THE OKLAHOMA BAR
Journal
Volume 90 — No. 11 — 6/1/2019

Court Issue

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THE OKLAHOMA BAR
Journal

Volume 90 – No. 11 – 6/1/2019

The Oklahoma Bar Journal Court Issue is published twice monthly and delivered electronically by the Oklahoma Bar Association, 1901 N. Lincoln Boulevard, Oklahoma City, Oklahoma 73105.

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2019 OK 32

In The Matter of the Reinstatement of Janet Bickel Hutson to Membership in the Oklahoma Bar Association, and to the Roll of Attorneys JANET BICKEL HUTSON, Petitioner, v. OKLAHOMA BAR ASSOCIATION, Respondent.

SCBD #6672. May 20, 2019

BAR REINSTATEMENT PROCEEDING

On April 30, 2019, we denied reinstatement and ordered the petitioner, Janet Bickel Hutson, to pay the remaining costs of $1,999.50.

On May 8, 2019, the petitioner filed a motion, pursuant to Rule 11.6 of the Rules Governing Disciplinary Proceedings, 5 O.S. Ch. 1, App. 1-A, to remand the matter to the Professional Responsibility Tribunal for another hearing regarding her reinstatement to ensure that she has adhered to and completed the conditions we imposed for reinstatement and paid the costs imposed.

The respondent may use the same evidence presented at her initial hearing and any other evidence which is pertinent to the conditions of reinstatement set forth in our opinion of Hutson v. Oklahoma Bar Association, 2019 OK 32, __ P.3d ___.

We hereby grant the petitioner's motion and order the Professional Responsibility Tribunal to hold an additional reinstatement hearing no later than six months after the date this order is filed.

DONE BY ORDER OF THE SUPREME COURT THIS 20TH DAY OF MAY, 2019.

/s/ Noma D. Gurich
CHIEF JUSTICE

GURICH, C.J., DARBY, V.C.J., KAUGER, WINCHESTER, EDMONDSON, COLBERT, JJ., REIF, S.J., concur.

COMBS, J., concurs in part and dissents in part.

2019 OK 37

THOMAS E. SOUTHON, Plaintiff/Appellant, v. OKLAHOMA TIRE RECYCLERS, LLC, Defendant/Appellee.

No. 116,888. May 21, 2019

ON APPEAL FROM THE DISTRICT COURT FOR CREEK COUNTY

¶0 Southon brought an action against Employer in the district court alleging that his termination was wrongfully motivated by his pending workers' compensation claim. He further asserted that, to the extent it governs his wrongful termination claim, 85A O.S.Supp. 2013 § 7 violates several provisions of the Oklahoma Constitution. Employer moved to dismiss the case for lack of jurisdiction, arguing that under section 7 Southon's exclusive, and constitutionally sufficient, remedy was before the Workers' Compensation Commission and not the district court. The Creek County District Court, finding 85A O.S.Supp. 2013 § 7 constitutional, agreed that the Workers' Compensation Commission had exclusive jurisdiction over Southon's claim and sustained Employer's motion to dismiss. Southon appealed, and this matter was retained and made a companion case to another cause concerning the same statutory provision.

ORDER OF THE DISTRICT COURT SUSTAINING DEFENDANT'S MOTION TO DISMISS AND FINDING 85A O.S.SUPP. 2013 § 7 CONSTITUTIONAL IS AFFIRMED

Attorneys and Law Firms

Rex W. Thompson and Stephanie L. Theban, Riggs, Abney, Neal, Turpen, Orbison & Lewis, Tulsa, OK, for Thomas E. Southon, Appellant

-and-

Bob Burke, Oklahoma City, OK, for Thomas E. Southon, Appellant

J. Clay Christensen, T.P. Howell and Lisa M. Molsbee, Christensen Law Group P.L.L.C., Oklahoma City, OK, for Oklahoma Tire Recyclers, LLC, Appellee

Opinion

GURICH, C.J.

¶1 The issues presented to this Court are: (1) whether 85A O.S.Supp. 2013 § 7 unconstitutionally restricts a plaintiff's right to jury trial, (2) whether section 7 denies Southon his right to due process, (3) whether section 7 wrongfully classifies workers' compensation claimants separately from other wrongful termination victims, and (4) whether a Burk tort is available to such plaintiffs in the district court. We conclude that Southon's four assignments of error are without merit and affirm the judgment of the district court.

Facts and Procedural History

¶2 Appellant Thomas Southon was employed by Oklahoma Tire Recyclers, LLC ("Employer"). On September 13, 2016, Southon sustained an injury while on the job and filed a claim for workers' compensation benefits. Employer fired Southon less than a month after he suffered the injury. Southon filed an action in the Creek County District Court, alleging Employer terminated him as retaliation for seeking workers' compensation benefits. Southon's petition further requested a declaratory ruling that 85A O.S.Supp. 2013 § 7 is unconstitutional.

¶3 Appellee Employer moved to dismiss the action, arguing that the Workers' Compensation Commission, and not the district court, has sole jurisdiction over wrongful termination claims involving workers' compensation benefits. The district court judge entered an order sustaining Employer's Motion to Dismiss. Further, the lower court found section 7 did not violate the Oklahoma Constitution. Southon appealed the ruling and we retained the case. We now affirm the district court.

Standard of Review

¶4 The subject of this appeal is Employer's 12 O.S.2011 § 2012(B)(1) Motion to Dismiss, which was granted by the district court. "The purpose of a motion to dismiss is to test the law that governs the claim in litigation, not the underlying facts." Young v. Station 27, Inc., 2017 OK 68, ¶ 8, 404 P.3d 829, 833. As such, whether an action should have been dismissed for lack of subject matter jurisdiction is a question of law this Court reviews *de novo* on appeal. Id.

Analysis

A Wrongful Discharge Claim Brought Pursuant to 85A O.S.Supp. 2013 § 7 Is Not an Action with a Guaranteed Right to Trial by Jury under Article II, Section 19 of the Oklahoma Constitution

¶5 Southon asserts 85A O.S.Supp. 2013 § 7[1] is unconstitutional because, by restricting jurisdiction to the Workers' Compensation Commission, it prevents claimants from having their cases heard by a jury. He argues that this violates article II, section 19 of the Oklahoma Constitution, which provides in relevant part that "[t]he right of trial by jury shall be and remain inviolate." Okla. Const. art. II, § 19. This Court has consistently interpreted "the right of trial by jury" to mean "the right as it existed in the territories at the time of the adoption of the Constitution." State, ex rel. Pruitt v. Native Wholesale Supply, 2014 OK 49, ¶ 24, 338 P.3d 613, 621 (citing A.E. v. State, 1987 OK 76, ¶ 11, 743 P.2d 1041, 1044; Md. Nat'l Ins. Co. v. Dist. Court of Okla. County, 1969 OK 73, ¶ 0, 455 P.2d 690, 690 (*Syll.*); Keeter v. State ex rel. Saye, 1921 OK 197, ¶ 0, 198 P. 866, 866 (*Syll.*)).

¶6 Oklahoma did not adopt a workers' compensation system until 1915. Young, 2017 OK 68, ¶ 13, 404 P.3d at 835. Consequently, the first cause of action based on the wrongful termination of an employee for filing a workers' compensation claim was created by the Retaliatory Discharge Act, enacted in 1976 and codified as part of the Workers' Compensation Act at 85 O.S.Supp. 1976 §§ 5-7. See Glasco v. State ex rel. Okla. Dep't of Corr., 2008 OK 65, ¶ 10, 188 P.3d 177, 182 (citing 1976 Okla. Sess. Laws, ch. 217). "As originally enacted, the statutes prohibited retaliatory discharge of an employee for participation in workers' compensation proceedings in § 5, provided for damages and reinstatement in § 6, and vested jurisdiction in the district courts to restrain employer violations in § 7." Id. This Court has repeatedly emphasized that the "obvious object" of the original Retaliatory Discharge Act was to "provide rights and benefits to employees ***that were not recognized by the common law at-will employment doctrine***." Id. (emphasis added); see also Young, 2017 OK 68, ¶ 13, 404 P.3d at 835-36. Accordingly, an action for retaliatory discharge predicated on the filing of a workers' compensation claim, is a "statutory tort" created by the Legislature in 1976 and the subsequent amendments to the workers' compensation statutes. It

is not an action which was originally guaranteed the constitutional right to a trial by jury.

¶7 Nevertheless, the right to a jury trial may be expanded by constitutional amendment. See A.E., 1987 OK 76, ¶ 11, 743 P.2d at 1045 (acknowledging the right to a jury trial in termination proceedings because the 1969 amendment to article II, section 19 modified the Constitution and expressly extended the right to juvenile proceedings). However, none of the three amendments to article II, section 19 since its creation has either expressly or impliedly created a right to a jury trial for workers' compensation proceedings or a retaliatory discharge claim. See id. ¶ 12, 743 P.2d at 1045; see also Okla. Const. art. II, § 19 (1952); Okla. Const. art. II, § 19 (1969); Okla. Const. art. II, § 19 (1990).[2] Because such an action was solely a creature of statute and not one guaranteed the right to a trial by jury at the time our constitution was adopted, article II, section 19 does not provide a basis for determining the relevant statute is unconstitutional. Therefore, we conclude 85A O.S.Supp. 2013 § 7 does not violate article II, section 19 of the Oklahoma Constitution and Southon's retaliatory discharge claim is not guaranteed the right to a trial by jury.

85A O.S.Supp. 2013 § 7 Does Not Deny Claimants Due Process in Violation of Article II, Section 7 of the Oklahoma Constitution or the Fourteenth Amendment of the U.S. Constitution.

¶8 Southon asserts 85A O.S.Supp. 2013 § 7 is unconstitutional because it denies him basic due process in violation of article II, section 7 of the Oklahoma Constitution and the Fourteenth Amendment to the United States Constitution. The due process guarantee of the Oklahoma Constitution is generally coextensive with those rights protected by the Fourteenth Amendment to the United States Constitution. Graham v. D & K Oilfield Serv.s, Inc., 2017 OK 72, ¶ 14, 404 P.3d 863, 867. "The party seeking a statute's invalidation as unconstitutional has the burden to show the statute is clearly, palpably, and plainly inconsistent with the Oklahoma Constitution." Id. ¶ 11, 404 P.3d at 867. We may not set aside legislation for violating substantive due process unless "it is clearly irrelevant to the policy the Legislature may adopt or is arbitrary, unreasonable or discriminatory." Torres v. Seaboard Foods, LLC, 2016 OK 20, ¶ 27, n.46, 373 P.3d 1057, 1072. When examining this question we must ascertain the following

> (1) if there is a legitimate government interest (a) articulated in the legislation or (b) championed by the parties or (c) expressed by a recognized public policy in support of the legislation, and (2) if that interest is reasonably advanced by the legislation.

Torres v. Seaboard Foods, LLC, 2016 OK 20, ¶ 28, 373 P.3d 1057, 1072. Southon argues that the jurisdictional limitation and the $100,000 cap on back-pay in 85A O.S.Supp. 2013 § 7 are arbitrary and not rationally related to a legitimate state interest.

¶9 In Graham v. D & K Oilfield Services, Inc., this Court upheld a workers' compensation statute which limited employees' temporary total disability benefits for hernias. 2017 OK 72, 404 P.3d 863. In Graham, the employee sustained a work-induced hernia on the job site and timely pursued compensation under the Workers' Compensation Act. Id. ¶ 2, 404 P.3d at 865. Although the employee's injury persisted, his temporary total disability benefits were capped according to the six-week limitation of 85A O.S.Supp. 2013 § 61. Id. ¶ 6, 404 P.3d at 866. The employee challenged the constitutionality of section 61 as a denial of due process. Id. ¶ 13, 404 P.3d at 868. Using his own injury as an example, the employee argued that six weeks of temporary total disability benefits was insufficient to compensate injured workers and that such a temporal restriction on damages was an arbitrary limitation not rationally related to any legitimate state interest. Id. ¶ 17, 404 P.3d at 869. Although the cap would not entirely compensate this particular employee, this Court determined that section 61 was rationally related to the competing, but legitimate, state interests of providing "reasonable support to injured workers" while still "protecting employers from excessive judgments and providing more limited and certain levels of monetary exposure." Id. ¶¶ 16, 21, 404 P.3d at 868, 870. Moreover, the six-week limitation was considered rational because it aligned with the higher end of hernia recovery times and the return to work scale. Id. ¶ 19, 404 P.3d at 869. Limitations on workers' compensation benefits are not unconstitutional simply because they inadequately compensate the disability caused by the injury. Id. ¶ 20, 404 P.3d at 870.

¶10 Similar to section 61, 85A O.S.Supp. 2013 § 7 attempts to balance the legitimate purpose of providing reasonable support to injured workers against the state's interest in protecting employers from the excessive judgments.

Southon argues that the $100,000 cap is an "artificial limit on damages," but we agree with the Employer that under the majority of circumstances it would reasonably compensate most injured workers while also protecting employers from unlimited monetary exposure. As such, it both aims to serve legitimate government interests and is reasonably tailored to advance those purposes. Accordingly, 85A O.S.Supp. 2013 § 7 does not deny Southon due process in violation of article II, section 7 of the Oklahoma Constitution or Amendment XIV of the U.S. Constitution.

Title 85A O.S.Supp. 2013 § 7 Is Not a Special Law in Violation of Article V, Section 46 of the Oklahoma Constitution

¶11 The Oklahoma Constitution prohibits local or special laws that regulate "the practice or jurisdiction of . . . judicial proceedings or inquiry before the courts. . . or other tribunals." Okla. Const. art. 5, § 46. Local or special laws

> Rest on a false or deficient classification…. [by] not embrac[ing] all the class that they should naturally embrace. They create preference and establish inequality. They apply to persons, things, and places possessed of certain qualities or situations and exclude from their effect other persons, things, or places which are not dissimilar in this respect.

Barrett v. Bd. of Comm'rs of Tulsa Cnty., 1939 OK 68, ¶ 17, 90 P.2d 442, 446. When evaluating a law for deficient classification under section 46, there is a presumption of constitutionality. Thayer v. Phillips Petroleum Co., 1980 OK 95, ¶ 12, 613 P.2d 1041, 1044. A classification will be upheld as constitutional as long as the classification itself is reasonable and there is a "reasonable opportunity for uniform or equal incidence on the class created." Id. The law should "be general in its application and embrace all of the given class." City of Enid v. Pub. Emps. Relations Bd., 2006 OK 16, ¶ 13, 133 P.3d 281, 287. Southon argues 85A O.S.Supp. 2013 § 7 is a special law because it designates remedies for victims of workers'-compensation-based wrongful termination that are different than the remedies available to victims of status-based wrongful termination.

¶12 The classification of wrongful termination victims "is determined by the public policy that is offended by the discharge of an employee who is either protected by the public policy or has acted in a way that is consistent with the public policy." MacDonald v. Corporate Integris Health, 2014 OK 10, ¶ 10, 321 P.3d 980, 984. We recently held in MacDonald, that the Oklahoma Anti-Discrimination Act was not a special law even though it created a new class of status-based wrongful termination victims.[3] Id. ¶ 4, 321 P.3d at 982. In MacDonald, as in the present case, "plaintiff argue[d] that all victims of wrongful termination are a similarly situated class of tort victims in the same way all victims of negligence" are a similarly situated class. Id. ¶ 5, 321 P.3d at 983. This Court rejected that notion and held that the remedies for status-based and conduct-based wrongful termination need not be commensurate because the remedies are intended to protect different policies. Id. ¶¶ 7, 10, 321 P.3d at 983-84. Accordingly, a class may receive individualized treatment where there is a separate policy reason for doing so.

¶13 To decide whether 85A O.S.Supp. 2013 § 7 is under-inclusive, we must determine whether the statute targets less than an entire class of similarly situated persons for different treatment. We conclude it does not. Section 7 treats all employees who are discharged for pursuing workers' compensation benefits in an identical manner. The Legislature created section 7 to ensure employees are free to pursue workers' compensation benefits without fear of retaliation. This policy interest is distinct from the interest of equality that inspired the Anti-Discrimination Act's classification of status-based claimants, and the Legislature was within its right to determine that it is better protected by an administrative remedy than by tort liability. We therefore conclude that 85A O.S.Supp. 2013 § 7 is not an unconstitutional special law.

Plaintiff Is Precluded from Bringing a Burk Tort Cause of Action Because the Statutory Remedies of 85A O.S.Supp. 2013 §7 Adequately Protect Oklahoma Public Policy

¶14 Finally, Southon argues that he should be able to litigate his claim in the district court as a Burk tort because the remedies of 85A O.S.Supp. 2013 § 7 are inadequate. In Burk v. K-Mart Corp., 1989 OK 22, 770 P.2d 24, this Court created an exception to the employment-at-will doctrine[4] by "restricting the right of employers to discharge at-will employees when that termination is in contravention of a clear mandate of public policy, as articulated by constitutional, statutory or decisional law." McCrady v. Okla. Dep't of Pub. Safety, 2005 OK 67, ¶ 7, 122 P.3d 473, 475. The exception created

in Burk "subjects the employer to tort liability where the employee is 'discharged for refusing to act in violation of an established and well-defined public policy or for performing an act consistent with a clear and compelling public policy.'" Id. Burk torts were deemed an available avenue for relief because, at the time, there was no other remedy to protect prevailing public policy. MacDonald, 2014 OK 10, ¶ 6, 321 P.3d at 983. "[I]t is axiomatic that the Legislature can declare and change public policy in the area of at[-]will employment and is empowered to provide the measures it deems necessary to protect that public policy." Id. As such, if the Legislature creates a statutory remedy that sufficiently protects employees from a discharge in contravention of public policy, they are precluded from resorting to a Burk cause of action. Shephard v. CompSource Okla., 2009 OK 25, ¶ 12, 209 P.3d 288, 293.

¶15 In 2013, the Legislature recodified the statutory cause of action for retaliatory discharge and specified new remedies which may be pursued through the Oklahoma Workers' Compensation Commission. 85A O.S.Supp 2013 § 7. Southon argues that the remedies set out in section 7 are inadequate because previous versions of the Retaliatory Discharge Act vested jurisdiction in the district courts and provided for actual damages, loss of future wages, emotional distress, punitive damages, and reinstatement. But as we previously explained, remedies available in prior versions of the statute do not render insufficient remedies the Legislature has now chosen and narrowly tailored for a statutory claim. Accordingly, we hold that newly imposed limitations on jurisdiction and damages do not automatically render section 7 inadequate.

¶16 Administrative agencies may serve as an appropriate and sufficient forum for wrongful termination actions. In Glasco v. State ex rel. Okla. Dep't of Corr., a state employee suffered a work-related injury, received temporary total disability benefits, and was placed on leave without pay. 2008 OK 65, ¶ 72, 188 P.3d at 180. After being on leave without pay for more than a year, the Department discharged the employee pursuant to the Oklahoma Personnel Act. Id. ¶ 4, 188 P.3d at 181; See 74 O.S. § 840-2.21. The employee initiated a tort claim against the employer in the district court, alleging retaliatory discharge under the Workers' Compensation Act. Id. ¶ 5, 188 P.3d at 181; See 85 O.S. 2001 §§ 5-7. The trial court found that the employee's discharge was governed by the Oklahoma Personnel Act which restricted ju-risdiction to the Merit Protection Commission and sustained the defendants' Motion for Summary Judgment. Id. ¶¶ 6-7, 188 P.3d at 181. On appeal, this Court affirmed. Id. ¶ 36, 188 P.3d at 188. This Court held that the Oklahoma Personnel Act did not limit access to the courts in violation of article II, section 6 of the Oklahoma Constitution by simply restricting jurisdiction to the Merit Protection Commission. Id.; see also Shephard, 2009 OK 25, ¶ 7, 209 P.3d at 292 (deciding that the Merit Protection Commission provides an "adequate remedy to protect state employee whistleblowers from wrongful termination" and "to protect the statutory public policy."); McCrady, 2005 OK 67, ¶ 12, 122 P.3d at 476 (deciding that the Oklahoma Merit System of Personnel Administration provides an "adequate remedy sufficient to protect [employees] and the identified public policy goals of Oklahoma.").

¶17 The case before us falls squarely within the purview of Glasco. Like the statutory claim in Glasco, 85A O.S.Supp. 2013 § 7 vests limited jurisdiction in an administrative agency to make a factual determination as to whether an employee has been wrongly discharged. Specifically, section 7 vests jurisdiction in the Workers' Compensation Commission to determine whether an employer "discriminate[d] or retaliate[d] against an employee" who filed a claim under the Oklahoma Administrative Workers' Compensation Act, retained a lawyer for representation regarding a claim under the Act, instituted any proceeding under the Act, or testified or was about to testify in any proceeding under the Act. 85A O.S.Supp. 2013 § 7. We specifically held in Robinson v. Fairview Fellowship, that the Workers' Compensation Commission, "as a Commission 'established by statute,' may 'exercise adjudicative authority or render decisions in individual proceedings.'" 2016 OK 42, ¶ 7, 371 P.3d 477, 481 (citing Okla. Const. art. 7, § 1). The Legislature explicitly gave the Workers' Compensation Commission sole jurisdiction to oversee wrongful termination claims that arise from an underlying Workers' Compensation Claim, and like the Merit Protection Commission, the Workers' Compensation Commission is fit to adequately protect Oklahoma public policy in this area.

¶18 Moreover, the Legislature designated the set of remedies that the Workers' Compensation Commission is authorized to award a prevailing

employee. "The amount of that recovery is in the province of the legislature under the specific directive of the constitution, and if it is too small the people have the power, either through their elected officials or by their right of initiative petition, to increase it." See, e.g, Hughes Drilling Co. v. Crawford, 1985 OK 16, ¶ 21, 697 P.2d 525, 530; Graham, 2017 OK 72, ¶ 21, 404 P.3d at 870. With the enactment of section 7, the legislature has determined that Oklahoma's public policy is adequately protected by a statutory cause of action brought in the Commission and subject to the relief set forth therein. Our law is well settled that "decisions concerning public policy in creating and abolishing causes of action are routinely within the judgment of the Legislature." Torres, 2016 OK 20, ¶ 35, 373 P.3d at 1075. We conclude that 85A O.S.Supp. 2013 § 7 provides an adequate statutory remedy sufficient to protect Oklahoma public policy, and thus, no Burk tort is available in the district court.

Conclusion

¶19 Southon failed to meet the burden required to establish section 7 is unconstitutional. We therefore hold that 85A O.S.Supp. 2013 § 7 does not violate either article II, sections 7 and 9, or article V, section 46 of the Oklahoma Constitution. Moreover, the remedies provided in section 7 are adequate and preclude Southon from bringing a Burk tort in the district court. We affirm the judgment of the district court dismissing the action against the defendants for lack of subject matter jurisdiction.

¶20 Gurich, C.J., Darby, V.C.J., Kauger, Winchester, Edmondson, Colbert, Combs, JJ., concur.

¶21 Reif, S.J., dissents.

GURICH, C.J.

1. Section 7 provides in its entirety:
   A. An employer may not discriminate or retaliate against an employee when the employee has in good faith:
      1. Filed a claim under this act;
      2. Retained a lawyer for representation regarding a claim under this act;
      3. Instituted or caused to be instituted any proceeding under the provisions of this act; or
      4. Testified or is about to testify in any proceeding under the provisions of this act.
   B. The Commission shall have exclusive jurisdiction to hear and decide claims based on subsection A of this section.
   C. If the Commission determines that the defendant violated subsection A of this section, the Commission may award the employee back pay up to a maximum of One Hundred Thousand Dollars ($100,000.00). Interim earnings or amounts earnable with reasonable diligence by the person discriminated against shall reduce the back pay otherwise allowable.
   D. The prevailing party shall be entitled to recover costs and a reasonable attorney fee.
   E. No employer may discharge an employee during a period of temporary total disability for the sole reason of being absent from work or for the purpose of avoiding payment of temporary total disability benefits to the injured employee.
   F. Notwithstanding any other provision of this section, an employer shall not be required to rehire or retain an employee who, after temporary total disability has been exhausted, is determined by a physician to be physically unable to perform his or her assigned duties, or whose position is no longer available.
   G. This section shall not be construed as establishing an exception to the employment at will doctrine.
   H. The remedies provided for in this section shall be exclusive with respect to any claim arising out of the conduct described in subsection A of this section.

2. The only amendment to section 19 since the creation of an action for retaliatory discharge, Okla. Const. art. II, § 19 (1990), did not substantively change the section. The 1990 amendment increased the amount in controversy to be eligible for a jury trial, adjusted the amount of jurors for civil and criminal cases, and clarified the number of jurors needed to reach a verdict. Accordingly, we reject Southon's argument that the 1990 amendment vested new causes of action with a right to jury trial.

3. The Oklahoma Anti-Discrimination Act, 25 O.S. 2001 §§ 1101-1901, created a class of status-based discrimination victims who alleged wrongful termination on the basis of their race, color, national origin, sex, religion, creed, age, disability, or genetic information. Shirazi v. Childtime Learning Ctr., 2009 OK 13, ¶ 8, 204 P.3d 75, 78.

4. "The doctrine of employment-at-will is firmly embedded in the common law of Oklahoma." McCrady v. Okla. Dep't of Pub. Safety, 2005 OK 67, ¶ 6, 122 P.3d 473, 474. Under the employment-at-will doctrine, "an employee with an employment contract of indefinite duration is free to leave his or her employment for any reason or no reason without incurring liability to the employer, and the employer has the corresponding freedom to terminate the at-will employee for any reason or no reason without incurring liability to the employee." Id. ¶ 6, 122 P.3d at 475.

2019 OK 38

In re: Creation of Rule 1.18 of the Oklahoma Supreme Court Rules Concerning Prisoner Filings

SCAD-2019-51. May 20, 2019

ORDER

Rule 1.18 of the Oklahoma Supreme Court Rules, as shown on the attached Exhibit "A", is hereby created, effective immediately.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 20th day of May, 2019.

/s/ Richard Darby
VICE CHIEF JUSTICE

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

Exhibit "A"

RULE 1.18 - PRISONER FILINGS, FRIVOLOUS OR MALICIOUS APPEALS AND ORIGINAL ACTIONS

A prisoner who has, on three or more prior occasions, while incarcerated or detained in any facility, or while on probation or parole, brought an action or appeal in a court of this

state or a court of the United States that has been dismissed on the grounds that the case was frivolous, or malicious, or failed to state a claim upon which relief could be granted, may not proceed in a matter arising out of a civil case, or upon an original action or on appeal without prepayment of all fees required by law, unless the prisoner is under immediate danger of serious physical injury. 57 O.S. § 566.2(A).

The court administrator of the Oklahoma courts shall maintain a registry of those prisoners who have had any cases dismissed as frivolous or malicious or for failure to state a claim upon which relief can be granted. 57 O.S. § 566.2(8). When a prisoner files an appeal or original action, the Clerk of the Supreme Court shall check the prisoner's name with the Registry of Frivolous or Malicious Appeals to determine if that prisoner already appears three or more times on the Registry.

When a prisoner who appears three or more times on the Registry of Frivolous or Malicious Appeals initiates an original action or an appeal filed with the Supreme Court without prepayment of all fees required by law, the Clerk shall file and docket the original action or appeal and forward the filings to the Chief Justice for review.

The Supreme Court will direct the prisoner to show cause why the matter should be allowed to proceed without prepayment of all fees as required by law. 57 O.S. § 566.2(A). If the prisoner fails to show adequate cause, the matter shall be summarily dismissed by order of the Chief Justice.

Notice of Judicial Vacancy

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

Associate District Judge
Twenty-fourth Judicial District • Creek County, Oklahoma

This vacancy is due to the retirement of the Honorable Mark Ihrig effective August 1, 2019.

To be appointed an Associate District Judge, an individual must be a registered voter of the applicable judicial district at the time (s)he takes the oath of office and assumes the duties of office. Additionally, prior to appointment, the appointee must have had a minimum of two years experience as a licensed practicing attorney, or as a judge of a court of record, or combination thereof, within the State of Oklahoma.

Application forms can be obtained on line at www.oscn.net by following the link tothe Oklahoma Judicial Nominating Commission or by contacting Tammy Reaves, Administrative Office of the Courts, 2100 North Lincoln, Suite 3, Oklahoma City, OK 73105, (405) 556-9300, and should be submitted to the Chairman of the Commission at the same address **no later than 5:00 p.m., Friday, July 12, 2019. If applications are mailed, they must be postmarked by midnight, July 12, 2019.**

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

ADA LOIS SIPUEL FISHER

DIVERSITY AWARDS

Nominations due July 31

Send to diversityawards@okbar.org

The Ada Lois Sipuel Fisher Diversity Awards categories are members of the judiciary, licensed attorneys and entities that have championed the cause of diversity. All nominations must be received by Tuesday, July 31.

For more details, visit www.okbar.org/diversityawards.

2019 OK CR 6

DAKOTA WILLIAM STEWART, Appellant, v. THE STATE OF OKLAHOMA, Appellee.

Case No. F-2017-622. May 16, 2019

OPINION

ROWLAND, JUDGE:

¶1 Appellant Dakota William Stewart appeals his Judgment and Sentence from the District Court of Carter County, Case No. CF-2016-330, for two counts of First Degree Manslaughter (Counts 1 & 2) in violation of 21 O.S.2011, § 711, and one count of Unlawful Possession of a Controlled Dangerous Substance (Metham-phetamine) (Count 3) in violation of 63 O.S.Supp.2012, § 2-402. The Honorable Dennis R. Morris, District Judge, presided over Stewart's jury trial and sentenced him, in accordance with the jury's verdict, to twenty-five years imprisonment on each of Counts 1 and 2 and ten years imprisonment on Count 3 with the sentences to be served consecutively. Stewart appeals contesting only the warrantless compulsory seizure of his blood and subsequent admission of his blood test results that revealed the presence of drugs. We find relief is not required and affirm the Judgment and Sentence of the district court.

FACTS

¶2 The facts of this case are not in dispute. Stewart lost control of his Chevy Avalanche while driving northbound on U.S. Highway 77 in Carter County on May 28, 2015. His car came to rest in the opposite lane of traffic where a van driven by Gerald Letkiewicz struck him broadside. Both Letkiewicz and Stewart's front seat passenger, Justin Skinner, died at the crash site. Though Stewart and his three other passengers sustained injuries, they survived. Stewart's injuries were critical and he was flown to an Oklahoma City trauma center for emergency medical treatment where he remained in a coma for several weeks. Shortly after Stewart's arrival at the hospital, and about three hours after the fatal crash, a registered nurse, acting at the direction of a state trooper without a search warrant or Stewart's consent, drew a sample of his blood. Subsequent testing revealed the presence of methamphetamine and marijuana in Stewart's system. Meanwhile, troopers found methampheta-mine, scales, smoking pipes, and pills while looking for identification inside Stewart's car at the crash site.

ANALYSIS

¶3 Stewart argues the warrantless, nonconsensual seizure of his blood and subsequent admission of its chemical analysis at trial violated his state and federal constitutional guarantees against unreasonable searches and seizures. U.S. Amend IV; Okla.Const. Art. 2, § 30. The district court denied his motion to suppress, ruling Title 47 O.S.2011, § 10-104(B) permitted the seizure of his blood without any search warrant or showing of probable cause and exigent circumstances. Because that statute and its authorization for the warrantless seizure of a suspect's blood in serious vehicle accidents was explicitly upheld by this Court in *Cripps v. State*, 2016 OK CR 14, 387 P.3d 906, *cert. denied*, ___U.S.___, 137 S.Ct. 2186, 198 L.Ed.2d 254 (2017), he urges the overruling of that case.

A.

¶4 In *Schmerber v. California*, 384 U.S. 757, 758-60, 86 S.Ct. 1826, 1829, 16 L.Ed.2d 908 (1966), a defendant convicted of driving under the influence of alcohol challenged the warrantless seizure and testing of his blood that was performed at the direction of police while he was being treated at a hospital for injuries suffered in a vehicle crash. The arresting officer smelled the odor of alcohol and observed other signs of intoxication on the defendant at the crash scene, and again at the hospital within two hours of the crash. *Schmerber,* 384 U.S. at 768-69, 86 S.Ct. at 1835. The Supreme Court upheld the warrantless seizure of the blood sample based in part upon the body's natural dissipation of alcohol. *Id.*, 384 U.S. at 770-71, 86 S.Ct. at 1835-36. The Supreme Court stated:

> The officer in the present case, however, might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence,' *Preston v.*

United States, 376 U.S. 364, 367, 84 S.Ct. 881, 883, 11 L.Ed.2d 777. We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system. Particularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. Given these special facts, we conclude that the attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to petitioner's arrest.

Id.

¶5 In *Missouri v. McNeely*, 569 U.S. 141, 145, 133 S.Ct. 1552, 1556, 185 L. Ed.2d 696 (2013), the Supreme Court made clear that the body's natural dissipation of alcohol does not itself create a *per se* rule of exigency which permits a warrantless search and seizure of a suspect's blood in every drunk-driving case. Rather, just as in all other Fourth Amendment contexts, "[w]hether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances." *McNeely,* 569 U.S. at 156, 133 S.Ct. at 1563. This pronouncement means that in addition to having probable cause to support the search, police must also obtain a warrant unless there is some exigent circumstance where "the needs of law enforcement [are] so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." *Id.*, 569 U.S. at 148-49, 133 S.Ct. at 1558 (quoting *Kentucky v. King*, 563 U.S. 452, 460, 131 S.Ct. 1849, 1856, 179 L.Ed.2d 865 (2011)).

B.

¶6 Title 47, Section 10-104(B) of the Oklahoma Statutes reads:

> Any driver of any vehicle involved in an accident who could be cited for any traffic offense where said accident resulted in the immediate death or great bodily injury, as defined in subsection B of Section 646 of Title 21 of the Oklahoma Statutes, of any person shall submit to drug and alcohol testing as soon as practicable after such accident occurs. The traffic offense violation shall constitute probable cause for purposes of Section 752 of this title and the procedures found in Section 752 of this title shall be followed to determine the presence of alcohol or controlled dangerous substances within the driver's blood system.

¶7 This statute "creates a *per se* rule requiring nonconsensual blood testing of a driver involved in an accident who could be cited for a traffic offense, where the accident involves either a fatality or great bodily injury of *any person, including the driver.*" *Cripps*, 2016 OK CR 14, ¶ 8, 387 P.3d at 909 (emphasis in original).

¶8 The *Cripps* Court held that because 47 O.S.2011, § 10-104(B) applied only when there was an accident involving death or great bodily injury, its *per se* rule survived *McNeely. Cripps*, 2016 OK CR 14, ¶ 8, 387 P.3d at 909. We now find that this analysis and construction of Section 10-104(B) cannot withstand scrutiny under the Fourth Amendment and we overrule *Cripps* as well as *Bemo v. State*, 2013 OK CR 4, 298 P.3d 1190, *Sanders v. State*, 2002 OK CR 42, 60 P.3d 1048, and *Guest v. State*, 2002 OK CR 5, 42 P.3d 289, insofar as these cases are inconsistent with this opinion.

1.

¶9 In *Cripps*, we found Section 10-104(B) beyond the reach of *McNeely* because its *per se* rule was different from the Missouri rule struck down in *McNeely*. We explained:

> The exigent circumstance justifying the *per se* rule in § 10–104(B) is the existence of great bodily injury or a fatality to persons including the driver. Put another way, § 10–104(B) does not depend solely on the dissipation of alcohol in the bloodstream over time as an exigent circumstance . . . . The majority in *McNeely* rejected the claim that states needed a *per se* rule based on the dissipation of alcohol in the blood in order to promote enforcement of laws against drunk driving. The *per se* rule found unconstitutional in *McNeely* is simply a different rule from the *per se* rule in § 10–104(B), and the difference is material.

Cripps, 2016 OK CR 14, ¶ 8, 387 P.3d at 909. Undoubtedly driving under the influence is a significant public safety problem and the enactment of statutes like Section 10-104(B) seek to assist law enforcement in uncovering evidence for prosecution of those who drive under the influence resulting in tragic consequences. The blanket rule in Section 10-104(B), however, like the dissipation of alcohol in the bloodstream in *McNeely,* substitutes one *per se* rule of exigency for another. This distinction is simply at odds

with the central point of *McNeely* that no such blanket rule will satisfy the Fourth Amendment requirement of individualized consideration of the existence of probable cause and exigent circumstances to justify the taking of a blood sample from a driver without a warrant.

2.

¶10 Indeed, Section 10-104(B) goes even further than the *per se* rule rejected in the *McNeely* case. It provides not only a *per se* rule of exigency in such cases, but also a *per se* finding of probable cause, completely eliminating any role of the magistrate in ruling upon probable cause or exigency either before or after the seizure of a suspect's blood. This departs from a foundational Fourth Amendment principle which requires probable cause be determined by a neutral and detached magistrate on a case-by-case basis.

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Johnson v. United States, 333 U.S. 10, 13–14, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1948). While Section 10-104(B) does not delegate the finding of probable cause to law enforcement officers, its inherent pronouncement of probable cause in an entire category of cases has impermissibly dispensed with the necessity of an individualized assessment of probable cause by a magistrate on a case-by-case basis.

¶11 In *Shadwick v. City of Tampa*, 407 U.S. 345, 352, 92 S.Ct. 2119, 2123-24, 32 L.Ed.2d 783 (1972), the Supreme Court upheld the review and issuance of search warrants by a municipal court clerk employed by the judicial branch, but voiced doubt about the constitutionality of such review being performed by non-judicial branch personnel. "Many persons may not qualify as the kind of 'public civil officers' we have come to associate with the term 'magistrate.' Had the Tampa clerk been entirely divorced from a judicial position, this case would have presented different considerations." *Id.*, 407 U.S. at 352, 92 S.Ct. at 2124. *See also, United States v. U.S. Dist. Court for E. Dist. of Mich., S. Div.*, 407 U.S. 297, 317, 92 S.Ct. 2125, 2136, 32 L.Ed.2d 752 (1972) ("The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates.")

¶12 An analogous attempt to legislate a Fourth Amendment standard was at issue in *Sibron v. New York*, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968), wherein the Supreme Court considered New York's "stop and frisk" statute, which allowed police to detain any person whom they reasonably suspected of committing certain crimes. Declining the parties' invitation to rule on whether the challenged statute was facially constitutional, the Court instead focused solely on whether the facts known to the officer at the time of a given stop constituted reasonable suspicion to detain.

> The constitutional validity of a warrantless search is pre-eminently the sort of question which can only be decided in the concrete factual context of the individual case….No search required to be made under a warrant is valid if the procedure for the issuance of the warrant is inadequate to ensure the sort of neutral contemplation by a magistrate of the grounds for the search and its proposed scope, which lies at the heart of the Fourth Amendment….
>
> The question in this Court upon review of a state-approved search or seizure 'is not whether the search (or seizure) was authorized by state law. The question is rather whether the search was reasonable under the Fourth Amendment. Just as a search authorized by state law may be an unreasonable one under that amendment, so may a search not expressly authorized by state law be justified as a constitutionally reasonable one.'

(citations omitted). *Sibron*, 392 U.S. at 59 & 61, 88 S.Ct. at 1901-02. Similarly, in *Tennessee v. Garner,* 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), the Supreme Court rejected a facial challenge to the constitutionality of a statute permitting police to use deadly force to apprehend all fleeing felons. Instead, the majority held that the statute was constitutional as applied to serious crimes where there was probable cause to believe the suspect posed a danger to others and the use of deadly force was necessary to prevent the suspect's escape. *Garner,* 471 U.S. at 11-12; 105 S.Ct. at 1701.

C.

¶13 Section 10-104(B) gives no consideration to the "concrete factual context of the individual case," nor does it allow for "neutral contemplation by a magistrate of the grounds for the search." *Sibron,* 392 U.S. at 59; 88 S.Ct. at 1901. If the Legislature may substitute a fatality or serious injury vehicle crash for a judicial finding of probable cause, it could substitute most any other factual scenario as well and the requirement of a neutral and detached magistrate becomes nothing more than a default position in the absence of legislative action. "The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great." *Schmerber,* 384 U.S. at 770, 86 S.Ct. at 1835.

¶14 Following the Supreme Court's lead in *Sibron* and *Garner*, we stop short of holding that Section 10-104(B) is unconstitutional on its face, but we hold that more than simple compliance with the statute is required in order to justify the warrantless seizure of blood from an intoxicated driving suspect. There must be an individualized determination of probable cause by a magistrate based upon the totality of the facts of each case, and the issuance of a search warrant, unless some exigent circum-stance(s) renders it impractical to obtain a warrant beforehand.[1] In those cases where police act without a warrant, a magistrate will rule upon the existence of probable cause and exigent circumstances, if and when the seizure is later challenged through a motion to suppress.[2] These are the same, familiar Fourth Amendment principles applied in nearly every other Fourth Amendment search and seizure context.

D.

¶15 In the case now before us, the record shows troopers found drugs and drug paraphernalia in Stewart's vehicle at the crash site, evidence highly significant to the question of whether there was probable cause to draw Stewart's blood. The record also shows that neither the investigating officers nor prosecutors sought to rely upon that evidence for probable cause, instead and understandably relying upon the categorical probable cause rule of Section 10-104(B) as interpreted by *Cripps.* This resulted in hardly any attention to developing a thorough factual record of these particular facts below and, as Stewart correctly points out, it is not clear when the drugs were discovered relative to the taking of his blood at the hospital in Oklahoma City.

¶16 Whether or how much it matters when the actual discovery of the drug evidence was made in the course of these events need not detain us long, because the exclusionary rule simply does not apply to Fourth Amendment violations where the officers involved relied on a state statute which they are entitled to assume is constitutional. *Illinois v. Krull*, 480 U.S. 340, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987). The Court in *Krull* explained

> The application of the exclusionary rule to suppress evidence obtained by an officer acting in objectively reasonable reliance on a statute would have as little deterrent effect on the officer's actions as would the exclusion of evidence when an officer acts in objectively reasonable reliance on a warrant. Unless a statute is clearly unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law.

Id., 480 U.S. at 349–50, 107 S.Ct. at 1167. The purpose of the exclusionary rule is to deter police misconduct and where, as here, there is no demonstrable police misconduct there is nothing to deter by suppressing evidence. The trooper's reliance in this case on Section 10-104 (B) as the basis for drawing Stewart's blood was objectively reasonable and unquestionably done in good faith. *See State v. Sittingdown,* 2010 OK CR 22, ¶¶ 17-18, 240 P.3d 714, 718. Had the record been further developed, it is highly likely it would have shown the existence of probable cause and exigent circumstances sufficient to justify Stewart's warrantless, nonconsensual blood draw. Regardless, the fruits of a search and seizure conducted pursuant to a state statute need not be suppressed even if the statute is subsequently invalidated if the officer, as in this case, acted in objectively reasonable reliance upon it and abided by its terms. *See id.*, 2010 OK CR 22, ¶ 17, 240 P.3d at 718. For these reasons, we find the warrantless, nonconsensual taking of Stewart's blood and subsequent admission of its chemical analysis warrants no relief in this case.

DECISION

¶17 The Judgment and Sentence of the district court is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2019), the **MAN-**

DATE is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF CARTER COUNTY THE HONORABLE DENNIS R. MORRIS, DISTRICT JUDGE

APPEARANCES AT TRIAL

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OPINION BY: ROWLAND, J.
LEWIS, P.J.: Concur in Results
KUEHN, V.P.J.: Concur in Part and Dissent in Part
LUMPKIN, J.: Concur
HUDSON, J.: Specially Concur

LEWIS, PRESIDING JUDGE, CONCURS IN RESULTS:

¶1 The majority opinion determines that a legislative act cannot supplant an independent finding of facts supporting probable cause necessary for a search, and still finds 21 O.S.2011, § 10-104(B) constitutional on its face.

¶2 The opinion cites *Tennessee v. Garner*[1] to support its holding that the statute is not unconstitutional on its face, but may be applied in a constitutional manner. The holding of *Garner* is distinguishable. In *Garner* the United States Supreme Court was faced with a statute that restated the common law rule allowing an officer to use any necessary force, including deadly force, to affect the arrest of a felon. *Garner*, 471 U.S. at 12-13 and 16, 105 S.Ct. at 1702 and 1703-04. The Court reasoned that the common law rule was unreasonably anachronistic. *Id.*, 471 U.S. at 13-15, 105 S.Ct. at 1702-03. The Court, however, found that the statute could be applied constitutionally by a showing that the fleeing felon posed a threat. *Id.*, 471 U.S. at 11-12, 105 S.Ct. at 1701.

¶3 In the present case, Section 104(B) is either constitutional on its face or it is unconstitutional. The majority opinion creates more confusion by upholding the statute and adding additional requirements to comply with constitutional standards.[2] If the majority feels the statute is unconstitutional on its face, they should just say so.

¶4 I find the statute reasonable under the Fourth Amendment and in compliance with the standards spelled out in *Sibron v. New York*.[3] The Fourth Amendment to the United States Constitution is practically identical to Article II, Section 30 of the Oklahoma Constitution and this Court has held that Article II, Section 30 gives no greater protection than the Fourth Amendment. *Long v. State*, 1985 OK CR 119, ¶ 6, 706 P.2d 915, 916-17.

¶5 The opinion holds that compliance with the statute, plus an individual determination of probable cause based on the totality of the circumstances, and a warrant or an exception to the warrant requirement would make the statute constitutional. This finding is as if the statute never existed, for this is the test for all Fourth Amendment cases. *See Smith v. State*, 2018 OK CR 4, ¶ 5, 419 P.3d 257, 259-60; *Hallcy v. State*, 2007 OK CR 2, ¶ 10, 153 P.3d 66, 68-69.[4]

¶6 The test for probable cause is not exact. Individualized determinations are unnecessary in cases such as the ones envisioned by this statute. This Court recognizes that,

> Probable cause is a flexible, common-sense standard, requiring that the facts available to the officer would warrant a man of reasonable caution in the belief that certain items may be contraband or useful as evidence of a crime; it does not demand any showing that such a belief be correct. [*Texas v.] Brown*, 460 U.S. [730] at 742, 103 S.Ct. [1535] at 1543, [75 L.Ed.2d 502 (1983)]; *Bland v. State*, 2000 OK CR 11, ¶ 45, 4 P.3d 702, 717. A practical, nontechnical probability based on factual and practical considerations that incriminating evidence is involved is all that is required. *See Brinegar v. United States*, 338 U.S. 160, 175-76, 69 S.Ct. 1302, 1310-11, 93 L.Ed.2d 1879 (1949).

Hallcy, 2007 OK CR 2, ¶ 10, 153 P.3d at 69.

¶7 Under the statute, an officer is required to obtain blood only when the driver has violated a traffic law and is involved in an accident resulting in death or great bodily injury. 47

O.S.2011, § 10-104(B); *see also* 47 O.S.2011, § 753 ("such test otherwise authorized by law may be made in the same manner as if a search warrant had been issued for such test or tests"). These circumstances involve only a narrow set of facts. *Cripps v. State*, 2016 OK CR 14, ¶ 8, 387 P.3d 906, 909.

¶8 I further find that the statute does not infringe on the expectation of privacy that society is prepared to recognize as reasonable when utilizing the balancing test that was reiterated in *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 625, 109 S.Ct. 1402, 1417-18, 103 L.Ed.2d 638 (1989).

¶9 Searches based on warrants are ideal, because warrant requirements ensure that intrusions are not the random or arbitrary acts of government agents. *Skinner,* 489 U.S. at 621-22, 109 S.Ct. at 1415-16. Warrants assure citizens that the intrusion is authorized by law and it is narrowly limited in objectives and scope. *Id.*, 489 U.S. at 622, 109 S.Ct. at 1416.

¶10 The justifications supporting blood draws in cases outlined in this statute are narrowly defined and there are virtually no facts for a neutral magistrate to evaluate in light of the standardized nature of the tests and the minimal discretion vested in those charged with enforcement. This well written statute is so narrowly drawn so as to be the equivalent of neutral review by a magistrate. Indeed, any reasonable magistrate faced with the facts outlined in the statute would find that probable cause exists for the issuance of a warrant for the taking of blood from the driver. The facts outlined in the statute support practical, nontechnical probabilities supporting a search for incriminating evidence. The limited facts outlined in the statute are sufficient.

¶11 The opinion relies heavily on *Missouri v. McNeely*, 569 U.S. 141, 133 S.Ct. 1552, 185 L. Ed.2d 696 (2013). As stated in *Cripps, McNeely* is distinguishable. *Cripps,* 2016 OK CR 14, ¶ 8, 387 P.3d at 909. I find no basis for overruling *Cripps* and its analysis of the *McNeely* case.

¶12 Under our statute, probable cause exists, according to the statute, if (1) a driver is involved in a traffic accident, (2) the driver could be cited for any traffic offense, and (3) the accident resulted in immediate death or great bodily injury, as defined in subsection B of Section 646 of Title 21 of the Oklahoma Statutes.[5] The procedure for determining the level of alcohol or controlled substances shall be determined by following 47 O.S.2011, § 752 (the testing procedures for breath, blood or urine).

¶13 In *Cripps*, this Court held that the dissipation of blood as well as the involvement in an accident involving immediate death or great bodily injury created the exigency necessary to overcome the warrant requirement. *Cripps*, 2016 OK CR 14, ¶ 8, 387 P.3d at 909.

¶14 This Court has held that searches and seizures under these circumstances are reasonable because the statute properly provides probable cause and spells out an exigency that is common in nearly all of these situations. This Court should affirm *Cripps* and confirm that the case by case analysis has been undertaken by the legislature in determining that accidents involving death or great bodily injury as well as the dissipation of intoxicants in the blood stream provide sufficient exigent circumstances as well as probable cause to take a driver's blood.

¶15 The seizure of blood from a person involved in an accident where the person could be cited for a traffic violation and where the accident results in immediate death or great bodily injury is reasonable under the Fourth Amendment to the United States Constitution and Article II, Section 30 of the Oklahoma Constitution. There is no need to save this case based on a good faith exception. This writer, therefore, would affirm the judgment and sentence on the grounds that the statute does not offend search and seizure jurisprudence.

KUEHN, V.P.J., CON CURRING IN PART/ DISSENTING IN PART:

¶1 Appellant's only claim on appeal is that 47 O.S.2011, § 10-104(B) violates the protections of the Fourth Amendment. I agree with this assertion and believe the statute should be declared unconstitutional. I believe the results of Appellant's blood test should have been suppressed, because while police had probable cause to suspect Appellant had been driving under the influence of intoxicants, the State failed to show that exigent circumstances justified taking a sample of his blood without a warrant. Nevertheless, the remaining evidence overwhelmingly supports Appellant's manslaughter convictions on both theories addressed by the jury's verdicts, and admission of the blood-test results was harmless beyond a reasonable doubt. For these reasons, I concur in part and dissent in part.

I.

¶2 Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances. *Missouri v. McNeely,* 569 U.S. 141, 156, 133 S.Ct. 1552, 1563. The "overarching test for judging the existence of probable cause is whether a reasonably prudent police officer, considering the totality of the circumstances confronting him and drawing from his experience, would be warranted in the belief that an offense has been or is being committed." *Hallcy v. State*, 2007 OK CR 2, ¶ 10, 153 P.3d 66, 68-69.

¶3 The statute at issue here provides, in relevant part:

> Any driver of any vehicle involved in an accident who could be cited for any traffic offense where said accident resulted in the immediate death or great bodily injury … of any person shall submit to drug and alcohol testing as soon as practicable after such accident occurs. *The traffic offense violation shall constitute probable* cause for purposes of Section 752 of this title and the procedures found in Section 752 of this title shall be followed to determine the presence of alcohol or controlled dangerous substances within the driver's blood system.

47 O.S.2011, § 10-104(B) (emphasis added).

¶4 The first quoted sentence places an obligation on motorists to submit to testing for intoxicants in certain situations. It does not purport to confer any authority on police to administer such tests without (1) a warrant, (2) the motorist's consent, or (3) some other recognized exception to a warrant, such as probable cause plus exigent circumstances. I find nothing constitutionally objectionable in this text.

¶5 The second quoted sentence, however, is problematic. For a warrantless nonconsensual search to be constitutionally reasonable, the government must show probable cause and exigent circumstances, and both must be based on the particular circumstances of the case. *Burton v. State*, 2009 OK CR 10, ¶ 10, 204 P.3d 772, 775. Section 10-104(B) dispenses with both requirements. It declares that certain facts establish "probable cause," and ignores the exigent-circumstances requirement entirely. Enactment of § 10-104(B) reflects our Legislature's justified concern over the horrific toll that intoxicated drivers inflict on our state's roadways. Even so, the provision violates the Fourth Amendment because it dispenses with individualized determinations of probable cause, as well as the requirement of exigent circumstances.[1]

¶6 Interestingly, the State here does not argue that the traffic citation alone established probable cause to take a blood sample; rather, the State argues (correctly) that the totality of the circumstances established probable cause. The plain language of § 10-104(B) authorized the troopers to obtain a blood sample because Appellant was involved in a traffic fatality accident. That *per se* rule regarding probable cause is what renders the statute unconstitutional, and it would be no less infirm without *McNeely.* Every other state that has considered this question has reached the same conclusion.[2] I agree that *Cripps v. State*, 2016 OK CR 14, 387 P.3d 906; *Bemo v. State*, 2013 OK CR 4, 298 P.3d 1190; and *Guest v. State,* 2002 OK CR 5, 42 P.3d 289, should be overruled to the extent they hold otherwise.

¶7 I also believe this Court should declare § 10-104(B) unconstitutional, and like Judge Lewis, I am puzzled why the Majority cannot bring itself to do so. While we must presume statutes are constitutional, and should always try to interpret them with that presumption in mind, *see State v. Howerton*, 2002 OK CR 17, ¶ 16, 46 P.3d 154, 157, we also cannot ignore the plain, unambiguous language of a statute, or add words to make it say something it does not. "A statute must be held to mean what it plainly expresses and no room is left for construction and interpretation where the language employed is clear and unambiguous." *Johnson v. State,* 2013 OK CR 12, ¶ 10, 308 P.3d 1053, 1055 (citation omitted). "We must hold a statute to mean what it plainly expresses and cannot resort to interpretive devices to fabricate a different meaning." *State v. Farthing*, 2014 OK CR 4, ¶ 5, 328 P.3d 1208, 1210.

¶8 Section 10-104(B) unambiguously declares that a certain set of facts *shall* authorize a blood draw. Nothing else is required. The Majority makes it perfectly clear that the statute is toxic. The statute "creates a *per se* rule requiring nonconsensual blood testing" when a particular set of circumstances exist (Slip Op. at 6). The only difference with *Missouri v. McNeely* (discussed in the Majority Opinion) is that our statute "substitutes one *per se* rule of exigency for another" (Slip Op. at 7). In fact, our statute "goes even further" by establishing "a *per se* finding of *probable cause*" (emphasis added),

eliminating the magistrate's role "completely" (Slip Op. at 8). The Majority correctly concludes that the statute "gives no consideration" to the particular facts of the case (Slip Op. at 11).

¶9 Why, then, do we not declare the statute unconstitutional? In avoiding the issue, the Majority quotes *Sibron v. New York*, 392 U.S. 40, 59, 88 S.Ct. 1889, 1900-01: "The constitutional validity of a warrantless search is pre-eminently the sort of question which can only be decided in the concrete factual context of the individual case." (Slip Op. at 10) I believe this is a classic case of category confusion. While every search is different, the language of a statute does not change to fit the facts. The validity of a particular *search*, under the Fourth Amendment's requirement that the search be "reasonable," is one thing; but the validity of a *statute* purporting to dispense with *any* fact-specific determinations, by a magistrate or anyone else, is quite another. Any statute is constitutional if you read enough into it.

¶10 What's more, in *Sibron* the Court described inquiry into the constitutionality of the law at issue there as "abstract and unproductive," because its provisions were "extraordinarily elastic." *Sibron*, *id.* Indeed, the *Sibron* court contrasted the law before it with one *"which purports to authorize the issuance of search warrants in certain circumstances." Id.* (emphasis added). And that is exactly what we have here. The text of § 10-104(B) can hardly be called "elastic," and unlike the provision in *Sibron*, it *does* purport to categorically authorize the seizure of evidence in certain circumstances.[3]

¶11 The Majority concludes that "more than simple compliance with the statute is required" – there "must" be an individualized determination of probable cause (Slip Op. at 12). But that is precisely what the statute does not require: an individualized determination of probable cause. To ensure that police have clear instructions on what is and is not permissible, we should declare § 10-104(B) unconstitutional.[4]

¶12 Regardless of § 10-104(B)'s problems, I believe under *the particular facts of this case*, there *was* probable cause to believe Appellant was under the influence of intoxicants – specifically, the nature of the accident coupled with the methamphetamine and smoking paraphernalia in his truck at the crash site. However, the State failed to establish the second part of the equation: that the exigencies of the situation made time of the essence, such that any delay necessitated by seeking a search warrant would jeopardize the ability to preserve the evidence. Absent exigent circumstances, the blood draw violated the Fourth Amendment.[5]

II.

¶13 At the end of the day, however, the illegality of the blood draw is of no help to Appellant. The State offered *two* independent misdemeanors on which the jury could predicate convictions for Misdemeanor Manslaughter: Driving Under the Influence of Intoxicants, and Driving without a License. The trial testimony showed (1) the accident appeared to have been caused by Appellant, who veered his truck into oncoming traffic on a state highway; (2) Appellant smoked methamphetamine with a friend hours before the accident; (3) at that time, Appellant told the friend he had been awake for several days already; (4) at trial, Appellant admitted having been awake for at least one full day before the accident, due to the effects of methamphetamine use in the preceding days; (5) methamphetamine and smoking gear were found in Appellant's truck after the crash; and, finally, (6) Appellant admitted he had never held a valid driver's license. On these facts alone, independent of the blood-test results, a rational juror could conclude that Appellant was guilty of manslaughter under *either* theory – and the jury found him guilty under both. Admission of the blood test was harmless beyond a reasonable doubt, and Appellant's convictions should be affirmed. *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *Wilson v. State,* 1994 OK CR 5, ¶ 6, 871 P.2d 46, 49 (constitutional error requires no relief if there is no reasonable probability that it contributed to the result).

HUDSON, J., SPECIALLY CONCURS:

¶1 Today's decision overruling *Cripps v. State*, 2016 OK CR 14, 387 P.3d 906 is long overdue. *Cripps* was a 3-2 decision that drew a dissent from myself and greatly divided this Court. The present case once again revisits the interplay of the Supreme Court's Fourth Amendment jurisprudence with the ability of law enforcement officers to combat the epidemic in this state of vehicular homicide cases involving intoxicated drivers using forced blood draws. We must start with the premise that the Fourth Amendment plays a critical role in safeguarding individual liberty against government action. As the Supreme Court recently observed:

> The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The "basic purpose of this Amendment," our cases have recognized, "is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 528, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967). The Founding generation crafted the Fourth Amendment as a "response to the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity." *Riley v. California*, 573 U.S. ——, ——, 134 S. Ct. 2473, 2494, 189 L. Ed. 2d 430 (2014). In fact, as John Adams recalled, the patriot James Otis's 1761 speech condemning writs of assistance was "the first act of opposition to the arbitrary claims of Great Britain" and helped spark the Revolution itself. *Id.*, at ____, 134 S. Ct., at 2494 (quoting 10 Works of John Adams 248 (C. Adams ed. 1856)).

Carpenter v. United States, __U.S.__, 138 S. Ct. 2206, 2213, 201 L. Ed. 2d 507 (2018).

¶2 The Fourth Amendment is a bulwark against government abuses and overreach – no matter how well-intentioned. *Cripps* was inconsistent with these Fourth Amendment values. *Cripps* undermined the well-established rule that a warrantless compulsory blood draw is unreasonable and therefore forbidden under the Fourth Amendment unless supported by both probable cause and exigent circumstances. *Missouri v. McNeely*, 569 U.S. 141, 152-53, 156, 133 S. Ct. 1552, 1561, 1563, 185 L. Ed. 2d 696 (2013); *Winston v. Lee*, 470 U.S. 753, 759, 105 S. Ct. 1611, 1616, 84 L. Ed. 2d 662 (1985); *Schmerber v. California*, 384 U.S. 757, 768, 770, 86 S. Ct. 1826, 1834-35, 16 L. Ed. 2d 908 (1966); *State v. Shepherd*, 1992 OK CR 69, ¶¶ 5-6, 840 P.2d 644, 646; *Marshall v. Columbia Lea Regional Hosp.*, 474 F.3d 733, 741 (10th Cir. 2007). *Cripps* allowed law enforcement officials in this state, on the authority of Title 47 O.S.2011, § 10-104(B), to detain and draw blood from the driver of any motor vehicle involved in a vehicular accident that resulted in death or great bodily harm who could be cited for any traffic offense.

¶3 Yet "[t]o be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing." *Chandler v. Miller*, 520 U.S. 305, 313, 117 S. Ct. 1295, 1301, 137 L. Ed. 2d 513 (1997). *Cripps* instead sanctioned forced blood draws regardless of whether the facts suggested intoxication. *Cripps*, 2016 OK CR 14, ¶ 6, 387 P.3d at 909 ("the fact of the accident serves as probable cause."). Such a *per se* rule is contrary to the Supreme Court's pronouncement that "[t]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt *and that the belief of guilt must be particularized with respect to the person to be searched or seized[.]" Maryland v. Pringle*, 540 U.S. 366, 371, 124 S. Ct. 795, 800, 157 L. Ed. 2d 769 (2003) (internal quotation omitted) (emphasis added). The mere fact that a defendant caused a vehicular accident resulting in death or great bodily injury while committing a traffic violation, without more, does not show a fair probability that a blood test would provide evidence that same person was under the influence of alcohol or drugs at the time of the crash.

¶4 *Cripps* was fatally flawed in a second, more fundamental way. It wrongly viewed the seriousness of the DUI-related crimes at issue as itself creating exigency for Fourth Amendment purposes. *Id.*, 2016 OK CR 14, ¶ 8, 387 P.3d at 909. In *Mincey v. Arizona*, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978), the Supreme Court rejected a categorical exception to the warrant requirement based on the existence of a possible homicide at a crime scene which, according to the State, presented an emergency situation demanding immediate action. *Id.*, 437 U.S. at 392-94, 98 S. Ct. at 2413-14. The *Mincey* court "decline[d] to hold that the seriousness of the offense under investigation itself creates exigent circumstances of the kind that under the Fourth Amendment justify a warrantless search." *Id.*, 437 U.S. at 394, 98 S. Ct. at 2414. *Cripps* ignored this fundamental premise of Fourth Amendment jurisprudence.

¶5 Today's decision does not mean authorities will be unable to investigate vehicular homicide cases where intoxication of one or more drivers is suspected. Police officers may conduct warrantless blood draws by obtaining consent from the driver or when supported both by probable cause and exigent circumstances. Otherwise, police officers must obtain a search warrant from a judge before drawing blood upon a showing of probable cause. The net effect of today's decision is that police officers may no longer rely upon *Cripps* to bypass

the requirements of the Fourth Amendment. I concur both in today's decision to overrule *Cripps* and in the decision to affirm the judgment and sentence of the district court in this case.

ROWLAND, JUDGE:

1. As the Supreme Court noted in *McNeely*, the use of telephonic or electronic search warrants is especially useful in cases like this where the probable cause is relatively simple. *McNeely*, 569 U.S. at 154, 133 S.Ct. at 1562. Title 22 O.S.Supp.2014, § 1225 permits the use of telephones, e-mail, or any similar electronic means of communicating with the magistrate for issuance of a warrant.

2. Today's opinion does not hold that the fact of a fatality or serious injury crash cannot support a finding of probable cause to seize blood from a driver. Indeed, a law enforcement officer with substantial training and experience in vehicle collision investigation, establishing a crash had no apparent benign cause, may be found sufficient to issue a warrant or, coupled with exigent circumstances, to support a warrantless seizure of the suspect's blood. The point is that such probable cause determinations must be made on a case specific basis by a neutral and detached magistrate.

LEWIS, P.J.:

1. 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985).

2. The only logical reason to save the statute is in hopes that the United States Supreme Court will find similar statutes constitutional and this Court can reverse this holding.

3. 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968).

4. In the present case an Oklahoma State Highway Patrol trooper found the evidence of methamphetamine use while searching for identification of the parties involved after they had been removed from the vehicles; more than likely prior to the blood draw. Further, blood was taken after Appellant arrived in Oklahoma City. This vehicle collision occurred around 9:00 a.m., it appears the first trooper arrived at 9:20, and the blood was taken around 12:14 p.m. It appears that the troopers had probable cause for a warrant and plenty of time to obtain a warrant before the blood draw had they not relied on this statute.

5. "'Great bodily injury' means bone fracture, protracted and obvious disfigurement, protracted loss or impairment of the function of a body part, organ or mental faculty, or substantial risk of death." 21 O.S.2011, § 646(B).

KUEHN, V.P.J.:

1. In *McNeely,* the fact that police had probable cause to justify taking the defendant's blood was not at issue. *McNeely* dealt with a *per se* theory in the *exigent-circumstances* part of the equation, but the principle that the reasonableness of warrantless searches must always be determined on a case-by-case basis was in place long before *McNeely*.

2. *See, e.g., State v. Blank*, 90 P.3d 156, 161-62 (Alaska 2004) (interpreting statute to incorporate requirements of *Schmerber v. California); State v. Quinn*, 218 Ariz. 66, 68, 178 P.3d 1190 (Ct.App.2008) (statute cannot authorize blood draw following traffic accident involving serious injury or death absent finding of probable cause that driver was impaired); *Cooper v. State*, 277 Ga. 282, 291, 587 S.E.2d 605 (2003) ("[T]o the extent [the statute] requires chemical testing of the operator of a motor vehicle involved in a traffic accident resulting in serious injuries or fatalities regardless of any determination of probable cause, it authorizes unreasonable searches and seizures in violation of the State and Federal Constitutions."); *King v. Ryan*, 153 Ill.2d 449, 463–64, 180 Ill.Dec. 260, 607 N.E.2d 154 (1992) (for blood test, officer needs more than probable cause to believe driver was partially at fault in an injury/fatality accident); *Hannoy v. State*, 789 N.E.2d 977, 992 (Ind. App.2003) (police may forcibly obtain blood sample from driver without warrant or consent, but only when they have probable cause to believe driver was intoxicated); *State v. Roche*, 681 A.2d 472, 472 n. 1, 475 (Me.1996) (statute prohibits use of evidence from administrative blood draw in criminal prosecution unless State can establish independent probable cause that driver was impaired); *McDuff v. State*, 763 So.2d 850, 855 (Miss.2000) ("[T]he tragic fact that a fatality arises out of a motor vehicle accident is in no way, standing alone, an indicator that alcohol or drugs were involved"); *Com. v. Kohl,* 532 Pa. 152, 164, 615 A.2d 308 (1992) (drawing blood sample pursuant to implied consent law from driver who had been involved in automobile accident violated Fourth Amendment, where driver was not under arrest and police lacked probable cause to believe driver was operating vehicle under the influence); *State v. Declerck*, 49 Kan. App. 2d 908, 914-22, 317 P.3d 794, 800-04 (2014)(finding statute similar to Oklahoma's, with same *per se* probable cause finding, unconstitutional).

3. As another instance where the Supreme Court avoided the issue of a statute's facial invalidity, the Majority cites *Tennessee v. Garner,* 471 U.S. 1, 11-12, 105 S.Ct. 1694, 1701, 85 L.Ed.2d 1 (1985). At issue in *Garner* was what degree of force was constitutionally permissible to apprehend a fleeing suspect. The statute at issue provided: "If, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest." In a brief paragraph with no citation to authority, the Court held that while deadly force was not constitutionally permissible in every case, the statute could be applied to situations where such force was warranted. I believe the language at issue in the case before us is rather more direct. If the statute in *Garner* had read, "A suspect's flight, after warnings to stop, shall justify the officer in killing him," the Court might have worded its opinion differently.

4. While some take the position that the statute can be "applied in a constitutionally sound matter" by considering the facts of each particular case, *see Cripps,* 2016 OK CR 14, 387 P.3d 906 (Lumpkin, V.P.J., concurring in result at ¶ 13), I find that sleight of hand unpersuasive. A statute whose constitutional validity hinges on facts that its express language does not require is not only useless, but dangerous. The separate opinions in *Cripps* felt it imperative to raise the red flag and warn police not to follow the literal language of § 10-104(B). *See Cripps,* 2016 OK CR 14, 387 P.3d 906 (Lumpkin, V.P.J., concurring in result at ¶ 15) (warning police to rely on Supreme Court jurisprudence, rather than "the *carte blanche* language in our statute"); and *id.* (Hudson, J., concurring in part and dissenting in part at ¶ 11) ("We leave the bench, bar and public wondering what the law truly is and, in the process, leave the fate of DUI-related vehicular accidents involving immediate death or injuries hanging in the balance"). Yet with *Cripps* out of the way, the Court now seems unusually timid about the law that *Cripps* sought to interpret. Failing to declare § 10-104(B) unconstitutional, to the extent it replaces true case-by-case analysis with a pre-packaged concept of probable cause, just perpetuates uncertainty in the law.

5. On appeal, the State argues that police did not have time to seek a warrant. After the crash, Appellant was transported to a hospital in Oklahoma City, some two hours away. Officers in Oklahoma City were enlisted to have Appellant's blood drawn by a nurse soon after his arrival. The blood sample was taken over three hours after the accident. We appreciate the stressful and dangerous situations that our peace officers find themselves in every day, and we acknowledge that they must make many important decisions at crime scenes without the benefit of hindsight. Here, however, we believe the officers had sufficient time to seek at least telephonic approval of the blood draw from a magistrate, while Appellant was *en route* to Oklahoma City.

2019 OK CR 8

ELIZABETH KAY SEARS, Appellant, v. THE STATE OF OKLAHOMA, Appellee.

No. RE–2017-1128. May 16, 2019

SUMMARY OPINION

KUEHN, VICE PRESIDING JUDGE:

¶1 Appellant appeals from the revocation of her suspended sentence in Logan County District Court Case No. CF-2013-295, by the Honorable Louis A. Duel, Associate District Judge.

¶2 On January 14, 2014, Appellant entered a plea of guilty to two counts of Child Neglect, in violation of 21 O.S.2011, § 843.5(C) (Counts 1-2), and one count of Harboring a Fugitive, in violation of 21 O.S.2011, § 440 (Count 4). Appellant was convicted and sentenced to eight years imprisonment for each count, with all but the first three years suspended. On October 3, 2014, Judge Duel modified Appellant's sen-

tence to five years imprisonment for each count, with all five years suspended. The sentences were ordered to be served concurrently.

¶3 On December 29, 2016, the State filed a 2nd Amended Motion to Revoke Suspended Sentence alleging Appellant committed several probation violations including the new crimes of Count 1 – Second Degree Burglary and Count 2 – Possession of Paraphernalia as alleged in Logan County District Court Case No. CF-2016-404.

¶4 On January 26, 2017, Appellant appeared before the trial court, represented by counsel, and was arraigned on the application to revoke and entered a plea of not guilty. Appellant requested, and was granted, a continuance and was ordered to reappear on February 23, 2017. The hearing on the motion to revoke in this case was heard on October 25, 2017.[1] After hearing the evidence and arguments, Judge Duel revoked Appellant's five-year suspended sentences in full.

¶5 Appellant argues in her first proposition this revocation order should be reversed and dismissed. According to Appellant, no valid waiver of the twenty day hearing requirement occurred within twenty days of her plea of not guilty which she alleges is required pursuant to 22 O.S.Supp.2016, § 991b(A). Specifically, she maintains because the record does not explicitly establish she was informed of the 20-day requirement this motion to revoke must be dismissed.

¶6 Appellant requested and was granted a continuance of her revocation hearing date. This Court held in *Grimes* "a defendant cannot acquiesce in the delay of a hearing and/or participate in the continuance of a hearing and then claim that he is entitled to relief because the court did not abide by the 20-day time limitation." *Grimes v. State*, 2011 OK CR 16, ¶ 7, 251 P.3d 749, 753 (citing *Yates v. State,* 1988 OK CR 179, ¶¶ 2-5, 761 P.2d 878, 879). Appellant does not allege her revocation counsel was ineffective. Revocation counsel is presumed to be competent. S*ee Strickland v. Washington,* 466 U.S. 668, 690, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674 (1984). As a result, we presume Appellant's revocation counsel was aware of the consequences associated with requesting a continuance in this case. *See Grimes*, 2011 OK CR 16, ¶¶ 7-8, 251 P.3d at 753.

¶7 In her second proposition of error, Appellant seeks an order clarifying the trial court's revocation order in this case. Appellant argues the trial court's grant of credit for time served incorrectly stated the amount of time Appellant has served. While the State acknowledges the trial court may have misspoke regarding the amount of time to be credited for time served, this issue has not been presented to Judge Duel to allow him to correct any error made before asking this Court to intervene. *See Grimes v. State*, 2011 OK CR 16, ¶ 21, 251 P.3d 749, 755. In *Grimes* this Court held "[a]bsent a determination by the District Court, this Court will not assume jurisdiction of an extraordinary writ, especially in a revocation appeal where our review is limited to whether or not the District Court abused its discretion in revoking all or part of a defendant's suspended sentence." *Id*.

¶8 However, we will no longer require an appellant to file an additional pleading in the trial court to have this claim addressed. Finding no obvious clerical error, this matter is **REMANDED** to the District Court of Logan County with instructions to address Appellant's request for issuance of an order nunc pro tunc as presented in Proposition II of this appeal. To the extent this opinion is inconsistent with the procedure followed by *Grimes* and similar cases, *Grimes* and any other case requiring an appellant to file a separate pleading in the trial court to address this issue are modified to reflect this change in procedure.

DECISION

¶9 The revocation of Appellant's suspended sentence in Logan County District Court Case No. CF-2013-295 is **AFFIRMED** and **REMANDED** for proceedings consistent with this opinion. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch.18, App. (2019), the **MANDATE** is **ORDERED** issued upon the filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF LOGAN COUNTY THE HONORABLE LOUIS A. DUEL, ASSOCIATE DISTRICT JUDGE

APPEARANCES AT REVOCATION

Lane Fitz, 4101 N. Classen Blvd., Ste. A, Oklahoma City, OK 73118, Counsel for Defendant

Emily Kirkpatrick, Asst. District Attorney, 301 E. Harrison, Guthrie, OK 73044, Counsel for State

APPEARANCES ON APPEAL

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Mike Hunter, Okla. Attorney General, Theodore M. Peeper, Asst. Attorney General, 313 N.W. 21st St., Oklahoma City, OK 73105, Counsel for Appellee

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

1. Following Appellant's failure to appear and comply with trial court orders, as well as continuances being granted to both parties, this application to revoke was set for hearing on October 25, 2017.

2019 OK CR 9

JESSE ALLEN JOHNSON, Petitioner, v. THE HONORABLE RAY C. ELLIOTT, JUDGE OF THE DISTRICT COURT, THE STATE OF OKLAHOMA, Respondent.

No. PR 2018-1203. May 24, 2019

ORDER GRANTING APPLICATION FOR EXTRAORDINARY RELIEF AND REMANDING MATTER TO DISTRICT COURT

¶1 On November 29, 2018, Petitioner, by and through counsel Melissa A. French, filed an application for an extraordinary writ in this Court from Oklahoma County District Court Case No. CF-2005-5714. Petitioner seeks an extraordinary writ to prohibit the Honorable Ray C. Elliott, District Judge, from resentencing him without empaneling a jury pursuant to 22 O.S.2011, § 929. Petitioner submits the District Court cannot legally sentence him without first empaneling a jury pursuant to the Mandate issued in *Jesse Allen Johnson v. State of Oklahoma*, Appeal No. PC 2017-755, issued May 22, 2018.

¶2 Petitioner, age seventeen, entered a blind plea of guilty on November 29, 2006, to First Degree Murder. He was sentenced to life imprisonment without the possibility of parole. Petitioner's certiorari appeal to this Court was affirmed in a Summary Opinion issued October 3, 2007, Appeal No. C-2007-83.

¶3 Citing *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), *Montgomery v. Louisiana,* 577 U.S. ____, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016), and *Luna v. State*, 2016 OK CR 27, 387 P.3d 956, Petitioner filed a post-conviction application in the District Court on March 13, 2017, alleging that because he was a minor at the time he was sentenced, the imposition of a life without parole sentence was unconstitutional. The denial of Petitioner's post-conviction application was appealed to this Court. In an Order issued May 22, 2018, Appeal No. PC 2017-0755, Petitioner's sentence of life without parole was vacated and the matter was remanded to the District Court for resentencing.

¶4 On August 27, 2018, Petitioner filed in the District Court a request for a jury trial on resentencing to which the State objected. A hearing was held before Judge Elliott on October 18, 2018. Judge Elliott denied Petitioner's request for a jury resentencing as he found Petitioner waived his right to sentencing by a jury when Petitioner entered his blind plea of guilty in 2006. Petitioner is seeking extraordinary relief from this Court to reverse the order denying jury resentencing.

¶5 For a writ of prohibition Petitioner must establish that (1) a court, officer or person has or is about to exercise judicial or quasi-judicial power; (2) the exercise of said power is unauthorized by law; and (3) the exercise of said power will result in injury for which there is no other adequate remedy. Rule 10.6(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2019).

¶6 In *Stevens v. State*, 2018 OK CR 11, ¶¶ 31, 38-40, 422 P.3d 741, 749-751, the District Court's order denying post-conviction relief was reversed by this Court, the matter was remanded to the District Court for resentencing, and the procedures for conducting said resentencing were established. As in the present case where Petitioner entered a plea of guilty and was sentenced to life without the possibility of parole for First Degree Murder, Stevens was sentenced to life without the possibility of parole when he entered a negotiated plea of guilty in 1996 to First Degree Murder. *Stevens* directs that the trial court shall schedule the matter for resentencing in accordance with both Sections 812.1 and 929 of Title 22 and to conduct resentencing pursuant to Section 929 of Title 22.

¶7 Section 929(C) directs that if a written request for a jury trial is filed within twenty days of the date of the appellate court order, the trial court *shall* impanel a new jury for a new sentencing proceeding. This means there is no judicial discretion in whether or not a judge proceeds with a jury for resentencing. If

the State or defendant files a request, but is outside the twenty days, then the trial court must utilize Section 929(B).

¶8 Allowing for a discretionary decision, Section 929(B) directs that when a criminal case is remanded for vacation of a sentence, the trial court *may* (1) set the case for a nonjury sentencing proceeding; or (2) if the defendant or the prosecutor so requests in writing, impanel a new sentencing jury. In this case, a written request for a jury trial was not filed within twenty days from the date of this Court's Order granting post-conviction relief. Thus, Section 929(C)'s mandatory language is not at issue, and the judge correctly used Section 929(B) in making a decision.

¶9 Section 929(B) gives the trial judge the discretion to impanel a jury if requested or to set the case for nonjury sentencing. In making his decision, Judge Elliott denied Petitioner's request for jury trial resentencing based upon a finding that Petitioner waived his right to sentencing by a jury when he entered his blind plea in 2006.

¶10 This finding is contrary to our decision in *Stevens*. Petitioner did not waive his rights under *Miller* when he entered his guilty plea. *Stevens*, 2018 OK CR 11, ¶ 23, 422 P.3d at 748. The Sixth Amendment demands that the trial necessary to impose life without parole on a juvenile homicide offender must be a trial by jury, unless a jury is affirmatively waived. *Stevens*, 2018 OK CR 11, ¶ 34, 422 P.3d at 750. Petitioner's waiver of his right to jury trial in 2006 was not an affirmative waiver of his rights to a jury on sentencing that he now possesses under *Miller.*

¶11 Therefore, we find this holding is an abuse of discretion as it is contrary to this Court's holding in *Stevens.* Petitioner has met his burden for an extraordinary writ. The trial court's denial of Petitioner's request for jury trial resentencing based upon waiver is **VACATED**, and the matter is **REMANDED** to the trial court for a decision using his discretion under the directives in *Stevens v. State*, 2018 OK CR 11, ¶¶ 38-39, 422 P.3d 741, 750-751, in determining which resentencing procedure pursuant to Section 929 of Title 22 is appropriate. Petitioner's pleas of guilty and convictions remain constitutionally valid.

¶12 The Clerk of this Court is directed to transmit a copy of this Order to the Honorable Ray C. Elliott, District Judge, as well as the parties.

¶13 **IT IS SO ORDERED**.

¶14 **WITNESS OUR HANDS AND THE SEAL OF THIS COURT** this 24th day of May, 2019.

/s/ DAVID B. LEWIS,
Presiding Judge

/s/ DANA KUEHN,
Vice Presiding Judge

/s/ GARY L. LUMPKIN, Judge

/s/ ROBERT L. HUDSON, Judge

/s/ SCOTT ROWLAND, Judge

ATTEST:
John D. Hadden
Clerk

HUDSON, J., DISSENTING:

¶1 I join Judge Rowland in his dissenting opinion. I write separately to emphasize the need to clarify *Stevens v. Stat*e, 2018 OK CR 11, ¶¶ 34-40, 422 P.3d 741, 750-51, to the extent it implies that the Sixth Amendment demands jury sentencing despite a prior, valid waiver of that right. The advent of *Miller* and *Montgomery* did not create any new constitutional right to jury sentencing under the Sixth Amendment that necessitates the restoration of that right once affirmatively waived. As Judge Rowland observes, both *Montgomery* and *Miller* reference judge sentencing.

¶2 Moreover, the Majority misinterprets and applies 22 O.S.2011, § 929. The Majority overlooks pivotal language contained in Sections 929(B)(2) and 929(C), which each reference impaneling a new jury. Section 929(B)(2) provides the trial court may "impanel a ***new*** sentencing jury" if the defendant or the prosecutor so request in writing. (emphasis added). Section 929 (C) states, "[i]f a written request for a jury trial is filed within twenty (20) days of the date of the appellate court order, the trial court shall impanel ***a new jury*** for the purpose of conducting a new sentencing proceeding." (emphasis added). To "impanel a new jury[,]" it is axiomatic that the original sentencing proceeding was a jury sentencing.[1] There can be no other interpretation. This language is clear and unambiguous. *See State v. Cooper*, 2018 OK CR 40, ¶ 11, 434 P.3d 951, 954 (rules outlining statutory interpretation, including construing statutes according

to the plain and ordinary meaning of their language and giving effect to legislative intent). Therefore, if jury sentencing was validly waived during the original proceedings, § 929 does not entitle the defendant to jury sentencing upon remand from this Court. Judge Elliott's denial of Petitioner's request for jury trial resentencing on grounds that Petitioner waived his right to jury sentencing when he entered his blind plea in 2006 was thus not an abuse of discretion.

¶3 For these reasons and those espoused from Judge Rowland's dissenting opinion, I dissent.

ROWLAND, JUDGE, DISSENTING:

¶1 I respectfully dissent from today's Order. The majority finds Judge Elliott abused his discretion by entering an order he clearly had the authority and discretion to enter. In my view, Judge Elliott got it right. In *Stevens v. State,* 2018 OK CR 11, ¶¶ 33-40, 422 P.3d 741, 749-51, we established procedures for conducting the individualized sentencing hearing required by the United States Supreme Court before a juvenile homicide offender may be sentenced to life imprisonment without the possibility of parole (LWOP). *See Montgomery v. Louisiana*, 577 U.S.___, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016); *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). When this Court ordered resentencing for Stevens, who is not only a juvenile homicide offender previously sentenced to LWOP but also Johnson's co-defendant, we directed the district court to follow the dictates in 22 O.S.2011, § 929. *Stevens,* 2018 OK CR 11, ¶ 38, 422 P.3d at 751. The trial judge, under Section 929, has discretion whether to impanel a jury, unless a written request for jury sentencing is filed within twenty days of the appellate court's remand order, in which case jury sentencing is mandatory. 22 O.S.2011, § 929 (B) & (C). Johnson filed his request for jury sentencing sixty-five days after this Court issued its remand order, and Judge Elliott denied his request upon finding that Johnson had waived his right to jury sentencing, along with other trial rights, when he entered his knowing and voluntary blind plea of guilty.

¶2 Therein lies the rub: Judge Elliott exercised his discretion based upon his sound belief that Johnson's 2006 guilty plea, including his waiver of jury trial, remained intact. While the majority correctly holds that Johnson did not waive his rights under *Miller/Montgomery* to an individualized sentencing proceeding because that case had yet to be decided, it misapprehends the constitutional requirements for such a proceeding. Neither *Miller* nor *Montgomery* created any new constitutional right to jury sentencing under the Sixth Amendment or provided for restoration of that right once waived. The right to be free from cruel and unusual punishments is as old as the Bill of Rights itself. U.S. Const., amend. VIII; Okla. Const., art. 2, § 9. *Miller* and *Montgomery* merely extended the age-old protections of the Eighth Amendment to forbid the imposition of a sentence of LWOP on juvenile homicide offenders unless certain factors are proved beyond a reasonable doubt.

¶3 Even were Johnson's right to jury sentencing somehow restored despite his 2006 waiver, the fact remains that he did not act to enforce this right by timely filing his written request as required by Section 929 (C). Thus, even after the issuance of this writ, Judge Elliott retains discretion to once again deny Johnson's request for jury sentencing so long as he does not base his denial upon his opinion that Johnson's earlier waiver remains valid.

¶4 It is undisputed Johnson knowingly and voluntarily waived his right to jury trial and sentencing twelve years ago when he pled guilty to First Degree Murder and received his LWOP sentence. This Court rejected his attempt to withdraw that plea in a certiorari appeal, noting that "[t]his was an extensive guilty plea hearing and sentencing with many witnesses. The trial judge was especially thorough, explained the process to Petitioner, and ensured Petitioner was thoroughly advised as to all facets of the plea." *Johnson v. State*, Case No. C- 2007-0083 (unpublished) (Okla. Crim. App., Oct. 3, 2007).

¶5 Nothing in the Supreme Court's or this Court's Eighth Amendment jurisprudence concerning juveniles sentenced to LWOP (*Montgomery, Miller, Luna* or *Stevens*) suggests these cases operate to revive an otherwise validly waived right to jury sentencing. Nor do these cases require the constitutionally-mandated individualized sentencing proceeding be held before a jury, and in fact both Supreme Court cases specifically refer to a sentencing judge. *Montgomery,* 136 S.Ct. at 733 ("*Miller* requires that before sentencing a juvenile to life without parole, the sentencing judge take into account "how children are different…."); *Miller,* 567 U.S. at 489, 132 S.Ct. at 2475 ("*Graham, Roper,* and our individualized sentencing decisions

make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.")

¶6 In *Stevens*, we set forth guidelines for a broad category of cases, without specifically addressing whether a previous, valid waiver of jury trial and sentencing was restored by *Miller, Montgomery, Luna*, and/or *Stevens*. I believe we should clarify our opinion in *Stevens* and hold that if jury sentencing was validly waived during the original plea, the defendant is not entitled to jury sentencing upon remand from this Court.

¶7 Although Oklahoma's statutory right to jury sentencing creates a federal liberty interest under the Fourteenth Amendment, *Hicks v. Oklahoma*, 447 U.S. 343, 346, 100 S.Ct. 2227, 2229, 65 L.Ed.2d 175 (1980), there is no federal constitutional right to jury sentencing under the Sixth Amendment. *Clemons v. Mississippi*, 494 U.S. 738, 746, 110 S.Ct. 1441, 1447, 108 L. Ed.2d 725 (1990). Notably, the Supreme Court said in *Clemons* that there would be no violation of the Sixth Amendment right to jury trial where an appellate court invalidated one of two aggravating circumstances sustaining a death sentence at trial and affirmed the death sentence on appeal after reweighing the aggravating and mitigating circumstances itself instead of remanding the case for jury sentencing. *Id.* at 745, 110 S.Ct. at 1446. Given that the United States Constitution does not mandate a capital sentencing proceeding be held before a jury for the reweighing of sentencing factors, I find it likewise does not require jury sentencing in a *Stevens/Luna* hearing if that right has been previously waived.

¶8 Nor do I find jury resentencing mandated by the applicable Oklahoma statute. Section 929 controls when "the appellate court" finds prejudicial error only with respect to the sentencing proceeding and remands the case to the district court for vacation of the imposed sentence and resentencing. Johnson knowingly and voluntarily pled guilty to First Degree Murder to avoid a jury trial. A defendant who enters a voluntary guilty plea waives his constitutional rights, including the right to jury trial and all non-jurisdictional defects. *See Lewis v. State*, 2009 OK CR 30, ¶ 4, 220 P.3d 1140, 1142; *Huddleston v. State*, 1985 OK CR 12, ¶ 12, 695 P.2d 8, 10; *Dobbs v. State*, 1970 OK CR 124, ¶ 6, 473 P.2d 260, 262. The cases dealing with juvenile homicide offenders sentenced to LWOP simply do not create, as the majority finds, any new constitutional right to jury trial which has yet to be waived. And, although Johnson is undoubtedly entitled to a new individualized sentencing hearing before he can be sentenced to LWOP, he is not entitled to a new sentencing entity, namely a jury. For these reasons, I dissent.

¶9 I am authorized to state that Judge Hudson joins in this dissent.

HUDSON, J., DISSENTING:

1. This interpretation is supported by and consistent with 21 O.S.2011, § 701.10a relating to resentencing in death penalty cases, which specifically provides that the prosecutor may only "move the trial court to impanel a new sentencing jury . . . provided[ ] the original sentencing proceeding was conducted before a jury[.]" 21 O.S.2011, § 701.10a(1)(b) (emphasis added).

2019 OK CR 10

STATE OF OKLAHOMA, Appellant, v. BRITTNEY JO WALLACE, Appellee.

Case No.S-2018-229. May 23, 2019

SUMMARY OPINION

LUMPKIN, JUDGE:

¶1 Appellee, Brittney Jo Wallace, was charged by Information in the District Court of Rogers County, Case No. CF-2016-461, with Enabling Child Abuse (Counts 1 & 2) (21 O.S.2011, § 843.5(B)) and Child Neglect (Count 3) (21 O.S. 2011, § 843.5(C)). On April 16, 2017, the Honorable H.M. Wyatt, III, Associate District Judge, held a pretrial hearing concerning Appellee's motion to suppress and took the matter under advisement. In a written order issued on February 22, 2018, Judge Wyatt sustained Appellee's motion and suppressed any and all evidence the State obtained in the search and seizure of Appellee's cell phone.[1] The State appeals to this Court pursuant to 22 O.S.2011, § 1053(6).

¶2 Section 1053 provides, in relevant part, that the State may appeal, "[u]pon a pretrial order, decision or judgment suppressing or excluding evidence in cases alleging violation of any provisions of Section 13.1 of Title 21 of the Oklahoma Statutes." Since both Enabling Child Abuse and Child Neglect are offenses enumerated under Section 13.1, we find that the State's appeal is proper.

¶3 The State raises the following propositions of error in support of this appeal:

I. The seizure of Appellee's cellular phone was supported by probable cause and thus a reasonable seizure.

II. The District Court's findings are in error and not supported by the law or the facts in the record.

¶4 This Court reviews appeals pursuant to 22 O.S.2011, § 1053 to determine if the trial court abused its discretion. *State v. Gilchrist*, 2017 OK CR 25, ¶ 12, 422 P.3d 182, 185; *State v. Hooley,* 2012 OK CR 3, ¶ 4, 269 P.3d 949, 950; *State v. Love*, 1998 OK CR 32, ¶ 2, 960 P.2d 368, 369. This is the same standard applied when we review a trial court's ruling on a motion to suppress. *Bramlett v. State*, 2018 OK CR 19, ¶ 10, 422 P.3d 788, 793; *State v. Keefe*, 2017 OK CR 3, ¶ 7, 394 P.3d 1272, 1275. An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue or a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented. *Neloms v. State,* 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170.

¶5 In Proposition One, the State challenges the District Court's suppression of the evidence recovered from Appellee's cellular phone. The State argues that the District Court erred when it determined that the initial seizure and accessing of Appellee's phone on May 13, 2016 was contrary to her constitutional rights against illegal search and seizure.

¶6 The United States Supreme Court has long held that the "'touchstone of the Fourth Amendment is reasonableness.'" *Ohio v. Robinette*, 519 U.S. 33, 39, 117 S. Ct. 417, 421, 136 L. Ed. 2d 347 (1996) (quoting *Florida v. Jimeno,* 500 U.S. 248, 250, 111 S. Ct. 1801, 1803, 114 L. Ed. 2d 297 (1991)). "Reasonableness, in turn, is measured in objective terms by examining the totality of the circumstances." *Id*.

¶7 Reviewing the record, we find that the District Court abused its discretion when it suppressed the evidence recovered from Appellee's cell phone. The District Court's determination that the initial seizure and accessing of the phone was illegal is clearly erroneous and without proper consideration of the facts and law pertaining to the matter. Warrantless seizures of evidence are presumed unreasonable. *State v. Sittingdown*, 2010 OK CR 22, ¶ 9, 240 P.3d 714, 716. Nonetheless, "society's interest in the discovery and protection of incriminating evidence from removal or destruction can supersede, at least for a limited period, a person's possessory interest in property, provided that there is probable cause to believe that that property is associated with criminal activity." *Segura v. United States*, 468 U.S. 796, 808, 104 S. Ct. 3380, 3387, 82 L. Ed. 2d 599 (1984). Therefore, a warrantless seizure is permissible when law enforcement has probable cause to believe the item seized is evidence of a crime, and exigent circumstances sufficient to justify immediate seizure are present. *Harjo v. State*, 1994 OK CR 47, 882 P.2d 1067, 1073 (citing *Cupp v. Murphy*, 412 U.S. 291, 93 S. Ct. 2000, 36 L. Ed. 2d 900 (1973)).

¶8 In *Riley v. California*, 573 U.S. 373, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014), the United States Supreme Court held that absent exigent circumstances or some other exception, police must get a warrant before searching the data on a cell phone. *State v. Thomas*, 2014 OK CR 12, ¶ 5, 334 P.3d 941, 944. However, the Supreme Court noted that law enforcement can seize and secure a phone to prevent the destruction of evidence while seeking a warrant. *Id*., 2014 OK CR 12, ¶ 7, 334 P.3d at 944 (citing *Riley*, 573 U.S. at 390-91, 34 S. Ct. at 2486-87).

¶9 The investigating detective had probable cause to believe that Appellee's cell phone contained evidence of the crime of child abuse and child neglect. The medical professionals at St. Francis Hospital informed the detective that two of Appellee's sons had suffered physical abuse and neglect. Both of the boys had significant injuries which were wholly inconsistent with the typical injuries for their respective ages and inconsistent with the history that Appellee and her boyfriend had given. Appellee advised the detective that she had documented every injury that the boys incurred by informing her mother, taking photographs of the injuries on her phone, and sending the pictures to her mother. Appellee's mother corroborated this fact. The detective knew that the photographs would have date and time data stamped on them. He also believed that the phone would contain communications about the boys' injuries based upon the statements of both Appellee and her boyfriend about the argument they had following the boys' earlier visit to a health clinic. Since the phone was located in Tulsa County and the Rogers County judges only permitted written applications for warrants, the detective did not attempt to get a search warrant from the Rogers County Associate District Judge when he contacted the judge by phone and secured the authority to place the boys in protective custody. Instead, the detective seized

Appellee's phone to prevent her from deleting any incriminating evidence on the device.

¶10 Similarly, we find that the detective's act of accessing the phone to forward Appellee's calls and activating the device's airplane mode function was reasonable. Both this Court and the United States Supreme Court have recognized that when seizing a cell phone, law enforcement may act to prevent both the remote wiping of data and the encryption of data. *Riley*, 573 U.S. at 390-91, 134 S. Ct. at 2487; *Thomas*, 2014 OK CR 12, ¶ 7, 334 P.3d at 944. In order to prevent the remote wiping of data from the cell phone, officers are permitted to turn the phone off, remove its battery, or place it in a "Faraday bag," *i.e.,* an enclosure that isolates the phone from radio waves. *Riley,* 573 U.S. at 391, 134 S. Ct. at 2487. "Or, if officers happen to seize a phone in an unlocked state, they may be able to disable a phone's automatic-lock feature in order to prevent the phone from locking and encrypting data." *Id.* To the extent that these actions do not sufficiently address law enforcement's specific concerns about the potential loss of evidence in a particular case, they may rely upon exigent circumstances to search the phone immediately. *Id.*

¶11 The detective testified that he accessed the phone to avoid the loss of any evidence from the device. He related that Appellee indicated in the negative when he asked if the phone had a passcode. Based upon Appellee's expressed desire to receive incoming phone calls, Appellee and the detective agreed to forward Appellee's phone calls to another number. The detective asked for Appellee's assistance in accessing the settings on the phone to accomplish this feat. He then placed the phone on airplane mode knowing that this action would disconnect the phone from the cellular network. The detective explained that he believed this would suffice to satisfy the dictates of *Riley* in light of the fact that his department did not have Faraday bags. He explicitly testified that he did not go through Appellee's personal information on the phone or get any evidence from his act of accessing the settings on the phone.

¶12 Citing to the detective's stray comments on the audio recording of his investigation at the hospital, Appellee argues that the detective admitted that he did not have probable cause to seize the phone. As outlined above, it is clear from the totality of the circumstances that the officer had probable cause to seize the phone. The detective's stray comments over the course of three plus hours of investigation do not overcome the objective reasonableness of his actions.

¶13 The detective's initial seizure and accessing of Appellee's phone was reasonable under *Thomas* and *Riley.* Therefore, finding the District Court abused its discretion when it ordered the suppression of the evidence, the State's appeal is granted and the matter is reversed and remanded to the District Court for further proceedings consistent with this Opinion.

¶14 In Proposition Two, the State challenges the District Court's determination that the search warrant which was subsequently issued for Appellee's cellphone was invalid. The State argues that the District Court failed to engage in the proper legal analysis in making its finding of facts, thus, abusing its discretion. We agree.

¶15 The District Court determined that the search warrant was "insufficient as overly broad, not supported by probable cause, and/or [the affidavit in support] contained false, speculative, or perhaps mistaken representations by [the detective] to the examining magistrate." This Court has laid out the precise manner in which courts of this State are to analyze such claims. "The burden of proving the invalidity of a search warrant rests on the accused who seeks to suppress the resulting evidence." *Darity v. State,* 2009 OK CR 27, ¶ 5, 220 P.3d 731, 733. A criminal defendant must allege and present evidence of acts and circumstances showing the invalidity of either the affidavit or the warrant in order to enable the court to review such a question. *Erickson v. State,* 1979 OK CR 67, ¶ 11, 597 P.2d 344, 347; *Daniels v. State,* 1967 OK CR 165, 4-6, 441 P.2d 494, 495-96. In the absence of a valid challenge, it is to be presumed the affidavit and search warrant are in all respects valid and legal. *Van Horn v. State*, 1972 OK CR 97, ¶ 8, 496 P.2d 121, 123; *Daniels,* 1967 OK CR 165, ¶ 4, 441 P.2d at 495.

¶16 To succeed on an overbreadth challenge, the defendant must establish that the search warrant failed to describe with specificity and particularity the place to be searched and the items to be seized. *See Moore v. State,* 1990 OK CR 5, ¶ 33, 788 P.2d 387, 395–96 (holding Fourth Amendment of the United States Constitution and Article II, § 30, of the Oklahoma Constitution both require search warrants describe with specificity and particularity the place to be searched and the items to be seized).

The items to be seized must be described as specifically as the nature of the activity under investigation permits. *Id.* Incorporation and attachment of the affidavit to the warrant may cure a lack of particularity. *See United States v. Riccardi*, 405 F.3d 852, 863 n.1 (10th Cir. 2005) ("Where the warrant itself is insufficiently specific regarding the items to be searched and seized, this Court has held that the affidavit in support of the warrant can cure the want of specificity, but only if the affidavit is both incorporated in and attached to the warrant.").

¶17 Similarly, we note that the United States Supreme Court has a well-established rule concerning challenges to the veracity of an affidavit in support of a search warrant.

> To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient.

Franks v. Delaware, 438 U.S. 154, 171, 98 S. Ct. 2674, 2684, 57 L. Ed. 2d 667 (1978). "[A]llegations of perjury or reckless disregard for the truth in an affiant's statements must be established by preponderance of the evidence. Moreover, if the inaccuracies are removed from consideration and there remains in the affidavit sufficient allegations to support a finding of probable cause, the inaccuracies are irrelevant." *Smith v. State*, 2018 OK CR 4, ¶ 6, 419 P.3d 257, 260 (quotations and citations omitted).

¶18 The District Court failed to follow this precedent in the present case. The record shows that Appellee did not challenge the validity of either the affidavit or the search warrant, instead, solely challenging the initial seizure and accessing of the phone. The District Court erred when it failed to require Appellee to allege and present evidence showing the invalidity of either the affidavit or the warrant before reviewing the validity of the search warrant. In the absence of the requisite challenge, the District Court was required to presume that both the affidavit and the search warrant were valid and legal in all respects.

¶19 Similarly, the District Court failed to give sufficient deference to the magistrate that issued the search warrant. "Reasonable minds frequently may differ on the question whether a particular affidavit establishes probable cause." *United States v. Leon*, 468 U.S. 897, 914, 104 S. Ct. 3405, 3416, 82 L. Ed. 2d 677 (1984). Thus, the United States Supreme Court has concluded that a reviewing court must give great deference to a magistrate's determination of probable cause. *Id.* Recognizing this requirement we have explained that "[t]he duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed." *Bland v. State*, 2000 OK CR 11, ¶ 45, 4 P.3d 702, 717.

¶20 We further note that the District Court failed to determine whether the good faith exception to the exclusionary rule might apply under the facts of this case. Both this Court and the United States Supreme Court have determined that the exclusionary rule does not bar the admission of evidence seized in reasonable, good-faith reliance on a search warrant that is subsequently held to be defective. *Leon*, 468 U.S. at 922, 104 S.Ct. at 3420; *Sittingdown*, 2010 OK CR 22, ¶ 17, 240 P.3d at 718. The good faith exception can apply where the facts set out in the affidavit were insufficient to establish probable cause. *State v. Haliburton*, 2018 OK CR 28, ¶¶ 13-18, 429 P.3d 997, 1001-02. Even where a warrant is invalid for the lack of particularity or specificity, the good faith exception may still apply. *See United States v. Otero*, 563 F.3d 1127, 1133 (10th Cir. 2009).

¶21 Finally, we find that the record below was not fully developed. Neither the State nor Appellee introduced any evidence concerning the particularity of the search warrant. No evidence was introduced regarding the applicability of the good faith exception. Thus, the record on appeal is lacking in several material matters.

Since the District Court entered its findings of fact and conclusions of law without proper consideration of either the facts or the law pertaining to the matter at issue, we conclude that the District Court abused its discretion. *Neloms*, 2012 OK CR 7, ¶ 35, 274 P.3d at 170. The District Court erred when it ordered the suppression of the evidence. The State's appeal is granted and this matter is reversed and remanded to the

District Court for further proceedings consistent with this Opinion.

DECISION

¶22 The order of the District Court of Rogers County suppressing the evidence is hereby **REVERSED**. The matter is **REMANDED** for further proceedings consistent with this Opinion. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch. 18, App. (2019), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT
OF ROGERS COUNTY
THE HONORABLE H.M. WYATT, III,
ASSOCIATE DISTRICT JUDGE

APPEARANCES AT TRIAL

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

1. Judge Wyatt did not stand for reelection and has retired from the bench since issuing this order.

2019 OK CR 11

**IVAN LUNA-GONZALES, Appellant, v.
THE STATE OF OKLAHOMA, Appellee.**

Case No. F-2018-243. May 23, 2019

OPINION

LUMPKIN, JUDGE:

¶1 Appellant, Ivan Luna-Gonzales, was tried by jury and convicted of Domestic Assault and Battery with Dangerous Weapon (21 O.S. Supp.2014, § 644(D)(1)) in District Court of Payne County Case Number CF-2016-837. The jury recommended as punishment imprisonment for two (2) years. The trial court sentenced Appellant accordingly and denied Appellant credit for the time that he spent in jail awaiting trial. It is from this judgment and sentence that Appellant appeals.

¶2 Appellant resided with the mother of his child in Stillwater, Payne County, Oklahoma. When the victim asked him to leave her home on October 26, 2016, Appellant repeatedly struck her with a two-by-four on the head and hand causing the victim great bodily injury requiring 14 staples. Appellant only ended his attack on the victim after her eight-year-old son cried out for him to stop. Appellant sliced his wrist with a steak knife and fled into the nearby woods. The Stillwater Police Department tracked Appellant with a canine whereupon he surrendered to the officers. Appellant denied striking the victim at trial and further denied confessing to the social worker that visited him in the jail. He asserted that the victim had injured herself. The physician that treated the victim explained that it was very unlikely that she caused her own injuries.

¶3 In his sole proposition of error, Appellant contends that the trial court violated 57 O.S. Supp.2015, § 138(G) when it refused to grant him credit for the time he spent in jail while awaiting trial. He argues that the trial court misinterpreted § 138(G).

¶4 This Court has not had the opportunity to specifically construe § 138(G). However, the rules of statutory construction are well settled. *Wells v. State*, 2016 OK CR 28, ¶ 6, 387 P.3d 966, 968. Statutes are to be construed according to the plain and ordinary meaning of their language. *Id.; State v. Young*, 1999 OK CR 14, ¶ 27, 989 P.2d 949, 955. The fundamental principle of statutory construction is to ascertain and give effect to the intention of the Legislature as ex-

pressed in the statute. *Arganbright v. State,* 2014 OK CR 5, ¶ 17, 328 P.3d 1212, 1216; *Young*, 1999 OK CR 14, ¶ 27, 989 P.2d at 955. "Each part of the various statutes must be given intelligent effect. This Court avoids any statutory construction which would render any part of a statute superfluous or useless." *Wells*, 2016 OK CR 28, ¶ 6, 387 P.3d at 968 (citations omitted).

¶5 Title 57 governs the State's prisons and reformatories. Section 138 of this title enacts and sets forth the requirements of the Oklahoma Department of Corrections' policies and procedures concerning inmate classification, achievement and earned credits. Section 138(G) provides:

> Inmates granted medical leaves for treatment that cannot be furnished at the penal institution where incarcerated shall be allowed the time spent on medical leave as time served. Any inmate placed into administrative segregation for nondisciplinary reasons by the institution's administration may be placed in Class 2. The length of any jail term served by an inmate before being transported to a state correctional institution pursuant to a judgment and sentence of incarceration shall be deducted from the term of imprisonment at the state correctional institution. Inmates sentenced to the Department of Corrections and detained in a county jail as a result of the Department's reception scheduling procedure shall be awarded earned credits as provided for in subparagraph b of paragraph 1 of subsection D of this section, beginning on the date of the judgment and sentence, unless the inmate is convicted of a misdemeanor or felony committed in the jail while the inmate is awaiting transport to the Lexington Assessment and Reception Center or other assessment and reception location determined by the Director of the Department of Corrections.

¶6 It is apparent from the plain language of the statute that this statutory provision does not govern the time that a criminal defendant spends in jail while awaiting trial. Instead, it is clear from the language of § 138 and specifically subsection G that the Oklahoma Legislature intended this statutory provision to control an inmate's accrual of credit towards his or her prison sentence after the imposition of the requisite judgment and sentence. Nothing within § 138(G) requires the trial court to grant "jail credit," *i.e.*, the deduction of the time that a criminal defendant was confined while awaiting trial from his or her final sentence. *See Black's Law Dictionary* 851 (8th ed. 2004).

¶7 This construction is consistent with our established precedent. "[I]t is a matter of well settled law that the sentencing judge in Oklahoma has discretion in deciding whether to allow a defendant credit for time served in jail before sentencing." *Holloway v. State*, 2008 OK CR 14, ¶ 8, 182 P.3d 845, 847; *see also In re Tidwell*, 1957 OK CR 33, ¶ 4, 309 P.2d 302, 304 (observing that "there is no statute in Oklahoma requiring the trial court to give credit for time spent in custody prior to trial," and that "in the absence of statute the time that the defendant has spent in jail awaiting trial forms no part of the time for which he was sentenced.") (quotations and citations omitted). "While it is common practice for the trial judge to give credit for time served, there is no authority mandating such credit or making it abuse of discretion to fail to give it." *Shepard v. State,* 1988 OK CR 97, ¶ 21, 756 P.2d 597, 602.

¶8 Solely focusing on the single sentence within § 138(G) which mentions "any jail term," Appellant argues that the statutory provision requires that a criminal defendant receive credit for any time he spent in jail following the time of his arrest. However, this construction of the statutory provision violates the fundamental principle that we ascertain and give effect to the intention of the Legislature as expressed in the statute. *Young,* 1999 OK CR 14, ¶ 27, 989 P.2d at 955. It is clear from the plain language of the statute that the Legislature solely intended § 138(G) to implement a system of inmate classification and earned credits applicable to prisoners already convicted and sentenced. The entirety of Section 138 and Subsection G both deal with "inmates" that have already incurred "a judgment and sentence." The credit referenced in § 138(G) does not apply to pretrial jail time. It is not jail credit. Instead, § 138(G) only applies to jail terms which occur after imposition of a judgment and sentence.

¶9 Citing *Loyd v. State*, 1981 OK CR 5, 624 P.2d 74, Appellant argues that this Court interpreted similar language within 57 O.S.Supp. 1980, § 138(C) as meaning a defendant would receive credit for the time he served in jail prior to trial. However, *Loyd* is neither controlling nor persuasive on the present case. As outlined above, *Loyd* is in conflict with the great weight of our cases on this point. The Oklahoma Legislature has amended and modified the lan-

guage within § 138 on numerous instances since 1980, thus, impliedly overruling *Loyd*. It is clear from the plain language of 57 O.S. Supp.2015, § 138(G) that a criminal defendant only receives automatic credit for jail terms which occur after imposition of a judgment and sentence. To the extent that *Loyd* may be read as inconsistent with the present case it is expressly overruled.

¶10 Reviewing the trial court's determination in the present case, we find that the trial court did not abuse its discretion. *See Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170. Appellant was arrested on October 26, 2016 and was continuously in the custody of the Sheriff of Payne County because the United States Immigrations and Customs Enforcement was seeking to deport him and placed a hold with the Sheriff on his person. Appellant's original trial in June of 2017 resulted in a mistrial when the jury became deadlocked and was unable to reach a verdict. He was retried and the trial court imposed Judgment and Sentence on him on February 23, 2018. The trial court refused to give Appellant credit for the time he was confined in jail awaiting trial because Appellant had refused to cooperate with the ordered presentence investigation.

¶11 In *Holloway*, this Court concluded that the imposition of a maximum punishment on an indigent defendant without credit for the time he was confined in jail awaiting trial and financially unable to make bond violated the Equal Protection Clause. *Holloway*, 2008 OK CR 14, ¶¶ 8-11, 182 P.3d at 847-48. We mandated that "jail time credit" be allowed in this circumstance. *Id.*

¶12 Appellant could not have gained release from the county jail without resolving the immigration hold lodged against him. Thus, it was the hold which necessitated his pretrial confinement. Since Appellant was not confined in jail awaiting trial due to financial inability to make bond, the trial court was not required to give him "jail time credit" under *Holloway*. In light of Appellant's refusal to cooperate with the Court ordered presentence investigation, we cannot find that trial court's determination was an abuse of discretion. Proposition One is denied.

DECISION

¶13 The Judgment and Sentence of the District Court is hereby **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2019), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT
OF PAYNE COUNTY
THE HONORABLE PHILLIP CORLEY,
DISTRICT JUDGE

APPEARANCES AT TRIAL

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

Judicial Nominating Commission Election Candidates

Pursuant to the Procedures of the OBA Governing the Election of Lawyer Members to the Judicial Nominating Commission, Nominating Petitions have been filed with the Executive Director for Districts 3 and 4

Ballots will be mailed June 7, 2019, and must be received at the bar center by 5 p.m. June 21, 2019.

District 3

Because nominee is unopposed, the candidate has been deemed to be elected.

James D. Bland

James Bland retired as district judge for the 18th Judicial District in January, after 25 years on the bench. During that time, he served on the state Judicial Conference executive committee, legislative committee and bench book committee. Prior to his judicial career, he was in private practice in McAlester for 12 years. He presently serves as president of the Pittsburg County Bar Association and as a coach for the McAlester High School mock trial teams, while also serving on the boards of various community organizations.

Nominating Resolutions have been received from these counties: Bryan, Latimer, LeFlore, McCurtain and Pittsburg

District 3 Counties: Atoka, Bryan, Carter, Choctaw, Coal, Cotton, Garvin, Haskell, Hughes, Jefferson, Johnston, Latimer, LeFlore, Love, Marshall, McCurtain, Murray, Pittsburg, Pontotoc, Pushmataha, Seminole and Stephens

District 4

Randy A. Bauman

Randy Bauman graduated from OU Law. He began as a general practitioner. He served as a state public defender with the Oklahoma Indigent Defense System. Then, Randy served 21 years as a federal public defender for the Western District of Oklahoma, ultimately as a supervisory attorney, before retiring from that position in mid-2018. Randy is a member of the bar in all Oklahoma federal districts, the 10th Circuit and the United States Supreme Court. He is a recipient of the OCDLA Thurgood Marshall Appellate Advocacy Award. Randy is on the Board of the Metro Mental Illness Advocacy and Awareness Organization.

(Additional candidates on next page)

David L. Butler

David Butler is a graduate of the OU College of Law. He has been in private practice since 1997 with his primary office in Lawton. He is a partner in Zelbst, Holmes & Butler. His practice primarily focuses on civil litigation and criminal defense. He is married to Karen Butler, and they have two children, Tyler and Ashley.

A Nominating Resolution has been received from Comanche County Bar Association.

Virginia D. Henson

Virginia Henson "Ginny" is a partner in the PHM Law Group PC in Norman. She began her practice in Shawnee in 1980 and moved to Norman in 2000. She practices primarily family law. Ginny is a two-time recipient of the "Outstanding Family Lawyer" award of the Oklahoma Bar Association Family Law Section (OBA-FLS), and she is a fellow of the American Academy of Matrimonial Lawyers (AAML). She has given numerous CLE presentations for the ABA Family Law Section, the OBA-FLS, the AAML and the OBA. Ginny will present "Recent Developments in Family Law" to the judicial conference in 2019.

District 4 Counties: Caddo, Cleveland, Comanche, Grady, Greer, Harmon, Jackson, Kiowa, McClain, part of Oklahoma (including Choctaw, Harrah, Luther, Midwest City, Newalla, Nicoma Park, Spencer and South of 89th Street), Pottawatomie, Tillman and Washita

Calendar of Events

June

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

6 **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

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

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

11 **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

18 **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

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

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

20-22 **OBA Solo & Small Firm Conference;** River Spirit Casino Resort, Tulsa

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

24 **OBA Appellate Practice Section meeting;** 11:30 a.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Cullen D. Sweeney 405-556-9385

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

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

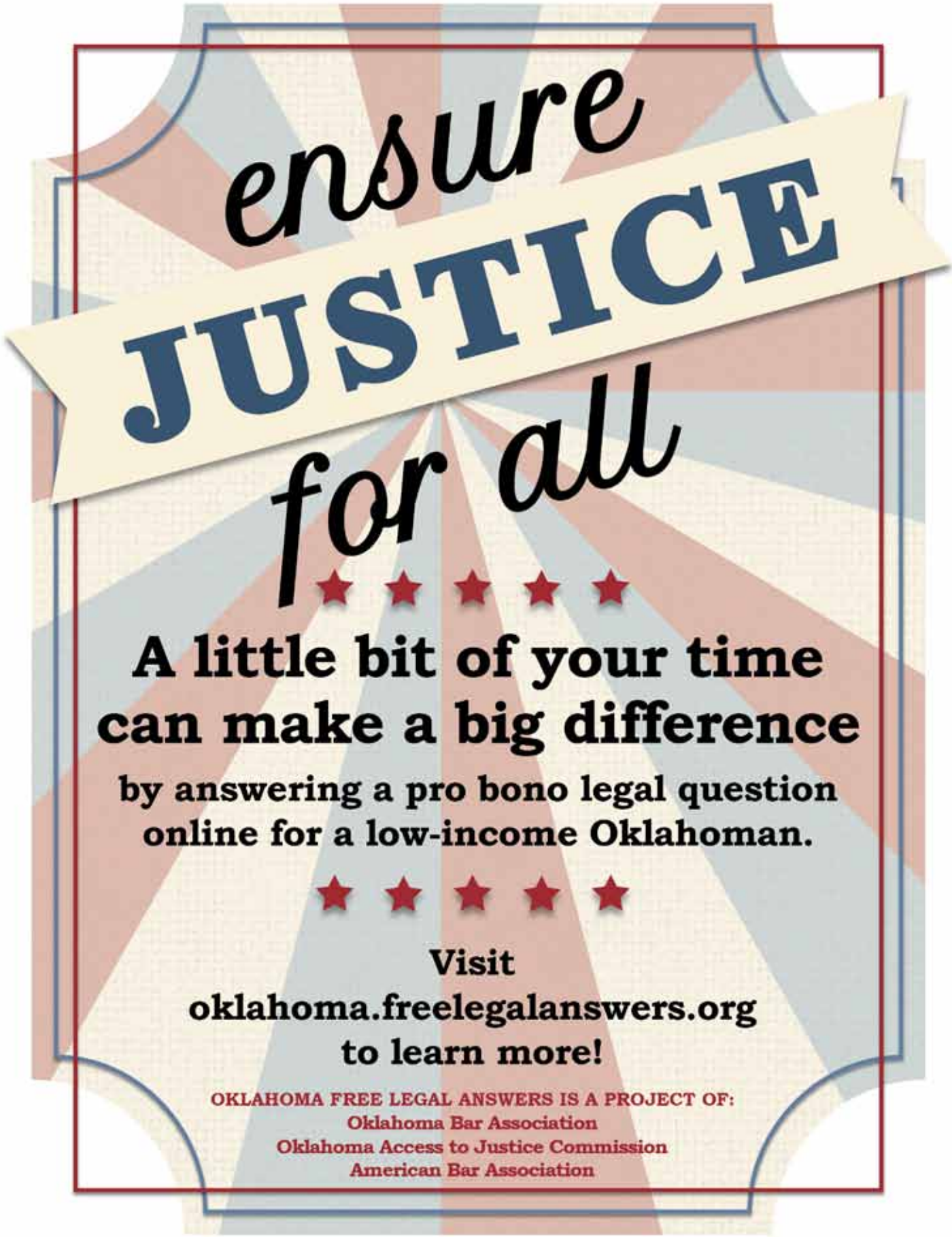
27 **OBA Professionalism Committee meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Linda G. Scoggins 405-319-3510

July

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

4 **OBA Closed** – Independence Day

5 **OBA Alternative Dispute Resolution Section meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Clifford R. Magee 918-747-1747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Applicants for July 2019 Oklahoma Bar Exam

The Oklahoma Rules of Professional Conduct impose on each member of the bar the duty to aid in guarding against the admission of candidates unfit or unqualified because of deficiency in either moral character or education. To aid in that duty, the following is a list of applicants for the bar examination to be given July 30-31, 2019.

The Board of Bar Examiners requests that members examine this list and bring to the Board's attention in a signed letter any information which might influence the board in considering the moral character and fitness to practice of any applicant for admission. Send correspondence to Cheryl Beatty, Administrative Director, Oklahoma Board of Bar Examiners, PO Box 53036, Oklahoma City, OK 73152.

EDMOND

Justin Gregory Bates
Talor Michelle Black
Joshua Paul Blair
Brian Gary Bond
Rebecca Ann Bryan
Jose Dan Cruz Guajardo
Emily Jane Evans
Emily Elizabeth Grossnicklaus
Brody Park Gustafson
Alexander McCay Hall
Charles Ellis Hart
Mitchell Thomas Holliman
Lina Khalaf
Jonathan Lance Kurz
Amber Noel Leal
Ashley Nicole McCord
John Maxwell Nowakowski
Nicholas Wesley Porter
Alexander Matthew Price
William Kyle Puckett
Cassity Beatrice Reed
Brandon Douglas Roberts
Kayla Marie Rochelle
Lezel Brianna Safi
Khaki Alaine Scrivner
Marjon Jacqueline Creel Stephens
Natalie Elizabeth Stewart
Scott Rachal Verplank, Jr.

NORMAN

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Nelson Nzalli Anaback
Dana Marie Whitlock Ashcraft
Darren Wiley Barr
Tyler James Bean
Jordan Lynn Berkhouse
Thomas David Bernstein
Taylor Nicole Brown
Brian Todd Candelaria
Sarah Katherine Capps
Ryan Paul Caron
Andrew Jonathan Chwick
John Thomas Cleveland
Bradley Evan Congdon
Leslie Catherine Corbly
Sawmon Yousefzadeh Davani
Tristan Lane Davis
Madeline Nicole Farris
Ashley Dawn Fetter
Aaron Logan Fournier
George Edward Gibbs
Kchristopher Bonard Griffin
Larry Alan Grizzle II
Jonathon Wesley Herndon
Alexander Elias Hilton III
Braden Mark Hoffmann
Peyton Storm Howell
Elaine Kramer Hsieh
Amanda Christine Jespersen
Victoria Anne Johnson
Kristin Michelle Josephs
Meilani Camille Kaaihue
Greg Stephen Keogh
Amos Teah Kofa
Alyssa Neil Lankford
Taylor Laurence Ledford
Alan Justin Looney
Scott Allen May
Calandra Skye McCool
Morgan Lee Medders
Allison Nicole Meinders
Phoebe Bess Mitchell
Jaron Tyler Moore
Robert Chad Nelson
Slate Wayne Olmstead
Ashton Nichole Paschal-Wilson
Raymond Dale Rieger
Jonathan Michael Rohrer
Ani Sargsyan
Alina Ruth Carlile Sorrell
Caitlyn Suzanne Spurgeon
Collen Loren Steffen
Marshall Leavy Stone
Taylor Alexandra Stovall
Claudia Blake Toellner
Paul Anthony Tortorici
Justin Tyler Valentine
Austin Lee Watford

OKLAHOMA CITY

Shannon Rashelle Beesley
Seth Ryan Blanton
Sean-Michael O Brady
Danielle LouAnn Brand
Wynne Elizabeth Brantlinger
Amanda Renique Broussard
Rachal Alexandria Brown
Abby Sue Broyles
Joshua Itzaeh Castro
Jacqueline Humphrey Chafin
Braxton Ayn Coil
Katherine Rose Colclazier
Allison Jane Daugherty
Joshua Cooper Davis
Brenda Lyda Doroteo
Cameron Scott Farnsworth
Emma Grace Foster Gandhi
Hardik Gandhi
Donald Eugene Gies III
Alyssa Marie Gillette
Matthew Paul Gomez
Myrenda Ralene Hancock
Benjamin Jerome Hartman
Alicia Nicole Hockenbury
Dereck James Hurt
James Christopher Irwin
Deni Shane Ketterman
Lauren Elizabeth Kiefner
Taylor Nathan Kincanon
Katelyn Michelle King
Prescott Edgerly Kiplinger
Cheyenne Janea Konarik
Eric Thomas Krampf
Gerald Sinclair Lalli
Garrett Sean Lam
Casey Robert Lawson
Matthew Daniel Mangru
Garrett Lane Marshall
Adrienne Marie Martinez
Beatrize Martinez
Vanessa Oliva Martinez
Kaitlin Nicole McCorstin
Brittany Faithe McMillin
Zachary Taylor Megee
Dane Harrison Miller
Joshua Caleb Mills
Garrett Logan Molinsky
Ann Marie Mudd
Bryan Ashton Don Muse
Hunter Christian Musser
Robert William Norton
Brandon Thomas Orr
Hayley Nichole Kathryn Parker
Christie Ann Porter
Montrel Dominique Preston
Susan Elisabeth Proctor
Reann Elizabeth Richards
Ruth Ann Brummett Rickey
JulieAnn Michelle Robison
Taylor Frances Rogers
Margaret Mary Sine
Mylin Alexander Stripling
Stephanie Rene Timmermeyer
Dillon McCaleb Turner
Larra Jane Williams
Sandra Grace Williams

TULSA

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Erik Sven Anderson
Adam James Boutross
Leslie Kathleen Briggs
Connor Evan Brittingham
James Linden Curtis
Sarah Elise Ebright
Melissa Ann Ferguson
Daniel Antonio Gibson
Christopher Joe Gnaedig
Alison Rebecca Hausner
Meghan Luanne Hilborn
Dillon James Hollingsworth
Austin Tyler Jackson
Dallas Lee Jones
Kaia Kathleen Kaasen Kennedy
Henry Herman Klaus
Benjamin Joel LaCourse
Katherine Paige Leach
Shelby Nicole Limburg
Michael Vincent Martin
Allison Joanne Martuch
Collin Norman McCarthy
Sarah Ann McManes
Peter Eamon McVary
Cheyenne Michelle Meckle
Laurie Ann Mehrwein
Madison Claire Mosier
Chandler Meshele Moxley
Margaret Louise Munkholm
Samantha Katlyn Oard
Keri Denman Palacios
Joshua Lee Payton
Lashandra Annette Peoples-Johnson
Clinton Bryce Privett
James Brian Rayment
Thomas Edward Rogers V
Elissa Rae Stiles

OTHER OKLAHOMA CITIES AND TOWNS

Alexandra Grace Adkins, Broken Arrow
Auziah Destinee Antwine, Spencer
Shea Alexander Bielby, Broken Arrow
Amanda Rae Blackwood, Moore
William Bradley Brents, Jones
Krystal Brooke Browning, Duncan
Shondra Beth Brumbelow-Neal, Moore
Isaiah Nathaniel Brydie, Owasso
Adam Riley Burnett, Pryor
Ismail Marzuk Calhoun, Spencer
Kimberly Savannah Carris, Enid
Cordal Lee Cephas, Broken Arrow
Philip Malcolm Chandler, Blanchard
Laura Jessica Chesnut, Miami
Molly Kester Clinkscales, The Village
Stephanie Leigh Coulter, Stillwater
Jayna Marie Cox, Bethany
Meagan Cherise Crockett-Edsall, Piedmont

Casey Anne Crook, Newcastle
Melissa D'Ann Diacon, Ada
William Hunter Dodson Jr., Sallisaw
Alexandra Jordan Dossman, Owasso
Collin Aaron Duel, Guthrie
Gabriel David Dunbar, Enid
Emily Joyce Dunn, Midwest City
David Dwayne English, Stillwater
Emily Jill Fry, Shawnee
Stacy Nichole Fuller, Owasso
Angela Willow Ganote, Yukon
Randi Nicole Gill, Owasso
David Bryan Goodpasture, The Village
Lindsay Ann Gray, Guthrie
Trent Daniel Guleserian, Shawnee
Jessie Kathleen Heidlage, Claremore
Jacob Duane Heskett, Bartlesville
Chantelle Lynette Hickman-Ladd, Yukon
Lindon Thomas Hogner, Bixby
Bailey Paul Hollabaugh, Vinita
Mychelle Martin Holliday, Stillwater
Joe Dawson Houk, Isabella
Tamara Erin Hurd, Guthrie
Joshua Dale Hutchins, Tahlequah
Aubrey Erin Jaffe-DeClercq, Piedmont
Kyle Drew Chance Johnson, Kingston
John Ramsey Kalka, Carney
Andrew Charles Knifechief, Pawnee
Melissa Ann Lantz, Shawnee
Kara Kathleen Laster, Shawnee
James Edward Littlefield Jr., Moore
Michael Scott Major, Collinsville
Mackenzie Anne Malone, Perkins
Maecey Jae McClain, Wellston
Maegan Christine Murdock, Owasso
Bryan Adam Myers, Yukon
Stephan Alexander Aaron Owings, Enid
Nocona Louise Pewewardy, Lawton
Nicholas James Pierson, Nichols Hills
Amber Dee Plumlee, Broken Arrow
Haley Marie Nix Proctor, Bixby
Kassidy Taylor Quinten, Broken Arrow
Ashley Morgan Ray, Newcastle
Shelby Lynn Rice, Velma
Dalton Bryant Rudd, Davis
Stephanie Rhiannon Rush, Sapulpa
Joya Christiania Nicole Rutland, Moore
Jacob Dakota Scroggins, Ada
Ashlyn Miller Smith, Moore
Robert Earl Stevens Jr., Perry
Caleb Robert Stiles, Yukon
Cole Jordan Trippet, Beaver
Sonja Lea Rae Turner, The Village
Gregory Louis Van Ness, Yukon
Justin Thomas Vann, Del City
Taylor Kaye Weder, Buffalo
Houston Dillard Wells, Sapulpa
Hannah Kacie White, Coyle
Cameron Martin Williams, Yukon
Zachary Eaton Williams-Kupec, Moore
Chase Andrew Winterberg, Owasso
Aaron William Wright, Owasso

OUT OF STATE

Maryam Adamu, Brooklyn, NY
Delia Addo-Yobo, New York, NY
Gregory Allen Bissonnette, Dallas, TX
James Edward Blaise, Tomball, TX
Andrew Gabriel Britt, Broomfield, CO
Brian Tyler Burkhardt, Fort Worth, TX
Frank Danilo Cardoza, Fort Smith, AR
Bryan Gregg Cleveland, Omaha, NE
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Christine Ann Evans, Rockwall, TX
Larry Bill Garmon Jr., Dallas, TX
Brian Ray Glass, Houston, TX
Elizabeth Elyn Govig, Phoenix, AZ
Jacob Arneal Hansen, Auburn, KS
Robert Lee Harmon, Colleyville, TX
Benjamin Rogers Hilfiger, New Orleans, LA
Colin Wade Holthaus, Topeka, KS
Dallas Myrl Howell, Parks, AZ
Joshua Welch Jackson, Fort Smith, AR
Kristen Nicole James, Providence Village, TX
Chasse William Alexander Jerson, Ponce Inlet, FL
Harriet Day Blackwell Jett, Atlanta, GA
Jim Varughese John, Glenview, IL
Michelle Kruse, Rowlett, TX
Thoai Ngoc Emma LamDo, Dallas, TX
Lauren Margaret Langford, Abilene, TX
Marc Richard Legarreta, Las Cruces, NM
Connor Jordan Mace, Trophy Club, TX

Ashley Elena Maguire, Dallas, TX
Micah Gabrielle-Joye Mahdi, Cedar Hill, TX
Heather Anne Mcfarlain, San Diego, CA
Kelly Michelle Middleman, Houston, TX
Andrea Lynne Mills, Derby, KS
Garrad Duane Mitchell, Marietta, GA
Miranda Jade Moorman, Washington, DC
Hayley Blair Myers, Smyrna, TN
Sydney Lee Nelson, Beaverton, OR
Mark Preston Pearson, Fort Smith, AR
Christopher Salvador Pena, Washington, DC
Robert Anthony Pomeroy, Charlottesville, VA
Lacy Beth Pulliam, Arlington, TX
Sohail Punjwani, Corpus Christi, TX
William Chancelor Rabon, Powderly, TX
James Ryan Reynolds, Derby, KS
Mandy Jo Schroeder, Lincoln, NE
Marcos Chavez Sierra, Desoto, TX
Geoffrey Edward Francis Speelman, The Woodlands, TX
Jonathan Wesley Sutton, Irvine, CA
Megan Kathleen Szukala, Carrollton, TX
Duy Khuong Tran, Allen, TX
Daniel Martin Vigilius, Andover, KS
John Lawrence Wagener, Lee's Summit, MO
Sarah Rose Weitekamp, Raymond, IL
Roslyn Madeleine West, Houston, TX
Kaimbri Blayne White, Bogata, TX

2019 OK CIV APP 26

T.J. CHARTNEY and STEPHANIE CHARTNEY, Individually and as Husband and Wife, T.J. CHARTNEY and STEPHANIE CHARTNEY, as Natural Parents and Next Friend of BRILEY CHEYENNE CHARTNEY, a Minor, Plaintiffs/Appellees, vs. THE CITY OF CHOCTAW, Defendant/Appellant.

Case No. 116,210. April 18, 2019

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE ROGER H. STUART, TRIAL JUDGE

REVERSED AND REMANDED

Jim Buxton, BUXTON LAW GROUP, Oklahoma City, Oklahoma, for Plaintiffs/Appellees,

Stephen L. Geries, COLLINS ZORN & WAGNER, P.C., Oklahoma City, Oklahoma, for Defendant/Appellant.

BRIAN JACK GOREE, CHIEF JUDGE:

¶1 The City of Choctaw (Defendant/Appellant) appeals the Journal Entry of Judgment entered in favor of T.J. Chartney, Stephanie Chartney, and Briley Chartney (Plaintiffs/Appellees) on the basis that the trial court committed reversible error in giving certain jury instructions, allowing the presentation of irrelevant or prejudicial evidence, and granting attorney's fees. We reverse because the negligence *per se* instruction was erroneous and there was a probable miscarriage of justice.

¶2 Defendant owns and operates the City's sewer system. After filing a Notice of Tort Claim (Notice) pursuant to the Oklahoma Governmental Tort Claims Act, Plaintiffs filed their action in district court for negligence and nuisance. In the Notice, Plaintiffs asserted a backup caused sewage to flood their home on October 13, 2014. The claim alleged the City operated and maintained its sewer system in a manner that damaged their real property and caused annoyance, discomfort, and inconvenience from the diminished use and enjoyment of their home.

¶3 Following the trial, the court submitted a negligence *per se* instruction and an instruction notifying the jury of the OGTCA damages cap. After deliberating, the jury returned a verdict in favor of Plaintiffs awarding $18,200 in property damages and $70,000 per person for nuisance damages, for a total award of $228,200. The court entered judgment in favor of the Plaintiffs and against Defendant and reserved the issue of attorney fees.

¶4 Defendant appeals and raises three propositions of error: first, the jury was misled by improper jury instructions; second, the evidence of other backups should have been excluded; and third, attorney fees should not have been awarded.

I.

Standard of Review

¶5 The test upon review of an instruction improperly given or refused is whether there is a probability that the jurors were misled and thereby reached a different result than they would have reached but for the error. *Woodall v. Chandler Material Co.*,1986 OK 4, ¶13, 716 P.2d 652. Moreover, 20 O.S. §3001.1[1] provides that a judgment will not be set aside unless the appellate court finds the error probably resulted in a miscarriage of justice or constituted a substantial violation of a constitutional or statutory right. *See Messler v. Simmons Gun Specialties, Inc.*, 1984 OK 35, ¶25, 687 P.2d 121. Similarly, 12 O.S. §78 requires appellate courts to disregard harmless error in the giving of jury instructions which does not affect the substantial rights of a party. 12 O.S. §78. *See also Sunray DX Oil Co. v. Brown*, 1970 OK 183, ¶21, 477 P.2d 67.

II.

The Negligence *Per Se* Instruction

¶6 Instruction No. 14 advised the jury that a violation of 27A O.S. §2-6-105 or 40 C.F.R. §122.41(e) would make the City negligent if the jury determined the violation was the direct cause of the injury. Appellant argues the instruction was not applicable and likely misled the jury causing it to return a different verdict than it would have without the instruction. Appellees respond that the negligence *per se* instruction was applicable, and even if it was not, it did not mislead the jury.[2]

¶7 The negligence *per se* instruction informed the jury that if it found "that a party violated any one of the Statutes, Ordinances or Regulations and the violation was the direct cause of the injury, then such violation in and of itself would make such party negligent." Instruction No. 14 recited the state statute and federal regulation:

> §2-6-105. Pollution of state air, land or waters – Order to cease:
>
> A. It shall be unlawful for any person to cause pollution of any waters of the state or to place or cause to be placed any wastes in a location where they are likely to cause pollution of any air, land or waters of the state.
>
> 40 CFR Section 122.41 (e):
>
> (e) Proper operation and maintenance. The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit.

¶8 The negligence *per se* doctrine is used to substitute statutory or regulatory standards for the common law's reasonable care standard. *Howard v. Zimmer, Inc.*, 2013 OK 17, ¶13, 299 P.3d 463. A violation of a statute or regulation is considered negligence *per se* if the injury complained of (a) was caused by the violation of the statute or regulation, (b) was the type of injury intended to be prevented by the statute or regulation, and (c) the injured party was one of the class meant to be protected by the statute or regulation. *See Boyles v. Oklahoma Natural Gas Co.*, 1980 OK 163, ¶14, 619 P.2d 613.

¶9 While the question of causation is one of fact for the jury, the trial court should be careful to determine whether the statutory or regulatory defined conduct is appropriate. *Busby v. Quail Creek Golf & Country Club*, 1994 OK 63, ¶¶6, 19, 885 P.2d 1326. ("If . . . there are criminal or regulatory statutes which delineate the defendant's conduct, courts may adopt the conduct required by the statues as that which would be expected of a reasonably prudent person – providing courts believe the statutorily required conduct is appropriate for establishing civil liability." (Emphasis added)).

¶10 We find the trial court erred in submitting the negligence *per se* instruction with respect to 27A O.S. §2-6-105 because it has no application to the facts and issues at hand. The Plaintiffs failed to demonstrate that the statute intended to prevent the type of injury they suffered or that they were in the class intended to be protected by the statute. Section 2-6-105 is located in the Oklahoma Environmental Quality Code and prohibits pollution of any waters of the state. Section 2-6-104 provides that the purpose and construction of the article is to "provide … remedies to prevent, abate and control the pollution of the waters of the state." Appellees have failed to demonstrate that the statute cited was intended to prevent damage from sewage backup in a privately owned home.

¶11 For the same reason, we find that the trial court erred in submitting the negligence *per se* instruction with respect to 40 C.F.R. §122.41(e). Section 122.41(e) is not applicable. The regulation requires Permittees, as part of the National Pollutant Discharge Elimination System, to properly operate and maintain their facilities and systems. 40 C.F.R. §122.1. Permits are required for the discharge of "pollutants" into "waters of the United States," and applies to "owners or operators of any treatment works treating domestic sewage." 40 C.F.R. §§ 122.1(b)(1)-(2). The regulation was not intended to prevent the type of injury at issue. Moreover, the regulation alone vaguely requires operators to properly operate and maintain facilities. 40 C.F.R. §122.41(e). A negligence *per se* instruction is not appropriate where the terms of the [regulation] do not impose positive objective standards. *Smith v. Baker,* 2017 OK CIV APP 69, ¶29, 419 P.3d 327, 333.

¶12 We must next consider whether submitting the jury instuction, though improper, requires reversal. When appellate courts consider error in a jury instruction, the entire set of instructions is considered as a whole. *See Johnson v. Ford Motor Co.*, 2002 OK 24, ¶16, 45 P.3d 86, 92. The instructions need not be ideal, but they must reflect Oklahoma law regarding the subject at issue. *Id.* at ¶9. The question before us is whether the inclusion of the negligence *per se* instruction constituted reversible error where the jury was otherwise properly instructed regarding negligence.

¶13 As a whole, the instructions advised the jury that negligence is a failure to exercise a duty of care. The duty was described in three ways. The jury was informed that it could find the City negligent by (1) failing its duty to use ordinary care, or (2) failing to see that its sewer

was not obstructed with refuse, or (3) violating a statute or regulation. It is impossible to ascertain from the record whether the jury based its finding of negligent property damage on a violation of a statute, or by breaching a common law duty.

¶14 Whether the improper submission of a negligence *per se* jury instruction is reversible or harmless error depends on the evidence. *Buck Creek Coal Mining Co., v. Johnson*, 1947 OK 185, 181 P.2d 1003, involved the accidental death of plaintiff's decedent when he was struck by a coal car in a part of the mine called the slope where coal was conveyed from shaft to surface. A statute mandated that mines have a man-way, evidently a second means of ingress and egress and separate from the slope. The court instructed the jury that violating this statute would entitle the plaintiff to recover. The statute was inapplicable, however, because the accident occurred in the slope. There was no evidence of a man-way during the trial.

¶15 On appeal, the Supreme Court held that giving the improper negligence *per se* instruction was not reversible error. *Id.* at ¶8. "Before this instruction could be fatal to the judgment rendered on the verdict it must appear that the instruction misled the jury in its consideration of the case and that its verdict was substantially the result of confusion of the jury caused by such instruction . . . the giving of an instruction which states a correct proposition of law, but which has no application to the issue involved or the proof, will not warrant a reversal of the judgment, unless it is apparent that such instruction misled the jury." *Id.* With this rule in mind we turn to the evidence admitted at the trial.

¶16 Mr. and Ms. Chartney testified their home was repeatedly damaged by raw sewage flooding out of the toilets and the bathtubs. The sewage flowed from the bathrooms into the hallway and then into the living room, bedroom, kitchen, and dining room. They had to replace carpets, baseboards, doors, sheet rock, furniture, and their daughters' toys. This happened six times in four years. The sewage was above ankle-deep on at least one occasion.

¶17 The jury heard evidence that the sewage in the plaintiffs' home was caused by rainwater and clogs. Sewer manholes near their home were not sealed and the sewer lines had cracks. Storm water would flow into the manholes. Also, rainwater would seep through the ground into the lines. At the same time, the City's sewer lines were clogged with roots, grease, sludge, and accumulated waste and waste products. At the point where an inflow or infiltration of ground water reached an obstruction in the sewer lines, it would push sewage backward through the main on the Chartneys' street and into their home.

¶18 The public works director for the City of Choctaw stated that blockage by roots was one cause of the sewage backups. He also testified that the City's work on a pump might have contributed to one of the backups when 1400 gallons of water was introduced into the lines during a repair procedure. There was competent evidence that, if believed by the jury, would have supported its verdict for negligence based on the City's failure to adequately maintain its sewer system free from obstructions.

¶19 However, several witnesses affirmed that the escape of sewage violates rules and regulations of the DEQ. There was testimony that it is unlawful to discharge sewage any place that is not permitted by the Oklahoma Department of Environmental Quality. The City is required to report all bypasses [A bypass is an incident where sewage flows outside the system and onto the ground]. The Oklahoma DEQ gave the City notices of violations. A witness for the City agreed that he was aware of notices of violation for discharging pollutants in excess of permit and failure to complete permit requirements at the wastewater plant. He agreed that the wastewater plant is part of the sewage system.

¶20 Considering the significant amount of evidence that the City violated regulations of the DEQ, we cannot say that instructing the jury on negligence *per se* was harmless error. On the contrary, it is likely the jury was misled because evidence was admitted that violations of regulations prohibiting the escape of sewage culminated in a "consent order" directing the City to repair or replace its treatment plant at a cost of $10.2 million dollars. We hold the erroneous negligence *per se* instruction may have caused a miscarriage of justice and the judgment based on the verdict must be reversed.[3]

III.

The Tort Damages Cap Instruction

¶21 Appellant also urges that the trial court's inclusion of the OGTCA damages cap instruc-

tion constituted reversible error.[4] Instruction No. 25 stated:

> [i]f you find that the property damage claimed in this suit was directly caused by the negligence of Defendant, and not by any contributory negligence on the part of the Plaintiff, then you shall use the Blue Verdict Form-Negligence Claim form and find in favor of Plaintiff. If you so find, Plaintiff is entitled to recover the full amount of property damages which you may find Plaintiff has sustained as a result of the occurrence. Under Oklahoma law these damages are limited to $25,000.
>
> If you find for one or more Plaintiff's [*sic*] on their nuisance claim, then you shall use the Blue Verdict Form-Nuisance Claim. If you so find, Plaintiff is entitled to recover the reasonable amount necessary to compensate Plaintiff for the inconvenience, annoyance and discomfort suffered as a result of the nuisance. Under Oklahoma law these damages are limited to $125,000.00 per person.

¶22 Appellant argues on appeal Instruction No. 25 "impermissibly provided an estimate of the value of the case, and improperly provided guidelines as to the amount of damages to be awarded . . . ." Appellant also speculates that "had the jury not been instructed . . . a much lower dollar figure may have been awarded."

¶23 No authority is presented that requires reversal for instructing the jury of the damages limitation of the OGTCA. Furthermore, the record is devoid of any evidence that would demonstrate the City was prejudiced by the complained of damages cap limit instruction or that the jury was misled. Therefore, we find the trial court's instruction regarding the tort cap limits did not constitute reversible error. *See Johnson v. Ford Motor Co.*, 2002 OK 24, ¶16, 45 P.3d 86.

IV.

Evidence of Other Backups

¶24 The City claims the trial court's admission of evidence of other backups constitutes reversible error. It contends the Notice of Tort Claim limited the Plaintiffs to the single incident on October 13, 2014. The parties disagree about whether the Notice is included in the record on appeal. It is not.

¶25 Relying on *Grisham v. City of Oklahoma City*, 2017 OK 69, 404 P.3d 843, and *Kennedy v. City of Talihin*a, 2011 OK CIV APP 108, 265 P.3d 757, the City argues the language of the Notice was insufficient to put it on notice that the Plaintiffs would claim damages from incidents occurring after October 13, 2014.

¶26 An appellant has a burden to present a record on appeal that demonstrates the alleged error in the trial court's decision. *Boyle v. ASAP Energy, Inc.*, 2017 OK 82, ¶5, 408 P.3d 183. Any material incorporated by reference in the trial court must actually appear in an appellate record when that material is used to either support or attack the judgment or order that is the subject of the appeal. *Id.* We are unable to analyze the scope of the Notice because it is not in the record. Consequently, this proposition of error must be disregarded. *Hamid v. Sew Original*, 1982 OK 46, 645 P.2d 496.

¶27 In conclusion, we hold the verdict was tainted by the improper negligence *per se* instruction. The judgment based on that verdict is REVERSED and this case is REMANDED for further proceedings.

JOPLIN, P.J., and BUETTNER, J., concur.

BRIAN JACK GOREE, CHIEF JUDGE:

1. 20 O.S. §3001.1 provides:
> No judgment shall be set aside or new trial granted by any appellate court of this state in any case, civil or criminal, on the ground of misdirection of the jury or for error in any matter of pleading or procedure, unless it is the opinion of the reviewing court that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right.

2. The parties disagree about whether the error was preserved. At trial, Counsel for the City specifically stated "I object to the instruction on negligence *per se*. I don't believe it's appropriate under the Governmental Tort Claims Act involving sewer backups." This was sufficient to provide the trial court with an opportunity to correct an error in the instruction. *See Cantrell v. Henthorn*, 1981 OK 15, ¶4, 624 P.2d 1056. The error was preserved for review.

3. Because we reverse the judgment against the City we likewise reverse the award of attorney fees.

4. Appellees contend the City did not preserve error on this issue. At trial, the City argued the damages limit of Instruction No. 25 was not relevant to the jury's decision-making process. Appellees argue City waived review because the objection was for relevance and not that the instruction was prejudicial. We conclude that the objection was sufficient to preserve the error for appeal. *See Cantrell v. Henthorn,* 1981 OK 15, 624 P.2d 1056.

2019 OK CIV APP 27

SAGE NIKOLE SUNDERLAND, Petitioner/Appellee, vs. MICHAEL DAVID ZIMMERMAN, Defendant/Appellant.

Case No. 116,675. January 7, 2019

APPEAL FROM THE DISTRICT COURT OF WOODS COUNTY, OKLAHOMA

HONORABLE MICKEY HADWIGER,
TRIAL JUDGE

REVERSED AND REMANDED

Jarrod Heath Stevenson, STEVENSON LAW FIRM, P.L.L.C., Oklahoma City, Oklahoma, for Petitioner/Appellee,

Tyler L. Gentry, GUNGOLL, JACKSON, BOX, & DEVOLL, P.C., Enid, Oklahoma, for Defendant/Appellant.

Kenneth L. Buettner, Judge:

¶1 Defendant/Appellant Michael David Zimmerman (Mr. Zimmerman) appeals the entry of a protective order against him. Petitioner/Appellee Sage Nikole Sunderland (Ms. Sunderland), the ex-girlfriend of Mr. Zimmerman, sought the protective order after their tumultuous relationship came to an end. After denying Mr. Zimmerman the opportunity to conduct discovery prior to the final hearing, the trial court granted the final protective order against him. We hold that the trial court abused its discretion by disallowing Mr. Zimmerman the opportunity to conduct discovery in accordance with the Oklahoma Discovery Code. We therefore reverse and remand with instructions to allow discovery.

¶2 Mr. Zimmerman, a resident of Alva, and Ms. Sunderland, a resident of Stillwater, met in Alva during the summer of 2017 and began a romantic relationship. When Ms. Sunderland's college classes resumed in the fall of 2017, the relationship became long-distance and the two traveled between Stillwater and Alva in order to see one another. According to the record, Mr. Zimmerman and Ms. Sunderland's relationship was fraught with jealousy and discord for nearly the entire duration.

¶3 While dating, Mr. Zimmerman and Ms. Sunderland agreed to "share" their GPS location with one another on a continuous basis. The couple also maintained an "open phone policy," where both parties would regularly inspect the social media interactions of the other by looking through the contents of each other's cellular phones. These "inspections" would result in disagreements between Mr. Zimmerman and Ms. Sunderland, during which jealous behavior and a lack of emotional restraint were often exhibited. Name-calling, use of foul language, and threats of breaking off the relationship were characteristic of these arguments.

¶4 Despite the recurrent tension between the couple, the relationship continued into late fall of that year. The disagreements eventually culminated in a final series of heated interactions on November 6, 2017. The evidence presented at trial indicates that on November 6, Ms. Sunderland became angry when Mr. Zimmerman abruptly ceased communications with her. Late that night, Ms. Sunderland drove from her place of residence in Stillwater to Mr. Zimmerman's home in Alva. En route, Ms. Sunderland continued to attempt to contact Mr. Zimmerman, indicating a state of extreme emotional distress. Upon her arrival in Alva, Ms. Sunderland learned that Mr. Zimmerman was not at his home, but was actually at the home of his ex-wife, along with his minor children. Further angered by this fact, Ms. Sunderland entered Mr. Zimmerman's house without his permission and proceeded to ransack his home.

¶5 Following this incident, around 1:00 A.M. on November 7, Ms. Sunderland contacted her parents and disclosed to them the volatile nature of her relationship with Mr. Zimmerman. Her parents consequently advised her to file a protective order against Mr. Zimmerman. Ms. Sunderland agreed and filed a Petition for Protective Order that morning. After an *ex parte* hearing, an Emergency Order of Protection was issued that same day, November 7, 2017. A full hearing on the Petition was set for November 15, 2017.

¶6 Both parties appeared with counsel at the November 15 hearing. Mr. Zimmerman requested a continuance, which the trial court granted and set the final hearing for December 8, 2017. Mr. Zimmerman submitted discovery requests to Ms. Sunderland on November 21, 2017, but she refused to respond to the requests. On November 28, 2017, Mr. Zimmerman filed a Motion to Shorten Time to Respond to Discovery, or, in the Alternative, Motion for Continuance. A telephonic hearing on the Motion was conducted December 5, 2017, in which the trial court denied the Motion. Mr. Zimmerman's Motion to Reconsider Ruling of December 5, 2017, was similarly denied, and Mr. Zimmerman did not receive discovery prior to the December 8, 2017 hearing.

¶7 At the December 8 hearing, Ms. Sunderland presented her own testimony, as well as text messages, pictures, and audio recordings of conversations with Mr. Zimmerman. Counsel for Mr. Zimmerman objected to the admission of the visual and audio evidence, stating

Ms. Sunderland had failed to provide the evidence in response to discovery requests. Mr. Zimmerman also presented his own testimony, pictures, text messages, and an attempted partial transcription of an audio recording presented by Ms. Sunderland. Following the hearing, the trial court entered a five-year final Order of Protection against Mr. Zimmerman, which included the requirement that Mr. Zimmerman attend a 52-week batterer prevention program. Ms. Sunderland was also awarded attorney fees in the amount of $6,780.

¶8 Mr. Zimmerman now appeals from the trial court's issuance of the final Order of Protection and award of attorney fees. On appeal, Mr. Zimmerman argues (1) that the trial court abused its discretion by denying him the opportunity to conduct discovery, and (2) that the trial court's issuance of the five-year final protective order was not supported by the evidence.

¶9 Protective orders granted to victims of domestic abuse, stalking, or harassment are governed by the Protection from Domestic Abuse Act (the Act). 22 O.S. Supp. 2013 § 60.2. Proceedings under the Act are reviewed for abuse of discretion. *Curry v. Streater,* 2009 OK 5, ¶ 8, 213 P.3d 550. Under an abuse of discretion standard, an appellate court should examine the record on appeal and reverse only if the trial court's decision was clearly against the weight of the evidence or contrary to a governing principle of law. *Id.*

¶10 The first issue on appeal is whether the trial court abused its discretion by not allowing Mr. Zimmerman to conduct discovery prior to the final hearing. "The Oklahoma Discovery Code shall govern the procedures for discovery in all suits of a civil nature in all courts in this state." 12 O.S. 2011 § 3224. This Court has previously established that the remedy of a protective order afforded by the Protection from Domestic Abuse Act is civil in nature. *Marquette v. Marquette*, 1984 OK CIV APP 25, ¶ 10, 686 P.2d 990. It logically follows that discovery procedures applicable to all other civil proceedings should also apply to proceedings under the Act.

¶11 The Act provides: "Within fourteen (14) days of filing of the petition for a protective order, the court shall schedule a full hearing on the petition . . . ." 22 O.S. § 60.4(B)(1) (emphasis added). Ms. Sunderland asserts that this provision requires that a petition for a protective order under the Act be fully disposed of within 14 days. As described below, there is a distinction between a full hearing and a final hearing.

¶12 After a full hearing held within 14 days of the filing of the petition for a protective order, the trial court has three options: (1) grant the order, (2) deny the order, or (3) hold further hearings on the petition in order to make a final ruling. In the last instance, the trial court has discretion to issue or continue an emergency temporary order. *See* 22 O.S. § 60.4(B)(6). A grant or denial of the final order must be made within six months of service on the defendant, or else the petitioner has the right to request a final hearing at any point beyond the six months. *Id.*

¶13 Oklahoma case law provides several examples in which proceedings for a protective order under the Act extended well beyond 14 days. In *Marquette v. Marquette*, the petition was filed October 13, but a final hearing was not conducted until November 19 (37 days later). 1984 OK CIV APP 25, ¶¶ 2, 3. Though at least one continuance in Marquette was by agreement of the parties, the reasons for the other continuances were not specifically mentioned in the appellate opinion. *Id.* ¶ 3. In *Curry v. Streater*, more than two months elapsed between the filing of the petition and the final hearing, though the continuance was by agreement of the parties. 2009 OK 5, ¶ 4, 213 P.3d 550. And in *Phillips v. Williams*, the final hearing began ten months after the petition was filed and concluded approximately five months later. 2010 OK CIV APP 98, ¶¶ 2, 3, 241 P.3d 696. In *Phillips*, several continuances were allowed by the trial court even before the issuance of the emergency protective order, at least one of which was to allow for discovery. *Id.* ¶ 3 n.1.

¶14 The trial court in this case appeared to understand the distinction between a full and final hearing. Here, Ms. Sunderland filed her petition November 7, 2017. With an emergency protective order issued following an *ex parte* hearing on November 7, the trial court then conducted a full hearing – with both parties present with counsel – on November 15, 2017 (within 14 days of filing). Upon hearing Mr. Zimmerman's motion for a continuance, however, the court set the matter for a final hearing on December 8, 2017 (one month after the filing of the petition). This continuance was not by the consent of the parties, but was a discretionary ruling made by the court in spite of Ms. Sunderland's objection.

¶15 "It is reasonable to assume the passage of the [Protection from Domestic Abuse] Act [was] a result of increased public awareness regarding the serious nature of domestic violence." *Marquette*, 1984 OK CIV APP 25, ¶ 9. In passing the Act, "[t]he Legislature . . . attempted to remedy [the problem of domestic violence] by providing immediate, as well as long-range, protection for the victims of domestic abuse." *Id.* Yet, the Legislature acknowledged that it could not legislate undue burdens on defendants' due process rights. In so recognizing, the Legislature included certain procedural safeguards, such as requiring service upon the defendant prior to a full hearing on the petition and placing a six-month limitation on a temporary order once the defendant has been served, absent an agreement of the parties. 22 O.S. § 60.4. This preservation of parties' procedural rights is furthered by applying the Discovery Code in proceedings for protective orders under the Act, although discovery may be unnecessary in a large majority of cases, and may be restricted in accordance with 12 O.S. §3226.

¶16 Rule 1 of the Oklahoma Discovery Code states, "The Discovery Code shall be construed, administered and employed by courts and parties to secure the just, speedy and inexpensive determination of every action." 12 O.S. 2011 § 3225. In *State ex rel. Protective Health Servs. v. Billings Fairchild Ctr., Inc.*, the Court of Civil Appeals recognized that one purpose of the Discovery Code is to allow "parties to obtain the fullest possible knowledge of the issues and facts before trial." 2007 OK CIV APP 24, ¶ 17, 158 P.3d 484 (citing *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1346 (5th Cir. 1978)). Quoting the Fifth Circuit, the court explained: "The aim of these liberal discovery rules is to make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *Id.*

¶17 Civil proceedings in Oklahoma courts are governed by the Oklahoma Discovery Code. The only exception to this principle is where the Legislature has explicitly exempted a certain type of special proceeding from the scope of the Code. See The Small Claims Procedure Act, 12 O.S. 2011 § 1760. Where the Protection from Domestic Abuse Act mentions no such exemption from the Code, parties in proceedings for protective orders under the Act are entitled to the procedures governed by the Oklahoma Discovery Code. A trial court overseeing discovery in protective order proceedings should keep in mind the intent and purposes behind both the Discovery Code and the Act, including the speedy and inexpensive disposition of legal actions, the protection of victims of domestic abuse, and the due process interests of all civil litigants.

¶18 Here, the trial court improperly determined that the Discovery Code did not apply to a proceeding for a protective order under the Protection from Domestic Abuse Act. In so doing, the trial court allowed Ms. Sunderland to "cherry-pick" favorable evidence from various records and otherwise omit unfavorable details. Had discovery been permitted, the trial court could have ensured a more complete and accurate record. Additionally, concerns for Ms. Sunderland's safety could have been quelled by the extension of the emergency temporary protective order. Considerations of expediency could have been accommodated by limiting the scope or timing of discovery pursuant to title 12 O.S. § 3226.

¶19 The trial court's holding that the Discovery Code did not apply to proceedings for protective orders under the Protection from Domestic Abuse Act was contrary to governing principles of law and was therefore an abuse of discretion. Additionally, because discovery in this case was cut short – or more accurately, nonexistent – we find it inappropriate to rule upon the sufficiency of the evidence as it supports the trial court's grant of a final protective order. We therefore reverse the final order of protection granted by the trial court and remand with instructions to allow the parties the opportunity to conduct discovery according to the Oklahoma Discovery Code.

¶20 REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

GOREE, C.J., and JOPLIN, P.J. concur.

2019 OK CIV APP 28

ADVANCED RESOURCE SOLUTIONS, LLC, an Arizona limited liability company, Plaintiff/Appellant, vs. STAVA BUILDING CORPORATION, an Oklahoma corporation and MID-CONTINENT CASUALTY COMPANY, Defendants/Third-Party Plaintiffs/Appellees, vs. MCDERMOTT ELECTRIC, LLC, an Oklahoma limited liability company, Third-Party Defendant.

Case No. 116,979. April 15, 2019

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE DON ANDREWS, TRIAL JUDGE

AFFIRMED

Ronald R. Tracy, RESOLUTION LEGAL GROUP, Oklahoma City, Oklahoma, for Plaintiff/Appellant

Craig M. Regens, GABLEGOTWALS, Oklahoma City, Oklahoma, for Defendants/Third-Plaintiffs/Appellees

JERRY L. GOODMAN, JUDGE:

¶1 Advanced Resource Solutions, LLC (ARS) appeals an April 3, 2018, order granting summary judgment to Stava Building Corporation (Stava) and Mid-Continent Casualty Company (Mid-Continent). Based on our review of the record and applicable law, we affirm the order under review.

BACKGROUND

¶2 ARS is a temporary staffing company. On January 15, 2014, ARS and McDermott Electric, LLC (McDermott) entered into a contract for ARS to provide it with temporary laborers, such as licensed apprentice and journeymen electricians, for use on various commercial construction projects. McDermott used these laborers on a Luther-Walmart project (Walmart Project). Stava was the general contractor for the Walmart Project and McDermott was Stava's electrical subcontractor.

¶3 On March 29, 2016, ARS filed a petition, asserting it had provided McDermott with laborers for commercial construction on an open account from January of 2015 through June 4, 2015, that it had invoiced McDermott for the labor in the amount of $115,706.50, and that McDermott had failed to pay for the services. To secure payment, ARS executed and filed with the Oklahoma County Clerk a Mechanic and Materialman's Lien Statement on August 13, 2015, pursuant to 42 O.S.2011 and Supp. 2013, § 143 (ARS Lien). On January 19, 2016, Stava posted a Bond to Discharge Mechanic's Lien, No. 1014148, with Mid-Continent as surety.

¶4 Stava and Mid-Continent answered, generally denying the allegations. Stava and Mid-Continent further filed a third-party petition against McDermott, seeking an accounting.[1]

¶5 ARS filed a motion for summary judgment on July 25, 2017, asserting that as a temporary staffing company it was entitled to recover from the lien discharge bond as it was a supplier of labor. Thus, it was a proper lien claimant pursuant to Oklahoma's lien statutes. *See generally*, 42 O.S.2011, § 141 *et seq*. Stava responded, disputing ARS's assertion. Stava asserted that to come within the scope of the mechanics's lien statute, ARS must have "performed labor."[2] See 42 O.S.2011 and Supp. 2013, § 143.

¶6 On January 24, 2018, Stava filed a motion for summary judgment, asserting ARS was a professional employer organization (PEO) and did not "perform labor" as required under the lien statutes. Therefore, ARS, a supplier or provider of labor, was not within the class of persons entitled to assert a mechanics's lien in Oklahoma. ARS disagreed, asserting it was not a PEO but rather a temporary staffing company, as it was the direct employer of the licensed journeymen and apprentice electricians that worked on the Walmart Project. Thus, it was the employer that furnished labor within the meaning of the lien statutes and therefore a proper lien claimant.

¶7 By order entered on April 3, 2018, the trial court found that ARS was not within the class of persons entitled to claim a mechanic's lien under the Oklahoma statutes. Accordingly, the court granted Stava's motion for summary judgment and denied ARS's motion for summary judgment.[3] ARS appeals.

STANDARD OF REVIEW

¶8 An appeal from an order granting summary judgment is subject to *de novo* review. *Shull v. Reid*, 2011 OK 72, ¶ 3, 258 P.3d 521, 523. "In its re-examination of the trial tribunal's legal rulings an appellate court exercises plenary, independent and nondeferential authority." *Bronson Trailers & Trucks v. Newman*, 2006 OK 46, ¶ 5, 139 P.3d 885, 899.

¶9 Summary judgment is properly granted "when the pleadings, affidavits, depositions, admissions or other evidentiary materials establish that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Davis v. Leitner,* 1989 OK 146, ¶ 9, 782 P.2d 924, 926. When reviewing a grant of summary judgment, we must view all conclusions and inferences to be drawn from the evidentiary materials in a light

most favorable to the party who opposes the motion. *Id.*

¶10 The dispositive legal issue in this case requires the interpretation of 42 O.S. § 143. Legal issues involving statutory interpretation are also questions of law, subject to *de novo* review. *Raymond v. Taylor,* 2017 OK 80, ¶ 9, 412 P.3d 1141, 1143-44 (citing *Head v. McCracken,* 2004 OK 84, ¶ 4, 102 P.3d 670, 674; *Fulsom v. Fulsom*, 2003 OK 96, ¶ 2, 81 P.3d 652, 654). "[S]tatutes are construed to determine legislative intent in light of the general policy and purpose that underlie them." *Troxell v. Okla. Dep't of Human Servs.*, 2013 OK 100, ¶ 4, 318 P.3d 206, 209.

ANALYSIS

¶11 In Oklahoma, statutory provisions for mechanic's and materialmen's liens are codified at 42 O.S.2011, § 141 *et seq*. Because these liens are created by statute, they exist in derogation of the common law and are strictly construed. *Jones v. Purcell Investments, LLC*, 2010 OK CIV APP 15, ¶ 6, 231 P.3d 706, 710 (citing *Riffe Petroleum Co. v. Great Nat. Corp., Inc.*, 1980 OK 112, ¶ 5, 614 P.2d 576, 579). However, once a mechanic's or materialmen's lien is found to exist, it will be liberally enforced. *Id.* "The purpose of the mechanic's & materialmen's lien statute is to protect materialmen and laborers, to secure payment of claims, and to give notice to the owners and to third parties of the intent to claim a lien for a definite amount. The recording requirement also protects innocent purchasers." *Jones*, at ¶ 6, at 710 (quoting *Davidson Oil Country Supply Co., Inc. v. Pioneer Oil & Gas Equipment,* 1984 OK 65, ¶ 6, 689 P.2d 1279, 1280-1281).

¶12 On appeal, ARS contends the trial court erred by holding it was not within the class of persons entitled to claim a mechanic's lien under Oklahoma Statutes. ARS contends it is a proper lien claimant under § 143, as it supplied labor for the Walmart Project. Stava disagrees, asserting ARS did not perform labor as required under § 143.

¶13 Title 42 O.S.2011 and Supp. 2013, § 143 provides, in pertinent part:

> Any person who shall furnish any such material or lease or rent equipment used on said land or perform such labor as a subcontractor, or as an artisan or day laborer in the employ of the contractor, may obtain a lien upon such land, . . . from the same time, in the same manner, and to the same extent as the original contractor, for the amount due for such material, equipment and labor. . . .

¶14 Oklahoma has not addressed whether a temporary staffing company, which supplies skilled workers to a subcontractor, is within the class of claimants who may file a claim under § 143. The goal of statutory interpretation is to follow the intent of the Legislature. *TRW/Reda Pump v. Brewington,* 1992 OK 31, ¶ 5, 829 P.2d 15, 20. We ascertain that intent from the legislative act in light of its general purpose and object. *City of Bethany v. Public Employees Relations Bd.*, 1995 OK 99, ¶ 8, 904 P.2d 604, 609. If a statute is plain and unambiguous, no judicial construction is necessary; it is only when the intent cannot be ascertained from the text that rules of statutory construction are invoked. *Yocum v. Greenbriar Nursing Home*, 2005 OK 27, ¶ 9, 130 P.3d 213, 219. If possible, we construe the various provisions as a harmonious whole. *City of Tulsa v. Smittle*, 1985 OK 37, ¶ 12, 702 P.2d 367, 370.

¶15 In relevant part, § 143 provides that "[a]ny person who . . . perform[s] such labor as a subcontractor" is a proper lien claimant under the statute. While ARS furnished labor to McDermott, the Court finds ARS has not performed labor as a subcontractor and therefore fails to qualify as a proper lien claimant under § 143.

¶16 The court in *Better Fin. Solutions v. Caicos Corp.*, 73 P.3d 424 (Wash.Ct.App. 2003), discussed the distinction between performing and furnishing labor. In *Caicos*, Caicos was awarded a construction contract. Caicos subcontracted the project's concrete work with MK Construction. MK entered into an agreement with Better Financial Solutions (BFS), a temporary labor provider. The BFS-MK agreement left control over the laborers' work to MK. BFS did, however, pay the laborers' wages, taxes and insurance, for which it received a 20% markup above these costs. BFS subsequently brought a claim against Caicos when it did not receive full payment. The trial court determined BFS was a subcontractor and thus a proper lien claimant under the state's statutory scheme.

¶17 On appeal, the appellate court reversed. The court rejected BFS's assertion it was a proper claimant under the state statutes because it furnished labor for the project.[4] The court drew a distinction between persons who actually perform labor or who supply provisions and supplies for performing labor with a

person who furnishes individuals who then labor. "A person who furnishes individuals who will then actually labor does no act to bring himself within the protected class." *Id.* at 427. The court held BFS was not a proper claimant under the Washington lien statutes.

¶18 In the present case, under the contractor statute, § 141, any person who performs labor or furnishes labor, materials, or equipment under a contract to make improvements to real property shall have a lien on the real property for the value of that labor, materials, or equipment. However, under the subcontractor statute, § 143, the Legislature choose to limit potential lien claimants to those who actually perform labor or furnish materials or equipment. The Legislature did not include those who furnish labor. ARS merely furnished labor, licensed apprentice and journeymen electricians to McDermott, who then actually labored. Furnishing labor is not the same as performing labor.

¶19 We further find ARS is not a subcontractor under § 143. The statutory provisions for mechanic's and materialmen's liens do not define "subcontractor." In *Welling v. Am. Roofing & Sheet Metal Co.*, 1980 OK 131, ¶ 4, 617 P.2d 206, 208, the Oklahoma Supreme Court defined "a sub-contractor [as] one who has entered into a contract, express or implied, for the performance of an act with a person who has already contracted for its performance." (Citations omitted).

¶20 In *Onsite Engineering & Mgmt., Inc. v. Illinois Tool Works, Inc.*, 744 N.E.2d 928 (Ill. App. Ct. 2001), the court addressed an analogous situation. Onsite Engineering & Mgmt., Inc. (Onsite), a temporary staffing provider, contracted with Smith Technology Corp. (Smith) to provide contract employees. The contract did not refer to type of work, project, or location of projects. Smith contracted with a general contractor, QST, to perform work on an Illinois project.

¶21 Onsite subsequently filed suit seeking, *inter alia*, to foreclose on a mechanic's lien after Smith failed to pay for its services. The defendants sought dismissal of this claim, asserting Onsite was not a subcontractor or secondary subcontractor entitled to a lien under the mechanic's lien act. The trial court granted the defendants' motion.

¶22 On appeal, Onsite asserted it was a proper lien claimant as it was a subcontractor or secondary subcontractor who furnished labor to Smith.[5] The defendants disagreed, asserting Onsite was not a subcontractor because the contract between Onsite and Smith was not a contract or subcontract specifically related to the Illinois project.

¶23 In rejecting Onsite's assertion that it was a subcontractor, the court relied on *Skillstaff of Colorado, Inc. v. Centex Real Estate Corp.*, 973 P.2d 674 (Colo. Ct. App. 1998). In *Skillstaff*, a temporary staffing provider, who had supplied laborers to a subcontractor, filed suit seeking to foreclosure on its mechanic's lien. Although the state's statute provided "furnish or supplies labor . . . or . . . performing labor," the court held the agency was not an entity which could assert a mechanic's lien. The court distinguished between "those who furnish labor pursuant to a contract to do 'some particular part of the work' and those who merely furnish labor for the benefit of the contractor." Onsite, at 932 (quoting *Skillstaff*, at 676 (quoting *Kern v. Guiry Brothers Wall Paper Co.*, 153 P. 87 (Co. 1915)). "Thus, those individuals who physically provide labor in the construction of a building may assert mechanics' liens, while those who provide laborers to a subcontractor without assuming any responsibility for performing the work on the project may not." *Onsite*, at 932, (quoting Skillstaff, at 676).

¶24 The court ultimately agreed with the defendants, finding the issue to be the relationship between Onsite and Smith. The court noted a subcontractor is "[o]ne who has entered into a contract, express or implied, for the performance of an act with the person who has already contracted for its performance." *Id.* at 932 (citations omitted). Like the temporary agency in *Skillstaff*, the court stated that while Onsite furnished labor to Smith, it did not do so pursuant to a specific sub-let of Smith's contractual obligations to QST. Rather, Onsite and Smith's contract was silent regarding the Illinois project. Thus, Onsite had no contractual obligation to perform any work for this particular project. *Id.*

> In order for Onsite to be able to claim a lien against the property at issue here, it would have had to contractually obligate itself to perform a portion of the work which Smith contracted with QST to perform on the Lincolnwood Project. However, it did not and thus is not a subcontractor or secondary subcontractor within the meaning of the Mechanics Lien Act.

Id.

¶25 The Court finds the analysis from *Onsite* persuasive. In the present case, the record provides ARS entered into a contract with McDermott to provide it with temporary laborers, *i.e.*, licensed apprentice and journeymen electricians, for use on its various commercial construction projects. The contract does not refer to a particular project. Rather, ARS is supplying McDermott with laborers on an open account. Thus, ARS has not entered into a contract to perform any act with regard to the Walmart Project. Accordingly, ARS is not a subcontractor under § 143 and is not a proper lien claimant under the state statutes.

¶26 The April 3, 2018, order granting Stava and McDermott summary judgment is therefore affirmed.

¶27 **AFFIRMED**.

THORNBRUGH, J., and RAPP, J. (sitting by designation), concur.

JERRY L. GOODMAN, JUDGE:

1. By order entered on February 6, 2019, the accounting claim was dismissed with prejudice.

2. Stava generally asserted ARS must have performed labor, furnished material, or leased or rented equipment to come within the scope of the statute, citing § 143.

3. The order further provides that, "The Parties stipulate that this decision should apply with equal force to [Mid-Continent], such that Mid-Continent is entitled to summary judgment against ARS for the same reasons Stava is entitled to summary judgment against ARS."

4. "The bond statute for contractors on public works projects, RCW 39.08.010, requires that the contractor 'pay all laborers, mechanics, and subcontractors and materialmen, and all persons who supply such person or persons, or subcontractors, with provisions and supplies for the carrying on of such work.' The retainage statute, RCW 60.28.011, confers a lien in favor of '[e]very person performing labor or furnishing supplies toward the completion of a public improvement contract' against the contractor's retainage bond or the public body's retained amount. RCW 60.28.011(2). Under the retainage statute, a '[p]erson' is 'a person or persons, mechanic, subcontractor, or material-person who performs labor or provides materials for a public improvement contract, and any other person who supplies the person with provisions or supplies for the carrying on of a public improvement contract.' RCW 60.28.011(12)(b)." Caicos, 73 P.3d at 426.

5. The relevant statutes provide:

> "'Subject to the provisions of Section 5, every mechanic, worker or other person who shall . . . furnish or perform services or labor for the contractor, . . . shall be known under this Act as a subcontractor, and shall have a lien for the value thereof, ...' 770 ILCS 60/21 (West 1996)." (Emphasis added).
>
> "When the contractor shall sub-let his contract or a specific portion thereof to a sub-contractor, the party furnishing material to or performing labor for such sub-contractor shall have a lien therefor; and may enforce his lien in the same manner as is herein provided for the enforcement of liens by sub-contractors. 770 ILCS 60/22 (West 1996)."

Onsite Eng'g & Mgmt., Inc, 744 N.E.2d at 931.

Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS
Thursday, May 9, 2019

F-2017-1074 — Appellant, Christopher Brown, was charged in Muskogee County District Court Case No. CM 2015-149 with Count 1 – Driving a Motor Vehicle While Under the Influence of Drugs, a misdemeanor, and Count 2 – Possession of Controlled Dangerous Substance, a misdemeanor. In Muskogee County District Court Case No. CF-2015-802 Appellant was charged with First Degree Burglary, a felony. And, in Muskogee County District Court Case No. CF-2016-184, Appellant was charged with Count 1 – Possession of Stolen Vehicle, a felony, Count 2 – Driving with License Cancelled/Suspended/Revoked, a misdemeanor, and Count 3 – Failure to Stop at Red Light, a misdemeanor. Appellant entered pleas of guilty in all three cases on September 13, 2017, and entered the 15th Judicial District Drug Court Program. The State filed an application to terminate Appellant from Drug Court in each case on October 3, 2017. Following a hearing on the State's application on October 16, 2017, the Honorable Robin Adair, Special Judge, sustained the State's application in each case and terminated Appellant from the Drug Court Program. In Case No. CM-2015-149 Appellant was sentenced to one year in the Muskogee County Jail. This sentence was ordered to run concurrent with Case Nos. CF-2015-802 and CF-2016-184. In Case No. CF-2016-184 Appellant was sentenced to five years imprisonment on Count 1 and one year in the Muskogee County Jail on Count 2. He was fined $1,000.00 on Count 1, $100.00 on Count 2 and $50.00 on Count 3. All counts were ordered to run concurrent and to run consecutive with CF-2015-802. In Case No. CF-2015-802 Appellant was sentenced to seven years imprisonment and fined $1,000.00. Case No. CF-2015-802 was ordered to run consecutive with CF-2016-184 and concurrent with CM-2015-149. Appellant appeals from his termination from Drug Court. Appellant's termination from Drug Court is AFFIRMED. Opinion by: Kuehn, V.P.J.; Lewis, P.J., concur; Lumpkin, J., concur; Hudson, J., concur; Rowland, J., concur.

F-2018-104 — Dameon Tyrese Lundy, Appellant, was tried by jury for the crime of Possession of a Controlled Drug with Intent to Distribute, After Conviction of Two or More Felonies in Case No. F-2018-104 in the District Court of Tulsa County. The jury returned a verdict of guilty and recommended as punishment 60 years imprisonment and a fine of $2,987. The trial court sentenced accordingly. From this judgment and sentence Dameon Tyrese Lundy has perfected his appeal. AFFIRMED. Opinion by: Kuehn, V.P.J.; Lewis, P.J., concur; Lumpkin, J., concur; Hudson, J., concur; Rowland, J., concur.

F-2017-825 — Ryan Paul Farr, Appellant, was tried by jury in Case No. CF-2016-736, in the District Court of Carter County, of Count 1: Burglary in the Second Degree, After Two or More Previous Convictions and Count 2: Felonious Possession of a Firearm, After Two or More Previous Convictions. The jury returned a verdict of guilty and recommended as punishment twenty-five years on Count 1 and fifteen years on Count 2. The Honorable Thomas K. Baldwin, Associate District Judge, sentenced accordingly ordering sentences to run consecutively and ordered credit for time served. From this judgment and sentence Ryan Paul Farr has perfected his appeal. AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs in Results; Lumpkin, J., Concurs; Rowland, J., Concurs.

F-2017-444 — James Edward Haskin, Jr., Appellant, was tried by jury, in Case No. CF-2011-388, in the District Court of LeFlore County, of nine counts of Child Neglect (Counts 1-9) and three counts of Child Sexual Abuse (Counts 10-12). The jury returned a verdict of guilty and recommended as punishment ten years each imprisonment on Counts 1-9; fifty years imprisonment on Count 10; sixty years imprisonment on Count 11; and forty-five years imprisonment on Count 12. The Honorable Jonathan K. Sullivan, District Judge, sentenced Appellant accordingly ordering all twelve sentences to run consecutively and imposed various costs and fees. From this judgment and sentence, James Edward Haskin, Jr., has perfected his appeal. AFFIRMED. Opinion by:

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

C-2018-372 — Lavonte Antonio Johnson, Petitioner, pled guilty to using a vehicle to facilitate the intentional discharge of a firearm in Case No. CF-2014-2033 in the District Court of Oklahoma County. The Honorable Susan K. Johnson, Special Judge, accepted the plea and deferred judgment for five years subject to the rules and conditions of probation. The State later moved to accelerate the judgment alleging Petitioner violated the rules and conditions of probation by possessing a firearm and jumping bail. The Honorable Ray C. Elliott, District Judge accelerated judgment and sentenced Petitioner to twenty-seven years imprisonment. Petitioner filed a motion to withdraw his guilty plea which the trial court denied. Petitioner now seeks the writ of certiorari. The Petition for Writ of Certiorari is DENIED. The judgment and sentence is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs; Rowland, J., concurs.

Thursday, May 16, 2019

F-2017-1098 — Rodger Dale Stevens, Appellant, was tried by jury for the crime of Performing a Lewd Act in the Presence of a Minor, After Former Conviction of Two or More Felonies, in Case No. BCF-2016-412 in the District Court of Creek County. The jury returned a verdict of guilty and set punishment at life imprisonment. The trial court sentenced accordingly. From this judgment and sentence Rodger Dale Stevens has perfected his appeal. AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs.

F-2017-1247 — Appellant Michael Wesley Watters entered negotiated pleas of no contest on August 29, 2016, in Noble County District Court Case No. CF-2015-84, to Child Abuse by Injury (Count 1) and Misdemeanor Domestic Assault and Battery in the Presence of a Minor (Count 2). The Honorable Lee Turner, Special Judge, accepted Watters' pleas and entered deferred judgments against him for five years on Count 1 and one year for Count 2. On February 6, 2017, the State filed a motion to accelerate Watters' deferred judgments. Following a hearing on October 2, 2017, Judge Turner accelerated Appellant's deferred sentences and sentenced him to twenty years imprisonment with the last ten years suspended and a $100.00 fine plus costs and fees for Count 1 and to one year in the Noble County Detention Center for Count 2. Judge Turner ordered the sentences to be served concurrently. Watters appeals from the acceleration of his deferred sentences. The order of acceleration is AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs.

M-2018-0277 — Appellant, Vladimir Mokienko, was convicted following a non-jury trial in the District Court of Texas County, Case No. TR-2017-2685, of Speeding. The Honorable A. Clark Jett, Associate District Judge, fined Appellant $10.00. Appellant appeals from the Judgment and Sentence imposed. Judgment and Sentence AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J.: concur; Lumpkin, J.: concur; Hudson, J.: concur; Rowland, J.: concur.

C-2018-943 — Petitioner Jessie Lee Burrola, Jr. entered a blind plea of guilty in the District Court of Marshall County, Case No. CF-2018-53, to Assault and Battery with a Dangerous Weapon, After Former Conviction of Six Felonies. The Honorable Gregory L. Johnson, Associate District Judge, accepted Burrola's guilty plea and delayed sentencing pending Burrola's completion of a drug rehabilitation program. Burrola failed to complete the program and moved to withdraw his plea prior to being sentenced. Judge Johnson denied the motion. Judge Johnson sentenced Burrola to ten years imprisonment, awarded credit for time served, assessed costs and ordered nine months of post-imprisonment supervision. Burrola timely filed a motion to withdraw his plea that Judge Johnson heard and denied. Burrola appeals the denial of that motion. Petition for a Writ of Certiorari is DENIED. The district court's denial of Petitioner's motion to withdraw plea is AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs in results; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs.

F-2018-103 — David Wayne Ellis, Appellant, was tried by jury for the crime of first degree murder and convicted of the lesser offense of manslaughter in the first degree, heat of passion, after former conviction of two or more felonies, in Case No. CF-2016-5175 in the District Court of Tulsa County. The jury set punishment at life imprisonment. The trial court sentenced accordingly allowing credit for time served. From this judgment and sentence

David Wayne Ellis has perfected his appeal. The Judgment and Sentence is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs; Rowland, J., concurs.

F-2018-418 — Ebrima Tamba, Appellant, was tried by jury for the crime of Trafficking in Illegal Drugs in Case No. CF-2016-43 in the District Court of Caddo County. The jury returned a verdict of guilty and set punishment at twenty years imprisonment. The trial court sentenced accordingly. From this judgment and sentence Ebrima Tamba has perfected his appeal. AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs.

F**-2018-112** — Christopher Lewis Whinery, Appellant, was tried without a jury and found guilty of first degree murder in Case No. CF-2015-30 in the District Court of Creek County. The Honorable Douglas W. Golden, District Judge, sentenced him to life imprisonment and a $500.00 fine. From this judgment and sentence Christopher Lewis Whinery has perfected his appeal. The Judgment and Sentence is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs; Rowland, J., concurs.

F**-2018-359** — Antonio Tiwan Taylor, Appellant, was tried by jury for the crimes of Count 1 and 2 - Robbery with a Firearm, Count 5 - Conspiracy to Commit a Felony and Count 8 - Felon in Possession of a Firearm, all After Conviction of Two or More Felonies in Case No. CF-2016-4761 in the District Court of Oklahoma County. The jury returned a verdict of guilty and recommended as punishment 30 years imprisonment on Counts 1 and 2, 10 years on Count 5 and 10 years on Count 8. The trial court sentenced accordingly and ordered all terms to be served consecutively. From this judgment and sentence Antonio Tiwan Taylor has perfected his appeal. AFFIRMED. Opinmion by: Kuehn, V.P.J.; Lewis, P.J., concur; Lumpkin, J., concur in results; Hudson, J., concur; Rowland, J., recuse.

F**-2018-289** — Appellant Anthony Douglass Crisel, Jr., was tried by jury and convicted of Lewd or Indecent Acts with a Child (21 O.S. Supp.2010, § 1123(A)(2)) in the District Court of Comanche County, Case No. CF-2016-514. The jury recommended as punishment six (6) years in prison and the trial court sentenced accordingly. From this judgment and sentence Anthony Douglass Crisel, Jr. has perfected his appeal. The Judgment and Sentence is AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur; Hudson, J., Concur; Rowland, J., Concur.

RE**-2018-208** — On February 26, 2016, Appellant Desmond Zhumonsha Smith entered a plea of nolo contendere to Possession of a Controlled Dangerous Substance (Count 1), and Falsely Personate Another to Create Liability (Count 2), in Case No. CF-2015-498 in the District Court of Garvin County. Appellant was convicted and sentenced by the Honorable Leah Edwards, District Judge, to 20 years imprisonment on each count, with all 20 years suspended. On October 30, 2017, the State filed a 2nd Amended Motion to Revoke Suspended Sentence. Following a revocation hearing, Judge Edwards revoked ten years of Appellant's remaining suspended sentence. The revocation is AFFIRMED. Opinion by: Kuehn, V.P.J.; Lewis, P.J., concur; Lumpkin, J., concur; Hudson, J., concur; Rowland, J., concur in results.

RE**-2018-249** — On February 2, 2005, Appellant Cameron Cleo Givens entered a plea of guilty to four counts of Rape in the Second Degree, in violation of 21 O.S. §§ 1111, 1114 (Counts 1-4), and three counts of Forcible Oral Sodomy, in violation of 21 O.S. §§ 886, 888 (Counts 5-7), in Case No. CF-2003-2422. Appellant was convicted and sentenced to fifteen years imprisonment each for Counts 1-4, with all but the first ten years suspended; and twenty years imprisonment each for Counts 5-7, with all but the first ten years suspended. Judge Jones ordered the sentences to be served concurrently. On May 2, 2017, the State filed an Amended Application to Revoke Suspended Sentence. Following a revocation hearing, Judge Jones revoked Appellant's remaining suspended sentence in full. The revocation is AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J.: concur; Kuehn, V.P.J.: concur; Hudson, J.: concur; Rowland, J.: concur.

F**-2018-167** — Roland G. Torgerson appeals from the acceleration of his deferred judgment and sentencing in Case No. CF-2015-134 in the District Court of Washita County, by the Honorable Christopher S. Kelly, Associate District Judge. AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., Concur in Results; Kuehn, V.P.J., Dissents; Hudson, J., Concur; Rowland, J., Concur.

F**-2018-339** — Appellant Gary Julian Gallardo, Jr., was tried by jury and convicted of Traf-

ficking in Illegal Drugs (Methamphetamine) (Count I) and Conspiracy to Commit Trafficking (Count II), both counts After Former Conviction of Two or More Felonies, in the District Court of Jackson County, Case No. CF-2016-158. The jury recommended sentences of forty (40) years imprisonment for each count. The trial court sentenced accordingly, ordering the sentences to run consecutively. It is from this judgment and sentence that Appellant appeals. The Judgment and Sentence is AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur; Hudson, J., Concur; Rowland, J., Concur.

F**-2018-15** — Marcus Ray Smith, Appellant, was tried in a non-jury trial and convicted of Count 1, driving a motor vehicle while under the influence of drugs causing great bodily injury; Count 2, felony eluding; Count 3, running a roadblock; and Counts 5 through 8, assault with a dangerous weapon, all after former conviction of a felony in Case No. CF-2015-843 in the District Court of Bryan County. The Honorable Mark R. Campbell, District Judge, sentenced Smith to ten years imprisonment in each of Counts 1 through 3, and thirty years imprisonment in each of Counts 5 through 8, with the last five years suspended, all to be served concurrently with credit for time served. The court further ordered the suspension pursuant to the rules and conditions of probation and imposed various fines and costs. From this judgment and sentence Marcus Ray Smith has perfected his appeal. The Judgment and Sentence is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs; Rowland, J., concurs.

F**-2018-202** — Katherine Marie Houser, Appellant, was tried by jury and convicted of Count 1, robbery with a dangerous weapon (a firearm or imitation firearm); Count 2, possession of a firearm in the commission of a felony; Count 3, conspiracy to commit a felony; Count 5, kidnapping; and Count 6, possession of a controlled dangerous substance in Case No. CF-2016-877 in the District Court of Oklahoma County. The trial court sentenced Houser according to the jury's recommendation of five years imprisonment on Count 1, five years on Count 3, and six months on Count 5. The trial court dismissed Counts 2 and 6 before sentencing at the State's request. The court ordered the sentences in Counts 1, 3 and 5 to run concurrently and imposed a $400.00 fine and various fees. From this judgment and sentence Katherine Marie Houser has perfected her appeal. The judgment and sentence is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs; Rowland, J., concurs.

Thursday, May 23, 2019

F-2017-1301 — Appellant William Curtis Box was found guilty by a jury of Aggravated Domestic Assault and Battery and the trial court entered an order deferring judgment for ten years, with Appellant ordered to serve the first ninety days in the county jail. On February 13, 2017, the State filed an Application to Accelerate Deferred Judgment. The Honorable Charles N. Gray, District Judge, accelerated Appellant's deferred judgment and sentenced him to two years imprisonment, with all time suspended. Appellant appeals. The acceleration of Appellant's deferred judgment is AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J.: Concur; Kuehn, V.P.J.: Concur in Results; Hudson, J.: Concur; Rowland, J.: Concur in Results.

F**-2018-120** — Milton Andre Shelton, Appellant, was tried by jury for the crime of Human Trafficking for Commercial Sex, After Conviction of Two or More Felonies in Case No. CF-2016-6494 in the District Court of Oklahoma County. The jury returned a verdict of guilty and recommended as punishment 30 years imprisonment. The trial court sentenced accordingly. From this judgment and sentence Milton Andre Shelton has perfected his appeal. AFFIRMED. Opinion by: Kuehn, V.P.J.; Lewis, P.J., concur; Lumpkin, J., concur; Hudson, J., concur; Rowland, J., concur.

RE**-2018-925** — Appellant Jaren Glenn Sellers entered negotiated pleas of no contest on September 13, 2013, in Pontotoc County District Court, Case No. CF-2012-390, to First Degree Rape (Count 1) and Forcible Sodomy (Count 2). The Honorable Gregory Pollard, Special Judge, accepted the pleas and sentenced Sellers to terms of imprisonment for ten years on each count, all suspended, to be served concurrently. On January 16, 2018, the State filed an amended application to revoke the suspended sentences. Following a hearing on August 27, 2018, Judge Pollard granted the State's application and revoked seven years of Sellers' ten-year suspended sentences. The orders of revocation are AFFIRMED. Opinion by: Kuehn, V.P.J.: Lewis, P.J., concur; Lumpkin, J., concur; Hudson, J., concur; Rowland, J., concur.

F-2017-1011 — Appellant Johnny Ray Hopes was tried by jury and found guilty of Unlawful Possession of a Controlled Dangerous Substance With Intent to Distribute (Count I) and two counts of Assault and Battery on a Police Officer (Counts II and III), in the District Court of Okfuskee County, Case No. CF-2015-58. The jury recommended as punishment imprisonment for four (4) years in Count I, and thirteen (13) months and a $500.00 fine in each of Counts II and III. The trial court sentenced accordingly, ordering the sentences to run consecutively. It is from this judgment and sentence that Appellant appeals. The Judgment and Sentence is AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., Concur in Results; Kuehn, V.P.J., Concur in Part Dissent in Part; Hudson, J., Concur in Results; Rowland, J., Concur in Results.

F**-2018-119** — Appellant, Arthur Tequon Hill, Jr., was tried by jury and convicted of Robbery with a Firearm (Count 1), Kidnapping (Count 2), and Gang Association (Count 4) in District Court of Oklahoma County Case Number CF-2014-1471. The jury recommended as punishment imprisonment for twenty-five (25) years in Count 1; twenty (20) years in Count 2; and five (5) years in Count 4. The trial court sentenced Appellant accordingly and ordered the sentences to run consecutively. It is from these judgments and sentences that Appellant appeals. From this judgment and sentence Arthur Tequon Hill, Jr. has perfected his appeal. The Judgment and Sentence is AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur; Hudson, J., Concur; Rowland, J., Recuse.

F**-2018-56** — Appellant Garry Wayne Wilson aka Gary Wayne Wilson was tried by jury and convicted of First Degree Murder (21 O.S.Supp. 2012, § 701.7(A)) (Count I) and Possession of a Firearm While Under Supervision of Department of Corrections (21 O.S.Supp.2014, § 1283 (C)) (Count II) in the District Court of Tulsa County, Case No. CF-2016-5198. The jury recommended a sentence of imprisonment for life in Count I and for ten (10) years in Count II. The trial court sentenced accordingly, ordering the sentences to run consecutively. It is from this judgment and sentence that Appellant appeals. The Judgment and Sentence is AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur; Hudson, J., Concur; Rowland, J., Concur.

RE**-2018-155** — On June 15, 2015, Appellant Vester Von Downum, represented by counsel, was convicted by a jury of Planning/Conspiring/Endeavoring to Perform an Act of Violence in Muskogee County Case No. CF-2014-656. Downum was sentenced to ten (10) years, with all but the first two (2) years suspended, subject to rules and conditions of probation. On December 6, 2017, the State filed an Application to Revoke Downum's suspended sentence alleging Downum violated his terms and conditions of probation. On February 7, 2018, the District Court of Muskogee County, the Honorable Norman D. Thygesen, Associate District Judge, revoked the remainder of Downum's suspended sentence in full. The revocation of Downum's suspended sentence is AFFIRMED. The matter is REMANDED to the District Court of Muskogee County for entry of an *order nunc pro tunc*. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs; Rowland, J., concurs.

F**-2018-321** — Wayne William White, Appellant, was tried by jury for the crime of Stalking, After Conviction of Two or More Felonies in Case No. CF-2014-341 in the District Court of Wagoner County. The jury returned a verdict of guilty and recommended as punishment 20 years imprisonment. The trial court sentenced accordingly. From this judgment and sentence Wayne William White has perfected his appeal. AFFIRMED. Opinion by: Kuehn, V.P.J.; Lewis, P.J., concur; Lumpkin, J., concur; Hudson, J., concur; Rowland, J., concur.

F-2017-1031 — Dakota Joe Spainhower, Appellant, was tried by jury for the crime of first degree murder in Case No. CF-2016-282 in the District Court of Creek County. The jury returned a verdict of guilty and recommended as punishment life imprisonment without the possibility of parole. The trial court sentenced accordingly. From this judgment and sentence Dakota Joe Spainhower has perfected his appeal. The Judgment and Sentence is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs; Rowland, J., concurs.

F**-2018-384** — Jimmy Dean Coke., Jr., Appellant, was tried in a bifurcated jury trial for the crime of Knowingly Concealing Stolen Property, After Former Conviction of Two or More Felonies (Count 1) and Obstructing Officer (Count 2) in Case No. CF-2016-523 in the District Court of Washington County. The jury returned a verdicts of guilty and set punishment

at twenty-five years imprisonment on Count 1 and one year incarceration on Count 2. The trial court sentenced accordingly and ordered the sentences to be served consecutively. The trial court also imposed a $1,000.00 fine on Count 1 and a $500.00 fine on Count 2. From this judgment and sentence Jimmy Dean Coke, Jr. has perfected his appeal. AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs.

F**-2018-326** — Sean Bryce Hill, Appellant, was tried by jury for the crime of stalking in Case No. CF-2017-3903 in the District Court of Tulsa County. The jury returned a verdict of guilty and recommended as punishment four years imprisonment and a $2,500.00 fine. The trial court sentenced accordingly. From this judgment and sentence Sean Bryce Hill has perfected his appeal. The Judgment and Sentence is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs; Rowland, J., concurs.

COURT OF CIVIL APPEALS
(Division No. 1)
Friday, May 10, 2019

116,236 — Arguello, Hope & Associates, P.L.L.C., Plaintiff/Appellant, v. Penn Grand Limited, W. Ray Pelfrey and Rosemarie Pelfrey, Defendants/Appellees. Plaintiff seeks review of the trial court's order denying recovery of attorney's fees and costs incurred in the prosecution of this action to determine and apportion attorney's fees due under a contingency fee contract from the settlement of the underlying lawsuit filed by Plaintiff on behalf of Defendants. In this proceeding, Plaintiff asserts it is entitled to re-cover its attorney's fees and costs incurred in the prosecution of this action to recover fees and costs under the parties' contingent fee agreement. There was never any question of Plaintiff's entitlement to attorney's fees pursuant to its contingency fee agreement, or to the recovery of reasonable and necessary expenses. Rather, the controversy in the present case concerned to what extent Plaintiff's claimed fees and expenses of more than $31,000.00 – predominantly expert witness fees incurred in the appraisal of Defendant's property damage – constituted reasonable and necessary expenses as an adjustment to arrive at the net divisible recovery. Inasmuch as Plaintiff asserted no claim for enforcement of an attorney's lien and the trial court did not identify a prevailing party on any claim, Plaintiff is not, as a matter of law, entitled to an award of attorney's fees pursuant to 42 O.S. §176. Further, because there was never any dispute concerning Plaintiff's recovery of attorney's fees pursuant to the parties' contingent fee agreement, Plaintiff is not, as a matter of law, entitled to an award of attorney's fees pursuant to 12 O.S. §936. Pursuant to 12 O.S. §2022, attorney's fees in interpleader actions is discretionary, and we find no abuse of discretion in denying fees under §2022. AFFIRMED. Opinion by Joplin, P.J.; Goree, C.J., and Buettner, J., concur.

Friday, May 17, 2019

116,819 — HSBC Bank USA, National Association, as Trustee, Plaintiff/Appellee, v. Dwight George Sulc, Defendant/Appellant. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Richard Ogden, Judge. Defendant seeks review of the trial court's order denying his motion to vacate the trial court's previous order granting the motion for summary judgment of Plaintiff in Plaintiff's action to collect a promissory note and foreclose a mortgage. Plaintiff attached to its motion for summary judgment a copy of the note executed by Defendant to GreenPoint, and an allonge from GreenPoint and HSBC, the trial court found Plaintiff entitled to enforce the note, and, absent a transcript of the hearing on the motion to summary judgment showing otherwise, we must accept the trial court's determination. Plaintiff's evidentiary materials also demonstrated Defendant's default in payments. Defendant submitted his forensic audit in support of the motion to vacate, but did not submit the results of his forensic audit in opposition to Plaintiff's motion for summary judgment. At best, the results of the forensic audit only establish a dispute as to the precise date of default, not whether a default in payments occurred. AFFIRMED. Opinion by Joplin, P.J.; Goree, C.J., and Buettner, J., concur.

(Division No. 2)
Thursday, May 9, 2019

117,492 — Judy Knight, an individual, and Phoenix Central, Inc., an Oklahoma corporation, Plaintiffs/Appellants, vs. Ward & Glass, P.C., an Oklahoma corporation, and Stanley Ward, Defendants/Appellees, and John or Jane Does 1-10, individuals or corporations, Defendants. Appeal from an Order of the District Court of Cleveland County, Hon. Aaron Duck, Trial Judge, denying Judy Knight's (Client) motion to vacate an earlier order granting sum-

mary judgment in favor of Defendants Ward & Glass, P.C., and Stanley Ward (collectively, Attorneys), on Client's claim of professional negligence. We examine *de novo* the underlying order granting summary judgment to determine if it was correct before reviewing the trial court's disposition of the motion to vacate the order granting summary judgment. After review, we conclude Client's assignments of error simply reargue the same issues addressed in the underlying motion for summary judgment. Client has not presented any new evidence, new witnesses, or any new argument that would suggest to this Court that entry of the trial court's order was an abuse of discretion. We therefore hold the trial court's order denying Client's motion to vacate was correct and is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Goodman, J.; Fischer, P.J., and Thornbrugh, J., concur.

Friday, May 10, 2019

117,148 — Wildcat Wellhead Services, L.L.C.; Larry Wade Pruitt; and Russell Tarlton, Plaintiffs/Appellees, vs. Canary, LLC; Canary Drilling Services, LLC; Canary Production Services, LLC; and Canary Wellhead Equipment, Inc., Defendants/Appellants. Appeal from an Order of the District Court of Oklahoma County, Hon. Aletia Haynes Timmons, Trial Judge, denying Defendants' motion to compel arbitration. Appellants' motion to dismiss or to compel arbitration requested the court dismiss Appellees' petition filed in district court and compel Appellees to arbitrate their claims in the previously filed arbitration proceeding. Based on our review of the record and applicable law, we affirm in part and reverse in part. That portion of the order providing "[Appellants'] claims are not subject to arbitration and [Appellees] should not be compelled to arbitrate" is reversed and stricken from the order. That portion of the order denying Appellants' motion to compel Appellees' remaining claims to arbitration is affirmed. AFFIRMED IN PART, REVERSED IN PART. Opinion from Court of Civil Appeals, Division II, by Goodman, J.; Fischer, P.J., and Thornbrugh, J., concur.

(Division No. 3)
Friday, May 10, 2019

115,659 — Mary Hope Forsyth, Plaintiff/Appellee, vs. David Matthew Hullum, Defendant/Appellant. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Sarah Day Smith, Trial Judge. Defendant/Appellant David Matthew Hullum (Hullum) appeals from the trial court's order granting Plaintiff/Appellee Mary Hope Forsyth a continuous protective order against Hullum. He argues that the trial court erroneously granted a continuous protective order, and that the trial court's findings were against the clear weight of the evidence. The trial court did not abuse its discretion in finding that the evidence supported the entry of a continuous final protective order. The trial court's order was supported by testimonial and documentary evidence, and was not erroneous. We therefore AFFIRM the trial court's issuance of a continuous final protective order. Opinion by Swinton, J.; Mitchell, P.J., and Bell, J., concur.

116,423 — Leta Hicks, as Personal Representative of the Estates of William Hicks and Virginia Hicks, Plaintiff/Appellee, vs. Central Oklahoma United Methodist Retirement Facility, Inc., d/b/a Epworth Villa Health Services, an Oklahoma Corporation, Defendant/Appellant. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Patricia G. Parrish, Judge. Defendant/Appellant Central Oklahoma United Methodist Retirement Facility, Inc., d/b/a Epworth Villa Health Services (Epworth Villa) appeals from the trial court's order awarding Plaintiff/Appellee Leta Hicks, as Personal Representative of the Estates of William Hicks (Mr. Hicks) and Virginia Hicks (Mrs. Hicks) $3,010,425.28 in punitive damages (Appellee). We find the trial court did not err by considering Epworth Villa's post-injury conduct when making the punitive damages award. We also find the court did not err when assessing Epworth Villa's financial condition. Finally, we find the trial court's award was not grossly excessive or influenced by passion, partiality, or prejudice. We AFFIRM. Opinion by Mitchell, P.J. Bell, J., concurs; GOREE, C.J. (sitting by designation), dissents in part.

Friday, May 17, 2019

117,093 — LSF9 Master Participation Trust, Plaintiff/Appellee, vs. Mark P. Hall and Christi Anne Hall, Husband and Wife, Defendants/Appellants, and Southwestern Bell Yellow Pages, Inc., FirstPlus Financial, Inc. and Life Bank, Additional Defendants. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Trevor Pemberton, Judge. Defendants/Appellants, Mark P. Hall and Christi Anne Hall, appeal from the trial court's grant of summary judgment in favor of Plaintiff/Appellee, LSF9

Master Participation Trust, in this mortgage foreclosure action. When Appellants purchased real property in Oklahoma County in 2001, Mark Hall executed a Promissory Note, secured by a Mortgage, payable to North American Mortgage Company. The Note was transferred to State Street Bank and Trust Company (State Street) in 2002. Appellants defaulted on the loan in 2006, State Street sued to foreclosure the Note and Mortgage, and the trial court granted summary judgment to State Street. This Court affirmed the judgment on appeal in 2009. In 2015, the parties voluntarily vacated the previous judgment due to concerns regarding the bank's standing. State Street amended its petition and attached an endorsed Note. Appellee LSF9 Master Participation Trust was then substituted as Plaintiff. Appellee filed its amended petition that contained the Note with the original endorsement by North American Mortgage Company to State Street; an allonge containing an endorsement by JPMorgan Chase Bank, N.A., as successor in interest to State Street, to JPMorgan Chase Bank, N.A.; and an allonge containing an endorsement by JPMorgan Chase Bank, N.A., to Appellee. Appellants answered and filed counter-claims. Appellee's summary judgment materials showed it has owned the Note and Mortgage since October 29, 2014, and it was in physical possession of the same prior to the date the amended petition was filed on April 24, 2015. Appellee also presented evidence of Appellants' default and argued, alternatively, that pursuant to the law of the case doctrine, this Court's 2009 opinion conclusively established the default. The trial court rejected Appellants' defenses and counter-claims, and granted summary judgment to Appellee. We hold Appellee's amended petition showed Appellee had the right to enforce the Note at the time the amended petition was filed. Furthermore, the evidentiary materials establish there is no genuine issue of material fact regarding Appellee's standing to foreclose the Note and Mortgage. The affidavit of an officer of Appellee's loan servicer was properly admitted and considered by the trial court. Because the trial court's judgment did not mention the law of the case doctrine, this Court need not address any hypothetical question regarding whether that doctrine applies to a mutually and voluntarily vacated prior judgment. Appellee presented evidence that demonstrates Appellants defaulted on their loan and have not tendered a loan payment since 2006. Appellants failed to present any evidence establishing they made their required payments or that Appellee's calculations are wrong. Upon *de novo* review of the instant record, we conclude there exists no disputed issue of material fact and Appellee is entitled to judgment as a matter of law. AFFIRMED. Opinion by Bell, J.; Mitchell, P.J., and Swinton, J., concur.

Friday, May 24, 2019

115,617 — Wade Lavoy, Plaintiff/Appellant, vs. United Services Automobile Association and USAA General Indemnity Company, Defendants/Appellees. Appeal from the District Court of Jackson County, Oklahoma. Honorable Richard B. Darby, Trial Judge. Plaintiff/Appellant Wade Lavoy (Lavoy) appeals from a denial of his motion for new trial in a bad faith action against Defendant/Appellee United States Services Automobile Association General Indemnity Company (USAA). At trial, the jury returned a verdict for Lavoy on his breach of contract claim, but found in favor of USAA on his bad faith claim. Lavoy alleges error in the jury instructions and the trial court's adverse evidentiary rulings at trial. The court's instructions to the jury reflected Oklahoma law, and were not misleading or erroneous. The limitation of testimony of both Lori Bodin and Mort Welch was not an abuse of discretion. We see no reversible error in the trial court's denial of Lavoy's motion for new trial. The order is therefore AFFIRMED. Opinion by Swinton, J.; Mitchell, P.J., and Bell, J., concur.

117,079 — Multiple Injury Trust Fund, Petitioner, vs. Jimmy Laneave and The Workers' Compensation Court of Existing Claims, Respondent. Proceeding to Review an Order of the Workers' Compensation Court of Existing Claims. Petitioner Multiple Injury Trust Fund (the Fund) appeals from an order of the Workers' Compensation Court of Existing Claims finding Respondent Jimmy Laneave (Claimant) is permanently and totally disabled (PTD) and awarding benefits. After reviewing the evidence, we hold the trial court's finding that Claimant was a physically impaired person due to an obvious and apparent impairment to his left knee was not against the clear weight of the evidence. However, combining the *Crumby* finding of pre-existing disability to Claimant's neck with his other injuries in determining he was PTD was contrary to law. We vacate the trial court's order and remand the matter for the trial court to determine whether Claimant is PTD based on the combination of his work-related back injury and his obvious and appar-

ent left knee injury. VACATED AND REMANDED. Opinion by Mitchell, P.J. Swinton, J., concurs; Bell, J., specially concurs.

117,194 — Paul Owen Hamilton, Plaintiff/Appellant, vs. Tulsa Police Department, ex rel. State of Oklahoma, Defendant/Appellee. Appeal from the District Court of Tulsa County, Oklahoma. Honorable William D. LaFortune, Judge. Plaintiff/Appellant Paul Owen Hamilton (Hamilton) appeals from an order denying his petition seeking the return of a computer tower and computer hard drive which were seized by law enforcement and used as evidence in a criminal proceeding against Hamilton in 2014. We find the court properly denied Hamilton's application because the property he seeks to recover was used to store and distribute child pornography; accordingly, the return of the property is prohibited by law. We further find Hamilton received sufficient procedural due process. We AFFIRM. Opinion by Mitchell, P.J.; Bell, J., and Swinton, J., concur.

(Division No. 4)
Tuesday, May 7, 2019

116,650 — In re the Marriage of: Melvyn Garner, Petitioner/Appellant, v. Mickie Garner, Respondent/Appellee. Appeal from the District Court of Mayes County, Hon. Shawn S. Taylor, Trial Judge. In this post-decree motion to modify a court-ordered award of support alimony, Petitioner/Appellant (Husband) appeals from the trial court's order denying his motion to reconsider the court's order denying his motion to modify. Husband also asserts as error on appeal matters concerning the trial court's judgment finding him to be in contempt of court. However, because no final appealable order was entered by the trial court and because the trial court did not fully adjudicate the contempt citation in its order finding Husband to be in contempt but setting sentencing for a future date, the appeal is premature as to both the motion to reconsider and the contempt citation. Accordingly, the appeal is dismissed. DISMISSED. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Wiseman, V.C.J., and Rapp, J., concur.

Thursday, May 9, 2019

117,176 — In the Matter of K.M.C., Alleged Deprived Child: Sabbrina Morris, Appellant, v. State of Oklahoma, Appellee. Appeal from the District Court of LeFlore County, Hon. Jennifer H. McBee, Trial Judge. In this termination of parental rights case, Appellant Sabbrina Morris (Mother) appeals from an order of the district court entered upon a jury verdict terminating her parental rights to K.M.C. The issues Mother presents on appeal are whether State properly proceeded to terminate her parental rights pursuant to 10A O.S. Supp. 2014 § 1-4-902(A)(3)(d) and whether State met its burden of proving by clear and convincing evidence that the termination of Mother's parental rights is in K.M.C.'s best interests. Contrary to Mother's assertion, however, State sought termination of Mother's parental rights pursuant to 10A O.S. Supp. 2015 § 1-4-904(B)(8) because her prior conviction for child neglect is an enumerated crime. Further, based on our review of the appellate record, the trial court properly entered its order terminating Mother's parental rights to K.M.C. because State provided clear and convincing evidence that it is in K.M.C.'s best interests to terminate Mother's parental rights. Accordingly, we affirm. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Wiseman, V.C.J., and Rapp, J., concur.

Friday, May 10, 2019

116,681 — Randy Harrison, Petitioner/Appellant, vs. The Oklahoma Police Pension and Retirement System and The Oklahoma Police Pension and Retirement Board of the State of Oklahoma, Respondents/Appellees. Appeal from an Order of the District Court of Oklahoma County, Hon. Richard Ogden, Trial Judge, affirming an order of the Oklahoma Police Pension and Retirement Board (OPPRB). Harrison was employed as a police officer with the Del City Police Department from January 13, 1995, until January 1, 2014, and was a member of the Oklahoma Police Pension and Retirement System (OPPRS) during his employment. Harrison filed an Application for Vested Benefits with OPPRS, seeking his retirement benefits. OPPRS subsequently denied the Application, finding he had forfeited the benefits as a result of his conviction of manslaughter in the first degree. On appeal, Harrison contends he vested upon ten years of credited service. We disagree. Although Harrison met the condition of service, he had not elected a vested benefit prior to his felony conviction. Pursuant to 11 O.S.2011, § 1-110(A), upon his felony conviction, Harrison forfeited his retirement benefits. The order of the district court affirming the denial of Harrison's Application for Vested Benefit is therefore affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Goodman, J.; Barnes, P.J., concurs, and Rapp, J., dissents.

Tuesday, May 14, 2019

116,476 — In re the Marriage of: Cheryl Ann Carbitcher, now Phillips, Petitioner/Appellee, v. Freeland Carbitcher, a/k/a Rusty Carbitcher, Respondent/Appellant. Appeal from the District Court of Seminole County, Hon. Timothy L. Olson, Trial Judge. In this proceeding to reduce child support arrears to judgment, Freeland Carbitcher (Husband) appeals from the trial court's grant of judgment to Cheryl Ann Carbitcher (Wife) in the amount of "$359,207.84 inclusive of interest as of August 28, 2017." Husband claims the trial court erred in disallowing his motion for a continuance of the hearing on Wife's motion and in proceeding to the merits. Husband also claims equitable defenses bar Wife's recovery of past due child support. We conclude the trial court did not abuse its discretion in denying Husband's request for a continuance of the hearing on Wife's motion nor did the court err in concluding that equitable defenses did not bar Wife's claim for past due child support. However, we reverse the judgment and remand the cause only for the purpose of directing the trial court to calculate and to show the method of calculation used to determine the amount of the arrearage and interest on that arrearage owed to Wife. Accordingly, we affirm in part, reverse in part and remand with directions. AFFIRMED IN PART, REVERSED IN PART AND REMANDED WITH DIRECTIONS. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Wiseman, V.C.J., and Rapp, J., concur.

Thursday, May 16, 2019

117,180 — Virgil Green, Plaintiff/Appellant, v. City of Spencer, a Municipal Corporation; Nicole L. Mukes, an individual; and Allen Lane, in his Official Capacity as Chief of Police, Defendants/Appellees. Appeal from the District Court of Oklahoma County, Hon. Thomas E. Prince, Trial Judge. Plaintiff/Appellant Virgil Green appeals from the trial court's grant of summary judgment to Defendants/Appellees City of Spencer, Nicole Mukes, and Allen Lane (Chief Lane) on Mr. Green's claims of blacklisting, wrongful and retaliatory discharge, invasion of privacy, intentional infliction of emotional distress, and tortious interference with contract. Mr. Green also filed an amended petition in error in which he additionally raised as error the trial court's post-judgment grant of costs to the City and Chief Lane. The issues presented for our review are as follows: (1) do questions of material fact remain concerning Mr. Green's retaliatory discharge claim; (2) do questions of material fact remain concerning Mr. Green's invasion of privacy claim; (3) did the trial court err as a matter of law in granting summary judgment to Defendants on Mr. Green's claim for intentional infliction of emotional distress; (4) did the trial court err in granting summary judgment to Defendants on Mr. Green's tortious interference with contract claim; and (5) did the trial court err in granting summary judgment to Defendant Mukes on Mr. Green's blacklisting claim. Based on our review of the summary judgment record and the applicable law, we determine the trial court properly granted summary judgment to the Defendants on all of Mr. Green's claims. We therefore affirm the trial court's grant of summary judgment to Defendants. As to Mr. Green's contention that the trial court erred in granting costs to City and Chief Lane, we note Mr. Green filed a motion for new trial within ten days of the court's order awarding those costs. The trial court's appearance docket reveals an objection and response was filed by the City and Chief Lane, a hearing was set then stricken, and no further action has been taken by the trial court on this post-judgment motion. Because Mr. Green's motion for new trial was filed within ten days of the trial court's order granting costs, the trial court retains jurisdiction over this matter and the issue of the propriety of the award of costs to City and Chief Lane is not yet ripe for appeal. 12 O.S. 2011 § 990.2(A). Accordingly, Mr. Green's appeal from the order granting costs to City and Chief Lane is premature and must be dismissed. Accordingly the appeal is dismissed as to costs. AFFIRMED AND APPEAL DISMISSED IN PART AS TO COSTS. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Wiseman, V.C.J., and Rapp, J., concur.

Thursday, May 23, 2019

116,635 — Christopher Chappelle, Plaintiff/Appellant, v. The Estate of Barbara McComas, Defendant/Appellee. Appeal from an Order of the District Court of Comanche County, Hon. Scott D. Meaders, Trial Judge. The plaintiff, Christopher Chappelle (Chappelle), appeals an Order granting the defendant, the Estate of Barbara McComas, deceased (McComas Estate), summary judgment. The appeal was assigned to the accelerated docket pursuant to Okla.Sup.Ct.R.1.36, 12 O.S. Supp. 2018, Ch. 15, App. 1. This Court concludes that the predicate facts necessary to require a creditor's notice to Chappelle are missing here. Chappelle had the burden to present the missing facts showing

that he had a claim and that West knew or should have known that he had a claim. Chappelle failed to present any evidentiary materials to show such fact. Consequently, it is not necessary to address the question of whether actual notice suffices for notice to creditors. The trial court did not err in granting summary judgment and the judgment is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., and Wiseman, V.C.J., concur.

Friday, May 24, 2019

115,770 — Marguerite Ondoa, Petitioner/Appellee, v. Barthelemy Tsala, Respondent, and Kidiaga Group, LLC, an Oklahoma limited liability company, Appellant. Appeal from an Order of the District Court of Cleveland County, Hon. Thad Balkman, Trial Judge. Kidiaga Group, LLC (Kidiaga Group) appeals a trial court Order denying Kidiaga Group's Motion to Quash Subpoena, Objection to Subpoena, Motion to Modify Subpoena and in the Alternative, Application for Protective Order and In Camera Hearing (Motion) in this motion to modify child support action. Kidiaga Group is not a party to the underlying child support modification action. The trial court erred in denying Kidiaga Group's Motion. This Court finds the Subpoena Duces Tecum seeks documents that are not relevant or will not lead to the discovery of admissible evidence concerning the issue before the trial court – modification of child support. This matter is remanded to the trial court with instructions to conduct a hearing to determine the relevancy of the requested documents and information to Mother's claims raised in this action, including but not limited to Father's relationship to Kidiaga Group and the income/compensation Father has received from Kidiaga Group. The trial court is further instructed to focus the breadth of the Subpoena Duces Tecum on issues relevant to the subject matter involved in the pending action. On remand, the production of documents in compliance with this Opinion shall be by protective order as originally ordered by the trial court. The trial court is instructed to modify the Subpoena Duces Tecum accordingly. REVERSED AND REMANDED WITH INSTRUCTIONS. Opinion from Court of Civil Appeals, Division IV, by RAPP, J.; Barnes P.J., and Wiseman, V.C.J., concur.

ORDERS DENYING REHEARING

(Division No. 1)
Wednesday, May 8, 2019

115,990 — Edward Wray, Petitioner/Appellant, vs. Barbara Ardeno and John Michael Fleming, Respondent/Appellees. Appellee's Petition for Rehearing and Supporting Brief, filed May 1, 2019, is *DENIED*.

Friday, May 17, 2019

116,105 — Wanda L. McGlothlin, Plaintiff/Appellee, vs. James A. Fuller, Defendant/Appellant. Appellant's Petition for Rehearing and Supporting Brief, filed May 9, 2019, is *DENIED*.

Tuesday, May 21, 2019

116,693 — Fountain View Manor, Inc., an Oklahoma Corporation, Plaintiff/Appellant, vs. Howard Sheward, Jr., Defendant/Appellee. Appellant's Petition for Rehearing, filed April 25th, 2019 is *DENIED*.

(Division No. 3)
Tuesday, May 14, 2019

117,074 — Jasen R. Elias, Plaintiff/Appellant, vs. Griffin Communications, LLC, an Oklahoma Limited Liability Company; Frontier Media Group, Inc., an Oklahoma not-for-profit corporation; Ziva Branstetter, an individual; and Dylan Goforth, an individual, Defendants/Appellees. Appellant's Petition for hearing and Brief in Support, filed May 6, 2019, is *DENIED*.

(Division No. 4)
Tuesday, May 28, 2019

117,560 — Sherri D. Hatchell, Plaintiff/Appellant, vs. Leah Hocker, Defendant/Appellee. Appellee's Petition for Rehearing is hereby *DENIED*.

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FEATURED SPEAKERS:

Carole A. Levitt, and Mark E. Rosch, Vice-President, principals of Internet for Lawyers and CLEseminars.com, have been internationally recognized CLE seminar speakers--full-time since 1999 and best-selling ABA Law Practice Division authors. Their areas of expertise are: Internet investigative, legal, and social media research; social media ethics; Google search; and Google cloud Apps.

Together, Mark and Carole have authored hundreds of Internet research articles and co-authored six ABA Law Practice Division books, including Google Gmail and Calendar in One Hour for Lawyers (2013); Find Info like a Pro, Volumes 1 and 2 and Google for Lawyers: Essential Search Tips and Productivity Tools (2010). They have also co-authored fourteen editions of IFL Press's The Cybersleuth's Guide to the Internet. Carole recently authored Internet Legal Research on a Budget.

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ADVANCED GOOGLE SEARCH FOR LAWYERS

PROGRAM DESCRIPTION:

There's so much more to Google than the simple search box on the home page...if you know where to look.

Carole Levitt and Mark Rosch, authors of "Google for Lawyers" and "The Cybersleuth's Guide to the Internet," will take you on a deep dive into the Google Advanced Search menu so you can quickly conduct factual and investigative research for your client matters. You will also explore some of Google's specialty databases and specialized searches to help you locate very specific types of information.

Program materials are excerpted from their book, "The Cybersleuth's Guide to the Internet."

- **Exploring Google's Advanced Search menu to create more sophisticated and targeted searches**
- **Determining credibility of results**
- **Searching Google's specialty databases**
- **News and News Alerts**
- **Image and Reverse Image searching**
- **Coaxing landline, cellular, fax numbers, and other contact information out of the Web**
- **Using Google as a dictionary**
- **Translating with Google**