclusive effect to federal court judgment) (original emphasis and footnotes omitted). Although the appellate record in this case does contain some of the filings in the federal case and the order granting GEO Group's motion for summary judgment, it does not contain "'the petition, the process, return, the pleadings subsequent thereto, reports, verdicts, orders, judgments, and all material acts and proceedings of the court . . . .'" *Id.* at n.11. The GEO parties' failure to include the entire federal court judgment roll precludes summary judgment in their favor on the basis of any preclusive effect the federal court judgment might have.

¶60 The judgment in favor of the GEO parties is vacated and Johnson's claim against them is remanded for further proceedings.

CONCLUSION

¶61 The district court's judgment in favor of the DOC is affirmed in part and vacated in part. The judgment is affirmed as to Johnson's tort claims; it is vacated as to Johnson's constitutional claim that he was denied medical care while he was in the custody of the DOC. That aspect of the case is remanded for further proceedings. The judgment in favor of the GEO parties is also vacated, and that aspect of the case is remanded for further proceedings.

¶62 **AFFIRMED IN PART, VACATED IN PART AND REMANDED FOR FURTHER PROCEEDINGS.**

THORNBRUGH, C.J., and WISEMAN, P.J., concur.

JOHN F. FISCHER, JUDGE:

1. In *Taylor v. City of Bixby*, 2018 OK CIV APP 18, ___ P.3d ___ (*cert. denied*, February 26, 2018), this Court also held that Oklahoma prisoners have a private right of action pursuant to Article 2, § 9 based on the conditions of their confinement and the imposition of excessive fines.

2. We need not decide whether at this point Johnson had one hundred and eighty days (51 O.S.2011 § 157(B)), or one year (12 O.S. Supp. 2017 § 95(11)) to file his suit. Johnson's Comanche County petition was filed well within either limitation period.

2019 OK CIV APP 14

CITY OF BROKEN ARROW, OWN RISK #14157 Petitioner, vs. GARY R. SNYDER JR., and THE WORKERS' COMPENSATION COURT OF EXISTING CLAIMS, Respondents.

Case No. 116,715. August 8, 2018

PROCEEDING TO REVIEW AN ORDER OF THE WORKERS' COMPENSATION COURT OF EXISTING CLAIMS

HONORABLE MICHAEL W. MCGIVERN, TRIAL JUDGE

SUSTAINED

Leah P. Keele, Brandy L. Inman, LATHAM, WAGNER, STEELE & LEHMAN, Tulsa, Oklahoma, for Petitioner

Jeffrey M. Cooper, Oklahoma City, Oklahoma and Gary Homsey, Oklahoma City, Oklahoma, for Respondent

KEITH RAPP, JUDGE:

¶1 The City of Broken Arrow, Oklahoma (City), appeals an Order of the Workers' Compensation Court of Existing Claims awarding compensation and medical treatment to its employee, Gary R. Snyder Jr. (Snyder).

BACKGROUND

¶2 Snyder is employed by City as a fireman. He contracted thyroid cancer and claims that the cancer was caused by his exposures to sundry cancer causing substances while fighting fires and by diesel from fire vehicles.[1] His date of awareness is March 8, 2010.

¶3 The trial court found that Snyder sustained a work-related injury and awarded benefits. The question in this appeal is whether

that ruling is supported by competent evidence.

¶4 Snyder testified about his work as a fireman and exposures to sundry substances. He did not relate any specific instances of exposure, but spoke of how he was exposed as a matter of course in the types of fires he engaged. He acknowledged that he was provided and wore protective clothing and apparatuses when engaging fires. He had a prior employment, but passed the physical to become a fireman. He also had a second job where he was exposed to hazardous materials.

¶5 The parties submitted medical reports. The trial court appointed an independent medical examiner (IME).

¶6 Snyder's physician's report recited the work history and the fact of thyroid cancer. The physician concluded that the major cause of the thyroid cancer was the exposures to sundry listed hazardous substances at work. Snyder also presented study documents relating to firemen and exposures to substances and cancer and outlining the types of substances to which they are exposed. These documents do not mention thyroid cancer and these exposures.

¶7 City's physician's report also recited the employment history. This physician noted the statutory presumption and continued:

> However, the literature as it relates to thyroid cancers would overcome this presumption. There is an extensive report . . . . Under thyroid cancers are reviewed all the studies related to thyroid cancer and firefighting. According to this study, "There is clearly therefore no consistent evidence to suggest any occupational relationship between firefighting and thyroid cancer."

¶8 Drawing on the referenced studies, the physician concluded that the employment as a fireman was not the major cause of the thyroid cancer. He further stated that the major cause is unknown "which is the usual scenario."

¶9 The IME's report recited Snyder's medical and employment histories. The IME stated that there is no causal relationship between the development of the thyroid cancer and employment. The IME further stated that he had researched the literature "and found nothing that substantiates a causal link between firefighting and thyroid cancer." He continued:

> Most occupationally-related thyroid cancers are linked to high levels or prolonged periods of exposure to ionizing radiation, which is not applicable to this case. There is an ongoing study of firefighters and cancer, supervised by National Institute of Occupational Safety and Health (NIOSH) which is ongoing for several more years which may provide more information on this issue in the future.

¶10 The three-judge panel had reversed the trial court's original use of a statutory presumption. On remand from the three-judge panel, the trial court entered an Order determining that Snyder sustained a work-related injury, thyroid cancer, and ordering medical treatment.

¶11 The trial court referred to the study mentioned by City's physician. The trial court cited the study's finding that firefighters had a slightly elevated risk of contracting thyroid cancer. Accordingly, the trial court ruled that the firefighter occupation put its personnel at a greater risk of thyroid cancer than the public in general. The trial court then determined that a causal relationship existed.[2]

¶12 Next, the trial court referred to the IME's statement about "most thyroid cancers" being linked to ionizing radiation. The trial court reasoned that "most" does not exclude exceptions, so exposures from work might be a cause for a firefighter's thyroid cancer. The trial court departed from the IME for that reason.

¶13 City now appeals the order.

STANDARD OF REVIEW

¶14 Given the date of injury, this matter comes within the "any competent evidence" standard of review. 85 O.S. Supp. 1997, § 3.6(C); *Parks v. Norman Mun. Hosp.*, 1984 OK 53, 684 P.2d 548. The appellate court's responsibility is simply to canvass the facts, not to weigh conflicting proof in order to determine where the preponderance lies, but only for the purpose of ascertaining whether the decision is supported by competent evidence. *Id.*

ANALYSIS AND REVIEW

¶15 Here, all of the medical evidence was received without any objection as to competency, but overruled an objection to probative value.[3] The issue in this appeal is whether the evidence is legally sufficient to support the result of the appealed Order.

¶16 Snyder testified to exposures of hazardous materials, although without identification of specific times or incidents. His physician unequivocally related these exposures to the thyroid cancer. City presented a list of reasons why this physician's testimony should not be considered. All of the City's reasons relate to the weight and credibility of the report. Pursuant to the standard of review, this Court does not weigh the evidence.

¶17 Although the primary focus of the City's physician's report is to refute the statutory presumption, both he and the IME conclude that Snyder's exposures are not the major cause of the thyroid cancer. Neither physician disputed the existence of the cancer or the facts of exposures to hazardous substances.

¶18 The City's physician referenced studies. He quoted a study finding that there is "no consistent evidence to suggest an occupational relationship between firefighting and thyroid cancer." He concluded that the employment was not the major cause of the thyroid cancer and that the major cause was unknown.

¶19 The trial court concluded that the study did not exclude Snyder's exposures as the cause. This Court notes a logical inconsistency. If, as the physician reports, the major cause is "unknown" then it follows that: (1) he could not exclude any specific causation where the evidence is inconsistent as to causation; and, (2) he would have to state that he does not know what caused the thyroid cancer.

¶20 The IME based his opinion on his research of medical and scientific literature, which did not disclose any relationship between thyroid cancer and the occupational exposures to hazardous materials as in this case. This research led him to the conclusion that "most" occupationally related thyroid cancers resulted from exposure to ionizing radiation. It is undisputed that Snyder was not exposed to ionizing radiation.

¶21 The trial court stated that "most" does not exclude all causal relationships based upon exposures to hazardous materials. In other words, the weight that the trial court chose to afford to the IME's report was influenced by the IME's qualified opinion.

¶22 All three reports are competent evidence in the sense that they are admissible and no objection was made by either party. Therefore, the reports are in evidence and, as a result, there is a conflict of evidence in the medical reports. The trial court decides what weight shall be given to these three reports.

¶23 Where the evidence is in conflict and there is any competent evidence reasonably tending to support the finding of the Workers' Compensation Court, an order or award based on the competent evidence will not be reversed. *Mrs. Baird's Bakery v. Cox*, 2005 OK 28, ¶ 2, 112 P.3d 1168, 1170. "Factual findings made in the WCC decision under review are conclusive and binding, unless they lack support in competent evidence. Only if a relevant factual finding lacks support by competent evidence may a WCC decision based thereon be deemed erroneous as a matter of law and, thus, subject to vacation by an appellate court." *Id.*

¶24 Clearly, the trial court relied on Snyder's evidence. The trial court had a rational basis to afford less or no weight to the other two medical reports. Therefore, the Order of the trial court is supported by competent evidence and is sustained.

SUMMARY AND CONCLUSION

¶25 Snyder's claim for workers' compensation benefits for thyroid cancer is based upon his exposure to hazardous materials while employed as a fireman for City. The facts of exposure and existence of thyroid cancer are not disputed. Snyder supported his claim with a medical report.

¶26 The City and the IME concluded that exposures were not the cause of the thyroid cancer. The trial court examined the premises for these reports and clearly decided not to afford them weight.

¶27 The date of injury causes this case to be reviewed under the "any competent evidence" standard. The weight to be given evidence is a function of the trial court, not the appellate court under this standard.

¶28 After review of the record, this Court finds that the Order of the trial court is supported by competent evidence. Therefore, the Order is sustained.

¶29 **SUSTAINED**.

BARNES, P.J., and GOODMAN, J., concur.

KEITH RAPP, JUDGE:

1. The Workers' Compensation Court Three-Judge Panel ruled that the statutory presumption of 11 O.S.2011, § 49-110(A) was rebutted. That ruling is final for this case.

2. Due to the ruling of the three-judge panel, the trial court's conclusion is unaided by the statutory presumption.

3. "[I]n the area of workers' compensation an objection to the 'competency' of a medical report is directed to the exhibit's admissibility on hearsay or other legal grounds. Alternatively, an objection to an exhibit's 'probative value' is used to challenge the evidence for insufficiency as legal proof of (a) medical findings with respect to the presence or absence of compensable disability, or of (b) the compensable impairment's rating. In other words, when evidence is objected to as lacking in probative value, the issue is whether it is probative of the elements it seeks to establish once admitted." *Lacy v. Schlumberger Well Service*, 1992 OK 54, ¶ 6, 839 P.2d 157, 159-60. "[T]he term 'competent' as used in the Parks test refers to the legal sufficiency, on any ground of evidence which supports an order of the Workers' Compensation Court." *Lacy*, 1992 OK 54 ¶ 7, 839 P.2d at 160.

2019 OK CIV APP 15

LISA MCCLAIN, individually and as Special Administrator of the Estate of B.L.M., a minor, Plaintiff/Appellant, vs. BRAINERD CHEMICAL COMPANY, INC., an Oklahoma corporation, Defendant/ Appellee, and PSYCHO PATH, LLC, an Oklahoma limited liability company; VICTOR R. MARQUEZ and SUZETTE MARQUEZ, individually; and WEST TEXAS DRUM COMPANY, LTD, II, a Texas limited partnership, Defendants, and PSYCHO PATH, LLC, an Oklahoma limited liability company; VICTOR R. MARQUEZ and SUZETTE MARQUEZ, individually; and BRAINERD CHEMICAL COMPANY, INC., Third-Party Plaintiffs, v. ROBERT THOMAS, an individual, Third-Party Defendant.

Case No. 117,356. January 2, 2019

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

HONORABLE CAROLINE WALL, TRIAL JUDGE

AFFIRMED

Frank W. Fraiser, FRAISER, FRAISER & HICKMAN, LLP, Tulsa, Oklahoma, for Plaintiff/ Appellant

James K. Secrest II, Jennifer L. Struble, SECREST, HILL, BUTLER & SECREST, Tulsa, Oklahoma, for Defendant/Appellee/Third-Party Plaintiff Brainerd Chemical Company, Inc.

DEBORAH B. BARNES, PRESIDING JUDGE:

¶1 Plaintiff/Appellant Lisa McClain, individually and as Special Administrator of the Estate of B.L.M., a minor, appeals from the trial court's order granting the motion for summary judgment of Defendant/Appellee Brainerd Chemical Company, Inc. The order states that "all claims presented against [Brainerd] by [Plaintiff] are hereby dismissed, with prejudice," and the trial court certified its order as a final order "pursuant to 12 O.S. § 994(a), [as] there is no reason for delay[.]"

¶2 For purposes of summary judgment, the parties agree B.L.M. was employed by Defendant/Third-Party Plaintiff Psycho Path, LLC to work at its haunted house. They further agree that B.L.M. was fatally injured as a result of using a torch to open an empty barrel that had previously contained the chemical toluene.[1] Plaintiff admits B.L.M. "was not killed by using a torch on a barrel full of toluene, but on an empty drum" – i.e., a drum containing "residual toluene [that] went up in flames and killed [B.L.M.]" Plaintiff asserts "[i]t was foreseeable to [Brainerd]" – which is in the business of selling drums full of toluene[2] – that an "empty drum would be resold and [Brainerd] did not include proper warnings about the use of resold drums" containing residual amounts of toluene. Plaintiff asserts "[t]he drum put into commerce by [Brainerd] was defective and unreasonably dangerous and caused the injuries to [B.L.M.]," and Plaintiff has also asserted a theory of ordinary negligence against Brainerd based on this failure to warn as to the dangers of residual toluene.

¶3 From the trial court's order granting summary judgment in favor of Brainerd, Plaintiff appeals.

STANDARD OF REVIEW

¶4 "This appeal stems from a grant of summary judgment, which calls for *de novo* review." *Woods v. Mercedes-Benz of Okla. City*, 2014 OK 68, ¶ 4, 336 P.3d 457 (citation omitted). Under the *de novo* standard, this Court is afforded "plenary, independent, and non-deferential authority to examine the issues presented." *Harmon v. Cradduck*, 2012 OK 80, ¶ 10, 286 P.3d 643 (citation omitted). Summary judgment is appropriate "[i]f it appears to the court that there is no substantial controversy as to the material facts and that one of the parties is entitled to judgment as a matter of law[.]" Okla. Dist. Ct. R. 13(e), 12 O.S. Supp. 2013, ch. 2, app.

ANALYSIS

¶5 As indicated above, Plaintiff states it is suing Brainerd "in manufacturers' products liability." Plaintiff's contention in this regard is that "the drum was defective in that there was no warning that it was flammable even when empty, and that this made the drum unreason-

ably dangerous – dangerous beyond the extent contemplated by an ordinary user." Plaintiff does not dispute that the drum included a warning addressing the dangers of a drum full of toluene, but Plaintiff asserts that because this "limited warning on the drum [did] not contain the danger of an empty drum, . . . it was defective at the time it left [Brainerd's] control." Plaintiff has also asserted a theory of ordinary negligence against Brainerd, and states in this regard that Brainerd was "in a position to need to warn" B.L.M. and/or his employer regarding the dangers of residual toluene, and breached its duty to B.L.M. and/or his employer "by failing to do so."

I. Products Liability

¶6 The Oklahoma Supreme Court has identified three elements to a products liability claim: the defect must have (1) caused the injury in question, (2) existed at the time it left the manufacturer's control, and (3) made the product unreasonably dangerous. *Kirkland v. Gen. Motors Corp.,* 1974 OK 52, ¶ 0, 521 P.2d 1353 (Syllabus by the Court) (adopting § 402A of the Restatement (Second) of Torts (1965)). "The defect can stem from either a dangerous design or an inadequate warning about the product's dangers." *Braswell v. Cincinnati Inc.,* 731 F.3d 1081, 1085 (10th Cir. 2013) (applying Oklahoma law). *See also Swift v. Serv. Chem., Inc.*, 2013 OK CIV APP 88, ¶¶ 15-16, 310 P.3d 1127 (The plaintiffs in *Swift* argued the chemicals in question were defective "because they left [the manufacturer's] hands without a warning adequate to anticipate and prevent [the alleged] injury," and the court explained that "[l]iability is contemplated . . . if a product does not have a warning sufficient to inform 'an ordinary consumer of the product' of its dangerous characteristics . . . ." (citation omitted)).

¶7 As indicated above, Plaintiff in this case asserts a defect existed in the form of an inadequate warning. "The manufacturer of a product has a duty to warn the consumer of potential dangers which may occur from the use of the product when it is known or should be known that hazards exist." *Swift*, ¶ 16 (quoting *McKee v. Moore*, 1982 OK 71, ¶ 4, 648 P.2d 21).

> In order to qualify as "unreasonably dangerous," however, "[t]he article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." Restatement § 402A, comment (i). Thus, a supplier's duty to warn extends only to the "ordinary consumer" who purchases the product. Liability is contemplated only if a product does not have a warning sufficient to inform "an ordinary consumer of the product" of its dangerous characteristics, and if the risk of harm is not one that an "ordinary consumer who purchases the product" reasonably would expect. . . .

Swift, ¶ 16 (emphasis added).

¶8 Thus, "[t]he distinction to be made regarding who constitutes an ordinary consumer of a specific product is of important consequence." *Woods v. Fruehauf Trailer Corp.*, 1988 OK 105, ¶ 13, 765 P.2d 770. "Only when a defect in the product renders it less safe than expected by the ordinary consumer will the manufacturer be held responsible." *Id.* (citation omitted). However, in *Woods*, where the product in question was a gasoline tanker trailer, the ordinary consumer was articulated by the Court as "one who is familiar with the hazards associated with loading, transporting and unloading gasoline[.]" *Id.* ¶ 14. The *Woods* Court further explained that "an alleged 'defect' may not render the product less safe than expected where the same 'defect' may render the product unsafe as to the general public." *Id.* The *Woods* Court again emphasized that "evidence that the tank could have been made 'safer' does not establish that it was less safe than would be expected by the ordinary consumer." *Id.* ¶ 17.

¶9 In the present case, it is undisputed that Psycho Path, LLC acquired the used and empty (or seemingly empty) barrel in order to use it for its own unique purposes at its haunted house. It is undisputed Psycho Path, LLC was not attempting to purchase toluene; indeed, it purchased, or sought to purchase, an empty drum. Thus, the evidence unequivocally shows B.L.M. and his employer were not ordinary consumers of the product sold by Brainerd. Furthermore, it is undisputed that, as set forth above, the tanks of toluene sold by Brainerd did include a warning addressing the dangers of a drum full of toluene. Although an additional warning setting forth the dangers of residual toluene may have made the product safer to non-ordinary consumers, Oklahoma products liability law does not impose such an obligation on manufacturers or suppliers. Any alleged defect in a warning hinges on the

expectations of the ordinary consumer, and, here, the ordinary consumer of the toluene sold by Brainerd would be one "familiar with the hazards associated with" the product.

¶10 Products liability "represent[s] a departure from, and an exception to, the general rule that a supplier of chattels [is] not liable to third persons in the absence of negligence or privity of contract." Restatement (Second) of Torts § 402A cmt. b (1965). Oklahoma's strict products liability is based on § 402A of the Restatement. *See Allenberg v. Bentley Hedges Travel Serv., Inc.*, 2001 OK 22, ¶ 11, 22 P.3d 223.3 Section 402A provides as follows:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

¶11 Here, however, it is undisputed Brainerd was not in the business of selling empty drums.4 Moreover, the product which Brainerd was in the business of selling – drums of toluene – was opened and emptied prior to being resold on the secondhand barrel market. Thus, even assuming arguendo that B.L.M. or his employer can properly be viewed as ordinary consumers of Brainerd's product, Brainerd's product was substantially changed in condition prior to reaching them.

¶12 The fact remains, however, that neither B.L.M. nor his employer at the time of the accident can be viewed as ordinary consumers; indeed, it is undisputed they were not consumers at all of the toluene sold by Brainerd, but were, instead, consumers of a secondhand barrel. The circumstances of the present case are remarkably similar to those presented in *Thompson v. TCI Products Co.*, 81 F. SupP.3d 1257 (N.D. Okla. 2015). In *Thompson*, a worker "was using a plasma cutter to cut lids from secondhand barrels. . . . [O]ne barrel exploded when [the worker] began cutting it open, and the explosion reportedly rocked the surrounding area. [The worker] died before emergency personnel arrived." 81 F. SupP.3d at 1260.5 The barrel, prior to entering the secondhand barrel market, had contained a chemical sold as an automobile paint thinner/automobile painting equipment cleaner. The representative of the estate of the deceased worker brought suit against the manufacturer of this product.

¶13 As in the present case, the manufacturer included a warning label on the barrel; however, the manufacturer made no effort to ensure that any businesses purchasing the product subsequently sold "the used barrels to a barrel refurbisher." *Id.* at 1261. Applying Oklahoma law, the Thompson Court stated as follows:

> Plaintiff contends that the meaning of "ordinary consumer" extends beyond "users who a manufacturer specifically targets" and should include those, like [the deceased worker], who acquire barrels that at one point contained [the paint thinner]. The Oklahoma Supreme Court has defined the "ordinary consumer" as "one who would be foreseeably expected to purchase the product involved." *Woods v. Fruehauf Trailer Corp*., 765 P.2d 770, 774 (Okla. 1988). In *Woods*, the Oklahoma Supreme Court determined that the ordinary consumer of a tanker trailer designed to haul gasoline was "one who is familiar with the hazards associated with loading, transporting and unloading gasoline." *Id.* The Tenth Circuit, applying Oklahoma law, determined that the wife of a man who worked with a product containing asbestos was not an ordinary consumer of the product because she was not a "foreseeable purchaser or user"; her only contact with the product came through laundering her husband's clothes. *Rohrbaugh v. Owens-Corning Fiberglas Corp.*, 965 F.2d 844, 846-47 (10th Cir. 1992) (*Rohrbaugh I)*. Finally, the Oklahoma Court of Civil Appeals recently concluded that individuals who purchased a product made of repackaged raw chemicals were not ordinary consumers of the chemicals because the manufacturer sold "technical grade" chemicals not intended for use by the public and would sell only to industrial users. *Swift*, 310 P.3d at 1132.

81 F. SupP.3d at 1263.

¶14 The Thompson Court then convincingly reasoned as follows:

> Even were the Court to broaden the meaning of "ordinary consumer" beyond [an automobile paint or body shop technician], it would not encompass [the deceased

> worker]. Fundamentally, [the deceased worker] was intent on acquiring the used barrel so that he could transform it for his own purposes; the contents of the barrel were irrelevant. As in *Rohrbaugh I,* there is no evidence that [the deceased worker] ever intended to or would purchase [the product in question]. He thus cannot be considered "one who would be foreseeably expected to purchase the product involved," *Woods*, 765 P.2d at 774; to so find would expand the meaning of "foreseeable" beyond the bounds of Oklahoma law. The Court finds that the ordinary consumer of [the product in question] is the automobile paint and body shop technician, as that is the person who would foreseeably purchase and use [the product].

81 F. SupP.3d at 1264.

¶15 We similarly conclude the ordinary consumer of the product sold by Brainerd is the industrial purchaser of toluene. Moreover, even were we to broaden the meaning of "ordinary consumer" beyond such a purchaser, it would still not encompass B.L.M. or his employer. We further conclude Brainerd's failure to warn regarding the dangers of empty drums containing residual amounts of toluene did not render its product unreasonably dangerous to an extent beyond that which would be contemplated by the ordinary consumer. Pursuant to *Thompson*, as well as to *Woods* and *Swift*, we conclude, as a matter of law, that Brainerd cannot be held liable under the strict products liability theory advanced by Plaintiff.

II. Negligence

¶16 In order to support an actionable claim under a negligence theory,

> it is necessary for a plaintiff to establish the concurrent existence of: 1) a duty on the part of the defendant to protect the plaintiff from injury; 2) the failure of the defendant to perform that duty; and 3) injury to the plaintiff resulting from such failure.

Woods, ¶ 19 (footnote omitted). As in the present case, in *Swift* the plaintiffs asserted a theory of ordinary negligence against the manufacturer of the chemicals in question "for negligent failure to warn of use of the chemicals." *Swift,* 2013 OK CIV APP 88, ¶ 24. As set forth above, and similar to Plaintiff's articulation of its products liability theory, Plaintiff asserts that Brainerd was "in a position to need to warn" B.L.M. and/or his employer regarding the dangers of residual toluene, and breached its duty to B.L.M. and/or his employer "by failing to do so."

¶17 In this regard, the *Swift* Court explained:

> Under a negligence theory of recovery, a seller or supplier of a product has a duty to use reasonable care to provide adequate warnings or instructions to avoid injury to a foreseeable plaintiff. An essential element to recovery is that the defendant owed the plaintiff a duty of care under the circumstances presented. "Just because the defendant has created a risk which harmed the plaintiff . . . does not mean that, in the absence of some duty to the plaintiff, the defendant will be held liable." *Nicholson v. Tacker,* 1973 OK 75, ¶ 11, 512 P.2d 156, 158. Whether a duty of care exists in a particular case is a question of law for the court to determine. *Prince v. B.F. Ascher Co.*, 2004 OK CIV APP 39, 90 P.3d 1020.

Swift, ¶ 24.

¶18 In reaching its conclusion that the manufacturer of the chemical did not owe a duty to the injured party, the *Swift* Court was guided by the Oklahoma Supreme Court's analysis in *Duane v. Oklahoma Gas & Electric Co.*, 1992 OK 97, 833 P.2d 284. The *Duane* Court explained "there is no duty to warn where the product is used in an unlikely, unexpected or unforeseeable manner." *Id.* ¶ 4. In *Duane*, the plaintiff "sued, among others, Shell and Chevron, for strict liability and negligence, arguing that Shell and Chevron were liable to him for their failure to warn of the dangerous propensities of their insulating oil." *Id.* ¶ 2 (footnote omitted). The plaintiff in *Duane* was employed by a company that designed "oil-filled switches," and one of these switches had been placed inside a tank which, after being shipped to a customer, "had exploded internally." *Id.* ¶ 1. It was surmised that the switch itself had failed, and the tank was therefore shipped back to the plaintiff's employer.

> In order to discover the cause of the switch's failure, [the plaintiff's employer] instructed his employees to drain the switch of the oil remaining inside before cutting open the tank, as they had done many times in the past. This time, however, [the plaintiff's employer] additionally instructed [the plaintiff] to purge the switch with compressed air before grinding it open to in-

spect the inside. [The plaintiff] was injured when he began grinding and the tank exploded.

Id. ¶ 2.

¶19 As indicated, the plaintiff in *Duane* sued the suppliers of the insulating oil, alleging that this oil caused the explosion which resulted in the plaintiff's injuries. However, regarding the duty to warn of dangerous characteristics, the Court explained as follows:

> The general rule as to a supplier's duty to warn of known dangers in the ordinary use of its product is set out in Restatement of Torts (Second), § 388:
>
> One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier
>
> (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and
>
> (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and
>
> (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.
>
> We find that neither (a) nor (b) above is present in the case at bar. The use for which the chattel in this case was supplied was for insulating oil to be used in oil-filled vacuum switches designed and manufactured by [plaintiff's employer]. The oil was not inherently dangerous for the use for which it was supplied: as insulating oil. Plaintiffs' own allegations are that the oil became dangerous when a variety of conditions occurred, such as severe electrical arcing, purging the switch with air, and grinding.

Duane, ¶¶ 5-6.

¶20 It is undisputed that B.L.M. and his employer were not using Brainerd's product "for the use for which it was supplied." Indeed, at the time of the accident, Brainerd's product was neither being used "in the manner for which" it was supplied, nor "by a person for whose use it [was] supplied." Therefore, we conclude there was no duty to warn B.L.M. or his employer in the manner advanced by Plaintiff. Finding no duty, we conclude Brainerd cannot be held liable under the ordinary negligence theory advanced by Plaintiff.

CONCLUSION

¶21 We conclude Brainerd cannot be held liable under either the products liability theory or ordinary negligence theory advanced by Plaintiff. Therefore, we affirm the trial court's award of summary judgment in favor of Brainerd.

¶22 **AFFIRMED**.

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

DEBORAH B. BARNES, PRESIDING JUDGE:

1. In the deposition of a corporate representative of Brainerd, the representative testified that "[t]he majority of a paint thinner is toluene." He testified that is why it is sold to entities like "Anchor Paint."

2. *See* n.4, *infra*.

3. In Oklahoma, "the seller of a product in a defective condition, which is unreasonably dangerous to the user or consumer, is strictly liable for the physical harm to the person or property caused by the defect. This theory of recovery is based on the Restatement (Second) of Torts, § 402A (1965)." Allenberg, ¶ 11 (footnote omitted).

4. In Plaintiff's supplemental response to Brainerd's motion for summary judgment, Plaintiff attached an affidavit of her attorney wherein he states that, based on the "recent testimony of Defendants Marquez" – *i.e.*, the employers of B.L.M. and the owners of Psycho Path, LLC – "[i]t is unknown when and from whom the barrel in question was purchased. The chain of custody of the barrel could have been with Defendant Thomas, Defendant West Texas Drum Company, or Defendant Brainerd. From the deposition of Mr. Marquez, it appears that more likely than not, the barrel was in the possession of one [of] these three (3) Defendants," and "it is impossible to determine which Defendant had custody of the barrel" immediately before it came into the possession of the Marquezes. However, it appears that any lack of evidence in this regard – in particular, lack of evidence as to whether Brainerd sold the empty drum directly to Psycho Path, LLC – is the result of the fact that this issue was never in dispute. That is, as set forth above, it was Plaintiff's position (at least until the filing of its supplemental response) that the drum was "resold" – *i.e.*, that it was foreseeable to Brainerd that its drums full of toluene might be subsequently resold – but at no point did Plaintiff allege that Brainerd was in the business of selling empty tanks or that it sold the tank to Psycho Path, LLC.

More importantly, evidentiary materials have been presented in support of the conclusion that Brainerd was in the business of selling toluene, not emptied secondhand barrels, and that the owners of Psycho Path, LLC purchased a barrel on the secondhand market from Third-Party Defendant Robert Thomas, an individual not affiliated with Brainerd, who testified to selling one-hundred secondhand barrels to Psycho Path, LLC just prior to the accident. *See, e.g.*, R. Tab 4, Brainerd's Exhibit 2 (stating, *inter alia*, "Product identifier [–] Toluene," "Distributed by: brainerd," "intended for use as a refinery feedstock, fuel or for use in engineered processes"); R. Tab 4, Brainerd's Exhibit 3; R. Tab 4, Brainerd's Exhibit 6 ("Through discovery, the parties have learned that [Mr. Thomas] actually supplied the used barrel that is the subject matter of this litigation . . . ."); R. Tab 6, Plaintiff's Exhibit 2 (deposition of Mr. Thomas wherein the following statements are found: "Mr. Victor Marquez, this individual who purchased the barrels"; "your testimony is that you sold Psycho Path two different orders of 50 barrels each? A. Yes, sir."; the sale occurred "[a]bout a week or two before Halloween."). Therefore, even if Mr. Marquez stated in his deposition that he does not know "when and from whom the barrel in question was purchased," this does not support a reason-

able, non-speculative, and countervailing inference that Brainerd sold the empty tank to Psycho Path, LLC.

Thus, we agree with Brainerd's assertions in its response in opposition to Plaintiff's supplemental response, wherein it states that no testimony of Mr. Marquez "change[s] the facts as they had previously been identified." Brainerd asserts, "Nothing in the testimony of Mr. Marquez indicates that the barrel came from anywhere but Mr. Thomas." Brainerd asserts this is "a fact known since July 2016, when Mr. Thomas gave his deposition and admitted that he had sold a large number of barrels to Mr. Marquez" prior to the accident. Brainerd further asserts Plaintiff has "presented no evidence that the barrel in question came from anywhere other than Mr. Thomas."

> Once a defendant has introduced evidentiary materials showing no substantial controversy as to one fact material to plaintiff's cause of action and this fact is in defendant's favor, the burden shifts to the plaintiff to show that evidence is available which would justify a trial of the issue. If such evidence is not presented, summary judgment should, if appropriate, be entered against the non-moving party.

Swift, 2013 OK CIV APP 88, ¶ 28 (internal quotation marks omitted) (citation omitted). We conclude Mr. Marquez's asserted lack of knowledge as to the provenance of the particular barrel in question fails to create a substantial dispute of material fact in this regard.

5. Notably, evidentiary materials were presented that "secondhand barrels 'have a thousand and one uses on the rural America farm.'" *Id.*

2019 OK CIV APP 16

AUTOMOTIVE FINANCE CORPORATION, Plaintiff/Appellee, vs. MARSHA ANNETTE ROGERS, individually, and d/b/a AUTOMOTIVE SOLUTIONS, Defendant/Appellant.

Case No. 115,626. March 1, 2019

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

HONORABLE MILLIE OTEY, TRIAL JUDGE

REVERSED AND REMANDED WITH INSTRUCTIONS

Kara Pratt, BARBER & BARTZ, Tulsa, Oklahoma, for Plaintiff/Appellee,

Keith O. McArtor, Amanda C. Mims, Tulsa, Oklahoma, for Defendant/Appellant.

Barbara G. Swinton, Judge:

¶1 In the proceeding filed by Plaintiff/Appellee Automotive Finance Corporation (Creditor) to enforce a foreign judgment pursuant to the Uniform Enforcement of Foreign Judgments Act, 12 O.S. 2011 §§ 719-726 (the Act),[1] Defendant/Appellant Marsha Annette Rogers, individually and d/b/a Automotive Solutions (Debtor) appeals a court order denying her motion seeking a determination of dormancy of judgment. Based on the record and applicable law, we reverse the order.

¶2 The appellate record includes only six items. The first is a "Default Judgment Entry" dated November 6, 2006 and signed by a judge from the U.S. District Court in the Southern District of Indiana, Case No. 1:06-cv-1417-SEB-JPG. The federal court judgment finds in favor of Creditor and against Debtor[2] and grants a total award of $340,560.50 plus attorney's fee and post-judgment interest. Creditor "registered" the "authenticated" federal judgment in Oklahoma by filing it with the Court Clerk of Tulsa County on June 10, 2009, Case No. CJ-2009-4308).[3]

¶3 The second item is a "Garnishment Affidavit" filed March 18, 2010 in CJ-2009-4308. The Affidavit states that Marsha Annette Rogers lists Century Bank as the garnishee and alleges it possessed non-exempt property of Debtor.

¶4 The third item in the record, a "Notice of Bankruptcy Filing," was filed in CJ-2009-4308 on August 23, 2010. The Bankruptcy Notice states "the above-named Debtors, Glenn David Chafin and Marsha Annette Chafin, filed on August 4, 2010, a Chapter 7 bankruptcy proceeding in the United States Bankruptcy Court for the Northern District of Oklahoma, such being numbered 1-12686-M."

¶5 The fourth item is a "Notice of Renewal of Judgment" that Creditor filed on October 23, 2015. In pertinent part, the Notice of Renewal states "date of Filing with the Court Clerk: November 6, 2006"[4] and confirmed that no notice of renewal of Judgment has been previously filed with the Court Clerk.

¶6 The fifth item is a motion filed by Debtor in CJ-2009-4308 on August 11, 2016, seeking, inter alia,[5] a determination that the "foreign judgment ... out of the U.S. Dist. Court of Southern District of Indiana [filed] in this Court on June 10, 2009" is dormant and unenforceable as a matter of law. Citing 12 O.S. 2011 § 735, Debtor argued "no execution or renewal of judgment was filed in the matter until a notice of renewal of judgment was filed on October 23, 2015 more than five (5) years after the Garnishment Affidavit and Summons was filed on March 18, 2010."[6]

¶7 The sixth item, the trial court's Order filed December 1, 2016, states an assets hearing was held on November 11, 2016, at which Debtor appeared with counsel. The order further states the trial court denied Debtor's motion, finding Creditor's "judgment is still enforceable." Debtor then filed this appeal, in which no transcript of the hearing was provided because "no stenographic reporting was made."

Standard of Review

¶8 The parties do not include a standard of review in their respective brief(s). Selection of the appropriate standard of appellate review requires the correct characterization of the trial court proceedings. *In re Assessment of Personal Property Taxes Against Missouri Gas Energy, Div. of Southern Union Co., for Tax Years 1998, 1999, and 2000*, 2008 OK 94, ¶ 17, 234 P.3d 938, 946. This proceeding was filed pursuant to the Act, the purpose of which is enforcement or collection of foreign judgments. *Taracorp, Ltd. Dailey,* 2018 OK 32, ¶ 22, 419 P.3d 217, 220. Said judgments are treated the same as if they were initially issued in Oklahoma." *Id.*

¶9 The Act's single filing requirement of "an authenticated foreign judgment" alone suggests it is a special proceeding.[7] Support is further found in §725 of the Act, which provides "[t]he right of a judgment creditor to bring an action to enforce his judgment instead of proceeding under this act remains unimpaired." Relying, in part, on § 725, Oklahoma courts agree foreign judgments filed pursuant to the Act are not civil actions to which 12 O.S. 2011 § 95's three year statute of limitations applies. *See Ford Motor Credit Co. v. Kurz*, 2015 OK CIV APP 16, ¶ 5, 344 P.3d 1100; *Producers Grain Corp. v. Carroll*, 1976 OK CIV APP 3, ¶ 10-11, 546 P.2d 285, 287-288 ("The Act was designed as a viable alternative to the traditional method of enforcing foreign judgments by separate lawsuit in which the judgment was considered nothing more than a contract debt...[and] lacked the force of a domestic judgment, except for evidentiary purposes.")

¶10 However, the appeal in this case is not brought from an order determining compliance with the Act.[8] Rather, according to the certified court appearance docket,[9] the proceeding that is subject to this appeal was filed pursuant to Oklahoma's post-judgment discovery and collection provisions under Title 12 O.S. § 841 *et seq*. *Bowles v. Goss*, 2013 OK CIV APP 76, ¶ 3, 309 P.3d 150. Such matters are "supplemental proceedings in aid of execution and are equitable in nature." *Id*., (citing *Stone v. Coleman,* 1976 OK 182, ¶ 2, 557 P.2d 904). As here, a "proceeding to disclose assets" pursuant to § 842 is "a special proceeding in an action after judgment." *Weaver v. Fourth Nat. Bank of Tulsa*, 1953 OK 329, ¶ 4, 263 P.2d 194. A § 842 proceeding is commonly known as a "hearing on assets." *See Bowles*, ¶ 21. In a § 842 proceeding, a debtor's challenge to the enforceability of a judgment under § 735 is a legal question for the court that is reviewed *de novo. Chandler-Frates & Reitz v. Kostich*, 1981 OK 74, 630 P.2d 1287.[10]

ANALYSIS

Compliance with 12 O.S. § 735

¶11 Both parties cite *3M Dozer* as authority for their opposing positions on the single question Debtor raises on appeal – whether the bankruptcy code tolls Oklahoma's dormancy statute, 12 O.S. 2011 § 735, during Debtor's § 362(a) automatic stay to allow Creditor to file a notice of renewal after the judgment's expiration. Section 735 provides that a judgment "shall become unenforceable and of no effect" unless, within five years after its filing in Oklahoma, a judgment creditor has performed specific steps for renewing the judgment.

¶12 In *3M Dozer* the need to address the tolling issue arose only because, prior to expiration of the judgment's five year extension that was due to expire during the debtor's bankruptcy stay, the judgment creditor had failed to comply in some respect with the statutory requirements for renewing its judgment and extending its judgment lien. Debtor in this appeal has not alleged any errors with the judgment creditor's compliance with § 735, and with no hearing transcript, it is impossible to confirm whether the issue was raised below.

¶13 An appellant's failure to raise an issue to the trial court generally prevents this court from addressing the unraised issue because "it is not the function of this court to make first-instance determinations of fact or legal questions which have been neither raised nor assessed at nisi prius." *Broadway Clinic v. Liberty Mutual Ins. Co*., 2006 OK 29, ¶ 26, 139 P.3d 873. Implied in the trial court's order, which expressly finds the "judgment is still enforceable," is necessarily a finding that Creditor did substantially comply with § 735's requirements to prevent its judgment from becoming unenforceable. Unlike in *Broadway Clinic*, the issue of statutory compliance with § 735 is the basis of the trial court's order and not a first instance question of law.

¶14 Moreover, "it is a well known general principle of appellate procedure that legal issues adjudicated on appeal are those which were raised either directly or by implication." (Emphasis added.) *Hedrick v. Commissioner of Dept. Of Public Safety*, 2013 OK 98, ¶ 16, 315 P.3d

989, 1002 (J. Edmondson, concurring in result). "Raising an issue either directly or indirectly... would include not only those issues actually raised by parties and adjudicated, but also those fairly comprised by the issues actually raised and the nature of the adjudication.[11] *Id.*

¶15 "An issue may be fairly comprised in a different issue....when a necessary part of the trial court's adjudication on a raised issue requires adjudication of a fairly comprised issue because it is within the evidentiary record before the tribunal on its decision." *Id.* In Creditor's proceeding to enforce a foreign judgment pursuant to the Act by means of a § 842 hearing on assets, the district court record constituted the "evidentiary record" necessary for the trial court's adjudication of the raised issue, the enforceability of the judgment, and the fairly comprised issue, Creditor's compliance with § 735. Because the unraised issue of Creditor's compliance with § 735 is fairly comprised within the issue Debtor raises on appeal and the court's ruling, the unraised legal issue is properly before this Court for review.

¶16 Our starting point, which neither party has addressed, is § 735's impact on a federal judgment registered in this state pursuant to the Act. When a judgment creditor has filed a foreign judgment that is enforceable at the time of its registration in Oklahoma, it is to be considered a "new judgment" for purposes of § 735 and "the dormancy period begins to run from the date of registration." *U.S. Mortgage v. Laubach*, 2003 OK 67, ¶ 13, 73 P.3d 887, 896. As previously explained, the record includes Creditor's federal judgment that was registered by filing it with the court clerk on June 10, 2009, and on that date Creditor's federal judgment became a new judgment for purposes of starting § 735's dormancy period. Thus under normal circumstances, the initial five year life of Creditor's judgment would expire five years later on June 10, 2014, unless sometime within the next five years Creditor renewed the judgment for five more years.

¶17 Creditor's appellate argument and calculations in support of the trial court's order is dependent on its judgment renewal under § 735(A)(3), which provides, "A judgment shall become unenforceable and of no effect, if, within five years from the filing.... 3. A garnishment summons is not issued by the court clerk." Claiming a garnishment summons was issued on March 18, 2010 in this proceeding, Creditor argues its judgment's five year renewal would not expire until March 18, 2015.

¶18 According to *Laubach*, "[i]t is uniformly the registrant (the judgment creditor) who bears the burden of proof and persuasion to show the continued efficacy of its non-Oklahoma judgment that has been registered in the state for enforcement as a domestic judgment. (Footnotes omitted; emphasis added.) *Id.*, ¶ 15. Relevant to that burden, the Court held "[t]o show a judgment lien's present effectiveness during summary process," District Court Rule 13's use of evidentiary substitutes to eliminate disputed facts did not control, and instead, the judgment creditors "must tender documentation that meets the standards of [12 O.S.Supp. 1997] § 759." *Id.*, ¶ 23. "That documentation must (a) bear the federal court clerk's certificate which identifies the document as a true and correct copy of the original on file in the clerk's office as well as (b) be filed in the Oklahoma County Clerk's office before the dormancy period has run on the registered federal-court judgment." *Id.*, ¶ 24.

¶19 Reviewing "a garnishment summons" the creditors attached to their summary judgment motion and represented it was issued in the federal-court case, the Court in *Laubach* stated "the summons, which bears a notation that it was recorded in the Oklahoma County Clerk's office on 13 September 2002, neither reflects the date of its issuance nor bears a certificate that it is a true and correct copy of the document in the custody of the federal court clerk." *Id.* The Court affirmed the court's finding that the judgment lien was no longer efficacious because the creditors "failed to show that they had filed in the county clerk's office a certified copy of the garnishment summons timely issued by the federal court clerk." (Emphasis added.) *Id.*

¶20 Nothing in the record remotely suggests Creditor has a perfected judgment lien. Nevertheless, we can find no reason why the *Laubach* Court's evidentiary standard for proving the present effectiveness of a judgment lien would not apply equally to Creditor's burden here to show its judgment's present enforceability.[12] Therefore to support Creditor's claim its registered judgment's initial life was renewed for five more years or until March 18, 2015, the record must show documentation meeting the standards of § 735(A)(3), *i.e*, a garnishment summon issued by the court clerk on March 18, 2010.

¶21 It is Appellant's burden to present a record that demonstrates the trial court erred, and she has accomplished that task in this appeal. Our review of the meager appellate record in this special proceeding reveals the documentation required here to establish Creditor's judgment was renewed until March 18, 2015, instead of its initial life's expiration June 9, 2014, does not meet the standards of § 735.

¶22 As previously explained, the appellate record submitted to this Court includes a "Garnishment Affidavit" filed on March 18, 2010, with "Century Bank" as the garnishee.[13] As relevant here, the affiant of the March 18, 2010 Garnishment Affidavit swore that "I am not seeking a continuing garnishment."

¶23 There is no garnishment summons included in the appellate record. The certified court appearance docket included therein has two separate entries for "3/18/2010," the first of which states "Garnishment Affidavit W/ Summons (Post-Judgment)." The second entry simply states "Garnishment Summons Issued Mailed by Plaintiff or Attorney." If such occurred, there is no proof in the district court record that is available to this Court.

¶24 There are several types of postjudgment garnishment, *see* 12 O.S.2001 § 1171, including a noncontinuing earnings garnishment pursuant to 12 O.S. 2001 § 1173. This type of garnishment is commenced by filing a garnishment affidavit. 12 O.S.2001 § 1173. Section 1173(D) mandates "the summons shall be served upon the garnishee... in the manner provided for in [§] 2004 of [Title 12] and shall be returned with proof of service within ten (10) days of its date." (Emphasis added.) Section 2004(2)(b) provides "[s]ervice by mail to a garnishee shall be accomplished by mailing a copy of the summons and notice by certified mail, return receipt requested, and at the election of the judgment creditor by restricted delivery, to the addressee."

¶25 Section 1174(C), which applies to "all cases of postjudgment garnishment," requires the court clerk to attach with the garnishment a notice about certain exemptions to which the defendant may be entitled and the need to request a hearing. Pursuant to § 1174(D), "said notification" may be accomplished by several options, including:

> 1. Serving a copy of the garnishee summons on the defendant or on his attorney of record in the manner provided for the service of summons; or
>
> 2. Sending the notice or a copy of the garnishee summons to the defendant or his attorney of record by registered or certified mail with return receipt requested, which receipt shall be filed in the action. (Emphasis added.)

Contrary to these statutes, the appearance docket in this proceeding has no entry for a return of service or proof of mailing with the required receipts to either the garnishee or to Debtor (or her attorney or record) and to which the garnishment summons should have been attached.[14] Therefore, other than entries on the court appearance docket, there is no proof in the appellate and district court records to establish "a garnishment summons was issued by the court clerk."

¶26 We note here that Debtor admits in her Brief in Chief that Creditor's Garnishment Affidavit w/Summons was issued March 18, 2010. Uncontroverted admissions in the brief may be accepted as material supplementing a deficient appellate record. *Deffenbaugh v. Hudson*, 1990 OK 37, ¶4, 791 P.2d 84, 85. Regardless, as this Court interprets the *Laubach* standard for a creditor's burden to prove "the continued efficacy of its non-Oklahoma judgment that has been registered in the state for enforcement as a domestic judgment": 1) entries in a court appearance docket and 2) a party's admission on appeal, would not qualify as "documentation that meets the standards of § 735" and should not be relied upon to prove compliance with its requirements. On the record before us, we conclude Creditor has not carried its burden of proof to show its compliance with § 735(A)(3).

¶27 Without record proof of a garnishment summons issued by the Court Clerk on March 18, 2010 to establish Creditor's judgment was renewed until March 18, 2015, the record before us establishes the relevant dormancy period for Creditor's registered judgment was from June 10, 2009 to June 10, 2014. Assuming, without deciding, § 735 may be tolled during Debtor's bankruptcy stay pursuant to the bankruptcy code and/or Oklahoma law, adding one year for the stay to the registered judgment's normal June 10, 2014 expiration would result in a new expiration of June 10, 2015, for which Creditor's notice of renewal of judgment filed October 23, 2015 was filed too late to prevent the judgment's dormancy.

Tolling of the judgment

¶28 Debtor argues the judgment is dormant and unenforceable because Creditor: 1) did not file a notice of renewal of the judgment during the automatic stay, and 2) neither filed a notice of renewal nor attempted to enforce its judgment for the 3.5 years between the lifting of the stay and the March 18, 2015 expiration of the judgment's five year extension. As a result, Debtor contends Creditor's notice of renewal filed October 23, 2015, was filed seven months and five days too late to prevent the judgment's dormancy.

¶29 Debtor concedes in her Reply brief that Creditor's October 23, 2015 Notice of Renewal would be timely filed "only if the entirety of the bankruptcy proceedings tolled the five year limitation." However, she argues § 735 "provides for no tolling and no exceptions" and tolling under these circumstances would be inequitable based on Creditor's total inaction for 3.5 years after the stay was lifted.

¶30 The very complex facts in *3M Dozer* presented two main issues.[15] The Court first addressed the effect of § 362(a) automatic stay on the creditor's right to renew and/or enforce its judgment and judgment lien pursuant to 12 O.S. §§ 735 and 759. The creditor unsuccessfully attempted to renew its judgment by filing a notice of renewal and also to extend its judgment lien that were due to expire during the almost five year stay. Concluding all of the creditor's § 735 options were barred by the stay, except for filing a notice of renewal, the Court held filing said notice "is not a judicial proceeding" and the stay does not prevent a creditor from filing one to keep its judgment enforceable.

¶31 The parties' arguments as a whole indicate their agreement that § 108(c)(2)'s thirty day extension would not help Creditor's judgment from becoming dormant.[16] They further agree the dispositive issue is whether § 108(c)(1) tolls § 735 for the entire duration of Debtor's stay so that Creditor's notice of renewal of judgment filed October 23, 2015 was timely. Creditor cites two authorities discussed in *3M Dozer* with similar material facts, *e.g.*, expiration of creditor's judgment and/or judgment lien occurred during stays that were very long or still in effect.

¶32 However, those similarities, among others, are not present in this case: 1) Debtor's stay, which prevented Creditor from executing/enforcing its judgment, lasted approximately one year; 2) Creditor's judgment did not expire during Debtor's stay; 3) after the stay was terminated, Creditor had 3.5 years before the judgment's expiration on March 18, 2015; and 4) Creditor has no judgment lien against Debtor's real property. Creditor has not cited one case with these facts that support its position.

¶33 As we interpret *3M Dozer*, § 108(c) tolls § 735's dormancy period only for Creditor's execution/enforcement or collections actions that a § 362(a) stay actually prohibits.[17] Because the Court specifically determined that filing a notice of renewal of judgment is not prohibited by the stay, it stands to reason that § 108(c)(1) would not apply to toll a notice of renewal filed outside the judgment's five year life. Therefore, we agree with Debtor that Creditor it is not entitled to application of § 108(c) to extend the filing of a § 735 notice of renewal of judgment, and thus the trial court on remand is instructed to dismiss as dormant the foreign judgment of Creditor.

REVERSED AND REMANDED WITH INSTRUCTIONS.

MITCHELL, P.J., and BELL, J., concur.

Barbara G. Swinton, Judge:

1. By § 720 of the Act, "foreign judgment" means any judgment, decree, or order of a court of the United States or of any other court which is entitled to full faith and credit in this state.

2. The default judgment was granted on four separate complaints, including breach of a note and security agreement, breach of guaranty, deception and fraud, and check deception.

3. Although the Act uses the terms "filed" or "filing" of the foreign judgment, "[t]he term 'registration' denotes those foreign judgments which are filed in accordance with the procedures of 28 U.S.C. § 1963 or the Uniform Enforcement of Foreign Judgments Act." *U.S. Mortgage v. Laubach,* 2003 OK 67, n. 22, 73 P.3d 887. "An out-of-district federal judgment (or sister state judgment) may be registered in Oklahoma by filing in the office of the court clerk of any county in this state a copy of the foreign judgment that has been authenticated in accordance with the applicable congressional act or state statute." (Emphasis added.) *Id.*, n. 20 (citing § 721 of the Act). In this case, Creditor filed its foreign judgment attached to an "Exemplification Certificate" from the aforementioned federal court that satisfies "the federally-mandated procedure for judgment authentication" requirements under 28 U.S.C. § 1738. *Id.*, n. 21.

4. This notice of renewal, although substantially conforming with the required form, incorrectly gives the filing date of the federal default judgment in the Indiana federal court. In *3M Dozer* the judgment creditor similarly filed a Notice of Renewal with the incorrect date of the original judgment.," *Id.*, ¶ 2. Because the creditor "conceded its judgment lien would have lost its efficacy under normal circumstances," the *3M Dozer* Court determined "we did not need determine" if the notice of renewal "substantially complied with [§] 735 to prevent the judgment's dormancy." *Id.*, 2003 Ok 68, n. 5. Similarly, this Court need not decide the same about this notice of renewal because reversal in this case is based on Creditor's failure to comply with § 735 in other respects.

5. Debtor moved to strike the court's Alias order entered June 21, 2016, which motion the trial court also expressly denied in the order on appeal. Debtor raises no error with this part of the order on appeal.

6. The certified court appearance docket in the appellate record confirms Creditor did not file a written objection or response to Debtor's motion to strike.

7. A special proceeding, a/k/a special statutory proceeding, differs from other civil actions in the manner of pleading, practice and procedure prescribed by law. *City of Tahlequah v. Lake Region Elec., Co-op., Inc.*, 2002 OK 2, ¶ 6, 47 P.3d 467, 474.

8. *See e.g., Bank of America v. Dasovich*, 2018 OK CIV APP 22, 415 P.3d 547 (the Act's authentication requirement for a foreign judgment is non-jurisdictional); *Concannon v. Hampton*, 1978 OK 117, 584 P.2d 218 (Missouri judgment was final and should be given full faith and credit; failure to question the judgment's authentication below waives appellate review of that issue on appeal).

9. Okla. Sup. Ct. R. 1.1(d) permits this court to "review information found on Oklahoma district court appearance dockets posted on the World Wide Web, such as on www.oscn.net in order to enhance the court's ability to inquire into and protect its jurisdiction."

10. In *Weaver*, the Court held an order denying the debtor's motion to vacate a § 842 order to disclose assets was not a "final order" under 12 O.S. 1951 § 953 and not appealable because it did not affect any substantial rights. The appealed order in this § 842 proceeding is similar to the order in *Kostich, i.e*, denied the debtor's motion to quash the order requiring the debtor to appear and answer as to assets and plea to jurisdiction on the ground that the judgment was dormant. *See also American Mortgage and Investment Co. v. Fallin*, 1994 OK CIV APP 33, 872 P.2d 949 (order on appeal refused to vacate an order requiring the debtor to appear for a hearing on assets and denying motion to declare judgment satisfied by operation of § 735) and *Tulsair Beechcraft, Inc. v. Polin*, 1991 OK CIV APP 15, 806 P.2d 1150 (trial court denied motion to vacate an order for debtor to appear and answer as to assets that also argued the judgment was dormant).

11. *See Hedrick*, fn 27 and 28 to Judge Edmondson's concurring opinion for supporting authorities.

12. Such standard is consistent with this Court's requirement that § 735 must be strictly construed. *Chandler-Frates & Reitz v. Kostich*, 1981 OK 74, ¶ 10, 630 P.2d 1287.

13. The document in the record is consistent with scanned document available on www.oscn.net.

14. Recognizing the federal court follows Oklahoma's procedure for garnishment process, the Court in *Laubach*, 2003 OK 67, n. 44, explained that "[t]he affidavit is the document that triggers a garnishment process. Upon the filing of garnishment affidavit, the federal court clerk issues garnishment summons. The garnishment summons is filed as an attachment to the return of service."

15. In February 1988, the creditor obtained a judgment in Major County and perfected a judgment lien against the debtor's interest in real property located in the same county. Five years later, Creditor renewed its judgment and extended its judgment lien for five more years. In November 1996, the debtor filed for bankruptcy, which automatic stay was effective for almost five years. During the stay the creditor's extended judgment was to expire February 1998, which to prevent it timely filed a notice of renewal of judgment with the court clerk, but failed to file a certified copy of the same notice with the county clerk which would extend its judgment lien. Two years later the bankruptcy court denied the creditor's request to modify the stay for a foreclosure action. The creditor filed the foreclosure on June 21, 2001, and the bankruptcy court stayed the foreclosure. In 2002 the same court vacated its stay order and terminated the automatic stay retroactive to the filing date of the foreclosure action.

16. We agree. The date relevant for applying §108(c)(2) is when Creditor received notice of the stay's termination, for which there is no evidence in the record and the parties dispute whether the stay was for 14 months (Debtor claims the case was closed October 5, 2011) or for 12 months (Creditor claims the stay ended when the bankruptcy court denied dischargeability on August 5, 2011). Assuming Creditor received the notice in late 2011 or even early 2012 when applying § 108(c)(2), adding 30 days to either period results in 2011 or 2012 dates and therefore cannot be the "later of" date under the facts of this case. Regardless of which of the two possible dates for the end of § 735's period, *i.e.*, June 10, 2014 or March 18, 2015, or two possible stay periods, §108(c)(1) results in the "later of" date, *e.g.*, 12 months added to either end date would be June 10, 2015 or March 18, 2016.

17. The Court in *3M Dozer* considered § 362(a)'s subsections that are specific to "any lien." 2003 OK 68, ¶ 10 (quoting § 362(a)(4) and (a)(5)). Although there is no judgment lien in this proceeding, Creditor was similarly prohibited during the stay by § 362(a)(2), *i.e.* "the enforcement, against the debtor ... of a judgment obtained before the commencement of the [bankruptcy] case," and by § 362(a)(1), "the commencement or continuance, including the issuance...of process...or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title."

2019 OK CIV APP 17

CITIZENS FOR THE PROTECTION OF THE ARBUCKLE-SIMPSON AQUIFER, Petitioner/Appellant, vs. OKLAHOMA DEPARTMENT OF MINES, Respondent/Appellee, and ARBUCKLE AGGREGATES, LLC, Intervenor.

Case No. 115,859. July 26, 2018

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE BRYAN C. DIXON, TRIAL JUDGE

AFFIRMED AS MODIFIED, REMANDED WITH INSTRUCTIONS

Krystina E. Phillips, INDIAN AND ENVIRONMENTAL LAW GROUP, PLLC, Ada, Oklahoma and

Tyler J. Coble, CHEEK LAW FIRM, P.L.L.C., Oklahoma City, Oklahoma, for Petitioner/Appellant

Mark Secrest, CHIEF LEGAL COUNSEL, OKLAHOMA DEPARTMENT OF MINES, Oklahoma City, Oklahoma, for Respondent/Appellee

Elizabeth C. Nichols, ELIZABETH C. NICHOLS, PC, Edmond, Oklahoma, for Intervenor

P. THOMAS THORNBRUGH, CHIEF JUDGE:

¶1 Petitioner, Citizens for the Protection of the Arbuckle-Simpson Aquifer (CPASA), appeals from a trial court judgment upholding an order by the Oklahoma Department of Mines (ODM) granting a non-coal surface mining permit to Arbuckle Aggregates, LLC (Aggregates). Based on our review of the relevant statutory and regulatory provisions as applied to the ODM order and the record of proceedings as set forth below, we affirm the decision as modified herein and remand to ODM with instructions that the agency comply prospectively with this Court's findings concerning applicable notice, hearing, and record compilation procedures.

BACKGROUND

¶2 This appeal arises from a lawsuit filed by CPASA in state district court after ODM granted Aggregates' application for a permit pursuant to the Oklahoma Mining Lands Reclamation Act, 45 O.S.2011 §§ 721, *et seq.* (OMLRA). The record reveals a long and contentious course of litigation, reflected in a disputed administrative

record containing more than 9,000 pages and leading to an agency decision that granted Aggregates a conditional permit to initiate non-coal surface mining activities on a 15-acre plot of land.

I. INITIAL APPLICATION, FIRST NOTICE AND FIRST INFORMAL CONFERENCE

¶3 The proceedings began in May 2010, when Aggregates submitted an application seeking a permit to mine limestone, dolomite, shale, sand, gravel, clay, and soil, using quarrying and strip mining methods,[1] on 575 acres in Johnston County. It is undisputed that the mine is ultimately expected to have a "life" of more than 50 years and be more than 200 feet deep.[2] It also is undisputed that the Arbuckle-Simpson Aquifer, a sensitive sole source aquifer, underlies much of Johnston County, and that the mine's proposed site is on or near the aquifer. The average depth to groundwater is not clear from the record, but testimony indicated that the water table generally is within 100 feet below the surface.[3]

¶4 At the time Aggregates submitted its initial application, ODM, following then-effective statutes and rules, published notice of it in a Johnston County newspaper. After receiving more than 300 written protests and comments, ODM scheduled an informal public conference for December 2, 2010. Numerous individuals and entities – including surrounding landowners, CPASA, the Oklahoma Department of Wildlife Conservation, the National Park Service, and the U.S. Fish and Wildlife Service – appeared and spoke against granting the permit. According to the transcript from that meeting, the primary concern of CPASA and many others was the effect of Aggregates' mining operation on the Arbuckle-Simpson Aquifer – the region's principal water source – particularly because several existing mines already operate in the area.

¶5 According to the December 2010 conference transcript, the ODM officer conducting the meeting announced that all persons who signed in would receive a copy of the ODM's notice of its "departmental decision" (NDD).[4] He also announced that the gathering was "an informal conference" (IC) at which ODM was present "simply to listen to the concerns of the citizens and to make sure that we make the right decision [in] issuing this permit." Aggregates announced it was submitting supplements to its permit application. The supplements were included as exhibits to the proceeding and the conference officer announced ODM would "hold the record open" until January 14, 2011, should any of the participants want to submit additional information.[5] Departing from its usual practice, however, ODM did not issue an NDD after the IC in December 2010.

II. AMENDED APPLICATION, SECOND INFORMAL CONFERENCE AND FIRST NDD

¶6 Aggregates provided additional information to ODM prior to January 14, 2011, and submitted an amended application to ODM in August 2011. This was followed by ODM's second publication of notice of the application in an area newspaper. The notice stated it was a "republication" of Aggregates' permit application notice.[6] Although it did not mention that Aggregates had amended the application, it stated that a copy of the complete application was available for public inspection at the Johnston County Courthouse.

¶7 In the meantime, in March 2011, the Oklahoma Supreme Court held unconstitutional the state statute and ODM rule stating that the only persons entitled to protest the issuance of a permit were "property owners and residents of occupied dwellings who may be adversely affected located within one (1) mile" of a proposed mining operation. *See Daffin v. State ex rel. Dept. of Mines*, 2011 OK 22, 251 P.3d 741. As a result of *Daffin*, ODM's published notice in August 2011 announcing Aggregates' permit application included a statement that any landowner, resident of an occupied dwelling, public entity or agency, or "any party that may be adversely affected has the right to submit comments or object to the issuance of the permit in writing."[7]

A. Second Informal Conference

¶8 The August 2011 notice also drew protests and comments from numerous individuals, including CPASA, affected landowners, and federal agencies. ODM scheduled a second IC for October 4, 2011. At that conference, the presiding ODM officer again announced that the conference would result in ODM's issuance of an NDD. He stated the notice would be sent only to "qualified protestors,"[8] although it also would be published in the newspaper. The officer read the names of 23 persons whose protests had been timely received after the last (August 2011) publication notice, and stated that those names represented qualified protest-

ers for the conference, as well as the approximately 307 individuals whose names were "on the mail list" from the first IC.[9] The term "qualified protestor" does not appear in ODM rules or applicable statutes, nor do we find the term used in any published Oklahoma appellate opinion.

¶9 A letter from Aggregates submitting an "updated copy" of its permit application was admitted as an exhibit to the second conference. The conference officer said the amended application had been available for public inspection at the Johnston County Clerk's office since August 1, 2011, and that those attending and signing in at the previous conference had received a letter informing them the application was available at the courthouse.[10] He also reiterated that the proceeding was an IC "to hear the public's view."[11]

B. First Findings and Recommendations

¶10 On November 2, 2011, the officer issued his findings and recommendation that Aggregates' permit application be granted conditioned upon its fulfilling a number of requirements.[12] The findings listed 24 persons identified as "[q]ualified protestants appearing by virtue of having complied with the rules," and six "[p]rotestants appearing, but not submitting a letter to ODM requesting an informal conference as required by (45 O.S.2001 § 724(H)(2) and (4) (OAC 460:10-17-6)."[13] The findings also listed protesters' specific concerns, which included, in addition to the possible harm the operation might do to the Arbuckle-Simpson Aquifer, its watersheds, and nearby surface streams and springs, the following: the lack of proper notice of the supplemental materials submitted by Aggregates and lack of notice of the hearing itself; the failure of Aggregates to obtain necessary permits from other agencies concerning the operation; the alleged lack of a hydrologic study by the Oklahoma Water Resources Board (OWRB) for the site; the mining operation's effect on property values in the area; possible dust, fumes, noise, and nighttime activities associated with the operation; and the operation's impact on area wildlife.

¶11 Responding to these concerns, the officer's recommended prerequisites to permit approval included matters specifically addressed to the protection and conservation of water resources of the aquifer; for example, that a proposed groundwater well monitoring program (previously submitted by Aggregates) collect baseline data for a minimum of 12 months prior to commencement of mining, and that a water management plan that Aggregates was submitting to the OWRB become a part of its ODM permit. The officer also noted that, when applicable, Aggregates would need to comply with 82 O.S.2011 § 1020.2.E.1 related to management of pit water. The officer noted Aggregates had submitted two applications to OWRB for permits to use stream or surface water, and recommended that no mining activities be allowed until the OWRB approved those permits.

C. First Notice of Departmental Decision

¶12 On November 14, 2011, ODM issued its first NDD, indicating that Aggregates' application had been conditionally approved substantially as set forth in the conference officer's recommendations. The NDD also stated that within 30 days of receipt of the notice any "person with an interest which is or maybe adversely affected may request a formal hearing on this decision."[14] A certificate of mailing in the Administrative Record indicates that copies of the conference officer's findings and recommendation, along with the first NDD, were either mailed via certified mail or via email to approximately 100 people.[15]

¶13 In response to the first NDD, Aggregates and numerous other parties requested a formal adjudicatory hearing. According to the appellate briefs, prior to the formal hearing Aggregates made additional changes to its application concerning its use and management of groundwater.[16] Aggregates then apparently withdrew its request for a formal hearing. ODM has referred to a formal hearing as having been "dismissed" in December 2012,[17] but the record is unclear as to when a formal hearing actually was scheduled or whether it was dismissed by ODM, by agreement of the parties, or by some other method.

III. AMENDED UPDATED APPLICATION, THIRD INFORMAL CONFERENCE AND SECOND NDD

¶14 In any event, in January 2013 Aggregates submitted more "amendments to its previously revised application," with changes that included withdrawing its water monitoring plan altogether and stating that the two stream water use permit applications it had submitted to OWRB had been cancelled.[18] ODM required that Aggregates publish, for the third time, notice of the updated application. Publication

occurred in January-February 2013.[19] The published notice mentioned that changes had been made to the application since the last publication, including withdrawal of the water monitoring and management plan and updates to location maps to reflect an incremental bonding plan and the 15-acre "Phase 1 bonding area." After again receiving numerous protests, ODM held a third IC, in April 2013.

A. Third Informal Conference

¶15 According to the presiding officer at the third IC, notice of the conference was mailed to "persons who the [ODM] showed as being objectors and other interested persons involved in this proceeding."[20] ODM's general counsel represented that there were 182 names on the matrix to whom notice of the time and date of the conference had been sent, *and to whom notice of the second NDD would be sent in addition to publication notice in the newspaper*.[21]

¶16 In addition to speaking against the permit, several parties raised questions as to whether the current proceeding was a new proceeding or a continuation of the previous proceeding, and whether documents introduced and comments made at the previous two ICs would be considered as incorporated into the ongoing proceeding. No clear conclusion appears to have been reached as to this question at the conference,[22] but ODM and Aggregates in their briefing and at the later, formal adjudicatory hearing treated the matter as a single, ongoing permit application. As a practical matter, this meant that, because Aggregates' initial application was filed prior to August 2011, it was deemed exempt from OWRB groundwater regulations authorized by 82 O.S.2011 § 1020.2, pursuant to subsection (C) of that statute.[23]

B. Second Findings and Recommendations

¶17 On September 4, 2013, the officer presiding at the third IC issued his findings and recommendation that the permit be conditionally granted.[24] The findings delineated the history of the case to date, noted that the specific issues and discussion set forth by the previous conference officer remained accurate, incorporated the previous NDD's discussion by reference, and stated that records from the two previous conferences were being included and considered.[25] The findings described at length the "major amendments or revisions" to Aggregates' most recently filed application as including the following:

¶18 (1) The amendment changed the "bonded" area for the permit's first year of operation to 15 acres from the original 575 acres.[26] Development beyond 15 acres after the first year of operation was described in a map with the letters "TBD" ("to be determined"). ODM rules allow for incremental bonding but prohibit an operator from mining outside the bonded area.

¶19 (2) The amended application reflected that Aggregates had withdrawn two surface water permit applications on file with the OWRB, replaced by Aggregates' statement in the amended application that its products would be processed with water from "any legal source permissible," and applicable water permits would be obtained "when necessary and/or required." The officer noted that while ODM rules require an applicant to demonstrate that its mining and reclamation operations "can be feasibly accomplished under the mining and reclamation plan" included with its application, ODM does not require, as part of its feasibility analysis, that an applicant obtain OWRB or other permits for mines located in the area (the Mill Creek watershed) of Aggregates' proposed mine. The conference officer's other comments also included the following:

> [Aggregates], in previous filings and statements made to ODM, indicated that it owns the groundwater under the 575 acres described for the permit area, and further that it has leased approximately 1,950 acres of water rights (surface and ground). Additionally, [Aggregates] indicates that for initial site work dust control and other construction activities it can truck in the amount of water needed, and further that groundwater will not be encountered in the quarry pit during the initial mining activities.
>
> Regardless of depth to groundwater at the proposed mining site . . . [i]t does appear . . . that eventually [Aggregates] would have to use an amount of water for normal mining operations that would be greater than could feasibly be trucked in, and that possible sources of supply would be [groundwater and surface water accumulating in the quarry pit] as well as surface water in nearby streams and groundwater that could be withdrawn from water wells.
>
> Whether [Aggregates] will need a permit or permits . . . will be matters for the OWRB to determine. . . . If such a permit or

> permits are required . . . [Aggregates] would have to obtain the same to . . . avoid being shut down by ODM's enforcement of the mining permit condition to comply with all government permits and licenses.[27]

¶20 The conference officer rejected the claim by several protesters that Aggregates' latest revisions were so substantial that its application should be treated as a new rather than an amended application. The officer mentioned the change in law[28] that had occurred after the initial application's date, but concluded that the OWRB would have the ultimate say as to whether Aggregates could claim an exemption under the amended law, and that ODM's rules did not contemplate that certain amendments required an application be treated as new.

¶21 The officer therefore recommended the application be granted, conditioned, *inter alia*, on Aggregates either obtaining OWRB permits or providing "documentation" from OWRB that no permits were required before initiating any use of groundwater or surface water for mining activities. The permit as recommended would allow Aggregates to "truck" water in and out for construction and mining activities, but would prohibit Aggregates from initiating any mining activities outside the 15-acre area without first obtaining ODM's permission to do so after submitting a revised permit application with bond coverage and other required information. [29]

C. Second Notice of Departmental Decision

¶22 On September 19, 2013, ODM issued its second Notice of Departmental Decision (second NDD) conditionally granting the permit per the conference officer's recommendations.[30] The second NDD recites that notice of the decision was provided in accordance with "Title 45 Oklahoma Statutes, 2001 § 724(H)(6)."[31]

¶23 Despite ODM counsel's and the conference officer's representations (at the third IC) that ODM would send the second NDD to each of the approximately 200 people who had filed written protests, however, ODM in fact mailed the second NDD only to persons who were *in attendance* at the third IC. The agency also published notice of the decision in the local newspaper. [32] Even so, the second NDD triggered more than 130 written protests requesting a formal adjudicatory hearing on Aggregates' permit application.

IV. FORMAL AJUDICATORY HEARING

¶24 Following discovery and pretrial motions, the formal hearing occurred over two days in September 2014.[33] Aggregates presented evidence in favor of granting the permit, while CPASA, the U.S. Fish and Wildlife Service, the National Park Service, and Oklahomaranch.com, LLC (whose property is adjacent to the proposed mining site) presented opposing evidence. Among Aggregates' witnesses was a representative of the OWRB, Kent Wilkins, who testified that "at this time" the OWRB did not require a permit or anything further from Aggregates. On cross-examination, he stated that Aggregates previously withdrew two stream water permit applications, and that, since the mine was not yet in operation, there was "not a whole lot that we could review" of a water management plan that Aggregates had submitted in 2012.

¶25 In November and December 2014, CPASA and Aggregates submitted proposed findings of fact and conclusions of law.[34] In February 2015, the ODM hearing examiner issued proposed findings of fact, conclusions of law, and a recommendation that a conditional permit be granted pursuant to the terms of the second NDD. The examiner found that Aggregates had demonstrated that its non-coal surface mining plan was "feasible," that it had agreed to comply with the other conditions of the second NDD, and that the company currently was "in compliance with the statutory requirements" of the OWRB. CPASA thereafter filed numerous exceptions challenging the substance of the findings,[35] and the ODM Director requested briefs from the parties as to those exceptions.

V. FINAL ODM DECISION

A. Adoption of the Hearing Examiner's Report and Recommendations

¶26 In December 2015, ODM issued its final decision adopting and modifying the report and recommendation of the hearing examiner.[36] Although the order largely incorporated the recommendations of the hearing examiner, it modified and/or clarified the examiner's recommendations in a few significant ways, as discussed below.

B. Modifications and Clarifications of the Hearing Examiner's Report and Recommendations

1. OWRB's Jurisdiction Over Water Issues

¶27 The order confirmed that ODM "may rely on the Oklahoma Water Resources Board in its exercise of jurisdiction over water issues" as to whether Aggregates was in compliance or out of compliance with OWRB's regulatory requirements; and found that if OWRB notified ODM that Aggregates was out of compliance, then ODM would suspend Aggregates' permit until it demonstrated such compliance and "amend[ed] its ODM permit accordingly."[37] The order stated:

> The rules promulgated by OWRB to implement SB 597 [82 O.S. § 1020.2] codified as 785:30-15-1 *et seq.*, include provisions which address the water issues raised. [Aggregates] must comply with these rules and any requirements made by OWRB pursuant to SB 597. Before [Aggregates] initiates any use of groundwater from wells or use of surface water from area springs or streams for any mining activities, [Aggregates] must first obtain the applicable permit or permits, for groundwater or for surface water as the case may be, from the OWRB, and provide copies of such permits to ODM. If no OWRB permit is needed, documentation stating such must be provided to ODM. [Aggregates] may truck in water for its initial construction activities, initial mining activities, and other mining activities as long as the trucked in water is from an authorized source.
>
> If the OWRB notifies ODM that [Aggregates] is out of compliance with any requirements of the OWRB, ODM will temporarily suspend the authority of [Aggregates] to conduct mining operations until such time as [Aggregates] demonstrates that it is in compliance with OWRB requirements and ODM will amend the mining permit to comply with any terms and conditions imposed by the OWRB.[38]

2. Incremental Bonding

¶28 The order agreed with CPASA that Aggregates had not complied with ODM regulation OAC 460:10-21-4(b)(2), and that ODM's grant of a permit was conditioned on Aggregates' compliance with that regulation. Among other things, the regulation requires that an applicant identify *all* property increments that eventually are proposed to be bonded on the application map.[39] The ODM order added findings of fact that Aggregates had chosen to bond the "proposed mining permit in increments," but had "submitted a permit application map showing only the initial [15-acre] increment to be bonded" rather than the 575 acres described in the application. The order also added a conclusion of law that Aggregates had "failed to satisfy" ODM regulations on incremental bonding. "Otherwise," it stated, Aggregates had submitted an "administratively complete and technically correct application for mining permit."[40]

3. Federal Wetlands Requirements

¶29 The order clarified that the permit was subject to Aggregates' compliance with federal wetlands requirements, and that Aggregates would be subject to an enforcement action by ODM if it fell out of compliance with those regulations.

4. Restriction to the Initial 15-acre Bonded Area

¶30 The order clarified that both the permit and ODM's finding of "feasibility" of the proposed mining operation, *was limited to the initial, 15-acre phase of the mining operation.* The order pointed out that the record reflected Aggregates' "initial phase of mining only covers 15 acres"; that both ODM's Deputy Director and Minerals Division Administrator had testified to feasibility with reference to a permit application that addressed only the 15-acre initial phase; and that the OWRB had testified to Aggregates' compliance with OWRB regulations on the same basis. Only after setting forth this explanation did the order find sufficient evidence to support the hearing examiner's recommendation to grant a conditional permit based on a determination of feasibility.[41] The order specifically restricted Aggregates "to the initial 15 acres so designated on the bonding area map until a revision is submitted and approved by ODM," and that "a revision to the permit to increase the bonded area will be required before initiating any mining activities in the permit area outside the initial 15-acre bonded area."[42]

5. Protection of Taxable Value of the Mining Site

¶31 The order interpreted ODM's duty to "protect and perpetuate the taxable value of property," set forth in 45 O.S. § 722, as applying only to property to be reclaimed as a result of being disturbed by a mining operation, and that the statute does not impose a duty on ODM to protect the value of property outside the mine site. As such, ODM rejected CPASA's

contention that the duty set forth in § 722 extended to protecting the value of property surrounding the mined lands. It modified the hearing examiner's proposed order by adding to its conclusions of law that "ODM properly interprets 45 O.S. § 722 when it insures the reclamation of the mine site."[43]

6. Property Disputes Between Interested Parties

¶32 Finally, ODM refused to consider CPASA's argument, raised during the formal adjudicatory hearing but not addressed by the hearing examiner in his proposed order, that Aggregates' use of groundwater would lower the water table under adjoining owners' property and thereby deprive them of the use and benefit of a valuable property right. The ODM referred to OAC 460:10:11-5(d) and (e), which provide, respectively, that "nothing herein shall authorize [ODM] to adjudicate property disputes between any interested parties," and that upon receiving notice of such a dispute "from any reasonable source," ODM's review of any "pending application . . . shall be suspended until the Department receives notice that such dispute has been conclusively resolved." ODM found that "since ODM's review of the permit application was completed prior to" the second NDD, ODM was not aware of "the property right issue during its review of this permit application." Apparently, the agency concluded it therefore was not required to suspend further action on the permit. Confusingly, however, ODM also found that it had not been put "on notice" of any "declaratory action regarding this legal issue" filed by a party to the proceeding.[44]

VI. DISTRICT COURT REVIEW

¶33 In April 2016, CPASA alone petitioned for judicial review of the ODM decision by the Oklahoma County District Court. Aggregates intervened as a party respondent. Before the trial court, CPASA argued that ODM had violated principles of procedural due process in its notice procedures; that ODM had not provided the trial court with the full administrative record because it had not included certain records introduced during the first and second informal conferences;[45] and that ODM's grant of the permit was arbitrary and capricious in light of applicable law and the substantial evidence. CPASA also offered evidence that, since issuing its decision, ODM had allowed Aggregates to increase the mine's "footprint" from 15 acres to 575 acres without notifying any party, by accepting Aggregates' revised incremental bonding map, which lists a total of eight phases of mining over the larger area.

¶34 The district court found ODM's order was supported by substantial evidence and was not contrary to law. It denied CPASA's request to supplement the record with the IC records as well as evidence related to the permit revision, stating that the items were outside the administrative record. Although stating his "biggest concern"[46] was the adequacy of notice given by ODM "to people," the trial court upheld the ODM order. CPASA filed this appeal.

STANDARD OF REVIEW

¶35 Pursuant to the OMLRA, 45 O.S.2011 §§ 721 through 738, ODM decisions issuing or denying a non-coal mining permit are subject to judicial review under the Oklahoma Administrative Procedures Act (OAPA), 75 O.S.2011 & Supp. 2017 §§ 250 through 323.[47] Accordingly, a district court and this Court apply the same review standard to the administrative record. *City of Tulsa v. State ex rel. Pub. Employees Relations Bd.*, 1998 OK 92, ¶ 12, 967 P.2d 1214. Under that standard:

> An agency's order will be affirmed if the record contains substantial evidence in support of the facts upon which the decision is based and the order is otherwise free of error. *Scott v. Oklahoma Secondary School Activities Ass'n,* 2013 OK 84, 313 P.3d 891, 299 Ed. Law Rep. 233. The order is subject to reversal, however, if the appealing party's substantial rights were prejudiced because the agency's findings, inferences, conclusions or decisions were entered in excess of its statutory authority or jurisdiction, or were arbitrary, capricious, or clearly erroneous in view of the reliable, material, probative and substantial competent evidence. *Id.*; *Oklahoma Dept. of Public Safety v. McCrady,* 2007 OK 39, 176 P.3d 1194. An appellate court may not substitute its judgment for that of the agency on its factual determinations. *McCrady, supra*, at 1200-1201.

Agrawal v. Okla. Dep't of Labor, 2015 OK 67, ¶ 5, 364 P.3d 618; *see also* 75 O.S.2011 § 322.[48]

¶36 "Whether an individual's procedural due process rights have been violated is a question of constitutional fact which is reviewed *de novo*," and requires an "independent, non-def-

erential re-examination of the administrative agency's legal rulings." *Pierce v. State ex rel. Dep't of Pub. Safety*, 2014 OK 37, ¶ 7, 327 P.3d 530 (footnote omitted). We also generally review *de novo* other questions of law, such as a party's right to contest an administrative action, *Dulaney v. Okla. State Dep't of Health,* 1993 OK 113, ¶ 16, 868 P.2d 676, and with limited exceptions, interpretations of law resolved by the trial court or the agency in making its decision. *In re Protest to Certificate of Title Brand Issued to AAAA Wrecker Serv., Inc.*, 2010 OK CIV APP 121, ¶ 10, 242 P.3d 578 (citing *Samman v. Multiple Injury Trust Fund*, 2001 OK 71, ¶ 8 and n.5, 33 P.3d 302). "An administrative agency's legal rulings are subject to an appellate court's plenary, independent and nondeferential reexamination." *Matter of Dobson Tel. Co*., 2017 OK CIV APP 16, ¶ 15, 392 P.3d 295 (approved for publication by the Oklahoma Supreme Court)(internal quotation marks omitted). As held in *Dobson*, this Court and the Oklahoma Supreme Court are "'the ultimate authority on the interpretation of the laws of this State. . . .'" *Id.* (quoting *Robinson v. Fairview Fellowship Home for Senior Citizens,* Inc., 2016 OK 42, ¶ 13, 371 P.3d 477 (footnote omitted)).

ANALYSIS

¶37 CPASA argues two basic propositions of error on appeal: (1) the procedures followed by ODM constituted a violation of due process warranting vacation of ODM's grant of the permit; and (2) ODM and the trial court committed reversible error because their decisions were based on an incomplete administrative record.

I. ODM'S ALLEGED VIOLATION OF PROCEDURAL DUE PROCESS

¶38 CPASA contends ODM has violated the due process rights of interested parties by failing to notify all parties by mail of the second NDD, thereby lessening the chance that interested persons would seek a formal adjudicatory hearing. It further contends ODM violated due process by failing to require Aggregates to publish notice of each amendment to Aggregates' permit application, including, most recently, Aggregates' filing of a completed incremental bonding map months after the formal hearing concluded. Finally, CPASA argues ODM's administrative process is procedurally defective in and of itself because it allows the agency to make a decision based on an informal conference, where the public is allowed only to comment but not cross-examine witnesses, present expert testimony, or formally challenge issues affecting private property rights.

A. Adequacy of the Procedure Followed as to ODM's Second NDD

¶39 ODM rules do not clearly require that mail notice of an NDD be given to all persons requesting or attending an IC. Public participation in ODM's consideration of non-mining permit applications is addressed at 45 O.S.2011 § 724 and ODM regulations, OAC 460:10-17-1 through 10-17-16. Section 724(G) prohibits ODM from issuing a permit "except upon proper application and public hearing, if requested." Pursuant to § 724(H)(1)(b), an applicant must publish notice "in a newspaper of general circulation in the vicinity of the mining operation" and include, *inter alia*, the following information:

> (1) the name and business address of the applicant,
>
> (2) a description which clearly shows or describes the precise location and boundaries of the proposed permit area and is sufficient to enable local residents to readily identify the proposed permit area. It may include towns, bodies of water, local landmarks, and any other information which would identify the location,
>
> (3) the location where a copy of the application is available for public inspection,
>
> (4) the name and address of the Department [of Mines] where written comments, objections, or requests for informal conferences on the application may be submitted . . . ,
>
> . . . [and]
>
> (6) such other information as is required by the Department.

1. ODM's Notice of the Second NDD

¶40 Title 45 O.S. § 724(H)(2), read in conjunction with the Court's opinion in *Daffin,* recognizes the right of any person whose interest might be adversely affected by a mining operation to submit comments or objections to a permit application, and to request a public hearing.[49] Section 724(H)(5) requires that, following the hearing, ODM "shall determine whether to issue or deny the permit, and shall

notify *all parties* of its decision" (emphasis added).

¶41 ODM regulations make requirements similar to § 724(H)(2) with regard to informal conferences. Under OAC 460:10-17-6(a), "[a]ny person who resides [sic] or owns property that could be adversely affected" by a proposed operation may file "written objections to an initial or revised application." Under OAC 460:10-17-7(a)("Informal conferences"), any "*person eligible* under 460:10-17-6(a)" may request ODM to hold an informal conference, and under OAC 460:10-17-7(b) ODM may accept "relevant information from any party to the conference," with a stenographic or electronic record of the conference to remain accessible to "all *parties*" (emphasis added). ODM must "give its written findings . . . to the permit applicant and *to each person who is a party to the conference*" explaining the grounds for its decision. OAC 460:10-17-11(c)(emphasis added throughout). Then, "[w]ithin 30 days after an applicant or permittee is notified of [ODM's] decision, *any person with an interest which is or may be adversely affected* may request a hearing on the reasons for the decision." OAC 460:10-17-15(a).

¶42 Neither Title 45 nor ODM regulations define "party," but under the OAPA, which is equally applicable here, the definition of "party" is virtually the same as what mining law recognizes as a person entitled to participate and receive notice of an ODM decision following an informal conference: a "party" is any "person or agency named and participating, *or properly seeking and entitled by law to participate*, in an individual proceeding." 75 O.S. 2011 and Supp. 2017 § 250.3(12). In turn, an "individual proceeding" is "the formal process employed by an agency having jurisdiction by law to resolve issues of law or fact between parties and which results in the exercise of discretion of a judicial nature." 75 O.S. 2011 and Supp. 2017 § 250.3(8).[50]

¶43 Thus, even under ODM's own rules, any person actually named as a participant or any person *who properly sought and was entitled to participate* would have been entitled, as a "party," to receive each ODM conference officer's decision. To the extent that those persons were known to ODM and their addresses were available, ODM was obliged to notify them of its decision in the same manner that it notified Aggregates and CPASA of ODM's decision. To the extent it failed to do so, it erred.

¶44 Unfortunately, the record here is unclear as to which persons who in fact "properly sought and were entitled to participate" in the third IC did not receive by mail the second NDD. However, the record is very clear that ODM failed to follow through on its assurance that it would mail the second NDD to each of the approximately 200 people who claimed they were entitled to participate and whose names and addresses had been placed on the agency's mailing matrix. In its brief on appeal, ODM appears to seek to deflect responsibility for any error by describing itself as having a "limited role" in the administrative proceedings, and states that the private parties seeking to "adjudicate their respective interests" before ODM are the real parties in interest. This description misconstrues ODM's role and the important duties conferred on the agency by Oklahoma law to not only enforce coal and non-coal mining laws but also to assure that the environment is protected.

¶45 ODM is designated as both a "groundwater protection agency" and a "state environmental agency" by Oklahoma's Environmental Quality Act, 27A O.S.2011 §§ 1-1-201(5) and 1-1-201(13). As such, it is charged with, among other duties, implementing and enforcing the laws and rules under its areas of environmental responsibility. 27A O.S.2011 § 1-1-202 (A)(1). It is "the groundwater protection agency for activities within [ODM's] jurisdictional areas of environmental responsibility," and must "take such action as may be necessary to assure that activities within [ODM's] jurisdictional areas of environmental responsibility protect groundwater quality . . . ." 27A O.S.2011 § 1-1-202(C)(1) and (5).[51] The law authorizing ODM to issue mining permits also is clear in assigning ODM the function and duty to review and approve or deny permit applications, conduct public hearings, and keep records of such proceedings. ODM rules also state unambiguously that the rules are intended to establish only "the *minimum* requirements for public participation in the permit process." OAC 460:10-17-1 (emphasis added). Thus, if ODM, at a public conference or hearing called and conducted by ODM, represents that it will give notice of its decision in a particular manner to particular persons, it is incumbent on the agency to follow through on that representation. Accordingly, we find that ODM erred when it failed to abide by its representations regarding the second NDD.

2. Was Due Process Afforded Here?

¶46 However, our finding that ODM erred does not automatically mean that ODM violated the due process rights of parties affected by the error. A state agency's failure to follow its own procedure does not automatically equate to a due process violation. *See e.g., Elliott v. Martinez*, 675 F.3d 1241, 1247 (10th Cir. 2012); *James v. Rowlands*, 606 F.3d 646, 657 (9th Cir. 2010). "Our inquiry into whether an individual has been denied procedural due process is twofold. Initially we must determine whether the aggrieved individual possessed a protected interest to which due process protections apply," and, "[i]f the person does enjoy a safeguarded status, we then must assess whether the party was conferred with the appropriate level of process." *In re T.T.S.*, 2015 OK 36, ¶ 14, 373 P.3d 1022.

¶47 Assuming *arguendo* that the parties whom CPASA contends were denied due process in fact possess a constitutionally protected interest,[52] the question for this Court then becomes whether the parties were nonetheless afforded an "appropriate level of process" under the circumstances presented. This question "must be determined on a case-by-case basis because the due process clause does not by itself mandate any particular form of procedure," but instead calls for such procedural protection "as the particular situation demands." *In re A.M.*, 2000 OK 82, ¶ 9, 13 P.3d 484 (citing *McLin v. Trimble*, 1990 OK 74, 795 P.2d 1035, and *Mathews v. Eldridge*, 424 U.S. 319, 322, 96 S.Ct. 893 (1976)). In *Daffin v. State ex rel. Okla. Dep't of Mines*, the Court used the approach initially set forth in *Mathews v. Eldridge*, to evaluate the due process claim of the plaintiff in that case, calling the approach a "balancing test" requiring the consideration of three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Daffin, 2011 OK 22 at ¶ 21 (quoting *Mathews,* 424 U.S. at 334-35). Ultimately, the Court said, "The state's interest must be balanced against the risk of unconstitutionally depriving a property owner of an opportunity to protect his interest" *Id.* ¶ 22.

¶48 In applying the factors here, it is important to note that CPASA's standing in this case derives from its status as an association whose members' interests may be adversely affected by the proposed mining operation. In response to challenges by ODM and Aggregates that CPASA lacks standing to raise due process on behalf of others, CPASA relies heavily on *Oklahoma Education Ass'n v. State ex rel. Oklahoma Legislature*, 2007 OK 30, ¶ 9, 158 P.3d 1058, where the Court recognized associational standing, as follows:

> An association has standing to seek redress for injury on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."

Id. ¶ 9 (quoting *Okla. Pub. Employees Ass'n. v. Okla. Dept. of Cent. Serv.*, 2002 OK 71, ¶ 9, 55 P.3d 1072). Neither ODM nor Aggregates denies that CPASA has met these requirements.

¶49 We do not suggest that CPASA's associational standing deprives an association member of the right to receive personal notice to which they would otherwise be entitled. We do find, however, that the fact of CPASA's representation of its members' interests lessens considerably the risk of harm caused by ODM's failure to individually notify all persons who were entitled to such notice of the second NDD. CPASA has actively participated since the inception of this matter, and under the record presented, appears to have worked consistently to protect area groundwater both from an environmental standpoint as well as from the economic standpoint of its members.

¶50 Furthermore, CPASA has offered no evidence that any individual *in fact* was prevented from participating in the formal adjudicatory hearing due to lack of notice, nor is there evidence that any individual's *reliance* on ODM's prior representations as to mail notice resulted in any person failing to seek an adjudicatory hearing. The fact that more than 130 people actually filed written requests for a formal hearing suggests otherwise, and the only harm that CPASA has vocalized with regard to ODM's erroneous decision is that it lessened

the likelihood that some unidentified persons would file a request for a formal adjudicatory hearing. In this respect, the situation presented here differs significantly from that presented in *Dulaney v. Okla. State Dep't of Health,* 1993 OK 113, 868 P.2d 676, and in *Daffin*, cases that each involved a named plaintiff who in fact had been denied participation in a proceeding.[53]

¶51 An inescapable factor here also is the restricted 15-acre area covered by the initial conditional permit approved by ODM. As discussed further below, ODM rules contemplate that interested parties will remain involved in the permit revision process and thus will continue to have opportunities to be heard at such time(s) as Aggregates seeks to revise its permit to expand its operation beyond 15 acres.

¶52 On the other hand, it is not difficult to imagine the significant fiscal and administrative burdens it would impose on ODM if we were to vacate its decision and require it to conduct corrected proceedings from the point of mailing notice of the second NDD to holding another formal hearing. Thus, overall, on balancing the various factors discussed above, we find the record shows that CPASA's members and those similarly situated have had their interests represented through the efforts of CPASA. We find that the process so far provided has been adequate to apprise interested and/or affected parties of ODM's decisions, and that no violation of due process resulted from ODM's failure to give notice as required by applicable statutes and the agency's own rules. Though our criticism serves as a guide for ODM prospectively in this and other such proceedings, we reject CPASA's contention that ODM's decision should be invalidated on this basis at this time.

B. Amendments to Aggregates' Application

1. Notice of Amendments

¶53 CPASA next contends its right of due process was violated when ODM failed to require Aggregates to republish notice each time it submitted an amendment to its pending application. CPASA does not cite authority to support the claim that an applicant must publish notice of each "amendment," no matter how trivial the amendment may be, to an initial application.

¶54 The statutory and regulatory requirements on this issue are unclear. The publication requirement under 45 O.S.2011 § 724(H) appears to apply only to an applicant's initial filing. ODM regulations concerning publication and public participation appear addressed to applications for *initial* and *revised* permits,[54] but not necessarily to *amendments* to a pending, initial permit application. *See, e.g.*, OAC 460:10-17-6(a) (referring to the right to "file written objections to *an initial or revised application* for a permit . . . within 14 days *after the last date of publication*" of newspaper notice) (emphasis added); OAC 460:10-9-5(c)("Revision of Permits") (application for revision of permit to be filed before permittee may revise operations; ODM to determine time for review and for public participation); OAC 460:10-19-4 (permit revisions proposing operation changes or enlargements to permit area are subject to requirements of Subchapter 17). Aggregates and ODM assert in their briefs that ODM's practice is to require an applicant to republish an amendment to a pending permit application if the proposed amendment constitutes a significant or a substantial change to the application. There is no evidence that this practice was violated here. CPASA does not deny that it was aware of all amendments made by Aggregates prior to the December 2014 formal adjudicatory hearing, and the permit application with all amendments at all times was available for public inspection at ODM. We reject CPASA's argument on this point.

2. Aggregates' Incremental Bonding Map

¶55 CPASA's larger complaint concerns Aggregates' submission of a completed "incremental bonding map" to ODM in January 2016, more than a year after the formal adjudicatory hearing and nearly a month after ODM issued its decision. Because the submission occurred after the formal hearing, the district court considered that it was not a part of the administrative record and refused to address it. CPASA does not allege this refusal was error, but nonetheless argues that Aggregates improperly submitted the map without notice to all parties. The map is included in the record on appeal, and the parties devote considerable argument in their appellate briefs to its meaning and effect. Thus, even though error was not properly preserved, the issue clearly will remain unresolved on remand. We therefore address it for the benefit of the trial court, the parties and the agency.

¶56 CPASA describes the map as having "increased [Aggregates'] intended areas of mining" from 15 acres to 575 acres without

notice to any party,[55] thus implying the map made a substantive revision to the permit area. Aggregates describes the map as its "phased bonding area" map, contends its "mining area has always been 575 acres," and claims it may "change the size of its bonded area without prior consent of ODM"[56] – thereby also appearing to suggest that it has made, and may make, a change to the permit area without notice to anyone at any time. ODM, on the other hand, describes the map as submitted by Aggregates purely as a technical change in fulfillment of the condition described in the ODM decision. ODM also reiterates unequivocally that the map "did not increase the acreage of the permit," and "did *not* eliminate the 15-acre restriction" contained in the permit.

¶57 We agree with ODM's view of the amended map as the fulfillment of a condition of Aggregates' permit, *which remains restricted to a 15-acre operational area* regardless of Aggregates' post-hearing fulfillment of a technical requirement regarding content required in an initial permit application. As discussed above, ODM agreed with CPASA that Aggregates had not complied with ODM rules requiring that a complete incremental bonding map be included with its initial application. ODM thus imposed the submission of such a map as a condition of the 15-acre-area permit. To the extent that Aggregates suggests it may change the operational area of its permit without submitting a revised permit application, complying with notice and public comment procedures, and obtaining ODM approval, however, it is in error. The latter view is contradicted both by the factual basis for that order and by the specific restrictions set forth in the ODM order under review here. The order clearly limits Aggregates "to the initial 15 acres so designated on the bonding area map until *a revision is submitted and approved by ODM," and that "a revision to the permit to increase the bonded area will be required* before initiating any mining activities in the permit area outside the initial 15-acre bonded area" (emphasis added).

¶58 As discussed above, ODM rules concerning revisions to non-coal surface mining permits generally impose notice and hearing requirements similar to those applicable to an initial permit application. *See, e.g.*, OAC 460:10-17-6(a); OAC 460:10-9-5(c)("Revision of Permits"); and OAC 460:10-19-4. Accordingly, future applications by Aggregates to revise its permit beyond the restrictions imposed by the ODM order will be subject to ODM oversight and approval.[57]

C. ODM's Administrative Process

1. Constitutionality of ODM's Informal Conference Process

¶59 CPASA next attacks ODM's administrative process as constitutionally deficient, in and of itself, because it allows the agency to base its initial decision whether to grant or deny a permit on an informal conference, where the public may comment but may not cross-examine witnesses, present expert testimony, or formally challenge issues that affect property interests. CPASA claims that ODM's permitting procedure – which allows interested parties to first request an informal conference and then to seek a formal hearing if desired – does not afford a meaningful opportunity for public participation prior to ODM's decision. Again, however, CPASA cites no authority aside from *Daffin* to support this proposition of error.

¶60 We find CPASA's reliance on *Daffin* is misplaced in this context. As discussed above, the Court in *Daffin* dealt only with the adequacy of the informal conference procedure from the standpoint of whether its denial of an interested property owner's right to be heard at an informal conference was constitutional. The Court did not strike down the agency's two-tiered system of turning first to an informal conference to gather public input and possibly resolve disputes before requiring a full-blown formal adjudicatory permit hearing. In addition, although the "decision" made by ODM following an informal conference may eventually lead to a permit, as ODM states in its brief, no permit will issue until the time to request a formal hearing has elapsed. If a formal hearing is requested, a final decision is not made until after that hearing, in a *de novo* proceeding at which all parties may call/cross-examine witnesses, present expert testimony, and raise any issues presented by the evidence. *Daffin* assured that any person who is entitled to request a formal hearing is also entitled to request and comment on a proposed permit at the informal conference. The Court did not criticize the ODM administrative hearing structure in and of itself, however.

¶61 The informal conference procedure used by ODM may be grouped within a broader category of agency procedures known as "informal adjudication." Informal adjudication

is used in a wide variety of state and federal agency actions, and has been described as "about 90 percent of what the government does with respect to the individual," as well as "'truly the life blood of the administrative process.'" Verkuil, Paul R., "*A Study of Informal Adjudication Procedures,*" 43 U. Chi. L. Rev. 739, 741, 744 (1976). Though originally written about federal agencies' informal administrative procedures, the following comment applies equally to informal procedures often used by state agencies:

> Informal adjudication procedures depart from the formal adjudicatory model in many respects. Subject to possible constraints imposed by due process, informal adjudication may include informal conferences, ex parte contacts, active involvement by the decisionmaker in the investigation and prosecution of the agency's case . . . limited evidentiary requirements, and generally a relaxation of the formalities associated with formal adjudication. There also may be no provision for confrontation of evidence and witnesses, and there may be no discovery . . . .

R. Levin, *Preface*, 54 Admin. L. Rev. 1, 29-30 (2002)(including an excerpt from "A Blackletter Statement of Federal Administrative Law," prepared by the American Bar Association's Section of Administrative Law and Regulatory Practice). In light of comments such as these, CPASA's implication of irregularity by ODM due to its use of informal procedures to obtain public input is unwarranted.

2. ODM's Formal Hearing Process

¶62 We also find the record does not support CPASA's assertion that, during the formal hearing, ODM refused to consider any issues that were not first raised at an informal conference. However, we find that the example CPASA has cited to illustrate its argument on this point is well taken. ODM erred as a matter of law and needlessly confused the issues by stating in its final order that the agency's *"review of the permit application was completed prior to"* the second NDD, and the agency had "no notice of the property rights issue" before that time, thereby suggesting, *wrongly*, (1) that the agency's review of the application was no longer "pending" at the time of the formal hearing,[58] and (2) that area property owners who have a "property dispute" but do not put ODM on notice of it prior to an NDD, may not later raise it before the permit is issued.

¶63 In its brief on appeal, ODM takes a position contrary to its own order, arguing that a permit application remains pending, with no permit issued, until the agency issues its final decision (following a formal hearing if the case has gone to a formal hearing). ODM also appears to recognize that its refusal to take evidence on a property dispute cannot preclude property owners from seeking to adjudicate groundwater property rights in an appropriate forum as a matter of law. Consequently, we find the affected portion of ODM's decision on this issue should be and hereby is vacated, and the order is modified accordingly.[59]

¶64 As a final note on this issue, we find no *evidence* that CPASA raised a legitimate "property dispute" before ODM other than the otherwise unsupported testimony of area property owners that they feared their domestic groundwater use might be compromised if ODM granted the permit. ODM has discretion to determine what constitutes a "reasonable source" of information of a property dispute within the meaning of the applicable regulatory provisions (OAC 460: 10-11-5(d) and (e)). In light of the fact that the permit as granted allows ***no*** groundwater to be taken, CPASA's assertion that the property owners' groundwater rights are currently endangered appears virtually impossible.

II. THE ADMINISTRATIVE RECORD BEFORE THE DISTRICT COURT

A. ODM's Administrative Record

¶65 In its final argument, CPASA claims reversible error occurred because ODM failed to include in the administrative record certain materials that the agency considered in making its decision. The materials are described generally in CPASA's brief as including written comments by public participants and other documents accepted by ODM at the three informal conferences. Although written transcripts of all three ICs were included by ODM in the administrative record, ODM admits that some of the written materials it received at those conferences were not included. Those materials apparently also were not described by any party in the pre-trial conference order or introduced for admission at the formal adjudicatory hearing. ODM and Aggregates contend the administrative record properly consists only of evidence introduced at the

formal adjudicatory proceeding. They argue, in essence, that CPASA failed to preserve the disputed materials as part of the administrative record when it did not list them in the pre-trial conference order for the formal hearing or seek admission of them at the formal hearing.[60] However, ODM and Aggregates cite no agency rule, state statute, or case law that limits judicial review of an agency decision to only the materials presented as part of the formal adjudicatory hearing when informal adjudication has also occurred.

¶66 Pursuant to the OAPA, 75 O.S.2011 § 309 (F), the administrative record in an individual proceeding "shall include" the following:

> 1. All pleadings, motions and intermediate rulings;
>
> 2. *Evidence received or considered at the individual proceeding;*
>
> 3. A statement of matters officially noticed;
>
> 4. Questions and offers of proof, objections, and rulings thereon;
>
> 5. Proposed findings and exceptions;
>
> 6. Any decision, opinion, or report by the officer presiding at the hearing; and
>
> 7. *All other evidence or data submitted to the hearing examiner or administrative head in connection with their consideration of the case* provided all parties have had access to such evidence.

(Emphasis added).

¶67 When a petition seeking judicial review is filed, the agency conducting the proceeding bears responsibility for compiling and transmitting the administrative record to the reviewing court. OAPA § 320; *Edwards v. Okla. Employment Sec. Comm'n*, 1997 OK CIV APP 87, ¶ 7, 953 P.2d 64. Pursuant to OAPA § 321, judicial review is confined to the administrative record, except "in cases of alleged irregularities in procedure before the agency, not shown in the record, testimony thereon may be taken in the reviewing court." Also relevant here is OAPA § 322, providing that a ground for reversal or modification of an agency order is an appellate court finding that "the substantial rights of the appellant or petitioner . . . have been prejudiced" because the agency decision is "clearly erroneous . . . upon examination and consideration of the entire record as submitted."

B. CPASA'S Supplemented Record in District Court

¶68 The appellate record designated by the parties to this Court includes a computer disk, labeled "CPASA's Supplement to the Record Case No. CV-2016-716, EX 1." It contains approximately 4,000 pages of documents and apparently was what the district court refused to consider because ODM had not included it in the administrative record.

¶69 As a general rule, a court reviewing an agency order must review "the full administrative record" that was before the agency at the time it made its decision. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419-20, 91 S. Ct. 814, 525-6 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99, 97 S. Ct. 980 (1977). Similar language is echoed in the OAPA's reference to the record as including all "evidence or data submitted" to the agency "in connection with [its] consideration" of the matter, and to "the entire record submitted." We find nothing in case law or other authority holding that an agency's administrative record is limited to the record made of the formal administrative hearing just because there have also been informal conferences and public meetings held as part of the agency's deliberative process.

¶70 In fact, as noted in the factual review above, ODM's informal conference officers told participants that the conferences allowed the agency to consider public opinion and help ODM to "make the right decision." They also referred to "holding the record open" after the end of a conference so that participants could submit additional materials for consideration. ODM admits in its brief on appeal that "results of an informal conference are a required portion of ODM's review and form a part of the basis upon which ODM makes its decision on the application."[61] Moreover, the importance of the informal conference to ODM decision-making was clearly recognized by the Oklahoma Supreme Court in the *Daffin* opinion, 2011 OK 22, 251 P.3d 741, discussed at length above.

¶71 Therefore, we reject ODM and Aggregates' contention that only materials that were listed on the pre-trial order or offered or admitted into evidence at the formal adjudicatory hearing were properly included in the administrative record submitted for judicial review. ODM therefore erred in omitting the materials solely for the reason that it did.

¶72 At the same time, however, we recognize that supplementing the administrative record, after a matter has been submitted to a court for review, should not be necessary as a matter of course. The following passage from the case of *American Petroleum Tankers Parent, LLC v. United States,* 952 F. SupP.2d 252, 261 (D.D.C. 2013), is both well-stated and instructive:

> Supplementation of the administrative record is the exception, not the rule. . . . This is because an agency is entitled to a strong presumption of regularity, that it properly designated the administrative record. … The rationale for this rule derives from a commonsense understanding of the court's functional role in the administrative state . . . Were courts cavalierly to supplement the record, they would be tempted to second-guess agency decisions in the belief that they were better informed than the administrators empowered by Congress and appointed by the President. … However, an agency "may not skew the record by excluding unfavorable information but must produce the full record that was before the agency at the time the decision was made. . . . The agency may not exclude information from the record simply because it did not rely on the excluded information in its final decision.… Rather, a complete administrative record should include all materials that might have influenced the agency's decision[.]

Id. at 261 (citations and internal quotation marks omitted).

C. Harmless Error and Lack of Prejudice

¶73 As noted above, CPASA submitted a computer disk containing approximately 4,000 pages of materials as part of its request to supplement the administrative record. It did not specifically identify any document or other data as being particularly relevant to judicial review, nor does CPASA delineate, now, how it was substantially prejudiced by ODM's failure to include these documents in the administrative record. In fact, CPASA does not argue in this Court that the agency decision is unsupported by the evidence; rather, it argues that procedural deficiencies and mistakes committed by ODM warrant reversal as a matter of law.

¶74 Thus, while we agree with CPASA that ODM improperly limited the record to only those items from the formal hearing, we nonetheless find that CPASA has not demonstrated how it was substantially prejudiced by ODM excluding the materials, or even how those items are relevant to this Court's review of ODM's decision. In other words, CPASA has not argued that the excluded materials would have changed the lower court's decision. Inasmuch as only a 15-acre operational area has been approved with no surface or groundwater use at this point, it appears unlikely that the excluded materials would have made such a difference, since the paramount concern to CPASA throughout these proceedings has been protecting the volume and quality of area surface and groundwater.

¶75 We decline to reverse the trial court's decision in order to require it to reconsider its decision in view of the materials that ODM should have included in the administrative record. Although we agree with CPASA that both the trial court and the agency erred as to this issue, we are constrained to find the error harmless at this point in the proceedings. We reject CPASA's contention that ODM's order should be reversed on this ground at this time, but caution ODM that "a complete administrative record should include all materials that might have influenced the agency's decision," *id.*, even if those materials were not necessarily supportive of the decision, in fact, particularly if they are not supportive of the decision.

CONCLUSION

¶76 As modified, we affirm ODM's order approving a conditional permit to mine an area currently limited to 15 acres. We note the opportunity for error in this case was exacerbated by ODM's inconsistent interpretation and application of its own rules, and by Aggregates' repeated amendments to its permit application, to what end still remains unclear. We remand to ODM with instructions to comply, prospectively, with the notice, hearing, and administrative record compilation procedures that we have described herein.

¶77 **AFFIRMED AS MODIFIED, REMANDED WITH INSTRUCTIONS.**

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

P. THOMAS THORNBRUGH, CHIEF JUDGE:

1. [Admin Record (AR) vol. 9 at pp. 3560+].

2. [Testimony by Peter Dawson, Aggregates' president. Transcript of Sept. 19-20, 2014 adjudicatory hearing, pp. 43-58; AR vol. 5 at pp. 1973 – 1988].

3. [Testimony by Geoffry Canty, Aggregates' consultant, at Sept. 19-20 adjudicatory hearing, Transcript pages 400-445, AR vol. 6 at pp.

2384-2429; Proposed Report and Order of Hearing Examiner, dated Feb. 11, 2015, at p. 10, AR vol. 7 at p. 2942].

4. [AR vol. 14 at p. 4205; transcript (TR) at p. 2].

5. [AR vol. 14 at p. 4205].

6. [Affidavit of Publication, AR vol. 11 at p. 3953].

7. [AR vol. 11 at p. 3953].

8. The conference officer stated:

> [I]f you've signed in tonight and you are a qualified protester, you will receive a copy of the notice of decision. If you are not – if you are not and you're also – now, we now publish our decisions in the – in the paper, local paper, so it will also be published. . . . And this one will be in the Johnston County Capital-Democrat [like] everything else has been. What the – basically what the decision will say, it will say what . . .our decision is and it will also inform you if you wanted to ask for administrative hearing, it will give you the . . . time frames for such.

[TR of 10/4/2011, AR vol. 14 at pp. 4255-4256]. Later in the hearing, he stated that anyone signing in at either of the conferences would receive a copy of the NDD, and it would also be published in the newspaper. [Tr. of 10/4/2011, AR vol. 14 at p. 4263]. Still later, he said "everyone who was a qualified objector in the December 2, 2010 informal conference and the October 4, 2011 informal conference that are qualified will receive a copy of that notice of decision," and "[i]f you are not a qualified objector, you will still get notice through the paper." [TR of 10/4/2011, AR vol. 14 at pp. 4311-12].

9. [TR of 10/4/2011, AR vol. 14 pp. 4262-63].

10. [AR vol. 14 p. 4265].

11. [AR vol. 14 pp. 4265-66].

12. "Findings of the Conference Officer" at AR vol. 16 pp. 4434-4459, which formed the basis for the ODM's first NDD, issued 11/14/11, at AR vol. 16 p. 4460.

13. [AR vol. 16 p. 4453]. "OAC" refers to Oklahoma Administrative Code.

14. [AR vol. 16 p. 4460].

15. [AR vol. 16 pp. 4457-59].

16. In June 2012 and November 2012, Aggregates had submitted to ODM two revised outlines of proposed water management and conservation plans. These documents stated that Aggregates was exempt from groundwater protection requirements of 82 O.S.2011 § 1020.2 due to the date its application was submitted; and that OWRB had not yet approved two surface water permits for which Aggregates had applied but that those permits were not necessary for the initial phases of Aggregates' operation. [AR vol.11 at p. 3954-56; 3978-80]. The November outline also noted, "Water rights may be added or deleted over time as the quarry develops." *Id*. at 3979.

17. *See e.g.*, AR vol. 14 at pp. 4330-31 (pp. 65-66 of the Transcript of the April 2, 2013 informal conference); and "Findings of the Conference Officer" dated 9/4/13 at Part V(D) [AR vol. 16 p. 4463].

18. [Findings of Conference Officer d. 9/4/2013, AR vol. 16 at p. 4463 (Part V, Summary of Proceedings, finding (E)].

19. [Affidavit of Publication, AR vol. 13 at pp. 4146-4149].

20. [AR vol. 14 at p. 4315].

21. At AR vol. 14 at p. 4331 (pp. 67-69 of the Transcript of the April 2, 2013 informal conference), the following exchange occurred among ODM Conference Officer Dean Couch, ODM General Counsel Mark Secrest, and protestants appearing at the conference:

> MR. SEACREST [sic]: But – but we haven't made a decision yet, so, you know, you can't have a formal hearing until the department makes a decision. Now, once we make a decision, **everybody on that matrix, the 182 I think that we mailed out, will be given notice of that decision and then there would be an ad run in the local newspaper** of what that decision is. Anybody who might be adversely affected – and this is a direct quote from the statute – has a right to request a formal hearing. Could be the operator if we deny this thing or if we had conditions on it. They appealed it the first time.
>
> * * *
>
> MR. COUCH: Now . . . just to clarify that point . . .to the extent there is a new or separate formal hearing requested by those adversely affected . . . . **I think the clarification is now the more than 200 or so will get notice – even though they're not here today, didn't sign in, may not have even objected for today's proceeding – will get notice of the recommendation and decision by the Department of Mines**. (Emphasis added).

22. [*See* AR vol. 14 at, for example, pp. 4325 and 4329-4331].

23. Pursuant to 82 O.S.2011 § 1020.2(C)(3), except for subsection (E), the requirements of § 1020.2 do not apply to the taking, using or disposal of water trapped in producing mines that "overlie a sensitive sole source groundwater basin or subbasin for which an initial application for a permit shall have been filed with the [ODM] as of August 1, 2011 . . . ." None of the parties dispute that Aggregates is in compliance with this statute at this time.

24. [AR vol. 16, pp. 4461-4474].

25. [AR vol. 16, p. 4468-69, at Part VIII(A)].

26. ODM required a bond of $1,500 per acre, meaning the 15-acre area required a bond of $22,500.

27. [AR vol. 16 at pp. 4470-71].

28. The reference is to 82 O.S.2011 § 1020.2, discussed at note 23 *supra*. As noted in the conference officer's findings, although the state legislature amended state groundwater law in 2003 to protect "sensitive sole source groundwater basins and subbasins," *see* 82 O.S.2011 §§ 1020.9, 1020.9A, and 1020.9B, until further amendments became effective in August 2011, *see* 82 O.S.2011 § 1020.2, "the taking, use and disposal of water trapped in producing mines was generally exempt from . . . Oklahoma Groundwater Law." [AR vol. 16 at p. 4473]

29. The conference officer stated, "Since the applicant has elected to bond the location in phases and has outlined phase I but has yet to determine the incremental movement through the permit area, **a revision to the permit to increase the bonded area will be required**." [AR vol. 16 at p. 4474] (emphasis added). During argument in district court, ODM counsel cautioned the trial court against using the word "revision" as to a pending permit application, stating that the term "[a] mended would be a better word. Because a revision, in our lingo, connotates [sic] that the permit's been issued. . . . And so an applicant has the right to make some modifications to their permit application while it's pending . . . ." [Tr. of 1/20/17 at p. 13 ROA p. 1156]. Although ODM does not refer to a statute or ODM rule that expressly specifies such a distinction, ODM's brief on appeal and the agency's rules appear generally consistent in following this usage. The distinction is important in light of the fact that ODM's decision to conditionally grant the permit at this point clearly is based on its evaluation of the feasibility only of a 15-acre operation, and includes the further condition that Aggregates must file a revised permit application in order to expand the operation to additional acreage.

30. [AR vol. 16 at pp. 4475-76].

31. The 2001 version of § 724 does not contain a subsection (H)(6). However, ODM likely is referring to 45 O.S.2011 § 724(H)(5), which states, "Upon completion of findings after the [public] hearing, the Department shall determine whether to issue or deny the permit, and shall notify all parties of its decision." This provision is identical to subsection (G)(5) in the 2001 version of 45 O.S. § 724. In May 2008, § 724(G)(5) was renumbered as § 724(H)(5). Current § 724(H)(6) does not address notice, but provides, "Any decision regarding the issuance of a permit under this section shall be appealable when entered, as provided in the Administrative Procedures Act."

32. *See* ODM Response Brief on Appeal at p. 3 and AR vol. 2 at p. 430, containing an email from ODM counsel to CPASA counsel stating that the second NDD was mailed only to "qualified protestants who attended and signed in" for the third informal conference, although ODM "did run an ad in the Johnston County Capital-Democrat notifying the public of the Second Departmental Decision." Curiously, the rationale cited in the email for restricting notice to only those in attendance is that Aggregates "began a new proceeding" when it "reran" its publication notice as an advertisement in January-February 2013 concerning its updated permit application. [AR vol. 2 at pp. 430-31].

33. [Transcripts at AR vol. 5 at pp. 1931-2301 and vol. 6 at pp. 2302-2472; with duplicates located at AR vol. 18 at pp. 4685-5055 and vol. 19 at pp. 5056-5226].

34. [*See* AR vol. 7 at pp. 2861-2895 (CPASA's proposed findings); AR vol. 7 at pp. 2896-2948 (Aggregates' proposed findings)]. On November 14, 2014, the U.S. Fish and Wildlife Service and National Park Service filed a "Joint Dismissal With Prejudice" of the entities' objections to Aggregates' mining permit. [AR vol. 6 at pp. 2476-2478].

35. [*See* AR vol 7 at pp. 2949 – 2959].

36. [AR vol. 7 at pp. 3257-3292].

37. [AR vol. 7 at pp. 3274-75 and 3289-90].

38. [AR vol. 7 at pp. 3290-91]. Although neither CPASA nor Aggregates challenges this finding, it is clear from ODM's language that ODM does not purport to assert that it has jurisdiction to require OWRB to function in a capacity whereby OWRB became answerable to ODM in performing OWRB's duties. How this particular provision will work as a practical matter is unclear, however, as there appears to be no statutory or regulatory provision requiring OWRB to notify ODM of violations of OWRB regulations; nor are we aware of an inter-agency agreement between OWRB and ODM containing such a provision.

39. OAC 460:10-21-4(b) states, in pertinent part:

> (2) When the operator elects to "increment" the amount of the performance bond during the term of the permit, he shall identify the initial and successive incremental areas for bonding on the permit application map submitted for approval as provided in Subchapter 17 of this Chapter and shall specify the proportion

of the total bond amount required for the term of the permit which will be filed prior to commencing operations on each incremental area. The schedule amount of each performance bond increment shall be filed with the Department at least 45 days prior to the commencement of non-coal surface mining and reclamation operations in the next incremental area.

40. [AR vol. 7 at pp. 3284 and 3289].

41. [*See* AR vol. 7 at pp. 3278-79; ODM Order at ¶ 5, pp. 22-23, stating that ODM's "regulations require the Department to find that the permit, *based on information set forth in the application* or other information available, is accurate, complete, and that the applicant has demonstrated that the mining and reclamation operations as required by the Act can be feasibly accomplished." (citing OAC 460: 10-17-10)(emphasis added), and that "the record reflects that [Aggregates'] initial phase of mining only covers 15 acres."]

42. This provision, along with the ODM condition that Aggregates submit a completed incremental bonding map, is further discussed in the Analysis section at Part I.B.

43. [AR vol. 7 at p. 3289, ODM order at p. 32]. Section 722 contains the legislative "Declaration of policy" for the OMLRA, as follows:

> It is hereby declared to be the policy of this state to provide for the reclamation and conservation of land subjected to surface disturbance by mining and thereby to preserve natural resources, to encourage the productive use of such lands after mining, to aid in the protection of wildlife and aquatic resources, to encourage the planting of trees, grasses and other vegetation, to establish recreational, home and industrial sites, *to protect and perpetuate the taxable value of property*, to aid in the prevention of erosion, landslides, floods and the pollution of waters and air, to protect the natural beauty and aesthetic values in the affected areas of this state, and to protect and promote the health, safety and general welfare of the people of this state. (Emphasis added).

44. [AR vol. 7 at p. 3276].

45. During the course of the district court proceedings, it also became apparent that a number of documents that were favorable to CPASA's argument and had been introduced during the formal administrative hearing had been omitted from the administrative record. The court entered an agreed order supplementing the administrative record with these items.

46. [1/20/17 Transcript of motion hearing, at p. 50].

47. *See also* OAC 460:3-1-5 ("Conducting hearings for formal review") and 460:10-17-16 ("Judicial review").

48. Section 322 provides that an appellate court may set aside or modify an agency order, or remand the matter to the agency for further proceedings "if it determines that the substantial rights of the appellant or petitioner for review have been prejudiced because the agency findings, inferences, conclusions or decisions, are:

> (a) in violation of constitutional provisions; or
> (b) in excess of the statutory authority or jurisdiction of the agency; or
> (c) made upon unlawful procedure; or
> (d) affected by other error of law; or
> (e) clearly erroneous in view of the reliable, material, probative and substantial competent evidence, as defined in Section 10 of this act, including matters properly noticed by the agency upon examination and consideration of the entire record as submitted; but without otherwise substituting its judgment as to the weight of the evidence for that of the agency on question of fact; or
> (f) arbitrary or capricious; or
> (g) because findings of fact, upon issues essential to the decision were not made although requested.

75 O.S.2011 § 322(1) (footnote omitted).

49. *See* ODM's Brief on Appeal at p. 6, note 2, stating that "currently, *any person* has the right to request an informal conference" (emphasis added). As written, 45 O.S.2011 § 724(H)(2) states that only "property owners and residents of occupied dwellings who may be adversely affected located within one (1) mile" of a proposed mining site have the right to protest and request a public hearing. The Supreme Court struck down this provision as unconstitutional in *Daffin v. State ex rel. Okla. Dep't of Mines*, 2011 OK 22, 251 P.3d 741. In that case, a property owner who lived outside the one-mile limit was prohibited from commenting at an informal conference. He sued ODM, seeking a ruling that the one-mile limitation was unconstitutional. The Court held that § 724(H)(2) and ODM rules that incorporated the statutory language violated the owner's right of due process. In addition to depriving the property owner of a chance to participate in an informal conference, the Court also found it significant that under ODM rules, only the permit applicant and "part(ies) to the conference," *i.e.*, those allowed to participate in the conference, would be "personally notified" of ODM's decision on the permit and then have 30 days to seek a formal hearing on the decision. *Id.* ¶ 13.

50. Although ODM initially employed informal conferences as part of the permitting process here, those conferences were nonetheless a part of the entire "individual proceeding" concerning Aggregates' permit application by which ODM aimed to resolve issues surrounding the application. In fact, the OAPA itself suggests that an informal procedure may be employed as part of an "individual proceeding," for example in 75 O.S.2011 § 309(E), which states, "Unless precluded by law, informal disposition may be made of any individual proceeding by stipulation, agreed settlement, consent order, or default."

51. ODM's jurisdictional areas of environmental responsibility are described at 27A O.S. Supp. 2017 § 1-3-101(G), as follows:

> The Department of Mines shall have the following jurisdictional areas of environmental responsibility:
> 1. Mining regulation;
> 2. Mining reclamation of active mines;
> 3. Groundwater protection for activities subject to the jurisdictional areas of environmental responsibility of the Commission; and
> 4. Development and promulgation of a Water Quality Standards Implementation Plan pursuant to Section 1-1-202 of this title for its jurisdictional areas of responsibility.

52. Neither ODM nor Aggregates denies that individuals who may be adversely affected by the mining operation have a protected interest at stake. Recognition of such a protected property interest also was implicit in the Court's opinion in *Daffin*, 2011 OK 22, 251 P.3d 741.

53. In *Dulaney,* the Supreme Court affirmed a trial court holding that the landfill permit process used by the Oklahoma State Department of Health (OSDH) was invalid because OSDH rules did not identify the parties who should be notified and allowed to contest the granting of a landfill permit in an individual proceeding conducted under the OAPA. Since *Dulaney,* the permitting process for landfill permits, including its notice provisions, have changed numerous times. Provisions regarding landfills are now found under the Solid Waste Management Act, 27A O.S. Supp.1993 § 2 – 10 – 101 *et seq.*, specifically, 27A O.S. Supp.1993 § 2 – 10 – 301, with permitting regulated under the Oklahoma Uniform Environmental Permitting Act, 27A O.S.2011 §§ 2 – 14 – 101 through 2 – 14 – 401, under the broader umbrella of the Oklahoma Environmental Quality Code, found at 27A O.S. Supp.1993 § 2 – 1 – 101, *et seq.* DEQ rules now require that applicants for a landfill permit "provide notice by certified mail, return receipt requested, to owners of mineral interests and to adjacent landowners whose property may be substantially affected by installation of a landfill site." OAC 252:4-7-13.

54. *See* the discussion at footnote 29 above concerning ODM's practice of distinguishing between "amendments" to a permit application versus "revisions" to a granted permit.

55. CPASA Brief in Chief at p. 6.

56. Aggregates' Brief in Chief at p. 25.

57. We further note that Aggregates' statement that it need not obtain ODM approval for bonding area changes is not supported by the ODM rule that it cites, OAC 460:10-23-5, which deals with adjustments to the amount of performance bond liability.

58. ODM relied on OAC 460:10-11-5(d) and (e), which provide, respectively, that "nothing herein shall authorize [ODM] to adjudicate property disputes between any interested parties," and that upon receiving notice of such a dispute "from any reasonable source," ODM's review of any "pending application . . . shall be suspended until the Department receives notice that such dispute has been conclusively resolved."

59. The language in question, comprised of the first six sentences of the first full paragraph on page 20 of ODM's December 15, 2015, order (ODM Record Bates Stamp #3276), is hereby vacated and the order is modified accordingly. The vacated language is as follows:

> I note that while water issues have been raised throughout the informal and formal proceedings regarding this permit application, these issues have dealt with quality, quantity and the jurisdiction to resolve those issues. In reviewing the pretrial order in this case, the issue of groundwater as a property right was not raised by the parties. Since ODM's review of the permit application was completed prior to NDD 2, ODM had no notice of the property right issue during its review of this permit application. I would further note that CPASA's counsel argued during the oral arguments that ODM should file a declaratory action in District Court to resolve this issue (Oral Arguments Transcript, p. 24), then argued it was AA's responsibility to have filed such action (Oral Arguments Transcript, p. 98). Since ODM does not have jurisdiction over this issue, it would not be the proper party to have initiated such legal action. Whether AA or one or more of the Protestants should have initiated this legal action is not for ODM to determine.

60. As noted above in our discussion of the facts, the trial court denied CPASA's motion to supplement the record with the materials. The court granted the motion with respect to certain other documents that had been admitted at the formal hearing after ODM agreed that the latter materials had inadvertently been excluded from the record it transmitted to the district court.

61. ODM Brief in Chief at p. 6.

2019 OK CIV APP 18

NATIONAL COLLEGIATE STUDENT LOAN, TRUST 2007-1, a Delaware Statutory Trust, Plaintiff/Appellee, vs. CHRISTOPHER ESTER, Defendant/Appellant.

Case No. 116,511. August 31, 2018

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

HONORABLE DAMAN H. CANTRELL, TRIAL JUDGE

AFFIRMED

Tracy Cotts Reed, Keith A. Daniels, William L. Nixon, Jr., LOVE, BEAL & NIXON, Oklahoma City, Oklahoma, for Plaintiff/Appellee,

Greggory Thomas Colpitts, Lauren Danielle Colpitts, THE COLPITTS LAW FIRM, Tulsa, Oklahoma, for Defendant/Appellant.

BRIAN JACK GOREE, VICE-CHIEF JUDGE:

¶1 Lender sued Borrower alleging he owed $68,937.40 on an educational loan. The trial court granted Lender's motion for summary judgment. Borrower appeals.

¶2 Plaintiff, National Collegiate Student Loan Trust 2007-1, a Delaware Statutory Trust (Lender), sued Defendant, Christopher Ester, (Borrower), alleging Borrower owed $68,937.40 on an educational loan. The trial court granted Lender's motion for summary judgment, finding there is no genuine issue of material fact and concluding that Lender is entitled to judgment as a matter of law.

¶3 In its motion for summary judgment, Lender contended that on January 29, 2007, Borrower signed a Non-Negotiable Credit Agreement (the agreement) with Bank of America, N.A. for an educational loan. The agreement was subsequently transferred, sold, and assigned to Plaintiff, National Collegiate Student Loan Trust 2007-1, a Delaware Statutory Trust (Lender). Borrower defaulted on the obligation. Lender pointed out that the agreement specifically stated, "Non-Negotiable Credit Agreement," and also stated that the Uniform Commercial Code (UCC) does not apply. It argued that the agreement is not a negotiable instrument, and the parties specifically agreed therein that the UCC is not controlling.

¶4 In his objection to the motion for summary judgment, Borrower argued that Lender lacked standing.[1] He stated that in order to enforce an instrument, the plaintiff has the burden of proving it is a "person entitled to enforce an instrument" by showing it is (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument. *Deutsche Bank National Trust Company v. Byrams*, 2012 OK 4, ¶5, 275 P.3d 129, referencing 12A O.S. 2011 §3-301. While he admitted that the agreement provides that Article 3 of the UCC does not apply, he nevertheless argues that Lender must demonstrate that it is in possession of the original document, and it has not done that. Borrower claims that Lender has not established that it is the proper plaintiff.

¶5 Standing focuses on the party seeking to get his complaint before the court and not on the issues tendered for determination. *Knight ex rel. Ellis v. Miller*, 2008 OK 81, ¶11, 195 P.3d 372. The question is whether the party invoking the court's jurisdiction has a legally cognizable interest in the outcome of the controversy. *Id.* The burden is on the party invoking a court's jurisdiction to establish standing. *Oklahoma Educ. Ass'n v. State ex rel. Oklahoma Legislature,* 2007 OK 30, ¶7, 158 P.3d 1058. If the plaintiff alleges facts which are sufficient to establish standing, then the case proceeds to the next stage. *Id.* at ¶10.

¶6 When a party does not rely on a particular statute or constitutional provision authorizing suit, the question of standing depends on whether the party has alleged a personal stake in the outcome of the controversy. *Id.*, ¶16. This is an action for breach of contract. Thus, the question of Lender's standing depends on whether Lender has a personal stake in the outcome of the case.

¶7 When standing is challenged in a contract action, the usual issue is whether the party suing is the proper party to bring the action. Here, Bank of America entered into a contract with Borrower. Lender, not Bank of America, filed suit against Borrower. The question is whether Lender is the proper party to sue.

¶8 Lender's right to enforce the debt is not governed by the UCC because the agreement is

not a negotiable instrument.[2] The agreement specifically provides that it is not governed by Article 3 of the UCC. Thus, standing is not analyzed in the same way as a mortgage foreclosure action where the plaintiff must demonstrate it is the holder of the promissory note or has the rights of a holder. *See Deutsche Bank National Trust Co. v. Byrams, supra*. In this case, Borrower executed the agreement which provides that Lender may assign the right to payment to another. Lender's petition alleges: (1) Borrower entered into the agreement with Bank of America on January 29, 2007, (2) Bank of America assigned agreement to Lender, (3) Borrower defaulted on the obligations under the agreement, (4) Borrower is indebted to Lender in the amount of $68,937.40. As a threshold legal question, we hold Lender has alleged sufficient facts to establish standing. *Oklahoma Educ. Ass'n v. State ex rel. Oklahoma Legislature,* 2007 OK 30, ¶10.

¶9 Although a trial court in making a decision on whether summary judgment is appropriate considers factual matters, the ultimate decision turns on purely legal determinations, *i.e.*, whether one party is entitled to judgment as a matter of law because there are no material disputed factual questions. Therefore, as the decision involves purely legal determinations, the appellate standard of review of a trial court's grant of summary judgment is *de novo. Tiger v. Verdigris Valley Electric Cooperative,* 2016 OK 74, ¶13, 410 P.3d 1007. We, like the trial court, will examine the pleadings and evidentiary materials submitted by the parties to determine if there is a genuine issue of material fact. *Ross v. City of Shawnee*, 1984 OK 43, ¶7, 683 P.2d 535. Further, all inferences and conclusions to be drawn from the evidentiary materials must be viewed in the light most favorable to the non-moving party. *Id.*

¶10 Lender attached the agreement to its motion for summary judgment. It provides, in part, "I (Borrower) may not assign this Credit Agreement or any of its benefits or obligations. You (Bank of America) may assign this Credit Agreement at any time." Lender also attached the affidavit of an employee for Transworld Systems Inc. (TSI), the subservicer of Lender and designated custodian of records for Borrower's educational loan. The employee stated he is competent to testify regarding the loan through personal knowledge of the business records maintained by TSI. He also declared Lender became the subsequent assignee of Borrower's loan, and that Borrower owes the principal sum of $68,937.40.

¶11 Although Borrower argued that Lender did not own the agreement, he did not attach any evidentiary materials to his response which would have created a genuine issue of material fact concerning Lender's ownership of the agreement.

¶12 Because there is no genuine issue of material fact and Lender is entitled to judgment as a matter of law, the trial court did not err in granting Lender's motion for summary judgment.

¶13 AFFIRMED.

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

BRIAN JACK GOREE, VICE-CHIEF JUDGE:

1. The record on appeal includes Borrower's motion to dismiss the petition based on Lender's lack of standing, Lender's response, Borrower's reply, and his supplement to his reply. The trial court did not rule on the motion to dismiss the petition. Therefore, this Court may not address this motion.

2. Title 12A O.S. §3-104(d) states: "A promise or order other than a check is not an instrument if, at the time it is issued or first comes into possession of a holder, it contains a conspicuous statement, however expressed, to the effect that the promise or order is not negotiable or is not an instrument governed b 2019 OK CIV APP 19

2019 OK CIV APP 19

IN THE MATTER OF THE ADOPTION OF: S.L.D., Minor Child. JESSICA DAVIS, Appellant, vs. MARCY DAVIS, Appellee.

Case No. 116,550. July 31, 2018

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

HONORABLE KURT GLASSCO, TRIAL JUDGE

REVERSED

Becki A. Murphy, Megan D. Martin, MURPHY FRANCY PLLC, Tulsa, Oklahoma, for Appellant

Christopher Brecht, PERRINE, REDEMANN, BERRY, TAYLOR & SLOAN, Tulsa, Oklahoma, Guardian Ad Litem for Natural Mother

Catherine Z. Welsh, Jim C. McGough, Rachel J. Ellsworth, WELSH & MCGOUGH, PLLC, Tulsa, Oklahoma, for Appellee

Angela Monroe, ASSISTANT PUBLIC DEFENDER, TULSA COUNTY PUBLIC DEFENDER'S OFFICE, Tulsa, Oklahoma, for Minor Child

P. THOMAS THORNBRUGH, CHIEF JUDGE:

¶1 In this appeal, Jessica Davis (Mother), the natural mother of S.L.D. (Child), seeks review of a trial court order declaring Child eligible for adoption without Mother's consent pursuant to 10 O.S.2011 § 7505-4.2(H) on grounds that Mother failed to maintain a substantial and positive relationship with Child. Based on our review of the record, the parties' briefs, and the applicable law, we find that the judgment that Mother's consent is unnecessary pursuant to subsection (H) is not supported by clear and convincing evidence under the facts presented. We reverse the order below.

BACKGROUND

¶2 Many of the underlying facts are not disputed. Child's father, Bo Ryan Davis (Father), and Mother were married when Child was born but have been divorced since February 2010, when Child was about two years-old. The consent decree of divorce granted Father sole custody of Child, and allowed supervised visitation by Mother during the initial months following the decree; however, it contemplated that the parties might eventually enter into a joint child custody plan if certain conditions were met. Appellee, Marcy Davis (Stepmother), has been married to Father since July 2011.

¶3 On October 4, 2016, Stepmother filed a petition to adopt Child. She simultaneously filed an application to determine Child eligible for adoption without Mother's consent (AWOC), alleging that "for a period of twelve (12) consecutive months out of the last fourteen (14) months immediately preceding the filing" of the petition for adoption, Mother had failed to establish and/or maintain a substantial and positive relationship with Child. *See* 10 O.S.2011 § 7505-4.2(H)(1). The parties agree that the 14-month relevant time period, pursuant to this provision, is August 4, 2015, through October 4, 2016 (relevant time period).

¶4 It is undisputed that notice of Stepmother's adoption proceeding was not served on Mother until November 11, 2016, but that Mother had filed, on October 25, 2016, a motion to enforce visitation in the divorce case. For approximately two years prior to Stepmother's filing of the adoption petition, Mother had been barred by a protective order, obtained by Father in September 2014, from contacting Child in any manner.

¶5 Though Father challenges the relevance of Mother's mental condition to this appeal, the record also shows as undisputed that from February 29, 2016, through August 11, 2016, Mother was involuntarily committed to a federal prison hospital undergoing treatment for mental illness. The commitment came after she was deemed incompetent for trial on federal charges related to violating the terms of her probation following her conviction in federal court of conspiracy to manufacture and pass counterfeit obligations.[1]

¶6 In April 2017, the district court appointed a guardian ad litem (GAL) for Mother at the request of Mother's counsel, who expressed concerns as to Mother's competency and ability to communicate. Stepmother then amended her AWOC application, adding grounds pursuant to § 7505-4.2(B)(2), that Mother had "willfully failed, refused and neglected" to contribute to Child's support during the relevant time period "according to [Mother's] financial ability" to do so; and pursuant to § 7505-4.2(L), that Mother has "a mental illness or mental deficiency" rendering her unable to properly exercise her parental responsibilities.

¶7 Trial occurred in October 2017. The trial court took judicial notice of the parties' consolidated divorce and protective order case. The docket sheet in that matter reveals considerable post-decree activity by both the parties and the district court, including an order granting Father's motion to modify visitation to require that Mother's visitation be supervised by a licensed professional at Mother's expense; two motions by Mother seeking to enforce visitation (the latest being her October 25, 2016 motion); a September 2014 motion by Father to require Mother to have a mental health evaluation; and a court minute indicating Mother's agreement to have the evaluation performed at her own expense. The current status of Mother's motions to enforce in the divorce case is not clear. Though not entirely clear from the record, Mother apparently has not had the mental evaluation requested by Father that is the subject of the court minute.

¶8 Mother admitted she had not had any contact with Child during the relevant time period. She stated she had had a mental "breakdown" in September 2014 and was hospitalized for her mental condition by the federal court for six months, beginning sometime in February 2016 until August 2016. She was eventually tried in federal court on the charges related to violating probation and was released with an ankle monitor. She recognized that the 2014 protective order obtained by Father remained in effect during the same time period.

She stated she knew it could be modified, however, and as a result, in October 2016 she filed, on her own behalf, a motion seeking to enforce her visitation rights.

¶9 Neither party offered expert testimony. During Mother's cross-examination in Stepmother's case in chief, however, Mother presented copies of two forensic mental health evaluations from federally-employed forensic psychologists to support her testimony that she had been hospitalized by the U.S. Department of Justice's Federal Bureau of Prisons due to her incompetency to stand trial in the federal case. The forensic evaluations reflect she was detained for six months during the 12 months period immediately preceding the adoption petition's filing. The trial court initially admitted the reports "under advisement," over Stepmother's objection that the reports were inadmissible hearsay. The court ultimately denied admission of the evaluations, however, after denying Mother's demurrer to the evidence,[2] and later refused Mother's GAL's request to reconsider the exclusion. At that time, the trial judge also recognized as "uncontroverted" that Mother had "various mental health diagnosis [sic]" and that she was both incompetent and competent during portions of the relevant time period.[3] During closing arguments, Stepmother withdrew § 7505-4.2(L) as a ground for her AWOC application.

¶10 At the conclusion of the trial the trial judge stated that while it "appears . . . that [Mother] does have significant mental health issues . . . the evidence is in conflict about what action she took during the relevant time period." The court deemed Child eligible for AWOC pursuant to 10 O.S.2011 § 7505-4.2(H) alone, finding Stepmother had shown by clear and convincing evidence that Mother "failed to exercise parental rights and duties over [Child], including failure to establish and/or maintain a substantial and positive relationship" during the relevant time period.[4] The court's order did not address Mother's mental condition or the motion to enforce visitation she filed prior to being served with the petition to adopt Child, however. Mother filed this appeal.

STANDARD OF REVIEW

¶11 When reviewing a trial court's decision declaring a child eligible for adoption without the consent of the biological parent, this Court reviews issues of fact under a "clear and convincing standard." *In re Adoption of G.D.J.*, 2011 OK 77, ¶ 17, 261 P.3d 1159 (citing *In re Adoption of C.D.M.*, 2001 OK 103, ¶ 13, 39 P.3d 802). "The burden is on the party seeking to adopt without consent to prove such adoption is warranted by clear and convincing evidence. Accordingly, the decision of the trial court will not be disturbed unless it fails to rest on clear and convincing evidence." *Id.* As to questions of law, however, we review the trial court's judgment *de novo. Id.* Statutory interpretation presents a question of law. *In re A.N.O.*, 2004 OK 33, ¶ 3, 91 P.3d 646.

ANALYSIS

¶12 Not surprisingly, the focus of argument on appeal is Mother's mental health. The essential issues presented are (1) whether the trial court correctly interpreted and applied 10 O.S.2011 § 7505-4.2(H) to Mother's situation; (2) whether the court was required to apply § 7505-4.2(L) in this case; and (3) whether Stepmother sustained her burden of producing clear and convincing evidence Mother's consent to Child's adoption is not necessary pursuant to § 7505-4.2(H). We hold that (1) the trial court misconstrued subsection (H) by including – within the statutory "twelve (12) consecutive months out of the last fourteen (14) months immediately preceding" the adoption petition's filing – the six months when Mother was adjudicated legally and mentally incompetent; (2) the district court is not restricted to applying only subsection (L) any time the parent in question has been diagnosed with a mental illness or deficiency; and (3) the order deeming Child eligible for adoption without Mother's consent is not supported by clear and convincing evidence, and must be reversed.

¶13 Pursuant to 10 O.S. § 7505-4.2(H):

> 1. Consent to adoption is not required from a parent who fails to establish and/or maintain a substantial and positive relationship with a minor for a period of twelve (12) consecutive months out of the last fourteen (14) months immediately preceding the filing of a petition for adoption of the child.
>
> 2. In any case where a parent of a minor claims that prior to the receipt of notice of the hearing provided for in Sections 7505-2.1 and 7505-4.1 of this title, such parent had been denied the opportunity to establish and/or maintain a substantial and positive relationship with the minor by the custodian of the minor, such parent shall prove to the satisfaction of the court that he or she has taken sufficient legal action to

establish and/or maintain a substantial and positive relationship with the minor prior to the receipt of such notice.

3. For purposes of this subsection, 'fails to establish and/or maintain a substantial and positive relationship' means the parent:

a. has not maintained frequent and regular contact with the minor through frequent and regular visitation or frequent and regular communication to or with the minor, or

b. has not exercised parental rights and responsibilities.

Also pertinent here is § 7505-4.2(L), which states:

L. Consent to adoption is not required from:

1. A parent who has a mental illness or mental deficiency, as defined by paragraphs f and g of Article II of Section 6-201 of Title 43A of the Oklahoma Statutes, which renders the parent incapable of adequately and appropriately exercising parental rights, duties and responsibilities;

2. The continuation of parental rights would result in harm or threatened harm to the minor; and

3. The mental illness or mental deficiency of the parent is such that it will not respond to treatment, therapy or medication and, based upon competent medical opinion, the condition will not substantially improve.

¶14 Comparing the definitions of mental illness and mental deficiency in 43A O.S.2011 § 6-201, art. II (f) and (g),[5] with the contents of the forensic evaluations submitted in the trial court, it is clear, as the trial court recognized, that for at least six months of the relevant time period, Mother had a mental deficiency or illness rendering her incapable of appropriately exercising her parental rights and duties. In addition, her condition fits the definition of a "mentally incompetent person" under 43A O.S.2011 & Supp. 2017 § 1-103(12)("Mentally incompetent person" means "any person who has been adjudicated mentally or legally incompetent by an appropriate district court"), and Mother was in fact involuntarily committed for treatment during that time. Oklahoma has long recognized, as a matter of public policy and state statute, that after an individual's incapacity or incompetency has been judicially determined, "a person of unsound mind can make no conveyance or other contract, nor designate any power, nor waive any right, until his restoration to capacity is judicially determined." 15 O.S.2011 § 24. This provision has been described as one by which the state, "for the protection of its incompetents," has deemed any "civil acts transacted by a person" after they were determined to be incompetent void as a matter of law. *National Life Ins. Co. v. Jayne,* 132 F.2d 358, 361 (10th Cir. 1942)(citing 15 O.S. 1941 § 24 and *Groenewold v. Groenewold,* 1943 OK 391, 144 P.2d 965).

¶15 Mother contends that her recognized mental illness or deficiency required as a matter of law that the trial court proceed only under the statutory provision specifically targeted toward a parent who has a mental illness or mental deficiency, in § 7505-4.2 (L), rather than the more general provision in subsection (H). Mother argues that her mental condition essentially is the only relevant factor here, and that the trial court was required to use subsection (L) rather than subsection (H) once Mother's mental illness/deficiency became clear. She makes a cogent argument that the analysis used by the Oklahoma Supreme Court in the recent decision, *In re B.K.*, 2017 OK 58, 398 P.3d 323, supports her contention that the Oklahoma Legislature intended and due process requires that subsection (L) exclusively must be used to forego parental consent to the adoption of a child of a mentally ill or deficient parent.

¶16 Stepmother, on the other hand, contends Mother's mental condition is wholly irrelevant and that the trial court correctly applied and interpreted subsection (H), which makes no requirement of intention or willfulness in determining whether a parent has failed to maintain a substantial and positive relationship with a child. Stepmother points to the fact that, prior to 2001, subsection (H) required proof that a parent "willfully" failed to maintain a substantial and positive relationship. She contends, in essence, that when the Legislature removed the willfulness requirement, it intended to recognize that a parent's duty to maintain a relationship is of utmost importance, regardless of the parent's capacity or intent, or the willfulness of the conduct. Stepmother argues "the best interest of the child" is served when adoption proceeds in an "orderly and expeditious" fashion that does not delay permanency indefinitely, as

Stepmother sees what Mother is attempting to do. Stepmother further argues that a potential adoptive parent should not be required to bear the expense of proving the requirements of subsection (L).

¶17 Stepmother's argument overlooks the public policy and due process concerns that Oklahoma recognizes as applicable to persons who have been adjudged mentally incompetent and incapable of handling their own affairs. Though in 2001 the Legislature removed "willfully" from subsection (H) and added subsections (H)(2) and (H)(3) to the statute, we do not interpret these changes as evincing legislative intent to override the general public policy of protecting persons who lack the capability of comprehending the significance of their actions or failure to act. Simply removing the term 'willful' does not equate to removing the presumption that a parent who fails to establish or maintain a substantial relationship is competent to choose to act otherwise, particularly when the failure to act will compromise the parent's recognized constitutional rights in the parent-child bond. *See Moody v. Voorhies*, 475 P.2d 579 (Oregon 1970) (biological father's commitment to mental hospital during year before adoption petition filed could not be used to support claim that he had abandoned the father-son role).

¶18 At the same time, however, we disagree with Mother's contention that a person (such as Stepmother) seeking to adopt a child without parental consent must exclusively rely on §7505-4.2(L) in any case involving a biological parent who has a mental illness/deficiency. In *In re B.K.*, 2017 OK 58, 398 P.3d 323, the Court made clear that situations may, and do, exist where it is inappropriate or unwise to exclusively require the use of a mental health statutory provision to terminate the rights of a mentally ill parent. Despite Mother's cogent analysis distinguishing *In re B.K.*, we reject that analysis here. The fact that Mother may have been mentally ill or deficient at one point, or multiple points, in time does not set in stone the proper AWOC procedure for all time. We therefore reject Mother's argument on this point.

¶19 We hold only that we decline to read subsection (H) as Stepmother argues and as the trial court applied it. We find, instead, that the six-month period when Mother was adjudicated incompetent and was involuntarily committed interrupted the relevant time period. The clear and convincing evidence therefore did not support the trial court's finding that Mother engaged in the requisite conduct to render her consent unnecessary under subsection (H). The court's decision finding Child eligible for adoption without Mother's consent pursuant to § 7505(H) is therefore is reversed.[6]

CONCLUSION

¶20 We hold that (1) the trial court misconstrued subsection (H) by including, as part of the statutory period required by § 7505-4.2(H), the six months when Mother's mental deficiency caused her to be adjudicated legally and mentally incompetent; (2) the district court is not restricted to applying only subsection (L) any time the parent in question has been diagnosed with a mental illness or deficiency; and (3) the order deeming Child eligible for adoption without Mother's consent is not supported by clear and convincing evidence. Accordingly, we reverse the trial court's order declaring Child eligible for adoption without Mother's consent.

¶21 **REVERSED**.

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

P. THOMAS THORNBRUGH, CHIEF JUDGE:

1. The record indicates that Mother was convicted in January 2014 and sentenced to four years of probation. At some point in mid- to late 2015 she was arrested for violating the terms of her probation. She was thereafter referred by a federal magistrate for the Northern District of Oklahoma for an examination to determine whether she was suffering from a mental disease or defect rendering her unable to understand the nature and consequences of the proceeding against her or to assist properly in her defense. As discussed later in the text, the trial court initially admitted forensic psychiatric evaluations related to Mother's diagnosis, then excluded them, but then characterized as "uncontroverted" her mental illness and incompetence for the time period claimed.

2. See trial transcript at pp. 57-58.

3. The court also recognized that the federal district court had entered an order declaring Mother incompetent to stand trial. *See* trial transcript at pp. 71-73.

4. Transcript at p. 84.

5. Subsections (f) and (g) of 43A O.S.2011 § 6-201, art. II, provide:

> (f) "Mental illness" shall mean mental disease to such extent that a person so afflicted requires care and treatment for the welfare of the person, or the welfare of others, or of the community.
>
> (g) "Mental deficiency" shall mean mental deficiency as defined by appropriate clinical authorities to such extent that persons so afflicted are incapable of managing themselves and their affairs, but shall not include mental illness as defined herein.

6. This determination does not take into account the undisputed evidence that Mother filed a motion in the divorce proceeding to enforce visitation prior to receiving notice that Stepmother's adoption petition had been filed. However, under the Court's recent decision in *In re Adoption of M.A.S.*, 2018 OK 1, ¶¶ 23-29, 419 P.3d 204, such action by Mother might be sufficient to invoke the defense available under § 7505-4.2(H)(2), that she was prevented from establishing or maintaining a substantial and positive relationship with Child."

2019 OK CIV APP 20

TEXASFILE, LLC, Plaintiff/Appellant, vs. JEANNIE BOEVERS, IN HER CAPACITY AS KINGFISHER COUNTY CLERK, Defendant/Appellee, and LORI FULKS, IN HER CAPACITY AS GARVIN COUNTY CLERK, Intervenor/Appellee.

Case No. 116,852. August 29, 2018

APPEAL FROM THE DISTRICT COURT OF KINGFISHER COUNTY, OKLAHOMA

HONORABLE ROBERT E. DAVIS, TRIAL JUDGE

AFFIRMED

William K. Elias, Wyatt D. Swinford, ELIAS, BOOKS, BROWN, & NELSON, P.C., Oklahoma City, Oklahoma, and

Henry J. Hood, HENRY J. HOOD, PLLC, Oklahoma City, Oklahoma, for Plaintiff/Appellant

Mike Fields, KINGFISHER COUNTY DISTRICT ATTORNEY, John M. Salmon, Eric Epplin, ASSISTANT DISTRICT ATTORNEYS, Kingfisher, Oklahoma, for Defendant/Appellee

Randall J. Wood, April D. Kelso, PIERCE COUCH HENDRICKSON, BAYSINGER & GREEN, L.L.P., Oklahoma City, Oklahoma and

Greg Mashburn, GARVIN COUNTY DISTRICT ATTORNEY, Carol Price Dillingham, ASSISTANT DISTRICT ATTORNEY, Norman, Oklahoma, for Intervenor/Appellee

KEITH RAPP, JUDGE:

¶1 Trial court plaintiff, TexasFile, LLC, (TexasFile) appeals the trial court's Journal Entry of Judgment denying the summary judgment motion of TexasFile and granting summary judgment in favor of defendant, Jeannie Boevers, in her capacity as Kingfisher County Clerk, and Intervenor, Lori Fulks, in her capacity as Garvin County Clerk. This accelerated appeal proceeds pursuant to Okla.Sup.Ct.R. 1.36(c), 12 O.S. Supp. 2017, ch. 15, app. 1.

BACKGROUND

¶2 TexasFile is a company that provides remote access to images of county land records to its subscribers via the Internet. TexasFile does business in Texas, New Mexico and a few counties in Oklahoma. TexasFile has contracts with officials from Blaine County, Logan County, Oklahoma County, and Grady County to receive digital land records for its business. TexasFile receives copies of available digital land records and allows their subscribers to access the images of these public land records.

¶3 On May 6, 2016, TexasFile requested, pursuant to the Oklahoma Open Records Act, a "complete electronic copy of all the Kingfisher County land records that are currently available in electronic format." TexasFile did not request the associated tract index. TexasFile specifically requested all records that were currently available on OKcountyrecords.com. TexasFile also requested the fee and timeline for providing the requested scanned records in electronic form. The County Clerk of Kingfisher County did not respond to the May 6, 2016, request.

¶4 TexasFile made a second request for the electronic copy of the land records on January 11, 2017. TexasFile also acknowledged they had recently made similar requests to Oklahoma, Blaine, and Logan Counties and those counties had complied with the requests. TexasFile had entered into a formal agreement to receive electronic copies of the land records with each of those counties.

¶5 On May 15, 2017, Jeannie Boevers, as County Clerk of Kingfisher County, responded to TexasFile's request per the Oklahoma Open Records Act and denied TexasFile's request. Boevers explained:

> This is to inform you that your request does not fall within the provisions of the Act as interpreted by the Oklahoma Supreme Court in *County Records, Inc. v. Armstrong,* 2012 OK 60, 299 P.3d 865. Neither the tract index nor the data (land records) inextricably linked to the computer software can be provided for resale. Commercial use or dissemination of these records is prohibited. You are welcome to come to my office like all other persons to inspect and copy documents.

¶6 TexasFile filed this declaratory judgment and mandamus action against Jeannie Boevers in her capacity as County Clerk of Kingfisher County asking the trial court to enter an order determining TexasLink was entitled to an electronic copy of the Kingfisher County public land records maintained by the County Clerk, pursuant to the Oklahoma Open Records Act, and compelling the County Clerk of Kingfisher County to make available the land records of the Kingfisher County Clerk's office in an electronic format at a reasonable fee.

¶7 After filing an Answer in the litigation, Boevers, in her capacity as Kingfisher County Clerk, and joined by Lori Fulks, in her capacity as Garvin County Clerk, (collectively referred to as County Clerks) filed a Motion to Consolidate Cases and Supporting Brief. County Clerks alleged TexasFile filed an identical action as the present action again Lori Fulks, in her capacity as Garvin County Clerk. County Clerks further alleged TexasFile sought a declaratory judgment that it was entitled to electronic copies of the public land records of Garvin County for a reasonable fee under the Oklahoma Open Records Act. County Clerks further alleged the legal issues in the Kingfisher County and the Garvin County actions are identical. The County Clerks also asserted:

> [a] number of County Clerks of the State of Oklahoma … seek a uniform judicial determination of the legal issue raised by TexasFile, LLC. Specifically, does the Open Records Act require the County Clerk's office to empty its electronic files into the hands of the Plaintiff so that the Plaintiff may then resell these records to customers in a commercial enterprise?

The County Clerks argued several factors favored consolidation – consolidation would prevent resolution of this important legal issue in a piecemeal fashion; concerns of judicial economy; and uniformity in a decision. In addition, County Clerks argued the Garvin County action was in its early stages of litigation.

¶8 On October 20, 2017, TexasFile filed a Motion for Summary Judgment and Brief in Support arguing there were no material facts in dispute and it was entitled to judgment as a matter of law. TexasFile argued Boevers, as County Clerk of Kingfisher County, had a statutory duty to maintain land records in Kingfisher County and to provide electronic copies of these land records to those making a request for the records. TexasFile relies on Title 19 O.S. § 286 and the Oklahoma Open Records Act for its premise that Boevers is bound to provide TexasFile with electronic copies of the Kingfisher County land records.

¶9 TexasFile argues that, under Section 286, the county clerk is required to maintain all instruments filed in the clerk's office and to make these records, including computerized records, available for viewing and copying. TexasFile contends "[t]he undisputed material facts show that TexasFile is entitled to downloaded copies of the land records maintained in electronic format under Section 286."

¶10 TexasFile also argues that the Open Records Act provides TexasFile the right to access and obtain downloaded copies of the electronic land records of Kingfisher County. TexasFile concedes the Open Records Act prohibits the copying of the tract index if the purpose is to sell the information, but states TexasFile did not request a copy of the tract index. In addition, TexasFile argues the policy of the Open Records Act – "to guarantee the public's right to access and reproduce the public records of the state and its entities" – supports its request for copies of the electronic land records.

¶11 TexasFile asserts the case relied on by Boevers, *County Records, Inc. v. Armstrong*, 2012 OK 60, 299 P.3d 865, is inapplicable to the present case. TexasFile alleges *Armstrong* is distinguishable because it involved a request for the tract index, which is statutorily prohibited. Here, TexasFile did not request the tract index. In addition, TexasFile argues the *Armstrong* court relied on the Abstractors Act, which is not involved in the present action.

¶12 Finally, TexasFile argues the fees charged by the County Clerk of Kingfisher County are illegal and unreasonable because the fees do not reflect the actual cost of providing the electronic copies. According to TexasFile, the fees charged by the County Clerk are more appropriate for providing hard copies of the land records and not the electronic copies.

¶13 On October 30, 2017, TexasFile filed its opposition to the Motion to Consolidate. The trial court entered a Court Minute on November 3, 2017, ruling that it was treating the Motion to Consolidate as a motion to intervene and granting the Motion to Intervene. The Court Minute further stated that the "[p]arties agree to stay Garvin County case pending resolution of Kingfisher County case."

¶14 County Clerks filed a joint response to TexasFile's summary judgment motion. County Clerks agreed there were no material facts in dispute and the motion presented an important question of law: "[A]re the county clerks required to comply with TexasFile's request for land record information so that TexasFile can then sell the same for a profit[?]" County Clerks argued the Oklahoma Supreme Court decided this issue in *Armstrong* holding that a county clerk is prohibited "from providing any documents and data from the land records for the intentional

sale of that information." *Armstrong*, 2012 OK 60 ¶ 11, 299 P.3d at 868. County Clerks also argued the Open Records Act prohibits the County Clerk from satisfying TexasFile's request.

¶15 After hearing arguments, the trial court denied TexasFile's summary judgment motion and granted summary judgment in favor of County Clerks pursuant to District Court Rule 13. The trial court entered a Journal Entry of Judgment memorializing its ruling, filed on February 13, 2018. TexasFile appeals.

STANDARD OF REVIEW

¶16 Whether the trial court's grant of summary judgment was proper is a question of law, which this Court reviews *de novo. Manley v. Brown*, 1999 OK 79, ¶ 22, 989 P.2d 448, 455. In a *de novo* review, the appellate court has the "plenary independent and non-deferential authority to reexamine a trial court's legal rulings." *Kluver v. Weatherford Hosp. Auth.*, 1993 OK 85, ¶ 14, 859 P.2d 1081, 1084. This Court will examine the parties' pleadings and evidentiary materials to determine if there is a disputed material fact or whether reasonable minds could draw different conclusions from undisputed facts. *Harmon v. Cradduck*, 2012 OK 80, ¶ 11, 286 P.3d 643, 648. This Court views the facts and reasonable inferences in the light most favorable to the non-moving party. *Id*.

¶17 "Permissive intervention is left to the sound legal discretion of the trial court based upon the nature of the controversy and the facts and circumstances of each case. The trial court's determination will not be reversed on appeal absent an abuse of that discretion." *Tulsa Rock Co. v. Williams*, 1982 OK 10, ¶ 5, 640 P.2d 530, 532.

ANALYSIS

¶18 The issue presented on appeal is whether a county clerk is required to provide an entity with an electronic copy of the county land records maintained by the county clerk when the copies will be used for commercial purposes. TexasFile maintains the trial court erred in denying its summary judgment motion, thereby denying its request for an electronic copy of all the land records, excluding the tract index, currently available in electronic format.

¶19 The Oklahoma Supreme Court addressed this issue in a factually similar case, *County Records, Inc. v. Armstrong*, 2012 OK 60, 299 P.3d 865. In *Armstrong*, the Court was presented with the issue of whether a real estate database company that provides land records to on-line subscribers, County Records, Inc., was entitled to access to electronic copies of a county's official public land records, including an electronic copy of the official tract index of county land records, when the web business sought to resell the records for profit. County Records sought a declaratory judgment to compel production of an electronic version of the county land records, including the official tract index, at a reasonable fee. The County Clerk had previously denied County Records request for the official tract index based on her belief she was "legally prohibited from providing it to [County Records] for its intended commercial sale of the information." *Id.* ¶ 4, 299 P.3d at 866.

¶20 The Oklahoma Supreme Court in *Armstrong* held that the express language of the Open Records Act prohibited the County Clerk from complying with the request for land records of the technology company, County Records, Inc. The Court stated:

> A special provision of the Open Records Act applies to the county land records:
>
> > The land description tract index of all recorded instruments concerning real property required to be kept by the county clerk of any county shall be available for inspection or copying in accordance with the provisions of the Oklahoma Open Records Act; provided, however, the index shall not be copied or mechanically reproduced for the purpose of sale of the information.
>
> [51 O.S. § 24A.5(4)]. The purpose of this provision is understood when it is considered with the provisions of the Oklahoma Abstractors Act, Okla. Stat. tit.1, §§ 20 - 43 (2011). Pursuant to the Act, abstractors are provided "free access to the instruments of record affecting real property." *Id.*, § 36(A)(1). However, "[a]ccess to instruments of record shall be for immediate and lawful abstracting purposes only. The sale of the instruments of record for profit to the public either on the internet or any other such forum by any company holding a permit to build an abstract plant is prohibited." *Id.* § 36(E). . . .
>
> When the Open Records Act is read with the Abstractors Act, the legislative intent becomes apparent. Production of the offi-

> cial tract index for inspection and copies of the official tract index and instruments of record affecting real estate are not limited unless the request for information from the county records is for the sale of that information. The tract index provision in the Open Records Act extends the prohibition on sale of the county land record information to any person who intends to profit from such a sale.
>
> The policy underlying the restriction on production of the official tract index is the prevention of the sale of the public records for private profit. It recognizes that the county clerk recoups part of the costs of the personnel and equipment necessary to produce, record, and maintain the land records from the sale of copies of land instruments. This is true whether the information is stored electronically or on paper.
>
> The [County Clerk] was correct to refuse Plaintiff's request for an electronic copy of the tract index based on the tract index restriction contained in the Open Records Act. *However, the mandate of that restriction is broader; it prohibits a county clerk from providing any documents and data from the land records for the intentional sale of that information.*

Id. ¶¶ 8-11, 299 P.3d at 867-68 (footnotes omitted) (emphasis added).

¶21 Based on the rationale of the Oklahoma Supreme Court in *Armstrong*, this Court finds the trial court did not err in denying TexasFile's request for the county land records of the County Clerks. Thus, the trial court did not err in denying TexasFile's motion for summary judgment. The trial court's Journal Entry of Judgment denying the summary judgment motion of TexasFile and granting summary judgment in favor of defendant, Jeannie Boevers, in her capacity as Kingfisher County Clerk, and Intervenor, Lori Fulks, in her capacity as Garvin County Clerk, is affirmed.

¶22 TexasFile next argues the trial court erred in treating the Motion to Consolidate as one to intervene and in granting the Motion to Intervene. TexasFile argues the Garvin County Clerk did not comply with the intervention procedure.

¶23 Application of the intervention statute requires a balancing of four countervailing interests:

> 1) the interest of the plaintiff in controlling the scope and extent of his cause of action and in not having new claims or parties complicate and confuse the determination of his case; 2) the interest of the defendant in having all parties and claims joined in the same action to prevent vexatious suits and to prevent possible inconsistent judgments; 3) the interest of third parties in having access to a forum when there is a possibility that stare decisis, res judicata or collateral estoppel may subsequently prevent them from seeking redress if not made a party to the original action; and 4) the general policy of this Court to apply joinder and intervention statutes liberally in the interests of justice and judicial economy by having the full subject matter of any controversy settled in one action.

Gettler v. Cities Serv. Co., 1987 OK 57, ¶ 7, 739 P.2d 515, 517. Here, allowing the County Clerk of Garvin County to intervene in the present action was a matter of judicial economy. Otherwise, the identical issue could potentially be raised in each county of the State. Furthermore, TexasFile has not shown how it was prejudiced by the trial court allowing the County Clerk of Garvin County to intervene thereby allowing TexasFile to litigate the issue in one county. This Court finds the trial court did not abuse its discretion in allowing the County Clerk of Garvin County to intervene in the present litigation.

CONCLUSION

¶24 The trial court's Journal Entry of Judgment denying the summary judgment motion of TexasFile and granting summary judgment in favor of defendant, Jeannie Boevers, in her capacity as Kingfisher County Clerk, and Intervenor, Lori Fulks, in her capacity as Garvin County Clerk, is affirmed.

¶25 AFFIRMED.[1]

BARNES, P.J., and GOODMAN, J., concur.

KEITH RAPP, JUDGE:

1. Appellees' Motion for Leave to Submit Appellate Briefs is denied.

2019 OK CIV APP 21

MARCELLA AYISI, Petitioner, vs. SEQUEL YOUTH & FAMILY SERVICES, LLC, TRAVELERS INDEMNITY CO., and THE

WORKERS' COMPENSATION COMMISSION, Respondents.

Case No. 117,348. February 28, 2019

PROCEEDING TO REVIEW AN ORDER OF THE WORKERS' COMPENSATION COMMISSION

HONORABLE MICHAEL T. EGAN, ADMINISTRATIVE LAW JUDGE

SUSTAINED IN PART, VACATED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS

Bob Burke, Oklahoma City, Oklahoma and Jeffrey M. Cooper, Oklahoma City, Oklahoma, for Petitioner

Mia C. Rops, AYIK & ASSOCIATES, St. Paul, Minnesota, for Respondents

DEBORAH B. BARNES, PRESIDING JUDGE:

¶1 This is the second appeal in this case. The first appeal – *Sequel Youth & Family Services LLC v. Ayisi*, 2018 OK CIV APP 7, 412 P.3d 107 – arose from an order of the Workers' Compensation Commission affirming the order of an Administrative Law Judge (ALJ) who found Marcella Ayisi (Claimant) sustained compensable injuries to both of her knees arising out of the course and scope of her employment. As explained at greater length in the prior appeal, Claimant fell on August 26, 2015, while working as a residential counselor for Sequel Youth & Family Services, LLC. She "land[ed] directly on both knees." 2018 OK CIV APP 7, ¶ 2. The medical evidence generated after the accident revealed that the primary injury or condition in Claimant's knees is osteoarthritis.

¶2 As explained in the prior appeal, the pertinent statutory provisions are found in 85A O.S. Supp. 2014 § 2, and provide as follows:

> 9. a. "Compensable injury" means damage or harm to the physical structure of the body . . . caused solely as the result of either an accident, cumulative trauma or occupational disease arising out of the course and scope of employment….
>
> . . . .
>
> b. "Compensable injury" does not include:
>
> . . .
>
> (5) any strain, degeneration, damage or harm to, or disease or condition of, the eye or musculoskeletal structure or other body part resulting from the natural results of aging, osteoarthritis, arthritis, or degenerative process including, but not limited to, degenerative joint disease, degenerative disc disease, degenerative spondylosis/spondylolisthesis and spinal stenosis, or
>
> (6) any preexisting condition except when the treating physician clearly confirms an identifiable and significant aggravation incurred in the course and scope of employment.

¶3 Regarding the exclusion of conditions "resulting from the natural results of aging, osteoarthritis, arthritis, or degenerative process," set forth in § 2(9)(b)(5), we explained that under both the Workers' Compensation Code and the Workers' Compensation Act such conditions were also excluded except where "the employment is a major cause of the deterioration or degeneration and is supported by objective medical evidence[.]" *Ayisi*, ¶ 14 (citing 85 O.S. Supp. 2010 § 3(13)(d); 85 O.S. 2011 § 308(10)(c)). We explained, among other things, that "legislative silence is rarely to be taken as clear legislative intent to abrogate an established construction," *Ayisi,* ¶ 14, and we explained that an alternative construction requiring that such injuries, in effect, be "caused solely" by the employment in order to be compensable would "be untenable in light of the statute as a whole," *id*. ¶ 21. We concluded, in pertinent part, that Claimant's osteoarthritis – which we explained was defined as a condition caused by the damage or breakdown of the protective joint cartilage between bones – is therefore compensable under § 2(9)(b)(5) if her employment is found to be the major cause of her osteoarthritis. *Ayisi,* ¶ 14 n.2. We stated in the prior appeal that "it is the legislative intent that, in this case, Claimant's osteoarthritis, if resulting from the natural results of aging, is not compensable unless it is found that the employment is the major cause of the deterioration or degeneration and such a finding is supported by objective medical evidence." *Id.* ¶ 27. We stated that this test "applies to both of Claimant's knees." *Id*. Following the issuance of the first appeal, neither party filed a petition for rehearing or a petition for certiorari. Mandate issued.

¶4 On remand, the ALJ determined Claimant's employment was not the major cause of her osteoarthritis in her knees and, therefore, denied compensation. Claimant sought review

by the Commission which affirmed the ALJ's order. The issue arose whether Claimant should at least be found to have sustained a compensable injury to her right knee as a result of an aggravation of a preexisting condition under § 2(9)(b)(6). As articulated by the Commission, however, this Court, in the prior appeal, "expressly held that Claimant's osteoarthritis is compensable only if her employment is the major cause of the degeneration in her knees. Because Claimant failed to seek relief from that decision, [that] determination is now the settled law of the case and cannot be relitigated."[1]

¶5 We take this opportunity to clarify that § 2(9)(b)(6) is applicable to cases involving preexisting conditions where "the treating physician clearly confirms an identifiable and significant aggravation [of that preexisting condition] incurred in the course and scope of employment."[2] Any implication to the contrary in the prior appeal regarding the effect of § 2(9)(b)(6) is in error.

¶6 With regard to Claimant's left knee, however, we explained in the prior appeal that the ALJ concluded there was no "preexisting condition as defined in the AWCA[.]" *Ayisi*, ¶ 15.[3] Thus, we concluded, at least impliedly, that the lower court erred in awarding compensation for the left knee under § 2(9)(b)(6). We further concluded that Claimant could still receive compensation for her left knee under § 2(9)(b)(5) if the major cause of her osteoarthritic condition in her left knee was her employment. Because the trial court's determination on remand that the major cause of Claimant's osteoarthritis is not work-related is supported by substantial evidence, we conclude compensation for Claimant's left knee was appropriately denied on remand. *See Gillispie v. Estes Exp. Lines, Inc.*, 2015 OK CIV APP 93, ¶ 15, 361 P.3d 543 (On fact questions, this Court will review the record to determine if there is substantial evidence to support the decision.).

¶7 The trial court also determined on remand that the major cause of Claimant's condition in her right knee is not work-related, and this determination is also supported by substantial evidence. However, the ALJ previously determined that, regarding the right knee, Claimant suffered an aggravation of a preexisting condition. The finding that there was a preexisting condition in Claimant's right knee at the time of the accident is based on the fact that Claimant had an arthroscopic procedure performed on her right knee approximately sixteen years before the accident. Regardless of the distance in time between the accident and this procedure, however, the findings that Claimant had a "preexisting condition" in her right knee at the time of the accident, and that this is the condition for which treatment was provided, are supported by substantial evidence.[4] Moreover, it is undisputed the treating physician confirmed an identifiable and significant aggravation occurred to that condition in the course and scope of Claimant's employment. Consequently, regarding Claimant's right knee, the ALJ appropriately found that, under § 2(9)(b)(6), Claimant sustained a compensable injury.[5] To the extent the prior appeal is at odds with this analysis, that portion of the prior appeal is overruled. Although Claimant failed to file a petition for rehearing or a petition for certiorari following this Court's issuance of the prior appeal, we conclude that a failure to reverse course would "result in a gross or manifest injustice." *Acott*, 2011 OK 56, ¶ 11.[6]

¶8 For these reasons, we sustain that portion of the Commission's order finding Claimant did not suffer a compensable left knee injury, but we vacate that portion of the Commission's order finding Claimant did not sustain a compensable injury to her right knee. We remand this case to the ALJ for further proceedings consistent with this Opinion.[7]

¶9 **SUSTAINED IN PART, VACATED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS.**

WISEMAN, V.C.J., and THORNBRUGH, J. (sitting by designation), concur.

DEBORAH B. BARNES, PRESIDING JUDGE:

1. The Oklahoma Supreme Court has explained:

> The doctrine of the settled law of the case . . . provides that issues which are litigated and settled on appeal, or which could have been settled in that appeal, may not be the subject of further litigation between the parties in that case and are deemed settled. It is a rule of judicial economy designed to prevent an appellate court from twice having to deal with the same issue.

Acott v. Newton & O'Connor, 2011 OK 56, ¶ 10, 260 P.3d 1271 (internal quotation marks omitted) (citations omitted). The *Acott* Court explained there is an

> exception to the rule when the prior decision is palpably erroneous and . . . failure to reverse it will result in a gross or manifest injustice. . . . Thus, under the settled law of the case doctrine, an issue may not be asserted on remand, or in a second or subsequent appeal, if the issue (1) was addressed in the first appeal, (2) could have been raised in the first appeal, or (3) the issue asserted was determined by implication in the first appeal.

Id. ¶ 11 (internal quotation marks omitted) (citations omitted).

2. As quoted above, § 2(9)(b)(6) provides that the term "compensable injury" does not include "any preexisting condition except when the treating physician clearly confirms an identifiable and significant aggravation incurred in the course and scope of employment." (Emphasis added.) *See also Stiles v. Okla. Tax Comm'n*, 1987 OK 85, ¶ 13, 752 P.2d 800 ("In Oklahoma[,] disability resulting from the aggravation of a pre-existing disease or condition is compensable." (footnote omit-

ted)); *ITT Continental Baking Co. v. Ware*, 1980 OK 167, ¶ 8, 620 P.2d 1308 ("[I]t has long been recognized in this jurisdiction that aggravation of a pre-existing condition or disease is compensable." (footnote omitted)). *See generally Okla. City v. Schoonover*, 1975 OK 52, 535 P.2d 688; *Marlar v. Marlar*, 1960 OK 110, 353 P.2d 17.

3. We also explained in the prior appeal that "the term 'preexisting condition' has a limited definition in the AWCA – it 'means any illness, injury, disease, or other physical or mental condition, whether or not work-related, for which medical advice, diagnosis, care or treatment was recommended or received preceding the date of injury[.]' 85A O.S. Supp. 2014 § 2(36)." *Ayisi*, ¶ 15.

4. We explained in the prior appeal:

> Claimant testified she was not having any problems with her knees prior to the accident, though she testified she had knee surgery performed on her right knee – a "right knee arthroscopic procedure" – in the year 2000. Claimant testified she was released "full duty" soon after that surgery, and she testified she had been working for sixteen years prior to the fall and had never been placed on any form of restrictions for her right knee.

Ayisi, ¶ 3. The past treatment to Claimant's right knee satisfies the limited definition of preexisting condition if the condition which she claims was aggravated by the accident was in fact the "condition . . . for which" the right knee arthroscopic procedure in 2000 was performed – i.e., the "condition . . . for which medical advice, diagnosis, care or treatment was recommended or received preceding the date of injury[.]" 85A O.S. § 2(36). The record indicates the past procedure was actually a right knee "meniscus repair," and the January 2016 medical report of Kevin W. Hargrove, M.D., states that Claimant "is likely now having some potential loose fragment that has developed, or possibly a recurrent or progressive lateral meniscus tear. However, her primary and obvious problem is osteoarthritis." This would appear to suggest that the surgery may have been for a condition distinguishable from the osteoarthritic condition present at the time of the accident, as does the following language found in the medical report of Lance E. Rosson, D.O., in which Dr. Rosson states he "suspect[s] that [Claimant] has MRI-documented meniscal tears and/or chondral injury and/or loose bodies *along with* aggravation of" the osteoarthritis in her right knee. (Emphasis added.) However, in the "Oklahoma Diagnostic Imaging" report regarding the MRI on Claimant's right knee, it is stated that "[t]here is degenerative blunting along the inner margin of the medial meniscus but otherwise no acute medial meniscus tear. There is complex degeneration and tearing throughout the lateral meniscus with peripheral extrusion of the meniscus body. . . ." This evidence supports the inference, which the ALJ endorsed, that the meniscus repair procedure was related to a long-term osteoarthritic condition in the right knee rather than an unrelated injury. *See also* Angela Lange et al., *Degenerative meniscus tears and mobility impairment in women with knee osteoarthritis*, 15 Osteoarthritis and Cartilage 701, 701 (2007), www.sciencedirect.com/science/article/ pii/S1063458406003232 ("Meniscus tears are often presumed to be associated with a traumatic event, but they can also occur as a result of the cartilage degeneration process in osteoarthritis (OA) of the knee."); Carol Eustice & Grant Hughes, *Meniscal Tears and Osteoarthritis* (2018), https://www.verywellhealth.com/meniscal-tears-and-osteoarthritis-2552038 ("[A] meniscal tear can lead to knee osteoarthritis," and it is also true that "knee osteoarthritis can lead to a spontaneous meniscal tear through breakdown and weakening (degeneration) of the meniscus. A degenerative meniscal lesion observed on MRI is suggestive of early osteoarthritis.").

5. Although the record indicates the osteoarthritis "with valgus deformities" is present in both of Claimant's knees, and our analysis leads to the conclusion that Claimant sustained a compensable injury only to her right knee, we note that the medical evidence also indicates the "right knee [is] much more advanced than [the] left," and Claimant reported in September 2015, for example, that her "left knee is significantly better" and she "is having no pain in that knee, but the right knee is still tender" with "increasing pain in the right knee . . . ."

6. We note that our determination in this appeal does not substantially thwart the interest of judicial economy which underpins the doctrine of settled law of the case. In this regard, the majority of this Court's analysis in *Ayisi*, 2018 OK CIV APP 7– in particular, our analysis of § 2(9)(b)(5) – remains unaffected by this decision, the remand of this case in the prior appeal was appropriate, and our resolution of this appeal requires no further adjudication of the underlying issues.

7. Claimant has raised additional arguments on appeal. However, those arguments are either rendered moot by our resolution of this appeal, or constitute arguments which either were raised and rejected, at least impliedly, in the prior appeal, or which could have been, but were not, raised in the prior appeal. *Acott*, ¶¶ 10-11. For these reasons, we will not address Claimant's additional arguments in this second appeal.

Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS
Thursday, March 7, 2019

F-2017-1054 — On August 28, 2014, as part of a plea agreement, the Honorable Richard G. Kessinger admitted Appellant, Justin Shane Moore, to the Pontotoc County Drug Court program in Pontotoc County District Court Case Nos. CF-2012-482 and CF-2014-256. On October 11, 2017, following an evidentiary hearing on an application by the State to terminate Appellant from Drug Court, Judge Kessinger sustained the application. In terminating Appellant from Drug Court, and in accordance with that agreement admitting him to the Drug Court Program, Judge Kessinger imposed a sentence of ten (10) years imprisonment in CF-2014-256 for Possession of a Controlled Dangerous Substance (Methamphetamine), a Subsequent Offense, and a sentence of two (2) years imprisonment in CF-2012-482 for Possession of a Controlled Dangerous Substance (Marijuana) within 1,000 Feet of a School. Both sentences were ordered to be served concurrently. Appellant appeals the final order terminating him from Drug Court. AFFIRMED.Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs; Rowland, J., concurs.

F-2017-88 — Kenneth Lee Granados, Appellant, appeals from an order of the District Court of Jackson County, entered by the Honorable Eric Yarborough, Associate District Judge, revoking Appellant from Drug Court participation and sentencing him in accordance with the plea agreement and Drug Court performance contract in Case No. CF-2011-126. AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs; Rowland, J., Concurs.

F-2017-728 — Eric Tyrone Bradford, Appellant, was tried by jury for the crimes of Count 1, first degree murder; Count 2, possession of a firearm after former conviction of a felony; and Count 3, feloniously pointing a firearm, all after former conviction of two or more felonies in Case No. CF-2016-2502 in the District Court of Tulsa County. The jury returned a verdict of guilty and set punishment at life imprisonment without parole on Count 1, life imprisonment on Count 2, and life imprisonment on Count 3. The trial court sentenced accordingly and ordered the sentences served consecutively. From this judgment and sentence Eric Tyrone Bradford has perfected his appeal. The Judgment and Sentence is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs in results; Lumpkin, J., concurs; Hudson, J., concurs; Rowland, J., concurs.

RE-2017-995 — In the District Court of Oklahoma County, Case No. CF-2009-4149, Appellant, Leron Martell Sabbath, while represented by counsel, entered a plea of guilty to Rape in the First Degree. On September 2, 2011, in accordance with a plea agreement, the Honorable Ray C. Elliott, District Judge, sentenced Appellant to ten years imprisonment, all suspended under written rules of probation. On September 19, 2017, Judge Elliott found Appellant violated his probation, and he revoked a nine-year-and-nine-month portion of the suspension order. Appellant appeals the final order of revocation. AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs in part and dissents in part; Lumpkin, J., concurs; Hudson, J., concurs.

M-2017-954 — Following a non-jury trial before the Honorable Susan Zwaan, Special Judge, in the District Court of Comanche County, Case No. CM-2017-322, Christian Wages, Appellant, was found guilty of Domestic Abuse – Assault and Battery and sentenced to one year in jail with all but the first thirty days suspended. Appellant appeals that conviction. JUDGMENT MODIFIED AND REMANDED FOR RESENTENCING. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., dissents; Hudson, J., concurs.

Thursday, March 14, 2019

F-2017-1166 — Appellant, Kenneth Allen Day, was charged in Oklahoma County District Court Case No. CF-2016-6470, with Count 1 – Unauthorized Use of a Vehicle, a felony, and Count 2 – Concealing Stolen Property, a felony. On November 3, 2016, Appellant entered a plea of guilty to Count 1. Count 2 was dismissed. Sentencing was deferred to November

2, 2021, with rules and conditions of probation. On June 16, 2017, the State filed an application to accelerate Appellant's deferred sentence. Following an acceleration hearing on November 13, 2017, Appellant's deferred sentence was accelerated. He was sentenced to five years imprisonment and a $100.00 fine. Appellant appeals from the acceleration of his deferred sentence. The acceleration of Appellant's deferred sentence is AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs.

Thursday, March 21, 2019

C-2018-650 — Petitioner, Desmond Deanthony Anderson, was charged by Information with Trafficking in Illegal Drugs (Cocaine Base) (Count 1) and Possession of Controlled Dangerous Substance with Intent to Distribute (Marijuana) (Count 2) After Former Conviction of Two or More Felonies in District Court of Pottawatomie County Case No. CF-2016-521. On May 22, 2017, Petitioner entered a blind plea of guilty. The Honorable John Canavan Jr., District Judge, accepted Petitioner's plea and scheduled sentencing for June 7, 2017. The District Court sentenced Petitioner to imprisonment for twenty (20) years in each count and ordered the sentences to run concurrently. On June 15, 2017, Petitioner, represented by counsel, filed a motion to withdraw his previously entered plea of guilty. The District Court denied the motion to withdraw without an evidentiary hearing. Petitioner perfected an appeal to this Court in *Desmond Anderson v. State*, 2018 OK CR 13, 422 P.3d 765. On May 17, 2018, this Court granted certiorari and remanded the case to the District Court with instructions to hold an evidentiary hearing. *Id.*, 2018 OK CR 13, ¶ 6, 422 P.3d at 767. On June 13, 2018, the District Court held the requisite evidentiary hearing and denied Petitioner's motion to withdraw. Petitioner timely filed his Notice of Intent to Appeal seeking to appeal the denial of his motion to withdraw plea. From this judgment and sentence Desmond Anderson has perfected his appeal. The District Court's order denying Petitioner's Motion to Withdraw Plea is AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur; Hudson, J., Concur; Rowland, J., Concur.

F-2017-959 — Appellant, Kurt Arthur Meyer, was tried by jury and convicted of First Degree Murder (Count 1) in District Court of Lincoln County Case Number CF-2015-9. The jury recommended as punishment imprisonment for life without the possibility of parole and the trial court sentenced Appellant accordingly. From this judgment and sentence Kurt Arthur Meyer has perfected his appeal. The Judgment and Sentence of the District Court is hereby AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur in Results; Hudson, J., Concur; Rowland, J., Concur.

RE-2017-797 — Dwight Deangelo Norfleet, Appellant, appeals from the revocation of his thirteen year suspended sentence in Case No. CF-2013-443 in the District Court of Comanche County, by the Honorable Gerald F. Neuwirth, District Judge. AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs in result; Lumpkin, J., concurs; Hudson, J., concurs.

RE-2017-1257 — Appellant, Joseph Cervantes, entered a plea of guilty to Counts 1 and 2 – Assault With a Dangerous Weapon, a felony, and Count 3 – Eluding a Police Officer, a misdemeanor, in Lincoln County District Court Case No. CF-2017-48. He was sentenced to five years on Counts 1 and 2, and one year on Count 3, with all except the first six months suspended. The sentences were ordered to run concurrently. The State filed a motion to revoke Appellant's suspended sentence on October 4, 2017. Following a revocation hearing held on November 21, 2017, the Honorable Cynthia Ferrell Ashwood, District Judge, found Appellant violated the terms and conditions of probation and revoked 4½ years on Counts 1 and 2 and six months in the Lincoln County Jail on Count 3. The sentences were ordered to run concurrently, with credit for time served. Appellant appeals the revocation of his suspended sentences. The revocation of Appellant's suspended sentences is AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs.

F-2018-156 — Luther Don Hyslop, Appellant, was tried by jury for the crime of Child Sexual Abuse (Counts 1-3) in Case No. CF-2016-790 in the District Court of Muskogee County. The jury returned verdicts of guilty and set punishment at life imprisonment on Counts 1 and 2 and fifty years imprisonment and a $5,000.00 fine on Count 3. The trial court sentenced accordingly and ordered the sentences to run consecutively to each other. From this judgment and sentence Luther Don Hyslop has perfected his appeal. AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J.,

concurs in result; Lumpkin, J., concurs; Hudson, J., concurs.

Thursday, March 28, 2019

RE-2018-23 — On December 3, 2009, Appellant Ralph Dmitri Ramnarine entered guilty pleas to Count 1, Possession of a Controlled Dangerous Substance With Intent to Distribute and Count 2, Transporting an Open Container in Caddo County Case No. CF-2009-181. Ramnarine was sentenced to ten (10) years and ordered to complete the Bill Johnson Drug Offender Work Camp, at which time the balance of his sentence would be suspended. On April 27, the State of Oklahoma filed its third applications to revoke Ramnarine's suspended sentences in alleging numerous probation violations, including the commission of new offenses as alleged in Caddo County Case No. CF-2017-198. On December 21, 2017, the District Court of Caddo County, the Honorable David A. Stephens, Special Judge, revoked Ramnarine's suspended sentences in full. The revocation of Ramnarine's suspended sentences in Caddo County Case No. CF-2009-181 is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs; Rowland, J., concurs.

F-2017-710 — Alex Moore, Appellant, was tried by jury for the crime of Murder in the First Degree, in Case No. CF-2015-9, in the District Court of Beckham County. The jury returned a verdict of guilty and recommended as punishment life imprisonment without the possibility of parole. The Honorable Doug Haught, District Judge, sentenced accordingly. From this judgment and sentence Alex Moore has perfected his appeal. AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs; Rowland, J., Concurs.

COURT OF CIVIL APPEALS
(Division No. 1)
Friday, March 22, 2019

115,827 — In Re the Marriage of Heidi Griffith, Petitioner/Appellee, v. Ryan Griffith, Respondent/Appellant. Appeal from the District Court of Pawnee County, Oklahoma. Honorable Jefferson D. Sellers, Judge. Appellant, Ryan Griffith (Father/Husband), appeals the trial court's February 1, 2017 decree of dissolution of marriage. Appellant asserts three propositions of error on appeal. First, he asserts the trial court erred in its award of custody to Appellee, Heidi Griffith (Mother/Wife), arguing that the trial court abused its discretion when it failed to award the parties joint custody of the minor children. Appellant's second proposition asserts the trial court erred in awarding alimony to Appellee. In his third proposition, Appellant asserts the trial court erred in its property division determination. The parties were married in 1995 and have three children. During the pendency of the case, Mother was granted custody of the two minor children and Father was given a modified standard visitation schedule. The trial court found the parties were not successful communicators and did not believe joint custody would be successful; the trial court awarded sole custody to Appellee. The trial court's child support award was based on the Child Support Guidelines. 43 O.S. Supp.2009 §118 et seq. The trial court imputed an income of $1761.00 per month to Appellee and an income of $6383.58 for Appellant. The court awarded Appellee $834.97 per month in child support. With respect to alimony, the trial court found based on Appellee's request and Appellant's ability to pay, the court awarded $750.00 per month in support alimony for sixty (60) months. For purposes of review on appeal, the trial court is vested with wide discretion in dividing property and awarding alimony in divorce proceedings. *Peyravy v. Peyravy,* 2003 OK 92, ¶13, 84 P.3d 720, 723. The appellate "court will not disturb the trial court's judgment regarding property division or alimony absent an abuse of discretion or a finding that the decision is clearly contrary to the weight of the evidence." *Id*. "In custody cases, we will ordinarily give deference to the trial court, who observes the demeanor of the witnesses." *Marriage of Bilyeu v. Bilyeu*, 2015 OK CIV APP 58, ¶5, 352 P.3d 56, 59. Appellant's first proposition asserts the trial court erred in awarding sole custody of the minor children to Appellee, because the parents communicated extensively during the period of their separation and Appellant argued they could continue to do so. We find the record provided evidence and testimony in support of both parents' positions. However, this appellate court acknowledges the trial court was in the best position to observe the parties and will not disturb the decision of the trial court where there is evidence in the record to support the decision. *Marriage of Bilyeu*, 2015 OK CIV APP 58, ¶5, 352 P.3d at 59. We do not find the trial court abused its discretion in this case with respect to awarding custody of the minor children to Appellee.

Appellant next asserts the trial court erred in awarding Appellee alimony of $750.00 per month for sixty (60) months. Appellant argues the income attributed to Appellee for purposes of evaluating the support alimony obligation was insufficient, because Appellee did not wish to expand her tumbling/gym business by teaching more classes and she said she could take on a part time job, but the trial court did not require her to do so. Appellant also insisted Appellee's evidence of monthly expenses was largely speculation and conjecture. In addition, Appellant asserted the trial court decree did not contain required language terminating alimony in the event of the death or remarriage of the alimony recipient. 43 O.S. Supp.2017 §134 (B). Appellee's proposed expenses had evidentiary support in the record. We do not find any relief is warranted with respect to Appellant's assertions that $750.00 per month was an excessive award. Mother's income attribution had support in the record and she provided evidence to explain why she chose not to expand her business at this time. We agree with Appellant's assertion that the order needs to contain language complying with the requirements of 43 O.S. Supp.2017 §134(B). However, based on the Oklahoma Supreme Court's holding in *Burrell v. Burrell*, 2007 OK 47, ¶¶15-16, 192 P.3d 286, 291, we find the requirements of §134(B) were addressed in the trial court order. Appellant's third proposition of error takes issue with the trial court's property division. Appellant divided this proposition into three components. First, Appellant asserts it was improper to award valuable sports memorabilia to the parties' children. Second, Appellee-Wife was improperly awarded a one-hundred percent (100%) repayment from Appellant for money used from marital accounts prior to the divorce. Third, Appellant asserts the real property valuations implemented by the trial court cause an undue burden on Appellant and do not properly account for business value and rental income awarded to Appellee. Appellant did not deny the sports memorabilia was in the possession of his children at the time of the divorce, the trial court left that property undisturbed. The record did not make clear the nature of any agreement the parties had with respect to the marital funds used as the Appellant was moving from the marital home and Appellant did not demonstrate an abuse of discretion by the trial court in awarding these marital funds to Appellee. The property value was stipulated to by both parties and the record indicated Appellee's income statement accounted for rental income that was paid into the business account by the tenant of the commercial building. Based on the record available, we do not find the trial court abused its discretion in formulating the property award. For the reasons provided, the decree of dissolution of marriage issued by the trial court on February 1, 2017 is AFFIRMED. Opinion by Joplin, P.J.; Goree, C.J., and Buettner, J., concur.

116,258 — In the Matter of the Guardianship of Alma Faye Davis Morgan: Joyce D. Lapee, Petitioner/Appellant, v. Alma Faye Davis Morgan, Respondent/Appellee, and Kenneth Morgan, Third Party. Appeal from the District Court of Cherokee County, Oklahoma. Daughter requested that the trial court appoint her as general guardian of her mother. Pursuant to 30 O.S. 2011 §3-311, the trial court dismissed the matter finding mother is domiciled in Florida. Daughter argues the trial court abused its discretion in declining to exercise its jurisdiction pursuant to 30 O.S. 2010 §3-311, and that it was error to dismiss on grounds that Florida is a more appropriate forum. She argues the trial court should have acknowledged the exclusive jurisdiction clause of 30 O.S. 2011 §1-113(B) and continued to exercise its jurisdiction to the exclusion of Florida. While §1-113 provides that the trial court has exclusive jurisdiction to determine the need for a guardian, it does not preclude the court from determining that another state is a more appropriate forum pursuant to §3-311. Section 3-311 is applicable to the present matter. Joyce argues that even if §3-311 is applicable, the trial court abused its discretion in failing to consider the nine factors in §3-311 in determining whether to dismiss the matter based upon an appropriate forum. We agree. The matter is REVERSED AND REMANDED WITH DIRECTIONS. The trial court is to conduct an evidentiary hearing and consider the factors in §3-311 in determining whether to dismiss the guardianship. Opinion by Goree, C.J.; Joplin, P.J., concurs and Buettner, J., dissents.

116,502 — Ashley R. Berry, Petitioner/Appellee, v. Jay M. Berry, Respondent/Appellant. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Sheila Stinson, Trial Judge. Jay M. Berry (Husband), Respondent/Appellant, and Ashley R. Berry (Wife), Petitioner/Appellee, were married on May 20, 2006, and separated in August 2013. In September 2013, Wife filed a Petition to dissolve the

marriage in Logan County. The parties were divorced in 2015, but reserved one issue: whether the stock in a Raymond James investment account (Account) constituted marital or separate property. The matter was transferred to Oklahoma County. There, the trial court conducted a hearing and issued its Journal Entry finding the Account was marital property and that Petitioner was entitled to an equitable share of the Account. Husband appeals. We reverse because the stock was traceable and did not lose its character as separate property. Opinion by Goree, C.J.; Joplin, P.J. and Buettner, J., concurs.

117,168 — Michael Manning, as the Special Administrator of the Estate of Terrence Crutcher, Sr., Plaintiff/Appellant, v. City of Tulsa, Defendant/Appellee. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Mary Fitzgerald, Trial Judge. Plaintiff proposes that the court erred in dismissing his wrongful death petition on the grounds of claim splitting. Title 12 O.S. 2011 §2012(B). Plaintiff filed a §1983 claim in federal court, and subsequently filed a wrongful death claim in state court. He submits the parties in the federal claim and the parties in the state claim are not the same. He urges he is only a nominal plaintiff in the §1983 claim and is only a nominal plaintiff in the wrongful death claim. Both the state and federal pleading codes provide that "every action shall be prosecuted in the name of the "real party in interest." 12 O.S. 2011 §2017(A);..... Fed.R.Civ.P. 17(A). Plaintiff filed the federal action as Special Administrator of the Estate of Terence Crutcher and is the real party in interest in the action. He filed the wrongful death action as Special Administrator of the Estate of Terence Crutcher and is the real party in interest in the action. The fact that damages in a particular claim may benefit certain people other than the party plaintiff does not alter who is the proper party plaintiff. The parties in both claims are the same. A claim, or cause of action, is defined according to the transaction, occurrence, or wrongful act. Both the federal §1983 claim and the state wrongful death claim arise from the same occurrence – the death of Terence Crutcher. Thus, the claims are the same. Plaintiff, as the only person with the substantive right to sue for both the federal §1983 claim and the state wrongful death claim arising from Terence Crutcher's death, improperly split his claims. The trial court properly dismissed Manning's state court claim based on 12 O.S. 2011 §2012(B)(8). AFFIRMED. Opinion by Goree, C.J.; Joplin, P.J., and Buettner, J., concurs.

(Division No. 2)
Monday, March 11, 2019

116,807 — In the Matter of T.B., Deprived Child: Nekia Brown, Appellant, vs. State of Oklahoma, Department of Human Services, Appellee. Appeal from an Order of the District Court of Oklahoma County, Hon. Harold Haralson, Trial Judge, following a jury verdict terminating the parental rights of Mother to Child on grounds of failure to correct conditions leading to Child's adjudication as deprived. Mother contends the evidence was insufficient to support the jury's factual findings that she did not correct conditions of Mother's problems with substance abuse, her failure to provide proper parental care and guardianship for Child, and the threat of harm to Child posed by Mother's behavior. She also claims ineffective assistance of counsel, thereby violating her right to due process. We reject both contentions. State's evidence was clear and convincing that Mother had not corrected the delineated conditions leading to Child's deprived adjudication. Mother's evidence failed to demonstrate that her trial counsel's assistance was deficient or that, even if such performance was deficient, there was a reasonable probability that correction of the alleged deficiencies would have made any difference in the outcome of the case. Accordingly, the trial court's judgment is affirmed. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Thornbrugh, J.; Fischer, P.J., and Goodman, J., concur.

Tuesday, March 12, 2019

116,383 — Utica Place, LLC, an Oklahoma limited liability company, Plaintiff/Appellant, vs. Cowen Construction IV, an Oklahoma corporation, Defendant, and Terry J. Westemeir, an individual, Appellee. Proceeding to review a judgment of the District Court of Tulsa County, Hon. Mary Fitzgerald, Trial Judge. Utica Place, LLC, appeals a decision of the district court that the court was without jurisdiction to consider a contempt/sanctions motion against a Special Master filed after the parties filed a joint dismissal of their case. "A trial court retains jurisdiction to impose sanctions for plaintiff's violation of court orders entered before plaintiff has voluntarily dismissed the case." *Barnett v. Simmons,* 2008 OK 100, ¶ 13, 197 P.3d 12 (emphasis added). *Barnett* is clear that the fundamental basis for a district court's con-

tinuing jurisdiction to hear sanctions issues after a dismissal is the violation of a court's order that existed at the time of dismissal. The record in this case shows no order existing before dismissal upon which a contempt citation could be based. We therefore find no basis for a "contempt" motion or related sanction. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Thornbrugh, J.; Fischer P.J., and Rapp, J. (sitting by designation), concur.

Monday, March 18, 2019

117,045 — In the Matter of: D.W. and H.H., Deprived Children. Mischa White, Appellant v. State of Oklahoma, Appellee. Appeal from an Order of the District Court of Tulsa County, Hon. Rodney Sparkman, Trial Judge. Mischa White (Mother) appeals from a January 30, 2019, order of the trial court denying her motion to vacate a judgment in connection with the termination of her parental rights entered after she failed to appear at a termination hearing. The issue on appeal is whether the trial court abused its discretion when it refused to vacate the termination of her parental rights. Given the fundamental right parents have in their children's custody and the finality of the termination process which ends that right, it was an abuse of discretion to refuse to vacate this default judgment. Accordingly, the trial court's January 30, 2019, order denying Mother's motion to vacate an April 27, 2018, consent order terminating her parental rights to the minor children is therefore reversed. REVERSED. Opinion from Court of Civil Appeals, Division II, by Goodman, J.; Fischer, P.J., concurs, and Thornbrugh, J., dissents.

117,516 — Nicole Raylene Bryer and Melinda Lucas, individually and as mother and next of kin to Dayton Tyler Beard, Deceased, Plaintiffs/Appellants v. Jesse Jackson, Defendant/Appellee, and Shirley McGee, Defendant. Appeal from an Order of the District Court of Nowata County, Hon. Carl G. Gibson, Trial Judge. Nicole Raylene Bryer (Plaintiff) and Melinda Lucas, individually and as mother and next of kin to Dayton Tyler Beard, Deceased (Decedent) (collectively, Passengers), appeal the trial court's order granting summary judgment to Jesse Jackson (Defendant), and dismissing Passengers' claim against Defendant. Defendant Shirley McGee (Driver) was operating a car eastbound on a two-lane Nowata County road. Plaintiff and Decedent were occupants of Driver's vehicle. Defendant was operating a vehicle westbound on the same road. Both vehicles were traveling at approximately 60 miles an hour. Driver looked down to get a bag of sunflower seeds next to her when the head-on collision occurred, injuring Plaintiff, and killing Decedent. Passengers claim the injuries and deaths arose from the negligence of both Driver and Defendant. Defendant sued Driver because the record reflects Driver was distracted while driving and crossed the center lane, striking Defendant. The collision took place in Defendant's lane of traffic. The trial court only dismissed Defendant from Passengers' lawsuit, leaving Driver as the sole remaining defendant. Because not all issues against all parties were resolved, the matter was certified for immediate appeal pursuant to 12 O.S.2011, § 994. We conclude Defendant has the burden to show he is entitled to summary judgment. This he has done by establishing through the evidentiary material attached to his motion that he was in his lane of travel when Driver's car crossed the centerline into his lane and hit his vehicle head on. That fact is undisputed by Passengers, and there is no suggestion Driver herself denies this critical fact. Defendant's evidentiary material, even viewed in the light most favorable to Passengers, still shows he committed no act of negligence to cause the accident. The trial court's order granting summary judgment to Jesse Jackson is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Goodman, J.; Fischer, P.J., and Thornbrugh, J., concur.

116,601 — In re the Marriage of: Candice Atzbach, Petitioner/Appellee, vs. Jerry Atzbach, Respondent/Appellant. Appeal from orders of the District Court of Rogers County, Hon. Lara M. Russell, Trial Judge, denying, *inter alia,* Jerry Atzbach's (Husband) motion to modify custody. The parties presented conflicting evidence regarding the minor child's best interests. The trial court was in the best position to resolve this conflicting evidence by its observation of the parties, the witnesses, and their demeanor. Our job on review is not to second guess the fact-finder, but only to ascertain whether there was sufficient, competent evidence introduced to support the trial court's decision when the correct law was applied. The trial court was in a much better position to decide which parent should be awarded as primary custodial parent of the minor child. Because Husband has failed to show that the trial court abused its discretion, we affirm the trial court's orders. AFFIRMED. Opinion from Court of Civil Ap-

peals, Division II, by Goodman, J.; Fischer, P.J., and Thornbrugh, J., concur.

(Division No. 3)
Tuesday, March 19, 2019

116,047 — Laura Lynn Fox, Plaintiff/Appellee, v. The City of Tulsa, Defendant/Appellant. Defendant/Appellant, The City of Tulsa, appeals from the trial court's judgment following a jury verdict in favor of Plaintiff/Appellee, Laura Lynn Fox, in her action based on a negligent criminal investigation conducted by a Tulsa Police Department (TPD) detective. Plaintiff is a licensed clinical social worker who, pursuant to a contract between her employer and DHS, provided counseling services to an impoverished Tulsa family during the summer of 2013. Following a visit to the subject family's home on August 6, 2013, Plaintiff was charged with failure to report suspected child abuse in violation of 10A O.S. 2011 §1-2-101(B). The charge was eventually dismissed and Plaintiff filed this negligence action. A jury found in favor of Plaintiff and awarded her $225,000.00 in damages, which was reduced to $175,000.00 under the Governmental Tort Claims Act. We hold the trial court failed to follow the letter of 12 O.S. 2011 §573 by allowing Plaintiff a second chance to exercise her peremptory challenges, but such error did not result in a miscarriage of justice or constitute a substantial violation of City's rights. The trial court did not abuse its discretion by prohibiting the two original police investigators from testifying at trial. The gravamen of this suit was the negligence of the detective, who relied solely on the written reports of those two officers. The proposed testimony was cumulative. Similarly, the trial court did not err in excluding lay testimony regarding the strength and probable duration of the subject home's stench on August 6, 2013. The proposed testimony was cumulative and City has failed to prove it was prejudiced by such exclusion. Finally, the trial court properly denied City's motion for a directed verdict. Viewing the evidence in the light most favorable to Plaintiff, there is ample evidence to support the judgment. Plaintiff's evidence included, among other things, the detective failed to disclose to the assistant district attorney important exculpatory information and included allegations which were materially false and/or misleading. AFFIRMED. Opinion by Bell, J.; Mitchell, P.J. and Swinton, J., concur.

116,891 — Kenneth P. Qualls, Plaintiff/Appellant v. City of Piedmont, Oklahoma, A municipal corporation, Respondent/Appellee. Appeal form the District Court of Canadian County, Oklahoma. Honorable Paul Hesse, Judge. Plaintiff/Appellant, Kenneth P. Qualls, appeals from the district court's judgment sustaining the decision of Defendant/Appellee, City of Piedmont, Oklahoma and City's personnel board to terminate Qualls' employment as a police officer. In district court, Qualls claimed his termination from employment should be reversed and remanded to the Board for an evidentiary hearing because he was terminated without just cause, denied adequate protections from arbitrary discharge from employment, and proscribed from presenting or cross-examining witnesses. Qualls also maintained he had a right to a jury trial on the issue of whether he was fired for "just cause." The district court held the Board provided Qualls with adequate protection from arbitrary discharge from employment and cause existed for his termination. The district court also held the Board's decision was free from prejudicial error and was supported by competent evidence. After reviewing the record, we AFFIRM the district court's judgment. Opinion by Bell, J.; Mitchell, P.J., and Swinton, J., concur.

117,442 — James Nisbett, Plaintiff/Appellant, v. State of Oklahoma, ex rel., Oklahoma Department of Corrections and Joe Allbaugh in his Official Capacity, Defendants/Appellees. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Patricia G. Parrish, Judge. Plaintiff/Appellant James Nisbett (Nisbett) appeals from an order granting the motion to dismiss filed by Defendants/Appellees the State of Oklahoma, *ex rel.* Oklahoma Department of Corrections and Joe Allbaugh (collectively, DOC). Nisbett, an inmate at John H. Lilley Correctional Center in Boley, Oklahoma, petitioned the trial court for a permanent injunction, declaratory relief, and compensation stemming from his inability to earn enhanced level credits pursuant to 57 O.S. Supp. 2015 §138. Nisbett claims the use of his juvenile record to disqualify him from earning enhanced level credits deprives him of his constitutionally protected liberty interest and violates the *Ex Post Facto* Clause of the Constitution. After *de novo* review, we find there is no constitutionally protected liberty interest in the *opportunity* to earn credits to reduce his sentence. However, because the district court did not address the validity of Nesbitt's *ex post facto* claim, the dismissal must be reversed and the case remanded for that determination. AF-

FIRMED IN PART, REVERSED IN PART AND REMANDED FOR FURTHER PROCEEDINGS. Opinion by Mitchell, P.J.; Bell, J., concurs and Swinton, J., concurs in part and dissents in part.

117,473 — Planet Home Lending, LLC, Plaintiff/Appellee, v. Barry C. Pretlow, Defendant/Appellant, and Lisa Pretlow; State of Oklahoma, *ex rel.* Oklahoma Tax Commission; Jane Doe, as Occupant of the Premises, Defendants. Defendant/Appellant Barry C. Pretlow (Appellant) appeals from summary judgment in favor of Plaintiff/Appellee Planet Home Lending, LLC (Appellee) and against Appellant and Defendant Lisa Pretlow (collectively Borrowers) related to a promissory note and mortgage executed by Borrowers. Appellant argues that Appellee lacked standing to bring the action against Borrowers because Appellee failed to present evidence that it was in possession of the note and mortgage when the petition was filed. The order on appeal, attached and incorporated herein, makes detailed, well-reasoned findings. Based on this Court's *de novo* review of the record, the parties' pleadings, and applicable law, we find that no reversible error of law appears, and the trial court's findings of fact and conclusions of law adequately explain its decision. We therefore summarily affirm the judgment of the trial court pursuant to Oklahoma Supreme Court Rule 1.202 (d). 12 O.S. 2011 Ch. 15, App. 1. AFFIRMED UNDER RULE 1.202 (d). Opinion by Swinton, J.; Mitchell, P.J., and Bell, J., concur.

Wednesday, March 20, 2019

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.

(Division No. 4)
Wednesday, March 6, 2019

117,007 — In the Matter of the Guardianship of A.A.R.M., a minor child/Ward, Patricia Lay, Natural Mother/Respondent/Appellant, vs. Jerri Van Ellen, Guardian/Petitioner/Appellee. Appeal from Order of the District Court of Creek County, Hon Joe Sam Vassar, Trial Judge. This proceeding is a guardianship of the minor, A.A.R.M. The natural mother, Patricia Lay (Mother) appeals the trial court's denial of her petition to vacate the order naming Jerri Van Ellen (Ellen) as guardian. This is a guardianship proceeding where Mother seeks to vacate the appointment of Ellen, as guardian, on the ground of the absence of jurisdiction based upon lack of notice. The Record is devoid of any indication that Mother was provided timely notice of the filing of the petition for guardianship and the right and opportunity to be heard. However, Mother cannot prevail if she had a timely notice, other than by the statutory notice, which is of the quality of notice required by Due Process of Law. This Court has examined the evidence admitted at the hearing on Mother's petition to vacate the guardianship appointment. This Court concludes that the clear weight of the evidence does not support the conclusion that Mother received a timely, qualified notice of the initiation of the guardianship proceedings. Viewed in its best light for Ellen, the evidence shows that at least one other child of Mother was under guardianship with someone other than Ellen. Mother is shown to be aware of a guardianship, but it is not clear that she was aware of the A.A.R.M. guardianship. In any event, the evidence does not establish that Mother knew, or was notified, that the petition for guardianship of A.A.R.M. had been filed and that a hearing was scheduled where she could be heard. Therefore, statutory or actual notice that qualifies to satisfy Due Process of Law is absent from the Record. Consequently, the trial court did not have jurisdiction to appoint Ellen as guardian of A.A.R.M. The judgment of the trial court declining to vacate the appointment is contrary to law and against the clear weight of the evidence. Therefore, the judgment is re-

versed and the cause is remanded with instructions to enter judgment for Mother on her petition to vacate the appointment of Ellen as guardian of A.A.R.M. REVERSED AND REMANDED WITH INSTRUCTIONS. Opinion from Court of Civil Appeals, Division IV by Rapp, J.; Wiseman, V.C.J., and Barnes, P.J., concur.

Thursday, March 7, 2019

117,288 — In the Matter of K.P., S.B., and F.B., Adjudicated Deprived Children, Kristina Simon, Appellant, vs. State of Oklahoma, Appellee. Appeal from an order of the District Court of Seminole County, Hon. Timothy Olsen, Trial Judge, terminating Kristina Simon's [Mother] parental rights to her minor children, KP, SB, and FB. Although Mother raises three propositions of error on appeal, an issue not raised is dispositive – whether the trial court's order terminating her parental rights is fundamentally deficient. Having reviewed the record on appeal and applicable law, we find the order is fundamentally deficient because it fails to identify the specific statutory basis the court relied on in its decision to terminate parental rights. Without a specific statutory basis for termination stated in the order, we must reverse. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, V.C.J.; Barnes, P.J., and Rapp, J., concur.

117,443 — Brown & Gould, PLLC, an Oklahoma Professional Liability Company, Plaintiff/ Appellee, vs. Nathanael Tanner, Defendant/ Counterclaim Plaintiff/ Appellant; Melissa Tanner, Counterclaim Plaintiff/Appellant, vs. Brown & Gould, PLLC, Dane J. Flesch, George H. Brown, and Tina Brown, Counterclaim Defendants/Appellees. Appeal from an order of the District Court of Oklahoma County, Hon. Lisa Davis, Trial Judge, awarding damages in favor of Brown & Gould, PLLC (Firm), Dane J. Flesch, George H. Brown, and Tina Brown (collectively, Counterclaim Defendants) after granting summary judgment in the Counterclaim Defendants' favor, denying the Tanners' request for a continuance, and denying their petition for rehearing. The trial court granted summary judgment in favor of the Firm on its petition for breach of contract for failure to pay legal fees. In its motion for summary judgment, it claimed as an undisputed fact that Nathanael owed it a sum certain for unpaid legal services. The Firm attached to its motion as exhibits the executed contract between Nathanael and the Firm and a billing statement showing the amount billed to Nathanael's account and payments made on the account. Nathanael did not controvert these facts in his response to the summary judgment motion. However, the trial court did not grant summary judgment on the issue of damages, but on the issue of liability only. The Tanners appear to claim that the fees are not owed due to malpractice by the Firm and Counterclaim Defendants. The Firm and Counterclaim Defendants state Nathanael "was the prevailing party in the underlying proceeding," and they attached copies of court records in the divorce case, including a copy of the order modifying the decree of dissolution of marriage, to support their prevailing party contention. Because the Tanners failed to controvert the statements of undisputed fact and the Firm and Counterclaim Defendants presented evidentiary support establishing Nathanael as the prevailing party in the underlying divorce case, we see no error in granting summary judgment in favor of the Firm and Counterclaim Defendants on the Tanners' counterclaim for legal negligence. We reach the same conclusion on the Tanners' counterclaim for breach of fiduciary duty and their claims regarding the credit card billing. We affirm the trial court's grant of summary judgment in favor of the Firm as to liability, and find no error in denying Nathanael's petition for rehearing on liability. But under the circumstances presented, discretion dictates that Nathanael's request for continuance of the hearing to reconsider the issue of damages be granted when his attorney sought to withdraw only two days before the hearing for a reason unrelated to Nathanael and was Nathanael's counsel until he was granted leave to withdraw during the hearing. The trial court's decision denying the request for a continuance and denying the petition for rehearing on damages is reversed. We remand the case to the trial court for a new trial on the issue of damages. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, V.C.J.; Barnes, P.J., and Rapp, J., concur.

116,539 — Charles J. Emerick and Phillip T. Emerick, Plaintiffs/Appellees, v. Ted Starr, Defendant/Appellant. Appeal from the District Court of McClain County, Hon. Leland Shilling, Trial Judge. In an order filed in September 2017, Defendant (Mr. Starr) was ordered to vacate the premises of property owned by Plaintiffs. Mr. Starr was renting the property pursuant to a month-to-month rental agree-

ment. On September 19, 2017, Mr. Starr filed a "Motion to Vacate Judgment" which was denied by the trial court in an order filed in October 2017. We are not persuaded by Mr. Starr's argument that because Plaintiffs' written notice of termination states it would become effective on August 10, 2017, a date that lands twenty-eight days after he was served with the notice of termination on July 13, 2017, that he was not provided with the "thirty-day period to terminate" set forth in 41 O.S. Supp. 2016 § 111(A). Section 111(A) further provides that "[t]he thirty-day period to terminate shall begin to run from the date notice to terminate is served[.]" This language indicates it is not the legislative intent that the notice of termination was rendered ineffective by failing to set forth a termination date exactly thirty days (or more) following the date of service; rather, the period of termination simply began to run from the date notice was served. Although, pursuant to the statute, the shorter time period set forth in the notice was ineffective, the notice itself was not ineffective. Mr. Starr's remaining arguments require an analysis of the facts presented to the trial court. In this regard, however, although the September order states that testimony was taken and considered by the court, and although the October order states that the parties appeared and argument was heard by the court, no transcripts or narrative statements of any proceedings have been provided on appeal. Arguing from a deficient appellate record with neither a transcript of the trial proceedings nor a narrative statement, Mr. Starr has failed to demonstrate that error occurred. Consequently, we affirm the trial court's September order as well as the trial court's October order denying Mr. Starr's "Motion to Vacate Judgment." AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Wiseman, V.C.J., and Rapp, J., concur.

Monday, March 11, 2019

116,197 — Fredda Ganer d/b/a Ganer Oil Company, Plaintiff/Appellant, vs. BP America Production Company, a Delaware Corporation, Gas Technology Institute, an Illinois Corporation, GTI Catoosa Test Facility, a Delaware Corporation, Angela Sue Williams and John Does 1-10, Defendants/Appellees. Appeal from an order of the District Court of Rogers County, Hon. Sheila A. Condren, Trial Judge, granting Defendant BP America Production Company's motion to clarify the trial court's order entered June 9, 2017, on motions for summary judgment. The June 9, 2017, order granted summary judgment to Defendants Gas Technology Institute and GTI Catoosa Test Facility (collectively, GTI) and to Defendant Angela Sue Williams. Ganer asserts the trial court erred in granting summary judgment to Defendants based on the statute of limitations because "the question of when the statute of limitations began to run is a question for the jury to determine." We agree with the trial court's findings and conclusions in granting GTI's and Williams' motions for summary judgment and later granting BP's motion for summary judgment concluding that Ganer's claims are barred by the statute of limitations. The August 28, 2017, order (which incorporates by reference the June 9, 2017, order) sets forth findings of fact and conclusions of law which, according to our reading of the record, are fully supported. The trial court's findings and conclusions more than adequately explain the basis for its decision. From our comprehensive review of the record and evidence in this case, we see no error in the trial court's decision on which to base reversal. Pursuant to Oklahoma Supreme Court Rule 1.202(d), 12 O.S. Supp. 2018, ch. 15, app. 1, we summarily affirm the trial court's order. Ganer also argues "The trial court abused its discretion in prematurely awarding costs and attorneys' fees to Appellee GTI because the Case has not been concluded, there is no prevailing party, nor has a final judgment been entered." Ganer asserts the trial court's award was premature according to Oklahoma law. In its September 22, 2017 order, the trial court awarded GTI "reasonable attorney's fees and costs as the prevailing party on all of Plaintiff's claims in this matter, pursuant to 12 O.S. § 940(A)." Because the trial court had resolved all of Ganer's claims against GTI, GTI became the prevailing party, thus entitling GTI to timely apply for attorney fees and costs. The trial court's order awarding prevailing party attorney fees and costs to GTI is also affirmed. SUMMARILY AFFIRMED UNDER RULE 1.202 (d). Opinion from the Court of Civil Appeals, Division IV, by Wiseman, V.C.J.; Barnes, P.J., and Rapp, J., concur.

Friday, March 15, 2019

116,766 — In the Matter of the Estate of Freddy L. Davis, Sr. Freddy L. Davis, Plaintiff/Appellant, v. Kellye Woodfork, Defendant/Appellee. Appeal from an Order of the District Court of Oklahoma County, Hon. Allen Welch, Trial Judge. Plaintiff, Freddy L. Davis, Jr.,

appeals the trial court's Order Denying Application and Amended Application in this probate matter. This Court finds the trial court's finding that Defendant did not exert undue influence over Decedent is not clearly against the evidence and is affirmed. However, a question exists concerning the title transferred under the Quit Claim Deed for the Seminole County property. This issue is reversed and remanded to the trial court for further proceedings to determine whether the Seminole County Quit Claim Deed creates a tenancy in common or a joint tenancy and, if a tenancy in common, to distribute the property per the laws of intestate succession. This Court also finds the trial court did not err in finding a valid inter vivos gift of Decedent's home, the Toyota truck and the MidFirst Account. Finally, this Court finds the trial court's finding that Decedent's household goods and furnishings were not a part of the Estate is clearly against the weight of the evidence and is reversed and remanded for further proceedings consistent with this Opinion. In all other respects, the trial court's Order Denying Application and Amended Application is affirmed. AFFIRMED IN PART AND REVERSED IN PART AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., and Wiseman, V.C.J., concur.

Monday, March 18, 2019

117,250 — Lancey Darnell Ray, Plaintiff/Appellant, and William Chestnut, Plaintiff, v. Kevin Stitt, in his capacity as Governor for the State of Oklahoma, Defendant/Appellee. Appeal from an Order of the District Court of Oklahoma County, Hon. Thomas E. Prince, Trial Judge. Plaintiff, Lancey Darnell Ray, appeals the trial court's Order Denying Ray's Motion to Reconsider in this action alleging a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Based on the foregoing, this Court finds Title 21 O.S.2011, § 13.1 does not violate the Equal Protection Clause of the Fourteenth Amendment. Thus, the trial court did not err in denying Plaintiff's Motion to Reconsider. The trial court's Order Denying Ray's Motion to Reconsider is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., and Wiseman, V.C.J., concur.

Thursday, March 21, 2019

117,405 — City of Chickasha, a Municipal Corporation, Plaintiff/Appellee, v. Phillip Willis, Timothy Willis, Charles Willis and Jerrold Willis, Defendants/Appellants, and B.S. Moser, Rodger Willis and Edward L. Moser, if living, and if deceased, the unknown heirs, successors and assigns of B.S. Moser, Rodger Willis and Edward L. Moser, Deceased, Billy Pittman, Defendants. Appeal from an Order of the District Court of Caddo County, Hon. Kory S. Kirkland, Trial Judge. The defendants, Phillip Willis, Timothy Willis, Charles Willis and Jerrold Willis (Collectively "Willis") appeal the grant of summary judgment to the City of Chickasha ("City"). The remaining captioned defendants have been adjudicated as in default except Billy Pittman, who is the current leaseholder of the subject property. The appeal proceeds under the accelerated docket pursuant to Okla. Sup.Ct.R.1.36, 12 O.S. Supp. 2018, Ch. 15, App. 1. City has sued to seek a declaratory judgment that the contract is unenforceable as to the "first option and right to lease" provision. In addition, and partly because the contract was filed of record, City seeks to quiet title. City argued that the provision cannot be enforced because it violates the Rule Against Perpetuities. Lease renewal options which are perpetual in nature do not violate the Rule Against Perpetuities if the option is tied to and exercised with the original lease and extensions. The agreement for the option must also provide readily ascertainable means to determine rent and length of term. Moreover, the Agreement must be related to a life or lives in being. Here, the Agreement does not meet the requisites to survive the Rule Against Perpetuities challenge. The Agreement is, therefore, in violation of the Rule Against Perpetuities. The statute calls for reformation pursuant to *cy pres* principles when possible. In this case, that possibility does not exist. This Court has reviewed the applicability of the *cy pres* doctrine to this matter and finds that it has no merit here for the reason that the provision in question is not a contract but rather a vague agreement to agree that the land will be leased without specifications into the future. The option portion of the Agreement is illusory, and the absence of ascertainable criteria, to set rent and lease term makes it unfeasible for the Court to reform the Agreement. The judgment of the trial court is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., and Wiseman, V.C.J., concur.

Friday, March 22, 2019

117,463 — Christopher W. Brooks, Plaintiff/Appellant, v. State of Oklahoma ex rel. Department of Public Safety. Appeal from an Order of the District Court of Oklahoma County, Hon. Geary L. Walke, Trial Judge, sustaining the revocation of Plaintiff's driver's license by the Oklahoma Department of Public Safety. Plaintiff's sole contention on appeal is that the trial court abused its discretion and exceeded its authority in granting State's motion for continuance on the day of trial after a key witness failed to appear, even though State failed to submit an affidavit pursuant to 12 O.S.2011 § 668. Plaintiff incorrectly assumes that the continuance was granted pursuant to § 668, and, consequently, mistakenly relies on *Thomas v. State ex rel. Dep't of Public Safety,* 1993 OK CIV APP 78, 858 P.2d 113. The record before us is consistent with the granting of a motion for continuance pursuant to § 667, and Plaintiff does not otherwise complain of error in the trial proceedings or of any issues involved in providing for a speedy trial. We find the delay of the trial setting was reasonable and minimal; that the continuance of the trial date upon the motion of State was properly considered pursuant to 12 O.S.2011 § 667; and that the grant of the continuance over Plaintiff's objection was within the sound discretion of the court. As such, we reject Plaintiff's claim that we must set aside the trial court's order sustaining the revocation of Plaintiff's license. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Thornbrugh, J.; Fischer, P.J., and Goodman, J., concur.

ORDERS DENYING REHEARING
(Division No. 1)
Thursday, March 21, 2019

115,675 — Bharat Mittal, Plaintiff/Appellant, vs. Bluestem Emergency Medical P.L.L.C., a professional limited liability company, and Thomas W. Britt, Roger J. Cotner, Holly B. Fouts, Ronald L. Hay and Ruth M. Thompson, Defendants/Appellees. Appellees' Petition for Rehearing, filed January 22, 2019, is *DENIED*.

(Division No. 2)
Thursday, March 7, 2019

114,015 (consolidated with 114,071) — Greenway Park Commercial Owners Association, Inc., an Oklahoma not for profit corporation and Greenway Park, LLC, an Oklahoma Limited Liability Company, Plaintiffs/Counterclaim Defendants/Appellants, vs. R.T. Properties, LLC, an Oklahoma Limited Liability Company, Defendant/Counterclaimant/Cross-Claimant/Appellee, and Rodney D. Thornton, Cross-Claimant/Appellee, vs. Philip R. Parker, Additional Defendant on Cross-Claim. R.T. Properties, LLC and Rodney D. Thornton's Petition for Rehearingis hereby *DENIED*.

Thursday, March 14, 2019

116,901 — James MacComack, an individual, Plaintiff/Appellant, vs. Oklahoma Steel & Wire, Inc., a domestic corporation, Defendant/Appellee, and Mid America Steel & Wire, a domestic corporation, Defendant. Appellant's Petition for Rehearing is hereby *DENIED*.

(Division No. 3)
Friday, March 1, 2019

117,053 (comp. w/116,640) — Jonathan Cruz, Scott Bender, Konark Ogra, Ben Bbosa, Joseph Neil Squire, Derek Ley, Jennifer Holland, Martin Bolin, Christi Lynn McClelland, Cecil Down, Lori Blevins, Brad Carmack, Lucy Henshaw, Taylor Linden, Dana Jiles, Carlos Adair, Chuck Cash, Christina Stovall, Terry Young, Garrett Allen Pierce, Lindsey Rae Pierce, Moses Thompson, Hana Thompson, Cash CJ Stevenson, Krysta Lauren Stevenson, Michael Ethridge, Robert Darden, Steven Turpin, and Ronald Shaw, Plaintiffs/Appellants, vs. Johnson Matthey, Inc., d/b/a Tracero, a foreign corporation, The University of Tulsa, a not-for-profit Oklahoma corporation, Chevron USA, Inc., a foreign corporation, Chase Environmental Group, Inc., a foreign corporation, and China Institute of Atomic Energy, a foreign corporation, Defendants/Appellees. Appellees' Petition for Rehearing, filed December 20th, 2018, is also *DENIED*.

Monday, March 4, 2019

116,821 — Tambra Bulstrode, Individually, and on Behalf of All Wrongful Death Beneficiaries of Edwin Bulstrode, III, Deceased, Plaintiff/Appellant, vs. BNSF Railway Company, Defendant/Appellee, and Philip Haws and Mark Burkes, Defendants. Appellant's Petition for Rehearing, filed February 14th, 2019, is *DENIED*.

Thursday, March 14, 2019

117,189 — Bryan Weatherly, Petitioner, vs. Fedex Express, Own Risk Carrier No. 16593 and The Workers' Compensation Commission, Respondents. Appellee' Petition for Rehearing, filed February 29th, 2019, is *DENIED*.

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POSITIONS AVAILABLE

DUE TO THE RETIREMENT OF A 37 YEAR PROSECUTOR, DISTRICT 9, PAYNE AND LOGAN COUNTIES, is seeking an experienced trial attorney. A minimum of 8 years prosecution experience including all major felony crimes is a requirement. Salary is commensurate with experience. Please send cover letter and resume to Scott.staley@dac.state.ok.us.

WATKINS TAX RESOLUTION AND ACCOUNTING FIRM is hiring attorneys for its Oklahoma City and Tulsa offices. The firm is a growing, fast-paced setting with a focus on client service in federal and state tax help (e.g. offers in compromise, penalty abatement, innocent spouse relief). Previous tax experience is not required, but previous work in customer service is preferred. Competitive salary, health insurance and 401K available. Please send a one-page resume with one-page cover letter to Info@TaxHelpOK.com.

THE OKLAHOMA BAR ASSOCIATION HEROES program is looking for several volunteer attorneys. The need for FAMILY LAW ATTORNEYS is critical, but attorneys from all practice areas are needed. All ages, all counties. Gain invaluable experience, or mentor a young attorney, while helping someone in need. For more information or to sign up, contact Margaret Travis, 405-416-7086 or heroes@okbar.org.

ASSOCIATE POSITION AVAILABLE: Small boutique law firm seeking associate with 3-5 years of experience; research and writing skills; top 25 percent graduate; law review or federal judicial clerk experience desired; complex litigation experience preferred. Submit resume to Federman & Sherwood, 10205 N. Pennsylvania Avenue, OKC 73120, or wbf@federmanlaw.com.

NORMAN BASED FIRM IS SEEKING A SHARP & MOTIVATED ATTORNEY to handle HR-related matters. Attorney will be tasked with handling all aspects of HR-related items. Experience in HR is required. Firm offers health/dental insurance, paid personal/vacation days, 401k matching program and a flexible work schedule. Members of our firm enjoy an energetic and team-oriented environment. Position location can be for any of our Norman, OKC or Tulsa offices. Submit resumes to justin@polstontax.com.

POSITIONS AVAILABLE

GUNGOLL, JACKSON, BOX & DEVOLL PC SEEKS EXPERIENCED LITIGATION ATTORNEY. Family law experience preferred but not required. Competitive pay and excellent benefits. Please send cover letter, résumé and writing sample to blanton@gungolljackson.com.

DAVIS GRAHAM & STUBBS LLP

A 150+ attorney law firm based in Denver, Colorado is seeking an associate with **3-5 years of experience** in M&A related to energy transactions to join our sophisticated and vibrant Natural Resources practice. Candidates should possess a broad range of experience in transactional matters (both upstream and/or midstream) for energy companies. Large law firm or energy boutique firm experience is preferred. Candidates must have excellent academic credentials and strong written and oral communication skills. Applicants should be entrepreneurial, team oriented, and highly motivated to help us grow our practice and serve our clients. Colorado license preferred. Candidates must have a J.D. from an accredited law school.

To apply for this position, please submit a cover letter, resume, law school transcript and a brief writing sample (5 pages maximum) to www.dgslaw.com/careers.

DEPUTY GENERAL COUNSEL III. The Oklahoma Health Care Authority (OHCA) is searching for a deputy general counsel III. The OHCA administers two health programs for the state including SoonerCare, Oklahoma's Medicaid program, and Insure Oklahoma. The ideal candidate will prosecute and defend administrative and judicial actions on behalf of OHCA. Candidate must be able to analyze, review and research copyright and trademark issues and provide legal support for IT issues. This position is also responsible for reviewing and analyzing contracts. Other duties include: coordinating referrals and investigative efforts; analyzing and determining impact of proposed legislation; addressing contract bid issues; attending to HIPAA and Open Records issues and acting as principal contact for legal advice and assistance to an administrative unit (e.g. Behavioral Health, Provider Services, etc.). Requires a bachelor's degree and 6+ years of experience practicing law. Must be an active member of the state bar of Oklahoma. Other relevant legal and/or health care administration experience involving bankruptcy proceedings, health care insurance and/or state or federal health care experience preferred. Advanced education and computer research/case management software is desired. Apply online at www.okhca.org.

GUNGOLL, JACKSON, BOX & DEVOLL, P.C. SEEKS EXPERIENCED ESTATE PLANNING ATTORNEY. Competitive pay and excellent benefits. Please send cover letter, résumé and writing sample to blanton@gungolljackson.com.

POSITIONS AVAILABLE

APPLICATIONS MUST BE RECEIVED AT DHS BY 11:59 PM OF THE CLOSING DATE of this job announcement. Apply online at https://jobapscloud.com/OK/sup/bulpreview.asp?R1=190314&R2=UNCE&R3=114. Basic purpose of position: The DHS Child Support Services – Grady CSS Office has an opening for a full-time attorney (CSS Attorney IV, $5,044.91 monthly) with experience in child support enforcement. This position will be located at 1707 W. Frisco, Chickasha, OK 73018-1636. Typical functions: The position involves preparation and filing of pleadings and trial of cases in child support related hearings in district and administrative courts. Duties will also include consultation and negotiation with other attorneys and customers of Oklahoma Child Support Services, and interpretation of laws, regulations, opinions of the court and policy. Position will train and assist staff with preparation of legal documents and ensure their compliance with ethical considerations. Knowledge, skills, and abilities (KSA's): Knowledge of legal principles and their applications; of legal research methods; of the scope of Oklahoma statutory law and the provisions of the Oklahoma Constitution; of the principles of administrative and constitutional law; of trial and administrative hearing procedures; and of the rules of evidence; and skill in performing research, analyzing, appraising and applying legal principles, facts and precedents to legal problems; presenting explanation of legal matters, statements of facts, law and argument clearly and logically in written and oral form; and in drafting legal instruments and documents. Minimum qualifications: Preference may be given to candidates with experience in child support and/or family law. This position may be filled at an alternate hiring level as a Child Support Services attorney III (beginning salary $4,405 monthly), Child Support Services attorney II (beginning salary $4,067.91 monthly), or as a Child Support Services attorney I (beginning salary $3,689.25 monthly), dependent on child support or family law experience and minimum qualifications as per state policy. Notes: A conditional offer of employment to final candidate will be contingent upon a favorable background check and a substance abuse screening. Veteran's preference points do not apply to this position. If you need assistance in applying for this position contact Oklahoma Department of Human Services, Talent Acquisitions at 405-521-3613 or email STO.HRM.TA@okdhs.org. Benefits: This is a full-time unclassified state position with full state retirement and insurance benefits, including paid health, dental, life and disability insurance. Annual leave of 10 hours per month and sick leave of 10 hours per month begin accruing immediately.

TULSA MID-SIZE LITIGATION FIRM SEEKS ATTORNEY with a minimum of three years' experience in all aspects of litigation as well as research and writing experience. Benefits package available. Send resume, cover letter, references and writing sample to downtowntulsaattorneys@outlook.com.

POSITIONS AVAILABLE

AV-RATED TULSA LAW FIRM SEEKING EXPERIENCED LAWYER with established litigation credentials to assist in preparation and trial of complex lawsuits. Only outstanding lawyers with a strong work ethic, who are willing to dedicate themselves to the representation of their clients, will qualify. Interested candidates should submit resume, current references and a summary of actual litigation experience in order to be considered. Please submit cover letter, resume and writing sample to tmartinez@richardsconnor.com.

THE UNITED STATES ATTORNEY'S OFFICE FOR THE EASTERN DISTRICT OF OKLAHOMA is seeking an experienced, self-motivated attorney to serve as an assistant United States attorney (AUSA) in our Criminal Division. Prior criminal prosecution experience is preferred. Assistant United States attorneys are responsible for legal research and writing, directing investigations, case development and case presentation in criminal cases. Federal criminal cases cover a wide range of areas including firearms, narcotics, gang prosecutions, terrorism, immigration violations, public corruption, computer crime, embezzlement/theft of government funds, financial institution fraud, health care fraud, identity theft, environmental crime, bankruptcy fraud, child pornography, interstate child exploitation and asset forfeiture. To be an effective federal prosecutor, the AUSA must possess excellent communication and organizational skills and the ability to work closely with federal, state, local and tribal law enforcement agencies. Applicants must have a J.D. degree, be duly licensed and authorized to practice as an attorney under the laws of any state, territory of the United States, or the District of Columbia, and have at least three years trial attorney experience. Applicants must be active members in good standing of the bar. Applicants should have superior research, writing and oral advocacy abilities, strong academic credentials and good judgment. United States citizenship is required, as is a successful pre-employment background investigation. Announcement will open on or about April 7, 2019, and closes on April 21, 2019. To view and apply for this vacancy announcement visit http://www.usajobs.gov. The U.S. Department of Justice is an Equal Employment Opportunity Reasonable Accommodation Employer.

THE OKLAHOMA DISTRICT ATTORNEYS COUNCIL (DAC) IS PLEASED TO ANNOUNCE that DAC has been designated by the U.S. Department of Justice to award and disburse loan repayment assistance through the John R. Justice (JRJ) Loan Repayment Program. The State of Oklahoma has received a total of $34,576 to be divided among eligible full-time public defenders and prosecutors who have outstanding qualifying federal student loans. Applications are available online. For more information about the JRJ Student Loan Repayment Program and how to apply, please go to http://www.ok.gov/dac. Under "About the DAC", click on the "John R. Justice Student Loan Repayment Program" link. Application packets must be submitted to the DAC or postmarked no later than June 19, 2019.

POSITIONS AVAILABLE

THE OKLAHOMA INDIGENT DEFENSE SYSTEM (OIDS) HAS TWO OPENINGS for an appellate defense counsel position in our General Appeals Division and in our Post Conviction Division, Norman offices. Visit us at http://www.ok.gov/OIDS/ for more details and how to apply. Deadline is April 16, 2019.

APPLICATIONS MUST BE RECEIVED AT DHS BY 11:59 PM OF THE CLOSING DATE of this job announcement. Apply online at https://jobapscloud.com/OK/sup/bulpreview.asp?R1=190314&R2=UNCE&R3=113. Basic purpose of position: The DHS Child Support Services – Norman CSS Office has an opening for a full-time attorney (CSS Attorney IV, $5,044.91 monthly) with experience in child support enforcement. This position will be located at 1000 E. Alameda, Norman, OK 73071. Typical functions: The position involves preparation and filing of pleadings and trial of cases in child support related hearings in district and administrative courts. Duties will also include consultation and negotiation with other attorneys and customers of Oklahoma Child Support Services, and interpretation of laws, regulations, opinions of the court and policy. Position will train and assist staff with preparation of legal documents and ensure their compliance with ethical considerations. Knowledge, skills, and abilities (KSA's): Knowledge of legal principles and their applications; of legal research methods; of the scope of Oklahoma statutory law and the provisions of the Oklahoma Constitution; of the principles of administrative and constitutional law; of trial and administrative hearing procedures; and of the rules of evidence; and skill in performing research, analyzing, appraising and applying legal principles, facts and precedents to legal problems; presenting explanation of legal matters, statements of facts, law and argument clearly and logically in written and oral form; and in drafting legal instruments and documents. Minimum qualifications: Preference may be given to candidates with experience in child support and/or family law. This position may be filled at an alternate hiring level as a Child Support Services attorney III (beginning salary $4,405 monthly), Child Support Services attorney II (beginning salary $4,067.91 monthly), or as a Child Support Services attorney I (beginning salary $3,689.25 monthly), dependent on child support or family law experience and minimum qualifications as per state policy. Notes: A conditional offer of employment to final candidate will be contingent upon a favorable background check and a substance abuse screening. Veteran's preference points do not apply to this position. If you need assistance in applying for this position contact Oklahoma Department of Human Services, Talent Acquisitions at 405-521-3613 or email STO.HRM.TA@okdhs.org. Benefits: This is a full-time unclassified state position with full state retirement and insurance benefits, including paid health, dental, life and disability insurance. Annual leave of 10 hours per month and sick leave of 10 hours per month begin accruing immediately.

POSITIONS AVAILABLE

POSITION FOR LITIGATION ASSOCIATE ATTORNEY IN TULSA. We are recruiting an experienced partner-track associate attorney to handle all phases of civil litigation within a strong team setting that focuses on client service and maximizing outcomes. Our practice includes challenging procedural and technical issues, and the successful candidate will possess strong analytical, advocacy and case management skills. We are looking for the right attorney to join our team who will take pride in the service we deliver and fit within our friendly, low-key firm environment. Candidates must have at least 7 years' experience in civil litigation that reflects highly developed skill in legal research, drafting memoranda, briefs and discovery, taking depositions, managing document production and oral argument. Candidates should submit a recent writing sample and CV to smcdaniel@ok-counsel.com.

ASSOCIATE ATTORNEY. We are a small law firm looking for an attorney with at least 7 years' experience. The ideal candidate will have experience in litigation, including trial work, depositions, preparing briefs, discovery and pleadings and attending court hearings. Experience in transaction and business litigation would be beneficial. Depending on experience, the position entails trial work, representing clients at motion dockets, at administrative hearings and counseling clients on legal issues. Our firm is more than 50 years old and has a well-established clientele. We work hard and take great pride in our work. Our work environment is pleasant, and we function on a collaborative basis between attorneys and staff. All replies are confidential. Send resume sample and salary requirements to "Box H," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

OKLAHOMA CITY FIRM SEEKS TRIAL LAWYER WITH AT LEAST 10 YEARS OF EXPERIENCE. Excellent compensation and benefits and reduced partnership track. Please submit cover letter and resume to "Box G," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

POSITIONS AVAILABLE

AV-RATED PLAINTIFF'S PERSONAL INJURY FIRM WITH OFFICES IN MULTIPLE LOCATIONS looking to hire a self-starter, hard-working, energetic attorney to become part of the firm's personal injury practice in our Tulsa office. 0-5 years' experience. Please forward resume to P.O. Box 1089, Stillwater, OK, 74076.

ASSISTANT DISTRICT ATTORNEY. District 27 (Adair, Cherokee, Sequoyah and Wagoner County). Salary range: commensurate with experience. Submit resume to kim.hall@dac.state.ok.us.

CLASSIFIED INFORMATION

REGULAR CLASSIFIED ADS: $1.50 per word with $35 minimum per insertion. Additional $15 for blind box. Blind box word count must include "Box ___," Oklahoma Bar Association, PO Box 53036, Oklahoma City, OK 73152."

DISPLAY CLASSIFIED ADS: Bold headline, centered, border are $70 per inch of depth.

DEADLINE: See www.okbar.org/barjournal/advertising or call 405-416-7084 for deadlines.

SEND AD (email preferred) stating number of times to be published to:

advertising@okbar.org, or
Mackenzie Scheer, Oklahoma Bar Association,
PO Box 53036, Oklahoma City, OK 73152.

Publication and contents of any advertisement are not to be deemed an endorsement of the views expressed therein, nor shall the publication of any advertisement be considered an endorsement of the procedure or service involved. All placement notices must be clearly nondiscriminatory.

DO NOT STAPLE BLIND BOX APPLICATIONS.

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MCLE CREDIT 3/1

TRUST ACCOUNTING ESSENTIALS

WEDNESDAY, APRIL 24, 2019

1:30 - 4:10 P.M.

Oklahoma Bar Center

FOR DETAILS AND TO REGISTER, GO TO WWW.OKBAR.ORG/CLE

Stay up-to-date and follow us on

The need to handle funds entrusted to a lawyer by a client or third person with scrupulous care should be self-evident.

Nonetheless, cases continue to arise where practicing lawyers, either inadvertently or intentionally, mishandle trust funds, subjecting clients and third persons to the risk of economic hardship and undermining public confidence in the legal profession.

The purpose of this is course is threefold: **(1)** to describe the rules for handling trust funds and property; **(2)** to discuss relatively recent changes to the handling of fees and trust transactions; and **(3)** to provide practical guidance on how to use both print and electronic tools to produce client and general ledgers and to perform proper three-way reconciliation of trust funds accounts.

NOT AVAILABLE ONLINE

TUITION: **$75 before April 17, 2019**
$100 after April 17, 2019
$125 walk-ins
No Discounts Apply.
THIS PROGRAM WILL NOT BE WEBCAST OR RECORDED.

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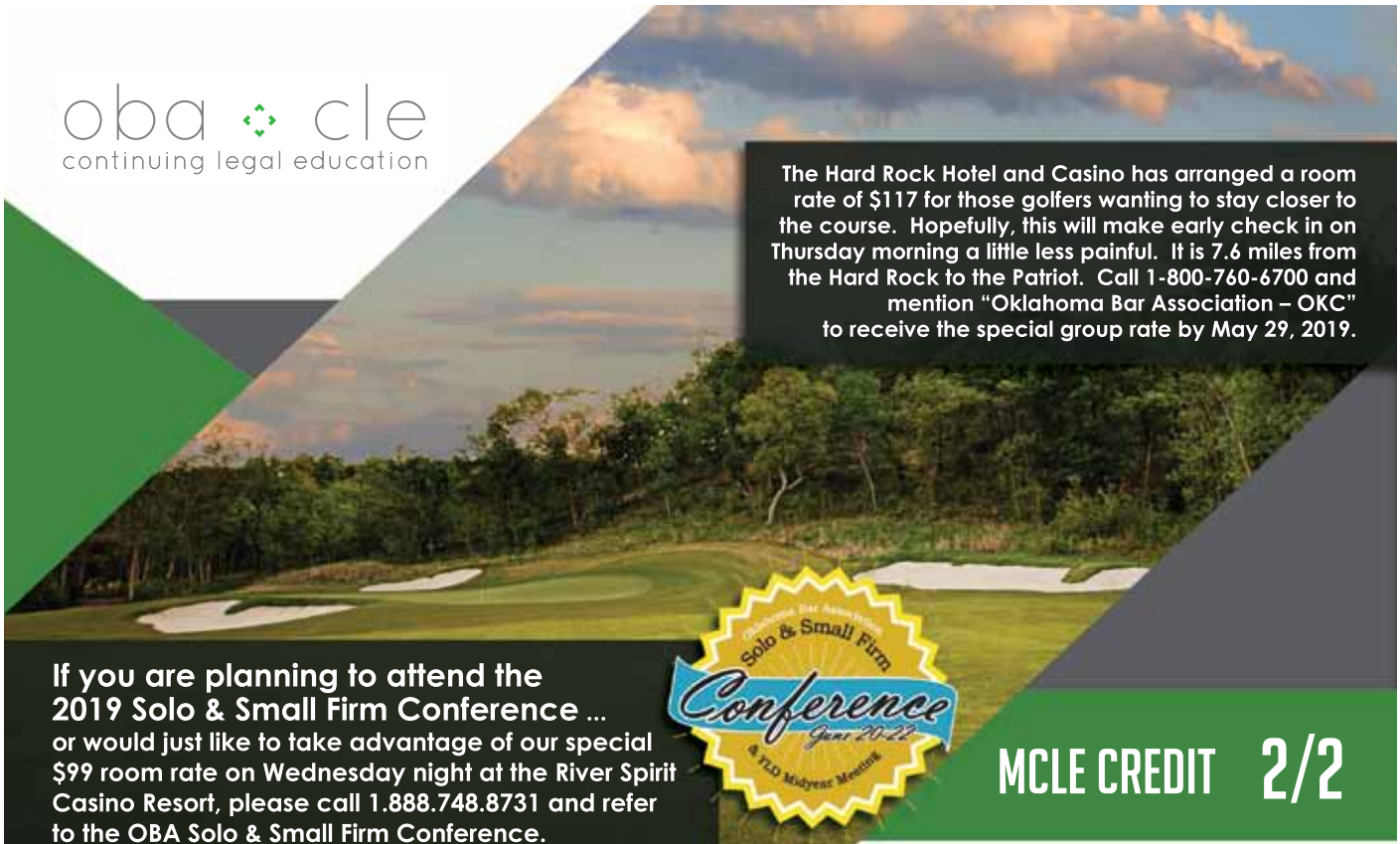

The Hard Rock Hotel and Casino has arranged a room rate of $117 for those golfers wanting to stay closer to the course. Hopefully, this will make early check in on Thursday morning a little less painful. It is 7.6 miles from the Hard Rock to the Patriot. Call 1-800-760-6700 and mention "Oklahoma Bar Association – OKC" to receive the special group rate by May 29, 2019.

If you are planning to attend the 2019 Solo & Small Firm Conference ...
or would just like to take advantage of our special $99 room rate on Wednesday night at the River Spirit Casino Resort, please call 1.888.748.8731 and refer to the OBA Solo & Small Firm Conference.

Solo & Small Firm Conference June 20-21 & YLD Midyear Meeting

MCLE CREDIT 2/2

ETHICS IN 18 HOLES

JUNE 20, 2019

8 A.M. - 2:50 P.M. (8 A.M. CHECK-IN; 9 A.M. TEE TIME)

The Patriot Golf Club, 5790 N Patriot Drive, Owasso, OK 74055

FOR DETAILS AND TO REGISTER, GO TO WWW.OKBAR.ORG/CLE

Stay up-to-date and follow us on

PROGRAM PLANNER/MODERATOR:

Joe Balkenbush,
OBA Ethics Counsel

Get some fresh air and a fresh perspective on legal ethics with all new questions and scenarios in a unique outdoor CLE format.

Your "classroom" is the great outdoors at The Patriot Golf Club. Eighteen ethics scenarios and a set of multiple-choice answers are your course materials. Discuss each scenario and possible answers as you play or ride to each hole. After you finish, head to the "19th Hole" for a buffet lunch and ethics discussion.

SPACE IS LIMITED. Register now to guarantee you or your team a place at this special CLE event! The event is set up for no mulligans, a max of bogey, and prizes will be given for 1st and 2nd place. Tie breaker is best score on the hardest handicapped holes. Flag prizes for closest to pin on hole #8 and #17 and longest drive on #11.

TUITION: **$235 before June 13, 2019**
$260 after June 13, 2019
NO WALK-INS
Member guests not staying for CLE or lunch may play for $185 early and $210 late by contacting Renee at 405.416.7029.

INCLUDES: 2 hours of MCLE credit, green fee, cart, balls, grab & go breakfast and buffet lunch