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Court Issue

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table of contents

June 22, 2019 • Vol. 90 • No. 12

page

Index to Opinions of Supreme Court

Index to Opinions of Court of Criminal Appeals

Index to Opinions of Court of Civil Appeals

Opinions of Supreme Court

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

2019 OK 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.

2019 OK 39

AMANDA COLE, Plaintiff/Appellant, v. SAMANTHA JOSEY, Defendant/Appellee.

No. 116,600. May 29, 2019

ON CERTIORARI TO THE OKLAHOMA COURT OF CIVIL APPEALS DIVISION II

¶0 The plaintiff, Amanda Cole, was injured in an automobile accident and sued the defendant, Samantha Josey. Plaintiff failed to serve process on the defendant within 180 days. The trial court dismissed the suit without prejudice. The plaintiff then refiled her petition within one year of the date of the order dismissing her case. The trial court dismissed her suit for failure to refile within one year of the 181st day following the filing of her original petition. Plaintiff appealed this decision. The Oklahoma Court of Civil Appeals affirmed the trial court. We granted certiorari and now reverse the trial court's decision and remand the matter to the trial court for further proceedings consistent with this opinion.

CERTIORARI GRANTED PREVIOUSLY; THE OPINION OF THE OKLAHOMA COURT OF CIVIL APPEALS IS VACATED; TRIAL COURT ORDER DATED NOVEMBER 9, 2017, IS REVERSED AND REMANDED FOR FURTHER

PROCEEDINGS CONSISTENT WITH THIS OPINION

Barry K. Roberts, Norman, Oklahoma, for Plaintiff/Appellant.

Reign Karpe and Tayler Lane, Angela D. Ailles & Associates, Oklahoma City, OK, for Defendant/Appellee.

COMBS, J.:

I. FACTS AND PROCEDURAL HISTORY

¶1 This negligence cause of action pertains to injuries and damages caused by the Appellee, Samantha Josey, against the Appellant, Amanda Cole, in an automobile accident. The accident occurred on May 15, 2013, and Cole filed her petition on April 29, 2015, in Cleveland County, Oklahoma, Case No. CJ-2015-508. On October 26, 2015, 180 days had passed since the petition was filed and no summons was recorded as issued and no service was accomplished. On November 16, 2015, Josey appeared specially and filed a motion to dismiss for lack of service within 180 days of filing the petition as required by "12 O.S. § 2004 (I)."[1] The trial court granted the motion and dismissed the first cause of action without prejudice on January 4, 2016. On January 3, 2017, Cole refiled her petition in McClain County, Oklahoma, Case No. CJ-2017-1. Josey filed another special appearance and again moved to dismiss the petition on July 14, 2017. She asserted the first petition was deemed dismissed on the 181st day, October 27, 2015, and Cole did not refile her petition within one year of that date pursuant to the "savings statute," 12 O.S. 2011, § 100. The district court agreed with Josey and granted her motion to dismiss by an order filed November 9, 2017. It determined, Cole's petition in the Cleveland County case was deemed dismissed on October 27, 2015, and was not refiled within one year of its dismissal in accordance with "12 O.S. § 100." Therefore, the McClain County petition, filed January 3, 2017, was untimely.

¶2 On December 8, 2017, Cole filed a petition in error with this Court. The case was assigned to the Oklahoma Court of Civil Appeals, Div. II. The appellate court affirmed the district court ruling on September 7, 2018. Cole filed a petition for rehearing which was denied. She then filed a petition for *certiorari* with this Court which was granted on April 1, 2019 and assigned to this office on the same day.

II. STANDARD OF REVIEW

¶3 The first impression question before us is one of law. A legal question involving statutory interpretation is reviewed *de novo, i.e.*, by a non-deferential, plenary and independent examination of the trial court's legal ruling. *Samman v. Multiple Injury Trust Fund*, 2001 OK 71, ¶8, n.5, 33 P.3d 302. In the interpretation of statutes, courts do not limit their consideration to a single word or phrase in isolation to attempt to determine their meaning, but construe together the various provisions of relevant legislative enactments to ascertain and give effect to the legislature's intention and will, and attempt to avoid unnatural and absurd consequences. *Mc-Neill v. City of Tulsa,* 1998 OK 2, ¶11, 953 P.2d 329. In construing statutes, harmony, not confusion, is to be sought and when parts of an act are reasonably susceptible of a construction which will give effect to both and to the words of each, without violence to either, such construction should be adopted in preference to one which, though reasonable, leads to the conclusion that there is a conflict. *Rogers v. Oklahoma Tax Commission*, 1952 OK 388, ¶17, 263 P.2d 409.

III. ANALYSIS

¶4 The sole issue on appeal is whether the refiling of a petition after the first petition is dismissed on the grounds that service was not made within 180 days must take place within one year of the finality of the order dismissing the case or within one year from the 181st day of filing the petition. We hold, the day after the filing of an appealable order dismissing the case is the date from which the 12 O.S. 2011, § 100 "savings statute" one year refiling period begins, if the order is not appealed. Where the dismissal order is appealed the one year period commences on the day after the appeal is final. This issue has not been specifically addressed by this Court under these facts and under the version of the statute applicable to this action.

¶5 Two statutes are applicable to this case. Title 12 O.S. Supp. 2014, § 2004 (I) and 12 O.S. 2011, § 100. Title 12 O.S. Supp. 2014, § 2004 (I) provides:

> I. SUMMONS: TIME LIMIT FOR SERVICE. If service of process is not made upon a defendant within one hundred eighty (180) days after the filing of the petition and the plaintiff cannot show good cause why such service was not made within that period, the action shall be deemed dismissed as to that defendant without prej-

udice. The action shall not be dismissed if a summons was served on the defendant within one hundred eighty (180) days after the filing of the petition and a court later holds that the summons or its service was invalid. After a court quashes a summons or its service, a new summons may be served on the defendant within a time specified by the judge. If the new summons is not served within the specified time, the action shall be deemed to have been dismissed without prejudice as to that defendant. This subsection shall not apply with respect to a defendant who has been outside of this state for one hundred eighty (180) days following the filing of the petition.

Title 12 O.S. 2011, § 100 ("savings statute") provides:

> If any action is commenced within due time, and a judgment thereon for the plaintiff is reversed, or if the plaintiff fail in such action otherwise than upon the merits, the plaintiff, or, if he should die, and the cause of action survive, his representatives may commence a new action within one (1) year after the reversal or failure although the time limit for commencing the action shall have expired before the new action is filed.

¶6 The trial court and Josey relied heavily on non-precedential opinions of the Oklahoma Court of Civil Appeals interpreting these two statutes. The trial court's order cited exclusively to *Thibault v. Garcia*, 2017 OK CIV APP 36, 398 P.3d 331. In *Thibault,* the sole issue was whether a petition not served within 180 days was deemed dismissed on the 181st day after filing or on the date the court ordered the petition dismissed. *Thibault,* 2017 OK CIV APP 36 at ¶9. *Thibault* held the current version of 12 O.S. § 2004 (I) "requires that a petition not served in compliance with that statute be deemed dismissed 181 days after it was filed." *Id.* The Court of Civil Appeals modified the trial court's journal entry of judgment to reflect that the date of dismissal occurred on the 181st day after the petition was filed. *Id.*, ¶17.

¶7 In her July 14, 2017, motion to dismiss, Josey relied upon two other Court of Civil Appeals opinions, *Hough Oilfield Service, Inc. v. Newton*, 2017 OK CIV APP 31, 396 P.3d 320, and *Moore v. Sneed*, 1992 OK CIV APP 107, 839 P.2d 682. Both of these opinions followed the non-precedential orders of this Court in a related appeal in *Moore*.[2] The *Moore* orders are based on this Court's opinion in *Mott v. Carlson*, 1990 OK 10, 786 P.2d 1247.

¶8 In *Hough*, the plaintiff filed suit on March 21, 2012, to recover embezzled funds but did not obtain service within 180 days. *Hough Oilfied Service, Inc.*, 2017 OK CIV APP 31 at ¶¶2-3. The defendants moved to dismiss. *Id.*, ¶3. The trial court granted the defendants' motion to dismiss on July 3, 2014, but found in its order that the case was deemed dismissed on September 18, 2012, which was the 181st day after the filing of the petition. *Id.* The plaintiff then refiled its petition on July 14, 2014, and the defendants again moved to dismiss. *Id.*, ¶4. The trial court granted the dismissal and held the plaintiff failed to refile its petition by September 18, 2013, which it was required to do pursuant to 12 O.S. 2011, § 100. The plaintiff appealed the order. In affirming the trial court's order, the Court of Civil Appeals held 12 O.S. 2011, § 2004 (I) does not address the date the action is deemed dismissed, but the Supreme Court had provided clear guidance in *Moore v. Sneed*, 1992 OK CIV APP 107, 839 P.2d 682; "[t]he Supreme Court's order in *Moore* clearly states an action without service is deemed dismissed, as a matter of law, from the 181st day." *Id.*, ¶¶ 11-15.

¶9 *Moore* has a similar fact pattern to *Hough.* The plaintiff filed suit but did not serve the defendant within 180 days. *Moore*, 1992 OK CIV APP 107 at ¶1. The trial court granted the defendant's motion to dismiss for failure to serve process pursuant to 12 O.S. Supp. 1986, § 2004 (I). *Id.* The plaintiff refiled his petition on the same day. *Id.* The defendant, however, petitioned the trial court to certify its order. *Id.*, ¶2. He asserted the date of dismissal should not have been the date of the order but instead should have been the date it was deemed dismissed on the 181st day after filing the original petition. *Id.* The trial court certified its order and this Court granted *certiorari.* In an unpublished order dated April 22, 1991, we held:

> The issues presented in this case are controlled by the decision in *Mott v. Carlson,* 786 P.2d 1247, 1250 (Okl. 1990). In that decision we held that if the plaintiff does not serve the defendant with process within 180 days of the filing of the petition, then the action is considered dismissed as to that defendant as a matter of law, according to 12 OS. [*sic*] Supp. 1986 § 2004(I). The opinion clearly indicates that the effective date of dismissal in such situations is none

other than the 181st day following the filing of the petition.

The order also notes § 2004 (I) was amended in 1989 to allow a plaintiff who has not served a defendant with process within 180 days of filing of a petition to have an opportunity to show good cause for non-service. We held this amendment should be given retroactive application because it is procedural in nature unless plaintiff's claim is already time barred. The order remanded the matter to the trial court for a determination whether 12 O.S. Supp. 1989, § 2004 (I) should be applied in this case. Upon remand, the trial court held the first action was dismissed without prejudice on the 181st day after the petition was filed. *Moore*, at ¶7. The second action was dismissed because the petition was not filed within one year of that date. *Id.* Plaintiff appealed and the Court of Civil Appeals determined the trial court in effect found the 1989 amendment to § 2004 (I) did not apply to this case, because the effective date of the amendment occurred several months after the refiling period would have run. *Id.*, ¶9. The Court of Civil Appeals affirmed the trial court's ruling. *Id.*, ¶14.

¶10 Justice Summers, who was also the author of *Mott v. Carlson*, wrote a dissent to the April 22, 1991, order with Vice Chief Justice Opala joining. (Summers, J., Dissenting, filed December 18, 1990, in case no. 74,354). The dissent states in part:

> *Mott v. Carlson*, in my judgment, does not resolve the question of when plaintiff s [*sic*] suit was dismissed for the purposes of refiling under 12 O.S. 1981 § 100. That question would be one of first impression. Any rule of law that would commence the time for a § 100 refiling when it was "deemed" dismissed under 12 O.S. Supp. 1984 § 2004 I (without notice to the plaintiff) would have to overcome serious obstacles in the form of an apparent lack of the process due under state and federal constitutions.

Justice Summers' dissent explains that Mott "does not resolve the question of when plaintiff s [*sic*] suit was dismissed for the purposes of refiling under 12 O.S. 1981 § 100." He believed the issue was at that time still one of first impression. *Mott* concerned 12 O.S. Supp. 1986, § 2004 (I) which allowed the court to dismiss an action after 120 days if there was no service made and the plaintiff could not show good cause for non-service. *Mott,* 1990 OK 10 at ¶4. This Court found no abuse of discretion and affirmed the judgment of the district court which dismissed the case because the plaintiff did not meet his burden of showing good cause. *Id.*, ¶¶15-16. The timeliness of the refiling of plaintiff's petition pursuant to 12 O.S. 1981, § 100 was not an issue in *Mott*. *Id.*, ¶2. In addition, there is no indication in *Mott* when an order dismissing the case was filed. The opinion offers no direct analysis of the issue of when does the one year period begin for refiling the petition under the "savings statute," 12 O.S. 2011, § 100, when there exists an order dismissing the action. A later opinion, also authored by Justice Summers, answers this question.

¶11 In *Grider v. USX Corp.*, the plaintiff, Grider, sued various companies for fraud and embezzlement related to a failed oil and gas venture. 1993 OK 13, ¶2, 847 P.2d 779. Grider filed his petition in state court on February 22, 1985. *Grider,* 1993 OK 13 at ¶2. On September 29, 1986, he dismissed his case without prejudice and refiled the same day in federal court. *Id.* The federal suit contained all the claims in state court and added new allegations under the Racketeering Influenced and Corrupt Organizations Act (RICO) and antitrust violations. *Id.* On April 2, 1987, the federal court dismissed the suit because the complaint failed to state a RICO claim. *Id.*, ¶3. With this dismissal, the pendent state claims were also dismissed. *Id.* Grider filed an appeal and on March 21, 1989, the Tenth Circuit Court of Appeals affirmed the dismissal. *Id.* On October 2, 1989, the U.S. Supreme Court denied *certiorari. Id.* Grider, thereafter, filed suit in state court on October 12, 1989. *Id.* The defendants filed motions to dismiss the suit alleging the claims were time-barred. *Id.* The trial court granted the motions on January 17, 1990. *Id.* Grider appealed and the Court of Civil Appeals affirmed. *Id.* The Court of Civil Appeals held, the time period allowed by 12 O.S. § 100 began when the federal district judge dismissed the action, rather than when the U.S. Supreme Court denied *certiorari*. *Id.* We granted *certiorari* and reversed and remanded for further proceedings. *Id.*

¶12 In our opinion, we noted no party alleged the one year savings period ran from the date of Grider's voluntary dismissal; September 29, 1986. *Grider,* at ¶5. The opinion only answered the briefed issue, which was whether the one year refiling period under 12 O.S. § 100 started with the dismissal of the federal suit at the trial level or with the finality of the federal

appeal. *Id.* We held the trigger date for the savings provision is the date the judgment of dismissal became final which was the date the U.S. Supreme Court denied *certiorari* and brought finality to the action. *Id.*, ¶14. Therefore, the refiling of the petition in state court, which occurred ten days after the *certiorari* denial, was timely. *Id.*, ¶¶3, 14.

¶13 This "finality" requirement, we determined, had been recently discussed by the Tenth Circuit Court of Appeals in *Twashakarris, Inc., v. Immigration and Naturalization Serv.*, 890 F.2d 236 (10th Cir. 1989). *Id.*, ¶9. In that opinion, the Tenth Circuit held the word "action" in 12 O.S. § 100 includes the initial judgment and any validly filed appeals that suspend the finality of the judgment. *Id.*, ¶10. We found our previous opinions have consistently held a final adjudication is either one in which no appeal has been taken and the time for appeal has run or one in which an appeal has been filed and acted upon by the appellate court. *Id.*, ¶11. The lodging of an appeal with this Court does not constitute a new action or an original proceeding, but is simply the continuation of the suit commenced in the trial court. *Id.*

¶14 We found the majority of other jurisdictions with similar savings statutes overwhelmingly agree the time of commencement of the savings provision is the date the judgment is decided on appeal, not the date of determination in the trial court. *Id.*, ¶13. These jurisdictions agree that the plaintiff should not be forced to choose between an appeal and a refiling of the claim to preserve rights given under a savings statute. *Id.* The date of finality of the order of dismissal is the determinative date and a judgment is not final, in this context, until the opportunity for appeal has passed or the appeal has been acted upon. *Id.*, ¶14. The finality occurred when the U.S. Supreme Court denied *certiorari. Id.* We concluded:

> Any other decision could result in a waste of judicial time and resources, because a decision on appeal could negate any need for the refiling of a claim. Requiring the filing of a suit in District Court to proceed simultaneously with an appeal on the same issue would not be judicially efficient.

Id.

¶15 Title 12 O.S. 2014, § 2004 (I) allows a plaintiff to show good cause why service was not made within 180 days from the date the petition was filed. *Mott* notes this provision was added in the 1989 amendment to the statute, which *Mott* found was not applicable to its decision. *Mott v. Carlson,* 1990 OK 10, ¶9, n.5, 786 P.2d 1247. The 2014 version of the statute reads in part:

> If service of process is not made upon a defendant within one hundred eighty (180) days after the filing of the petition and the plaintiff cannot show good cause why such service was not made within that period, the action shall be deemed dismissed as to that defendant without prejudice.

In 2017, this language was changed to read: "and the plaintiff ~~cannot show~~ has not shown good cause why such service was not made within that period...." 2013 Okla. Sess. Laws c. 305, §1. Even assuming this provision is procedural and may be applied retroactively[3] it is only setting a time limit for the plaintiff to establish "good cause" for not serving process, *i.e*, requiring the plaintiff to move to make such a showing prior to the expiration of the 180 day period. This 2017 amendment, however, does not change our analysis as to "finality" for purposes of determining when the "savings statute" period is to commence.

¶16 Section 2004 (I) does not, as mentioned in *Hough,* define "deemed dismissed" nor does it attempt to tie this provision to the 12 O.S. 2011, § 100 "savings statute." *Grider* is applicable in determining when the "savings statute" period commences. The one year period in 12 O.S. 2011, §100 begins to run when there is finality in the judgment. A case dismissed pursuant to § 2004 (I) still needs a final appealable order to begin this process. The one year period begins the day after there is finality to the appeal or on the day after the order is filed if the judgment is not appealed. The best interpretation of the "deemed dismissed" language is that after the expiration of the 180 days under § 2004 (I), grounds for dismissal have ripened.[4] However, the dismissal will not be final for purposes of 12 O.S. 2011, § 100 until, at the earliest, a final appealable order is filed. This interpretation does not render the language "deemed dismissed" superfluous and harmonizes 12 O.S. 2014, § 2004 (I) and 12 O.S. 2011, § 100. Action by a court is still needed to bring finality and begin the running of the one year "savings statute" period for refiling. To hold otherwise could prevent a plaintiff's right to appeal the dismissal. An appeal requires a final appealable order. 12 O.S. 2011, § 990A, Okla.Sup.Ct.R. 1.21 (a). If a case was "deemed

dismissed" by operation of law on the 181st day after filing of the petition and no order granting the dismissal was entered within one year of that date, the plaintiff would have no right to appeal before they would lose their right to refile their cause of action. Without such an order any attempted appeal of an action "deemed dismissed" as a matter of law would be premature. There would be grave due process violations with such an automatic dismissal or with a retroactive application of the dismissal in a subsequent order. Even if an order dismissing the case is filed there are still problems with using the date "deemed dismissed" for refiling purposes. If the "savings statute" period automatically began to run from the 181st day, any properly filed appeal of an order dismissing the action pursuant to § 2004 (I) may be pointless if the time for the disposition of the appeal took longer than the one year period. An appellant who was not successful on appeal would be prohibited, under that interpretation and scenario, from refiling their action pursuant to 12 O.S. 2011, § 100. In addition, as *Grider* pointed out, requiring the plaintiff to both refile their petition and simultaneously file an appeal is a needless waste of judicial economy when considering the successful plaintiff/appellant would not have needed to refile their petition. As far as *Mott v. Carlson* may be interpreted to require the refiling of a petition within one year from the 181st day after the filing of the first petition, it is hereby overturned.

IV. CONCLUSION

¶17 The trial court, by written order, dismissed Cole's first suit on January 4, 2016, due to service of process not being made within 180 days of the date of the filing of her first petition. Cole refiled her suit in McClain County on January 3, 2017, within one year of the order of dismissal. For the above mentioned reasons, we hold Cole's second petition was timely filed. *Certiorari* was previously granted, the opinion of the Oklahoma Court of Civil Ap-peals is hereby vacated, the trial court's No-vember 9, 2017, order is reversed and this matter is remanded to the trial court for further proceedings consistent with this opinion.

CERTIORARI GRANTED PREVIOUSLY; THE OPINION OF THE OKLAHOMA COURT OF CIVIL APPEALS IS VACATED; TRIAL COURT ORDER DATED NOVEMBER 9, 2017, IS REVERSED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION

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

COMBS, J.:

1. The first motion to dismiss filed November 16, 2015, did not specify which version of 12 O.S. §2004 (I) was applicable. In the McClain County case, she filed a motion to dismiss on July 14, 2017, and cited 12 O.S. 2011 § 2004 (I). The version of the law in effect at the time of the accident was 12 O.S. Supp. 2012, § 2004. Subsection (I) of § 2004 in the 2012 version is identical to the 2011 version of the statute and the record reflects the parties are relying upon the same statutory language. No party is contesting which version of the law is applicable to the case at hand. On June 4, 2013, and less than a month after the accident, this Court held a 2009 bill which, among many other things, added some of the language found in § 12 O.S. Supp. 2012, 2004 (I), was unconstitutional due to a single subject rule violation. *Douglas v. Cox Retirement Properties, Inc.*, 2013 OK 37, 302 P.3d 789. The legislature immediately held a special session in September 2013 and re-added the 2009 amendments to § 2004 (I). 2013 Okla. Sess. Laws, c. 13, § 9 [1st Ext. Sess.], eff. December 8, 2013. This 2013 amendment is identical to the 2011 version and was the version in place when Cole refiled her petition in McClain County. However, this 2013 amendment did not make it into the 2013 Supplement of the Oklahoma Statutes and first appeared in the 2014 supplement. For clarity and for the purpose of this opinion, we will use the 2014 Supplement version of § 2004 (I) as the applicable version of the law. At all applicable times these versions contained the same language.

2. The parties in *Moore*, were involved in two appellate matters. The first concerned a petition for *certiorari* of a certified interlocutory order in case no. 74,354, heard by the Supreme Court of Oklahoma, and the second concerned an appeal of the order of the trial court upon remand in case no. 77,720. This Court issued two orders in the certified interlocutory matter. The first was filed on December 14, 1990, and a second order, after a rehearing of the first order, was filed on April 22, 1991.

3. *See Trinity Broadcasting Corp. v. Leeco Oil Co.*, 1984 OK 80, ¶¶6-7, 692 P.2d 1364.

4. The "deemed dismissed" date is a trigger for the trial court to enter an order of dismissal, thereby, providing a final appealable order.

2019 OK 40

IN THE MATTER OF THE SUSPENSION OF MEMBERS OF THE OKLAHOMA BAR ASSOCIATION FOR NONPAYMENT OF 2019 DUES

SCBD No. 6799. June 10, 2019

ORDER OF SUSPENSION FOR NONPAYMENT OF DUES

On May 20, 2019, the Board of Governors of the Oklahoma Bar Association filed an Application for the suspension of Oklahoma Bar Association members who failed to pay dues for the year 2019 as required by the Rules Creating and Controlling the Oklahoma Bar Association (Rules), 5 O.S. 2011, ch. 1, app. 1, art. VIII, §1. The Board of Governors recommended that the members whose names appear on the Exhibit A attached to the Application be suspended from membership in the Oklahoma Bar Association and from the practice of law in the State of Oklahoma, as provided by the Rules, 5 O.S. 2011, ch. 1, app. 1, art. VIII, §2.

This Court finds that on April 15, 2019, the Executive Director of the Oklahoma Bar Association notified by certified mail all members delinquent in the payment of dues and/or expense charges to the Oklahoma Bar Association for the year 2019. The Board of Governors have determined that the members set forth in Exhibit A, attached hereto, have not paid their dues and/or expense charges for the year as provided in the Rules.

This Court, having considered the Application of the Board of Governors of the Oklahoma Bar Association, finds that each of the Oklahoma Bar Association members named on Exhibit A, attached hereto, should be suspended from the Oklahoma Bar Association membership and shall not practice law in the State of Oklahoma until reinstated.

IT IS THEREFORE ORDERED that the attorneys named as set forth on Exhibit A, attached hereto, are hereby suspended from membership in the Association and prohibited from the practice of law in the State of Oklahoma for failure to pay membership dues for the year 2019 as required by the Rules Creating and Controlling the Oklahoma Bar Association.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 10TH DAY OFJUNE, 2019.

/s/ Noma D. Gurich
CHIEF JUSTICE

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

Exhibit A

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2019 OK 41

IN THE MATTER OF THE SUSPENSION OF MEMBERS OF THE OKLAHOMA BAR ASSOCIATION FOR NONCOMPLIANCE WITH MANDATORY CONTINUING LEGAL EDUCATION REQUIREMENTS FOR THE YEAR 2018

SCBD No. 6800. June 10, 2019

ORDER OF SUSPENSION FOR FAILURE TO COMPLY WITH THE RULES FOR MANDATORY CONTINUING LEGAL EDUCATION

On May 20, 2019, the Board of Governors of the Oklahoma Bar Association filed an Application for the suspension of members who failed to comply with mandatory legal education requirements for the year 2018 as required by Rules 3 and 5 of the Rules for Mandatory Continuing Legal Education (MCLE Rules), 5 O.S. 2011, ch. 1, app. 1-B. The Board of Governors recommended the members, whose names appear on the Exhibit A attached to the Application, be suspended from membership in the Oklahoma Bar Association and prohibited from the practice of law in the State of Oklahoma, as provided by Rule 6 of the MCLE Rules.

This Court finds that on March 15, 2019, the Executive Director of the Oklahoma Bar Association mailed, by certified mail to all Oklahoma Bar Association members not in compliance with Rules 3 and 5 of the MCLE Rules, an Order to Show Cause within sixty days why the member's membership in the Oklahoma Bar Association should not be suspended. The Board of Governors determined that the Oklahoma Bar Association members named on Exhibit A of its Application have not shown good cause why the member's membership should not be suspended.

This Court, having considered the Application of the Board of Governors of the Oklahoma Bar Association, finds that each of the Oklahoma Bar Association members named on Exhibit A, attached hereto, should be suspended from Oklahoma Bar Association member-

ship and shall not practice law in this state until reinstated.

IT IS THEREFORE ORDERED that the attorneys named on Exhibit A, attached hereto, are hereby suspended from membership in the Association and prohibited from the practice of law in the State of Oklahoma for failure to comply with the MCLE Rules for the year 2018.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 10th DAY OF JUNE, 2019.

/s/ Noma D. Gurich
CHIEF JUSTICE

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

Exhibit A

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2019 OK 42

STATE ex rel. OKLAHOMA BAR ASSOCIATION, Complainant, v. LON JACKSON DARLEY III, Respondent

SCBD # 6802. June 10, 2019

ORDER APPROVING RESIGNATION FROM OKLAHOMA BAR ASSOCIATION PENDING DISCIPLINARY PROCEEDINGS

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

¶2 THE COURT FINDS AND HOLDS:

¶3 During the pendency of disciplinary proceedings against him, Lon Jackson Darley III offered, on May 21, 2019, to surrender his license to practice law and to resign from Bar membership.

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

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

¶6 Grievance by Lant Gallup: The grievance alleges that the Respondent was entrusted with funds belonging to a client, Lant Gallup. Specifically $75,611.55 was supposed to be held in the Respondent's attorney trust account (IOLTA) on behalf of the client. The money was to be disbursed to the client by installments. The grievance alleges that the Respondent did not account for approximately $28,000.00 belonging to the client. The Respondent improperly transferred some of the funds to his operating account and comingled it with other funds. The client alleges the Respondent owes him $28,441.00.

¶7 Grievance by Lee Loggins: The allegations are that the Respondent was retained to represent Lee Loggins in various matters, some of which were criminal cases, and also a foreclosure action. The Respondent entered an appearance in October 2018 in the Oklahoma County foreclosure case, CJ-2018-3276. It is further alleged that he did not file any pleadings and made no further court appearances in the case. The case was concluded by summary judgment entered February 2019 against Lee Loggins, *et al*.

¶8 Respondent is aware that, if proven, these grievances would constitute violations of Rules 1.1 (Competence), 1.15 (Safekeeping Property), 1.3 (Diligence), 1.4 (Communication), 8.4 (a) and (c), (Misconduct, Dishonesty, Fraud, Deceit or Misrepresentation), Oklahoma Rules of Professional Conduct, 5 O.S. 2011, Ch. 1, App. 3-A and Rules 1.3 (Discipline for Acts Contrary to Prescribed Standards of Conduct) and 5.2 (Investigations — Failure to Timely Answer), RGDP; and Respondent's oath as a licensed Oklahoma lawyer.

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

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

¶11 Respondent agrees to comply with RGDP Rule 9.1 within twenty days following the date his resignation was filed with this Court, May 28, 2019.

¶12 Respondent acknowledges and agrees that he may not apply for reinstatement of his legal license (and of his membership in the Bar) before the expiration of five years from the effective date of this order. The Respondent also acknowledges that he may be reinstated to the practice of law only upon full compliance with the conditions and procedures prescribed by Rule 11, RGDP.

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

¶14 Respondent must surrender his Oklahoma Bar Association membership card to the Office of the General Counsel, if he has not already done so.

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

¶16 Respondent acknowledges the Oklahoma Bar Association has incurred costs in the investigation and prosecution of this matter. The Bar Association has applied to this Court to assess costs in the amount of $1,317.26. The Respondent has agreed he is responsible for reimbursement of these costs.

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

¶18 Respondent's name and address appear on the official Bar roster as: Lon Jackson Darley III, O.B.A. No. 15415, 4528 N. Classen Blvd., Oklahoma City, OK 73118.

¶19 IT IS THEREFORE ORDERED THAT the resignation of Lon Jackson Darley III, tendered during the pendency of disciplinary proceedings be approved, and the resignation is deemed effective on the date it was executed and filed in this Court, May 28, 2019.

¶20 IT IS FURTHER ORDERED that Respondent's name be stricken from the Roll of Attorneys and he may not apply for reinstatement of his license to practice law (and of his membership in the Bar) before the lapse of five years from the effective date of this order (May 28, 2019). Respondent shall comply with RGDP Rule 9.1.

¶21 IT IS FURTHER ORDERED that Complainant's request for reimbursement of costs is sustained. Respondent shall pay costs in the amount of $1,317.26 within thirty (30) days from the date of this order. Any consideration of any future Rule 11 petitions is conditioned upon such payment.

DONE BY ORDER OF THE SUPREME COURT THIS 10th DAY of JUNE, 2019.

/s/Noma D. Gurich
CHIEF JUSTICE

Concur – Gurich , C.J., Darby, V.C.J., Kauger, Winchester, Edmondson, Colbert, Combs, JJ.

2019 OK 43

IN THE MATTER OF THE STRIKING OF NAMES OF MEMBERS OF THE OKLAHOMA BAR ASSOCIATION FOR NONPAYMENT OF 2018 DUES

SCBD No. 6659. June 17, 2019

ORDER STRIKING NAMES

The Board of Governors of the Oklahoma Bar Association filed an Application for Order Striking Names of attorneys from the Oklahoma Bar Association's membership rolls for failure to pay dues as members of the Oklahoma Bar Association for the year 2018.

Pursuant to the Rules Creating and Controlling the Oklahoma Bar Association (Rules), 5 O.S. 2011 ch. 1, app. 1, art. VIII §2, the Oklahoma Bar Association's members named on Exhibit A, attached hereto, were suspended from membership in the Oklahoma Bar Association and prohibited from practicing law in the State of Oklahoma by this Court's Order of June 4, 2018, for failure to pay their 2018 dues in accordance with Article VIII, Section 2 of the Rules. Based upon the application, this Court finds that the Board of Governors determined at its May 17, 2019, meeting that none of the Oklahoma Bar Association members named on Exhibit A, attached hereto, have applied for reinstatement, pursuant to Article VIII, Section 4 of the Rules, at the time of the filing of its application. The Board of Governors further declared that the members named on Exhibit A, attached hereto, shall cease to be members of the Oklahoma Bar Association and that their names should therefore be stricken from its membership rolls and the Roll of Attorneys on June 4, 2019, pursuant to Article VIII, Section 5 of the Rules. This Court further finds that the actions of the Board of Governors of the Oklahoma Bar Association are in compliance with the Rules.

It is therefore ordered that the attorneys named as set forth on Exhibit A, attached hereto, are hereby stricken from the Roll of Attorneys for failure to pay their dues as members of the Association for the year 2018.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 17th DAY OF JUNE 2019.

/s/ Noma D. Gurich
CHIEF JUSTICE

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

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2019 OK 44

IN THE MATTER OF THE STRIKING OF NAMES OF MEMBERS OF THE OKLAHOMA BAR ASSOCIATION FOR NONCOMPLIANCE WITH MANDATORY CONTINUING LEGAL EDUCATION REQUIREMENTS FOR THE YEAR 2017

SCBD No. 6660. June 17, 2019

ORDER STRIKING NAMES

The Board of Governors of the Oklahoma Bar Association filed an application for an Order Striking Names of attorneys from the Oklahoma Bar Association's membership rolls and from the practice of law in the State of Oklahoma for failure to comply with the Rules for Mandatory Continuing Legal Education, 5 O.S. 2001, ch. 1, app. 1-B, for the year 2017.

Pursuant to Rule 6(d) of the Rules for Mandatory Continuing Legal Education, the Oklahoma Bar Association's members named on Exhibit A, attached hereto, were suspended from membership in the Association and the practice of law in the State of Oklahoma by Order of this Court on June 4, 2018, for noncompliance with Rules 3 and 5 of the Rules for Mandatory Continuing Legal Education for the year 2017. Based on its application, this Court finds that the Board of governors determined at their May 17, 2019, meeting that none of the Oklahoma Bar Association's members named on Exhibit A, attached hereto, have applied for reinstatement within one year of the suspension order. Further the Board of Governors declared that the members named on Exhibit A, attached hereto, shall cease to be members of the Oklahoma Bar Association and their names should therefore be stricken from its membership rolls and the Roll of Attorneys on June 4, 2019. This Court finds that the actions of the Board of Governors of the Oklahoma Bar Association are in compliance with the Rules.

It is therefore ordered that the attorneys named on Exhibit A, attached hereto, are hereby stricken from the Roll of Attorneys on June 4, 2019, for failure to comply with the Rules for Mandatory Continuing Legal Education for the year 2017.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 17th DAY OF JUNE 2019.

/s/ Noma D. Gurich
CHIEF JUSTICE

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

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2019 OK 45

CRYSTAL WELLS, individually and as Administrator of the ESTATE OF ROBERT YOUNG, Deceased, Plaintiff/Appellant, v. OKLAHOMA ROOFING & SHEET METAL, L.L.C., and OKLAHOMA ROOFING & SHEET METAL, INC., Defendants/ Appellees.

No. 112,844. June 18, 2019

CERTIORARI TO THE COURT OF CIVIL APPEALS, DIVISION IV

¶0 Daughter of the deceased employee brought a wrongful death action in district court against the decedent's employer for intentional tort, asserting that the decedent's employer was willful, wanton, and intentional in directing the decedent-employee to perform certain tasks that the decedent's employer knew was certain or substantially certain to result in the decedent-employee's death and sought declaratory relief that the exclusive liability provision of the Workers' Compensation Act was unconstitutional. The district court declared the Act's exclusivity provision constitutional, ultimately determined the decedent-employer's liability was exclusively governed by the Oklahoma Workers' Compensation Act, and dismissed the daughter's petition. The Court of Civil Appeals, Division IV, declared the statute constitutionally infirm as a special law in violation of Okla. Const. art. 5, §§ 46, 59. The COCA reversed the district court's order of dismissal and remanded the matter for further proceedings.

CERTIORARI PREVIOUSLY GRANTED; OPINION OF COURT OF CIVIL APPEALS VACATED; DISTRICT COURT ORDER REVERSED; CAUSE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

James K. Secrest, II, Edward J. Main, SECREST, HILL, BUTLER & SECREST, Tulsa, Oklahoma, for Appellees.

Larry A. Tawwater, Darren M. Tawwater, THE TAWWATER LAW FIRM, P.L.L.C., Oklahoma City, Oklahoma, for Appellant.

Mike Hunter,[1] ATTORNEY GENERAL, Oklahoma City, Oklahoma.

Colbert, J.

¶1 The issue presented on certiorari review is whether intentional torts are within the purview of the workers' compensation scheme at Okla. Stat. tit. 85, § 12 (2001 and Supp. 2010)[2] and whether this part of § 12 is an unconstitutional special law in violation of Okla. Const. art. 5, §§ 46, 59.[3] Based on this Court's review of the undisputed facts, the Oklahoma Constitution, and applicable laws, we find that the portion of § 12 that includes intentional torts is not within the walls of the workers' compensation scheme or jurisdiction. This analysis ap-plies equally to subsequent iterations found in Okla. Stat. tit. 85A, § 5(B)(2)(2013),[4] 209(B),[5] and Okla. Stat. tit. 85, § 302(B)(2011) (now repealed). Accordingly, the district court's order is reversed and the matter is remanded to the district court for further proceedings consistent with today's pronouncement.

I. BACKGROUND AND PROCEDURAL POSTURE

¶2 On June 27, 2011, Robert Young, an employee of Oklahoma Roofing & Sheet Metal, Inc., and Oklahoma Roofing & Sheet Metal, L.L.C. (collectively, Employer), was working on a roof applying a membrane roof on a three-story building when he was required by Employer to unhook his single line lanyard requiring him to cross over two coworkers. He walked ten feet beyond the point where he had unhooked his lanyard when he fell, landing on an awning thirty feet below, and then he rolled off the awning and fell onto bricks on the ground twelve feet below to his death. Prior to the date of Wells injury and death, Oklahoma Roofing and Sheet Metal, Inc., was cited for a violation related to the duty to have a sufficient fall protection system.

¶3 Crystal Wells, individually and as Administrator of the Estate of Robert Young, Deceased

(Wells), commenced an action in district court seeking damages for Decedent's death and declaratory relief. Wells's first amended petition alleged Decedent's death was the result of Employer's intentional tort. Specifically, Wells alleged that Employer provided and intended Decedent to use a single-line lanyard fall-protection system that required Decedent to temporarily unhook his safety anchor in order to pass over the other co-workers working on the roof. Wells alleged that when the anchor was unhooked, the fall protection system was inoperable; and therefore, unable to prevent an employee's fall like the instant fall which led to Decedent's death. Wells alleged Employer knew the single-line system would lead to Decedent's death; that Employer's actions were willful, wanton, and intentional; that Employer was found to be a repeat violator of the Occupational and Safety Health Administration's (OSHA) safety rules; that Employer was fined by OSHA for acts related to Decedent's death;[6] and that Employer was previously cited on two[7] separate occasions "by the United States Government for violating various Federal requirements regarding the fall-protection equipment." Wells alleged Employer's actions were willful, wanton, and intentional, with specific knowledge of the dangerous and potentially lethal conditions and thus, her remedy was not limited to those benefits provided by the Workers' Compensation Act. In addition, Wells sought declaratory relief to declare the exclusivity provision of Okla. Stat. tit. 85, § 12 (2001 and Supp. 2010) unconstitutional as a special law and therefore, inapplicable to her action. Employer filed a motion to dismiss, essentially alleging that Wells's claims were barred by § 12. In relevant part, that section states:

> The liability [of the Act] shall be exclusive …except in the case of an intentional tort, … **An intentional tort shall exist only when the employee is injured as a result of willful, deliberate, specific intent of the employer to cause such injury. Allegations or proof that the employer had knowledge that such injury was substantially certain to result from its conduct shall not constitute an intentional tort. The issue of whether an act is an intentional tort shall be a question of law for the court** . . . . (emphasis added).

¶4 The district court declared § 12 constitutional and granted Employer's motion to dismiss. The court held that, while Wells's allegations met the "substantial certainty" element set forth in Parret v. UNICCO Serv. Co., 2005 OK 54, 127 P.3d 572, it did not satisfy the specific intent definition prescribed in § 12. Plaintiff Wells appealed.

¶5 Upon review, the COCA found that, in the context of the workers' compensation law, § 12 defined an "intentional tort" much narrower than the definition utilized in a garden-variety intentional tort action, although both types of actions are litigated in courts of general jurisdiction. As applied, § 12 created a subset of litigants and treated those litigants differently than other similarly-situated litigants. The COCA reversed the district court's determination and held § 12 unconstitutional as a special law. Employer sought certiorari review.

II. STANDARD OF REVIEW

¶6 Decedent's work-related death occurred on June 27, 2011. The law in effect at the time of Decedent's death, including claims for injuries, is governed by Okla. Stat. tit. 85, § 12 (2001 and Supp. 2010). Vasquez v. Dillard's, Inc., 2016 OK 89, ¶ 25 n.60, 381 P.3d 768, 786; Holliman v. Twister Drilling Co., 2016 OK 82, ¶ 5, 377 P.3d 133, 134.

¶7 At issue is the constitutionality and application of Okla. Stat. tit. 85, § 12 (2001 and Supp. 2010). A constitutional challenge to a statute's "validity, construction and application are legal questions this Court reviews de novo." John v. St. Francis Hosp., 2017 OK 81, ¶ 8, 405 P.3d 681, 685. De novo review is the proper standard also for reviewing the trial court's grant of a motion to dismiss. Wilson v. State ex rel. State Election Bd., 2012 OK 2, ¶ 4, 270 P.3d 155, 157 (citation omitted). Generally, motions to dismiss are "disfavored and granted only when there are no facts consistent with the allegations under any cognizable legal theory or there are insufficient facts under a cognizable legal theory." Id. Last, we assume "plenary independent and non-deferential authority to reexamine a trial court's legal rulings." John v. St. Francis Hosp., 2017 OK 81, ¶ 8, 405 P.3d 681, 685 (internal citation omitted).

III. DISCUSSION

A. Specific Intent and Substantial Certainty are Nomenclatures of an Intentional Tort

¶8 At the outset, it is critical to this Court's analysis to bring into focus what constitutes an intentional tort while fortifying the walls of the

Oklahoma Workers' Compensation's exclusivity provision. In general, an employer's liability for an employee's injuries is limited to the exclusive purview of the Workers' Compensation Court, except in cases of an intentional injury and, although not applicable here, "where the employer has failed to secure the payment of compensation for the injured employee." Okla. Stat. tit. 85, § 12 (2001 and Supp. 2010). It is well-settled that the common law divides actionable tortious conduct into two categories: (1) accidental and (2) willful acts that result in intended or unintended harm. Graham v. Keuchel, 1993 OK 6, ¶ 49, 847 P.2d 342, 362. Parret v. UNICCO Serv. Co., reflects that dichotomy. 2005 OK 54, ¶ 12, 127 P.3d 572, 575.

¶9 In Parret, a worker died when he was electrocuted while replacing emergency lights at a job site as ordered to do by his employer even though the employee knew that the lights were "hot or energized." Id. ¶¶ 3-4, 127 P.3d at 574. This Court settled the question that only an employer's intentional acts fall outside of the Oklahoma Workers' Compensation exclusivity provision. Id. ¶ 24, 127 P.3d at 579. Our review in Parret, however, was limited in scope to the two questions certified by the Federal court. Id. ¶ 1, 127 P.3d at 573-74. Relevant here, is question one, seeking guidance on the application of Oklahoma's intentional tort standard – namely, the "true intentional tort" and "substantial certainty." Id. ¶ 9, 127 P.3d at 575.

¶10 Parret reiterated that an employer's intentional acts against its employee come within the exclusivity exception to the workers' compensation laws, as intentional acts are neither accidental in nature nor arise out of the normal course and scope of an employee/employer relationship. Id. ¶¶ 8-9, 127 P.3d at 575. There, we stressed that the legal justification for an intentional tort action at common law, is the non-accidental, deliberate character of the injury judged from the employer's subjective standpoint. Id. ¶ 24, 127 P.3d at 579. Our focus was not limited to a particular employee and the injury sustained; but rather, the employer's intentional acts or willful failure to act as contemplated by the Oklahoma Workers' Compensation scheme. Our lengthy discussion detailed the historical development of Oklahoma's workplace injuries; the Legislature's expressed act of excluding injuries not covered by the terms in the workers' compensation laws; and the balance of interests driving the legislatively created scheme to provide employees compensation for accidental injures, regardless of fault. Id. ¶ 19, 127 P.3d at 579. Cloaking an employer with immunity from liability for their intentional behavior unquestionably would not promote a safe and injury-free work environment. An employer's impunity to commit an intentional act with the knowledge that, at the very most, his workers' compensation premiums may rise slightly is not in accord with Oklahoma's public policy. Id. ¶ 22, 127 P.3d at 578. Because Oklahoma's workers' compensation laws clearly underscore and contemplate the accidental character of a workplace injury, an employer's immunity, then, cannot be stretched to include the employer's intentional acts.

¶11 Parret denotes that when an employer "(1) desire[s] to bring about the worker's injury or (2) act[s] with the knowledge that such injury was substantially certain to result from the employer's conduct," an intentional tort action will lie. Id. ¶ 24, 127 P.3d at 579. We acknowledged that "all consequences which the actor desires to bring about are intended." Id. ¶ 17, 127 P.3d at 577. That intent, whether an intentional act or intentional inaction, is, by definition, deliberate. So, because "[i]ntent denotes a desire to cause the consequences of his act that the actor knows is certain, or substantially certain to result, then under the law, the actor has in fact desired to produce the result." Id. ¶ 17, 127 P.3d at 579 (quoting 1 Restatement (Second) of Torts § 8A (1965)). Shifting our focus to the substantial certainty element, we stated that the employer not only had to intend the act that caused the injury, but also required that the employer knew that the injury was substantially certain to follow. Id. ¶ 24, 127 P.3d at 579. The employee, then, "must allege facts which 'plausibly demonstrate that' the employer's conduct was intentional …." Id. The employer's knowledge "may be in-ferred from the employer's conduct and all the surrounding circumstances." Id. Although our limited review focused on the substantial certainty aspect of an intentional tort, we by no means "expand[ed] the narrow intentional tort exception to [the] workers' compensation exclusivity" provision. Id. ¶ 27, 127 P.3d at 579. Rather, we stated that both elements constitute an intentional tort and spoke directly to the tortfeasor's requisite mental state – that is, the employer's subjective appreciation of the resulting injury. Id. ¶ 24, 127 P.3d at 579. In short, Parret did not recognize two types or levels of inten-

tional torts. Compsource Okla. v. L&L Construction, Inc., 2009 OK CIV APP 28, ¶ 18, 207 P.3d 415, 420. Rather, Parret clarified what kinds of conduct constitute an intentional tort. Id.

¶12 Employer contends that § 12, like its successors,[8] was a legislative response to address a perceived unwarranted expansion of the intentional tort exception to the workers' compensation laws resulting, presumably, from our decision in Parret v. UNICCO Serv. Co., 2005 OK 54, 127 P.3d 572. According to Employer, § 12 attempts to redefine the existence of intentional torts to only those that result from the "willful, deliberate, specific intent of the employer" to cause injury and excepts those injuries an employer knows are substantially certain to occur. Yet, that fallacy is premised on the specific intent and substantial certainty nomenclatures, commonly misunderstood as one being different than the other. **They are not**. "[W]hat appears at first glance as two distinct bases for liability is revealed on closer examination to be one and the same." Hoyle v. DTJ Enters., Inc., 36 N.E.3d 122, 127 (quoting Rudisill v. Ford Motor Co., 709 F.3d 595, 602-03 (6th Cir.2013) (describing Ohio R.C. 2745.01 as "a statute at war with itself")).

¶13 In relevant part, § 12 states: "An intentional tort shall exist only when the employee is injured as a result of willful, deliberate, specific intent of the employer to cause such injury." That is, an employer's intent to injure an employee must be willful, deliberate, and specific. But what do those words mean? In examining a legislative enactment, this Court will "construe and apply it in a manner that avoids conflict with our Constitution and give[s] the enactment the force of law." Torres v. Seaboard Foods, LLC, 2016 OK 20, ¶ 17, 373 P.3d 1057, 1066-67, as corrected (Mar. 4, 2016).

¶14 Our analysis begins with the text and context of § 12. The operative word in § 12 is "intentional." The category of intentional torts have remained unchanged since before the inception of Oklahoma's workers' compensation laws in 1915 – a period in excess of a century. Adams v. Iten Biscuit Co., 1917 OK 47, 162 P. 938; see also Roberts v. Barclay, 1962 OK 38, 369 P.2d 808. The first constitutional challenge to Oklahoma's workers' compensation scheme was addressed in Adams v. Iten Biscuit Co., 1917 OK 47, 162 P. 938. In Adams, the court upheld the workers' compensation scheme as the exclusive remedy for work-related **accidental** injuries. Id. ¶ 17, 162 P. at 945. In determining the Act's constitutionality, we stated: "The act does not undertake to regulate willful injuries . . . but leaves the injured employee to his remedy as it existed when the act was passed. Considering the various provisions of the act together . . . [the Act] embraces all kinds of accidental injuries . . . whether occurring from the negligence of the employer or not arising out of and in the course of employment, **but does not include willful or intentional injuries inflicted by the employer**." Id. ¶¶ 16-17, 162 P. at 945.

¶15 In a subsequent decision, U.S. Zinc Co. v. Ross, the court clarified the Adams decision, holding that only injuries occasioned by an employer's **willful and intentional injuries** could not be considered accidental. 1922 OK 247, ¶ 3, 208 P. 805, 806. There, the court defined "willful" as "more than a mere act of will, and carries with it the idea of premeditation, obstinacy,[9] and intentional wrongdoing." Id. ¶ 6, 208 P. at 807 (citation omitted). By its definition, "willful" embodies intentional. Id. In context, this reading is consistent with the preceding provision that conditions an employer's liability on accidental injuries and expressly excludes injuries resulting from the "willful intention" and "willful failure" of the employee and co-employee. Id. The definition of "intentional," then, remains fixed and excluded from our compensation laws since before adoption of the compensation scheme and therefore, controls its meaning.

¶16 In the context of deliberate intent, that is an employer's deliberate intentions, the Supreme Court of Oregon stated that,

> [D]eliberate intent follows as a deduction from the allegation of knowledge of the danger and the carelessness, negligence, and recklessness of defendant in not obviating it . . . . A deliberate act is one the consequences of which are weighed in the mind beforehand. It is prolonged premeditation, and the word when used in connection with an injury to another denotes design and malignity of heart. It has been defined so many times that it is difficult to select any one definition which covers every phase in which the word is used, but some of the most apt are:
>
> "The word 'deliberate' is derived from two Latin words, which mean, literally, 'concerning,' and 'to weigh.' * * * As an adjective * * * it means that the manner of the

> performance was determined upon after examination and reflection – that the consequences, chances and means weighed, carefully considered and estimated."
>
> "Deliberation is that act of the mind which examines and considers whether a contemplated act should or should not be done."

Jenkins v. Carman Mfg. Co., 79 Or. 448, 453, 155 P. 703, 705 (1916) (citations omitted). "Deliberation" is "premeditation." Id. And, the premeditated thought is described as a mental thought beforehand, for any length of time preceding an act or willful failure to act, however short. See Easley v. State, 78 Okl. Cr. 1, 8, 143 P.2d 166, 170 (1943). In order to come within § 12's exception, "it is incumbent upon an injured [employee] to establish that his employer had a deliberate intention to injure him or someone else and that he was in fact injured as a result of that deliberate intention." Kilminster v. Day Mgmt. Corp., 323 Or. 618, 631, 919 P.2d 474, 481 (1996) (citations omitted). The more difficult question is how does an injured employee demonstrate an employer's requisite statutory intent when that intent is subjective.

¶17 An employer's "specific intent" to injure, or knowledge that an injury is "substantially certainty to result," equate to an intentional tort. Both require a knowledge of foreseeable consequences and are interpreted to mean intentionally knowing culpable acts. The belief that one has a different level or degree of a tortious act, and thereby concluding that specific intent and substantial certainty are different animals, is a fallacy. "A culinary example may be more illustrative. If you make a peanut butter cookie, it is apparent that it is a smooth, one flavor cookie. It is still a peanut butter cookie even if you use crunchy peanut butter, because its major flavor is still peanuts. . . ." Douglas v. Cox Ret. Properties, Inc., 2013 OK 37, ¶ 19, 302 P.3d 789, 801 (Kauger, J., concurring specially). Yet, despite its consistency, it remains a cookie. Similarly, the major flavor of intentional tort is the actor's subjective intent to cause harm. That requisite mens rea no more ceases to be intentional merely because the actor specifically targeted a particular employee or another employee, generally. Parret recognized that point, finding that the two definitions were essentially the same and demonstrated the Legislature's intent to permit recovery for an employer's intentional acts only when an employer acts with the specific intent to cause an injury. In both instances, you must prove that the willful, deliberate, culpable act was intentional.

¶18 Specific intent, like its counterpart substantial certainty, is purely a subjective fact never susceptible to direct proof. Stated differently, showing an employer's subjective intent to engage or refusal to engage in an activity that the employer knows that injury is certain to occur requires consideration of objective facts, and from those objective facts, an ultimate conclusion is drawn. See Tiger v. Verdigris Valley Elec. Coop., 2016 OK 74, ¶¶ 14-15, 410 P.3d 1007, 1011-12. "[A]n employer's knowledge may be inferred from the employer's conduct and all the surrounding circumstances." Id. (citation omitted). **Therefore, an employer's conduct and the surrounding circumstances can be established through circumstantial evidence**. Estrada v. Port City Prop., Inc., 2011 OK 30, ¶ 22, 258 P.3d 495, 504. To illustrate, assume a "defendant pushes [a] plaintiff into a room, locks the door and throws away the key." § 29 The Meaning of Intent, Dan B. Dobbs, Paul T. Hayden and Ellen M. Bublick. Because "the trier of fact has no mind reading machine to determine" the defendant's subjective intent," the trier of fact is entitled to infer [from external or objective evidence] that the defendant intends to confine the plaintiff, at least for a time." Id. "[E]vidence that the defendant intended any given act may be good evidence that he also intended the results that tend to follow such an act." Id. Such a determination is clearly a question of fact that is ordinarily inferred from the employer's conduct or acts under the circumstance of a particular case. Lucenti v. Laviero, 176 A.3d 1, 11 (Conn. 2018).

¶19 We think by the words "**willful, deliberate, specific intent of the employer to cause such injury**" that the Legislature unequivocally intended to convey that the employer must have determined to injure an employee and used some means appropriate to that end; and that there must be a deliberate intent. It is now settled that an employer's **willful, deliberate, specific intent to injure** with the purpose to cause injury or which injury is substantially certain that makes an employer's act or failure to act intentional. Mere carelessness or negligence, however gross, will not suffice. However, we do not believe, as Employer contends, that the Legislature intended to bifurcate the sphere of intentional torts constitutionally reserved as common law rights of actions which

predate the inception of Oklahoma's workers' compensation scheme.

¶20 At this juncture we note that there has always been disparity between the rights and remedies of persons injured while in the course and scope of their employment and those who are injured elsewhere. See Adams v. Iten Biscuit Co., 1917 OK 47, 162 P. 938. However, that disparity is properly confined within the Workers' Compensation system. Id. The original Industrial Bargain/Grand Bargain struck between employees and employers is premised on compensating employees for **accidental** work-related injuries regardless of fault. Id. "[T]he workers' compensation statutes were designed to provide the exclusive remedy for accidental injuries sustained during the course and scope of a worker's employment [and] were not designed to shield employers or co-employees from willful, intentional or even violent conduct." Parret, 2005 OK 54, ¶ 8, 127 P.3d 572, 575 (quoting Thompson v. Madison Machinery Co., 1984 OK CIV APP 24, ¶ 17, 684 P.2d 565, 568).

¶21 The relevant part of the 2010 version of 85 O.S. § 12 and the current version of 85A O.S. § 5 state: "Allegations of proof that the employer had knowledge that the injury was substantially certain to result from the employer's conduct shall not constitute an intentional tort." The Defendants are making the argument herein that the Legislature may rework or change the Grand Bargain where employees lost the right to bring a District Court action against their employers in exchange for the no-fault workers' compensation remedies. Invoking the legislature's power to change the Grand Bargain is going beyond merely stating an evidentiary standard to prove an intentional tort in District Court has been statutorily changed. The Employer is therefore arguing for a form of absolute immunity from legal liability for an employer when that employer intentionally injures an employee pursuant to the substantial certainty standard. In other words, it is argued the Legislature may state both an employer's intentional tort is not actionable in a District Court regardless of the nature or extent of the employee intentionally injured and the employee's injury caused by the employer has no remedy in the workers' compensation scheme; leaving the employee in a virtual no man's land when it comes to seeking a remedy.

¶22 The effect of the Employer's argument before this Court is that an employee's injury is compensable in a workers' compensation no-fault scheme even if the injury was a result of merely a slight degree of negligence, but an employer's substantially certain intentional tort received no remedy in workers' compensation or in the District Court.[10] No public interest is articulated by Employer to support any public policy for denying a course of action in District Court based upon an employer's intentional tort injuring an employee while also denying a workers' compensation remedy other than the party's reference to the power of the Legislature. This interpretation of the statutes presents an underinclusive-overinclusive constitutional invalidity issue similar to the one addressed in Torres v. Seaboard Foods, LLC.[11]

¶23 When the Legislature superseded Parret, as argued by Employer herein, it did not also change the definition of an "accident" or otherwise expressly make clear a substantially certain employer's intentional tort is compensable using a workers' compensation remedy. It is patently clear that the Legislature has expressed an intent to confine adjudication of accidental work-related injuries to the workers' compensation system.[12] By its expressed terms, § 3 of 85A mandates that every employer and employee shall be subject and bound to the Administrative Workers' Compensation Act, but that the "**act shall only apply to claims** for injuries and death **based on accidents** . . . ." § 3(B) (emphasis added). The key here is that the Act only covers injuries or deaths caused by **accidents** based on negligence where a duty of care has been breached. The Act was never intended as a remedy for intentional torts. Therefore, we find that the Legislature's definition of intentional tort codifies and galvanizes the common law right of an intentional tort action. We further find that intentional injuries have never been inside the walls of the workers' compensation scheme of Okla. Stat. tit. 85, § 12.

IV. CONCLUSION

¶24 We hold that the willful, deliberate, specific intent of the employer to cause injury, and those injuries that an employer knows are substantially certain to occur, are both intentional torts that are not within the scheme of the workers' compensation system or its jurisdiction. Plaintiff's additional constitutional arguments are thus not necessary to adjudicate this appeal. For the reasons expressed herein, the district court's order is reversed and the matter

is remanded to the district court for further proceedings consistent with today's pronouncement.

CERTIORARI PREVIOUSLY GRANTED; OPINION OF COURT OF CIVIL APPEALS VACATED; DISTRICT COURT ORDER REVERSED; CAUSE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

VOTE:

Gurich, C.J., Colbert J., Reif, S.J. and Rapp, S.J., concur;

Edmondson, J., concurs specially (**by separate writing**)

Darby, V.C.J., Kauger (**by separate writing**), Winchester (**by separate writing**) and Combs, JJ., dissent.

1. On February 21, 2014, Plaintiff filed and served notice to the Attorney General of the constitutional challenge to Okla. Stat. tit. 85, § 12 (2001 and Supp. 2010), pursuant to Okla. Stat. tit. 12, § 2024(D)(1).

2. Section 12 limits an employer's liability to the exclusive purview of the Workers' Compensation Court, except in cases of an intentional tort. In pertinent part, that section states,

> An intentional tort shall exist only when the employee is injured as a result of willful, deliberate, specific intent of the employer to cause such injury. Allegations or proof that the employer had knowledge that such injury was substantially certain to result from its conduct shall not constitute an intentional tort. The issue of whether an act is an intentional tort shall be a question of law for the court.
> * * * *

Okla. Stat. tit. 85, § 12 (2001 and Supp. 2010).

3. Article 5, § 46 of the Oklahoma Constitution prohibits local and special laws on certain subjects. In relevant part, that section states:

> The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law authorizing:
> * * * *
> Regulating the practice or jurisdiction of, or changing the rules of evidence in judicial proceedings or inquiry before the courts, justices of the peace, sheriffs, commissioners, arbitrators, or other tribunals, or providing or changing the methods for the collection of debts, or the enforcement of judgments or prescribing the effect of judicial sales of real estate;
> * * * *
> For limitation of civil or criminal actions;
> * * * *

Article 5, § 59 of the Oklahoma Constitution states that, "[l]aws of a general nature shall have a uniform operation throughout the State, and where a general law can be made applicable, no special law shall be enacted."

4. Okla. Stat. tit. 85A, § 5(B)(2) is raised in companion case Farley v. City of Claremore, No. 115,400.

5. Okla. Stat. tit. 85A, § 209(B) Limitation on Qualified Employer Liability - Exceptions - Employee Intoxication - Benefits Paid Offset Awards - Statute of Limitations, states:

> B. Except as otherwise provided by its benefit plan, or applicable federal law, a qualified employer is only subject to liability in any action brought by a covered employee or his or her dependent family members for injury resulting from an occupational injury if the injury is the result of an intentional tort on the part of the qualified employer. **An intentional tort shall exist only when the covered employee is injured because of willful, deliberate, specific intent of the qualified employer to cause such injury**. Allegations or proof that the qualified employer had knowledge that such injury was substantially certain to result from its conduct shall not constitute an intentional tort. The issue of whether an act is an intentional tort shall be a question of law for the court or the duly appointed arbitrator, as applicable. (emphasis added).

Of note – § 209(A) was invalidated on other grounds. Vasquez v. Dillard's Inc., 2016 OK 89, 381 P.3d 768.

6. According to the United States Department of Labor's Accident Investigation Summary dated June 28, 2011, The Federal Occupational Safety and Health Administration proposed a penalty for Young's death in the amount of $12,600.00. Plaintiff's Answer to Defendant's Petition for Certiorari. Employer does not refute the allegation.

7. Date of Citation: 08/05/2009
Inspection Number: 313684946
OR&SM, Inc. was cited for a violation classified as "Serious." The violation Standard number was 19260501 B10. This standard number cites to 1926.0501 "Duty to have fall protection." The B10 subsection is described as:

"Roofing work on Low-slope roofs." Except as otherwise provided in paragraph (b) of this section, each employee engaged in roofing activities on low-slope roofs, with unprotected sides and edges 6 feet (1.8 m) or more above lower levels shall be protected from falling by guardrail systems, safety net systems, personal fall arrest systems, or a combination of warning line system and guardrail system, warning line system and safety net system, or warning line system and personal fall arrest system, or warning line system and safety monitoring system. Or, on roofs 50-feet (15.25 m) or less in width (see Appendix A to subpart M of this part), the use of a safety monitoring system alone [i.e. without the warning line system] is permitted.

29 CFR § 1926.501(b)(10)
Date of Citation: 06/28/2011
Inspection Number: 314933318
OR&SM, Inc. was cited for two violations, classified as "Serious" and "Repeat." The violation Standard number was 19260501 B01. This standard number cites to 1926.0501 "Duty to have fall protection." The B01 subsection is described as:

"Unprotected sides and edges." Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

29 CFR § 1926.501(b)(1).

8. For the successive enactments, see: Okla. Stat. tit. 85, § 12 (2011) The Act; Okla. Stat. tit. 85, § 302(B)(2011) The Code; Okla. Stat. tit. 85A, § 5(B)(2)(2011, Supp. 2014) The Administrative Workers' Compensation Act (AWCA).

9. Obstinacy is defined as the quality or condition of being obstinate; stubbornness. "Obstinacy" is also a synonym for "willfulness." Merriam-Webster's Dictionary.

10. There are three statutory degrees of negligence in Oklahoma, slight, ordinary and gross. See 25 O.S. 2011 § 5 "There are three degrees of negligence, namely, slight, ordinary and gross. The latter includes the former."); 25 O.S. § 6 ("Slight negligence consists in the want of great care and diligence; ordinary negligence in the want of ordinary care and diligence; and gross negligence in the want of slight care and diligence.")

11. 2016 OK 20, 373 P.3d 1057.

12. See Parret v. UNICCO Serv. Co., 2005 OK 54, 127 P.3d 572, and the cases cited therein.

EDMONDSON, J., CONCURRING SPECIALLY, and joined by GURICH, C.J., and RAPP, S.J.

¶1 I write separately to explain further the analysis I believe this controversy requires. One of the parties states the implied legislative purpose or intent of 85 O.S.Supp. 2010 § 12 was to supersede the Court's holding in *Parret v. UNICCO Serv. Co*., 2005 OK 54, 127 P.3d 572, as such relates to the substantially certain standard used to show the intent of a defendant in a tort action. If the legislature intended to use section 12 for the purpose of superseding language in *Parret*, then the effort resulted in an internally inconsistent statutory scheme. Inconsistent statutes may be reconciled by courts to

effectuate perceived legislative intent.[1] However, a court's reconciliation method is limited by the Oklahoma Constitution, and the Court will not interpret legislative intent in a manner to create a constitutional flaw or uncertainty in one of the statutes.[2] The argument asserting *Parret* was superseded by statute is based upon a view requiring workers' compensation statutes to be inconsistent and injecting constitutional invalidity.

¶2 The workers' compensation statutes state an employer's workers' compensation liability is "exclusive and in place of all other liability of the employer" and an injured employee's "rights and remedies are exclusive of all other rights and remedies of the employee."[3] The 2010 version of the statutes in effect at the time of injury[4] states a "compensable injury," other than cumulative trauma, must arise out of and in the course of the employment, and be caused by a "specific incident."[5] In the present statutes[6] a compensable workers' compensation injury must be an "accident" and "unintended."[7] Historically, an "accident" for workers' compensation law was required for liability and generally excluded injury caused by a person's intentional tort.[8] The remedies provided by the workers' compensation *statutory scheme* do not apply "in the case of an intentional tort," or if "the injury was caused by an intentional tort committed by the employer."[9]

¶3 The substantially certain standard as an evidentiary standard for showing the element of intent in an intentional tort cause of action was recognized in American jurisprudence in both the 1934 and 1965 Restatements on torts as part of a continuum of tort liability. Modern tort jurisprudence recognizes this liability continuum with intent and negligence occupying opposite ends of a spectrum with varying degrees of probability between these opposite ends.[10] The substantially certain standard is on this continuum and is used as one type of evidence to show an actor intended the result of his or her actions.[11] The *Restatement (Second) of Torts* states the following:

> Intent is not, however, limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result. As the probability that the consequence will follow decreases, and becomes less than substantial certainty, the actor's conduct loses the character of intent, and becomes mere recklessness as defined in § 500 [of the Restatement]. As the probability decreases further, and amounts only to a risk that the result will follow, it becomes ordinary negligence, as defined in § 282 [of the Restatement].

Restatement (Second) of Torts, § 8A cmt. b. (1965) (explanatory phrases added).

The language of a substantially certain standard is also found in the *Restatement (First) of Torts* § 13 (1934).[12] The substantially certain standard appears in various forms and in matters as diverse as the Model Penal Code[13] and controversies involving fidelity bonds and employee-dishonesty coverage disputes.[14] The standard has been referenced by this Court when contrasting negligence.[15] The standard was noted by this Court prior to *Parret* and in the context of workers' compensation when we observed application of the intent standard is not limited to an intent for the purpose of a specific consequence.[16] *Parret* did not invent the substantially certain standard or its use in a tort cause of action. The concept has been well-known since the 1934 Restatement.[17]

¶4 The 2010 version of 85 O.S. § 12 and the current version of 85A O.S. § 5 state: "Allegations or proof that the employer had knowledge that the injury was substantially certain to result from the employer's conduct shall not constitute an intentional tort." The argument is made by a party herein the Legislature may rework or change the Grand Bargain where employees lost the right to bring a District Court action against their employers in exchange for the no-fault workers' compensation remedies. Invoking the legislature's power to change the Grand Bargain is going beyond merely stating an evidentiary standard to prove an intentional tort in District Court has been statutorily changed. The party is arguing for a form of absolute immunity from legal liability for an employer when that employer intentionally injures an employee pursuant to the substantially certain standard. In other words, it is argued the Legislature may state both an employer's intentional tort is not actionable in a District Court regardless of the nature or extent of the employee intentionally injured and employee's injury caused by the employer has no remedy in the workers' compensation scheme.

¶5 States which have rejected the substantially certain standard for an employer's intentional conduct have explained the stricter specific intent to injure standard is acceptable for the purpose of workers' compensation law because "it is only when the employer acts with specific intent to injure the employee that the resultant injury is *stripped of its accidental character.*"[18] In other words, in these states an employee injured from an employer's conduct satisfying a substantially certain test may obtain compensation using a statutory workers' compensation remedy because the injury is considered as accidental.[19] We have no statute cited to us showing a substantially certain intentional tort may serve as the basis for a workers' compensation claim.

¶ 6 The effect of one of the arguments before us is that an employee's injury is compensable in a workers' compensation no-fault scheme even if the injury was the result of merely a slight degree of negligence, but an employer's substantially certain intentional tort receives no remedy in workers' compensation or in the District Court.[20] No public interest is articulated to support any public policy for denying a cause of action in District Court based upon an employer's intentional tort injuring an employee while also denying a workers' compensation remedy other than the party's reference to the power of the Legislature. This interpretation of the statutes presents an underinclusive-overinclusive constitutional invalidity issue similar to the one addressed by the Court in *Torres v. Seaboard Foods, LLC*.[21]

¶7 The party's petition for certiorari also argues: "A worker who cannot prove an intentional tort under the Statutory Definition may still recover benefits under the Workers' Compensation regime." However, this statement is not supported with any statutory authority making a substantially certain intentional tort qualify for a workers' compensation claim. A necessarily implied element to this party's argument is that when the Legislature expressly denied a District Court action the Legislature also simultaneously created an *implied* statutory workers' compensation cause of action and remedy based upon a substantially certain intentional tort.

¶8 Generally, it is a matter of statutory construction whether a statute creates a cause of action by implication.[22] However, no ambiguity exists in the workers' compensation statutes on the inclusiveness of intentional torts as a workers' compensation remedy or the degrees of culpability used for remedies in either a District Court or the Workers' Compensation Commission.[23] Reading the face of the statutes and moving from the highest degree of culpability to the lowest: (1) A District Court cause of action is provided for the highest degree of culpability when there is an employer's intent to harm by causing the specific injury intended; (2) No statutory cause of action in either the District Court or Workers' Compensation Commission when there is an employer's intent to harm based upon the substantially certain standard; and (3) A workers' compensation remedy when the employer's conduct could be classified as negligent using any of the three types of negligence.[24] The statutes provide for legal remedies when the employer's conduct has higher and lesser culpability, but not when the employer's conduct falls between the two extremes. We stated in 1963 that an accidental injury for the purpose of a workers' compensation remedy is "where the injury results through some accidental means, was unexpected and undesigned, or may be the result of mere mischance or of miscalculation as to the effect of voluntary action."[25] Contemporaneous with this definition are the Court's holdings that a wilful or intentional assault upon an employee by a third person will qualify for workers' compensation when there exists a causal connection between the assault and the worker's employment.[26] More recently, the 2001 statutes provided for an employer's liability for compensation except when certain types of wilful or intentional conduct resulted in the injury, *e.g.*, employee's wilful self-injury, employee's wilful failure to use a guard or protective device, employee's illegal use of prohibited chemicals causing the injury, and an employee's wilful or intentional behavior qualifying as a prank or horseplay causing his or her injury.[27] Also in 2001, the Court explained that workers' compensation liability was based upon an "accidental injury" and contrasted this type of injury with an injury caused by an employer's "deliberate, wilful or intentional acts."[28] While the Legislature has since used an evidentiary standard in defining an employer's intentional tort, the Legislature has not created any amendments redefining the scope of an "accidental injury" as including certain types of deliberate, wilful or intentional acts. Legislative acquiescence on the definition of accidental injury and its accidental-intentional dichotomy appears to qualify as legislative approval with the Court's dichotomous definition.[29] On this argument

two final points must be made. First, the statutory workers' compensation remedy is an exclusive remedy, and secondly, absent any statutorily-created ambiguity on the definition of an accidental injury I decline to turn a District Court cause of action into an *implied* statutory workers' compensation claim.[30]

¶9 When the Legislature superseded *Parret,* as argued by a party herein, it did not also change the definition of an "accident" or otherwise expressly make clear a substantially certain employer's intentional tort is compensable using a workers' compensation remedy. Because of this Court's past construction of what constitutes an "accident," if the Legislature was indeed superseding *Parret* as well as other opinions by the Court defining an accidental injury, then I would have expected either (1) a statutory amendment to what constitutes an accidental injury to include the intentional tort at issue, or (2) some indication of a public policy sufficient for the exercise of a police power and the legislative destruction of some but not all intentional tort causes of action brought by an injured party in an Oklahoma District Court while simultaneously denying a workers' compensation remedy for such injuries.

¶10 In *Torres v. Seaboard Foods, LLC*,[31] an employer argued an employee was prevented from obtaining a remedy in either a District Court or the Workers' Compensation Commission although the type or nature of injury *was otherwise compensable as part of the workers' compensation statutory scheme*. We reversed the order of the Commission and remanded the matter for further proceedings on the employee's workers' compensation claim *when the claim was subject to a workers' compensation remedy*. In the controversy before us the employer argues there is no *District Court remedy* for an employer's intentional tort pursuant to a statute, although the injury is otherwise compensable as a *District Court remedy.* I decline to read the workers' compensation statutes as providing an *implied* remedy for an employer's intentional torts when such is not expressly authorized by the workers' compensation statutes. There is no legally cognizable public policy championed herein for simultaneously denying an injured worker any legal remedy in District Court or the Workers' Compensation Commission when the worker is injured by the intentional conduct of an employer. While a mere doubt of unconstitutionality requires the Court to uphold a statute, when invalidity of statutory language is shown the Court has a constitutional duty not to enforce the offending language.[32] The fundamental *Torres* flaw I ob-serve herein is the result of an omission in the statutory amendments, and this particular flaw is not outside the power of the Legislature to correct by the appropriate statutory enactments. The matter must be remanded to the District Court for plaintiff to proceed using a substantially certain standard for an intentional tort.

1. *St. John Medical Center v. Bilby,* 2007 OK 37, ¶ 6, 160 P.3d 978, 979 (the Court may reconcile statutory discord and ascertain legislative intent).

2. *Powers v. District Court of Tulsa County*, 2009 OK 91, ¶ 28, 227 P.3d 1060, 1078 (Court construes statutes, if possible, to be consistent with constitutional provisions). *Cf. Crowell v. Benson*, 285 U.S. 22, 62, 52 S.Ct. 285, 76 L.Ed. 598 (1932) (when the validity of an act of the Congress is drawn in question it is a cardinal principle that the Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided).

3. 85 O.S.Supp.2010 § 12; 85A O.S.Supp.2013 § 5(A).

4. Substantive rights in workers' compensation law become fixed on the date of injury. *Multiple Injury Trust Fund v. Coburn*, 2016 OK 120, ¶ 4, 386 P.3d 628, 631; *Scruggs v. Edwards*, 2007 OK 6, ¶¶ 7 – 8, 154 P.3d 1257, 1261. The worker in this controversy was injured on June 27, 2011, and the statutes in effect on that date control this controversy.

5. 85 O.S.Supp. 2010 § 3 (13)(a).

6. Subsequent amendments to a statute may be used by a court when determining legislative intent. *Apache Corp. v. State, ex rel. Oklahoma Tax Commission*, 2004 OK 48, ¶ 3, n. 3, 98 P.3d 1061, 1068, citing *Letteer v. Conservancy District No. 30,* 1963 OK 218, 385 P.2d 796, 801 ("subsequent legislation may be considered as an aid in construing prior enactments upon the same subject").

7. 85A O.S.Supp.2013 § 2(9)(a).

8. *Roberts v. Barclay*, 1962 OK 38, 369 P.2d 808, 809 (worker's compensation applied only to disability or death resulting from accidental injuries, and conclusory allegations employer acted "wilfully and knowingly" without facts giving rise to such inference were insufficient to show plaintiff's fall from a scaffold was anything other than an accidental injury arising out of and in the course of employment with an exclusive worker's compensation remedy). *See infra* at ¶ 8 and note 26.

9. 85 O.S.Supp.2010 § 12; 85A O.S.Supp.2013 § 5(B)(1).

10. *Walston v. Boeing Co.*, 181 Wash.2d 391, ¶ 26, 334 P.3d 519, 525 (2014) ("The gradations of tortious conduct can best be understood as a continuum.") citing *Woodson v. Rowland,* 329 N.C. 330, 341-42, 407 S.E.2d 222 (1991) (discussing the *Restatement (Second) of Torts* § 8A & cmt. b (1965) and W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on the Law of Torts* § 8, at 35 (5th ed.1984).

11. *Halo Electronics, Inc. v. Pulse Electronics, Inc.*, 579 U.S. ___, ___,136 S.Ct. 1923, 1933, 195 L.Ed.2d 278 (2016) (observing "culpability is generally measured against the knowledge of the actor at the time of the challenged conduct" with citations including, but not limited to, the *Restatement (Second) of Torts* § 8A (1965) ("intent" denotes state of mind in which "the actor desires to cause consequences of his act" or "believes" them to be "substantially certain to result from it"), and W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* § 34, p. 212 (5th ed. 1984) (describing willful, wanton, and reckless as "look[ing] to the actor's real or supposed state of mind"), and *Safeco Ins. Co. of America v. Burr,* 551 U.S. 47, 69, 127 S.Ct. 2201, 167 L.Ed.2d 1045 (2007), (a person is reckless if he acts "knowing or having reason to know of facts which would lead a reasonable man to realize" his actions are unreasonably risky).

12. *Restatement (First) of Torts* § 13 (1934) (Battery; Harmful Contact), (Comment on Clause (a): "An act which, directly or indirectly, is the legal cause of a harmful contact with another's person makes the actor liable to the other, if (a) the act is done with the intention of bringing about a harmful or offensive contact or an apprehension thereof to the other or a third person . . . (d) Character of actor's intention. In order that an act may be done with the intention of bringing about a harmful or offensive contact or an apprehension thereof to a particular person, either the other or a third person, the act must be done for the purpose of causing the contact or apprehension or with knowledge on the part of the actor that such contact or apprehension is substantially certain to be produced."

13. *U. S. v. Bailey,* 444 U.S. 394, 403-404, 100 S.Ct. 624, 62 L.Ed.2d 575 (1980) (Court discussed the American Law Institute's Model Penal Code's approach where the ambiguous and elastic term "intent" is replaced with a hierarchy of culpable states of mind; and the different levels in this hierarchy are commonly identified, in descending order of culpability, as purpose, knowledge, recklessness, and negligence); *United States v. United States Gypsum Co.*, 438 U.S. 422, 445, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978), (stating it is now generally accepted that a person who acts [or omits to act] intends a result of his act [or omission] under two quite different circumstances: (1) when he consciously desires that result, whatever the likelihood of that result happening from his conduct; and (2) when he knows that the result is practically certain to follow from his conduct, whatever his desire may be as to that result) quoting W. LaFave & A. Scott, *Criminal Law,* 196 (1972). *See also* the *Resolution Trust Corp. v. Fid. & Deposit Co. of Md., infra* at note 14.

14. A substantially certain standard has been applied in controversies involving the issue of "manifest intent" in fidelity bonds and employee-dishonesty coverage disputes. *See, e.g., Auto Lenders Acceptance Corp. v. Gentilini Ford, Inc.*, 181 N.J. 245, 854 A.2d 378, 390-391 (2004) quoting *Resolution Trust Corp. v. Fid. & Deposit Co. of Md.*, 205 F.3d 615, 639 (3d Cir.2000) (stating the United States Court of Appeals for the Third Circuit had explained that the substantially certain test could be loosely analogized to the Model Penal Code's mental state "knowingly," as a person acts knowingly under the Model Penal Code if he or she is aware that "a result is practically certain to follow from his conduct, whatever his desire may be as to the result "); *F.D.I.C. v. United Pacific Ins. Co.*, 20 F.3d 1070, 1078 (10th Cir. 1994) ("manifest intent" as a phrase used in the fidelity insurance industry since 1978 does not require that the employee actively wish for or desire a particular result; rather, manifest intent exists when a particular result is substantially certain to follow from the employee's conduct), citing *Heller Int'l Corp. v. Sharp,* 974 F.2d 850, 857 (7th Cir.1992), and relying on *F.D.I.C. v. St. Paul Fire and Marine Ins. Co.*, 942 F.2d 1032, 1035 (6th Cir.1991) "although the concept of 'manifest intent' does not necessarily require that the employee actively wish for or desire a particular result, it does require more than a mere probability . . . manifest intent exists when a particular result is 'substantially certain' to follow from conduct").

15. *Moran v. City of Del City,* 2003 OK 57, ¶ 11, 77 P.3d 588, 591. ("In negligence, the actor does not desire to bring about the consequences which follow, nor does he know that they are substantially certain to occur, or believe that they will."). *Cf. Dayton Hudson Corp. v. American Mut. Liability Ins. Co.*, 1980 OK 193, 621 P.2d 1155, 1161, 16 A.L.R. 4th 1 (if a master *had reason to know* in advance that his servant was *likely* to commit the injurious act for which liability was imposed, the situation may be legally analogous to that where the insured himself commits a willful or intentional injury), citing *Casualty Ins. Co. v. Welfare Finance Co.,* 75 F.2d 58, 60 (8th Cir. 1934); *Schovanec v. Archdiocese of Oklahoma City*, 2008 OK 70, ¶ 40, 188 P.3d 158, 173 (In *Dayton* we used "foresee" with reference to the proximate causation element of negligence, i.e., the causal link between a particular defendant's conduct and the resulting injury of a particular plaintiff.").

16. *Davis v. CMS Continental Natural Gas, Inc.*, 2001 OK 33, ¶ 14, 23 P.3d 288, 294-295 (2001) ("if the actor knows that the consequences are certain, or substantially certain to occur, intent is inferred").

17. I have omitted discussion of the appearance of different forms the standard in court opinions prior to the *Restatement (First) of Torts.*

18. *Limanowski v. Ashland Oil Co., Inc.*, 275 Ill.App.3d 115, 211 Ill. Dec. 666, 655 N.E.2d 1049 (1995) citing *Mayfield v. ACME Barrel Co.,* 258 Ill.App.3d 32, 196 Ill.Dec. 145, 629 N.E.2d 690 (1994) (emphasis added).

19. *Lantz v. National Semiconductor Corp.*, 775 P.2d 937, 940 (Utah Ct.App. 1989) quoting 2A Arthur Larson, *The Law of Workmen's Compensation* § 68.14 at 13-46 (1988) (knowingly ordering claimant to perform an extremely dangerous job, willfully failing to provide a safe place to work, or even willfully and unlawfully violating a safety statute, this still falls short of the kind of actual intention to injure that robs the injury of its accidental nature); *Helf v. Chevron U.S.A., Inc.*, 2009 UT 11, 203 P.3d 962, 969-975 (affirming the "intent to injure" standard in *Lantz,* and (1) rejecting the substantially certain standard explaining an intent to injure standard is broader than a desire or intent to bring about a particular result, (2) injuries satisfying the substantially certain test are covered by the workers' compensation remedy, (3) "intent" must be distinguished from "probability of injury" used in a substantially certain standard). *Cf., Fenner v. Municipality of Anchorage*, 53 P.3d 573 (Alaska 2002) (exclusive remedy of workers' compensation applied where no evidence was present showing a specific intent to injure); *Kilminster v. Day Management Corp.*, 323 Or. 618, 919 P.2d 474, 480 (1996) (an action based upon an employer's "deliberate intention" to injure may be brought for damages over the amount payable under the state's workers' compensation remedy).

20. There are three statutory degrees of negligence in Oklahoma, slight, ordinary, and gross. *See* 25 O.S.2011 § 5 ("There are three degrees of negligence, namely, slight, ordinary and gross. The latter includes the former."); 25 O.S.2011 § 6 ("Slight negligence consists in the want of great care and diligence; ordinary negligence in the want of ordinary care and diligence; and gross negligence in the want of slight care and diligence.").

21. 2016 OK 20, 373 P.3d 1057.

22. *Transamerica Mortg. Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11, 15, 100 S.Ct. 242, 245, 62 L.Ed.2d 146 [1979] ("The question whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction").

23. The workers' compensation remedies were originally designed to function within a no-fault liability system. *Evans & Associates Utility Services v. Espinosa*, 2011 OK 81, ¶ 14, 264 P.3d 1190, 1195. Whether, or to what extent, the Administrative Workers' Compensation Act, 85A O.S.Supp.2013 §§ 1-106, properly altered this no-fault system by injecting elements of fault-based liability in specific instances has been raised in litigation before this Court. *See, e.g., Maxwell v. Sprint*, 2016 OK 41, ¶ 25, 369 P.3d 1079, 1092-1093 (statute "reinstates the concept of fault into a no-fault system"), and the separate opinion by Colbert, J., concurring in part and dissenting in part, and joined by Watt, J., at ¶ 2, 369 P.3d at 1095; and *Vasquez v. Dillard's, Inc.*, 2016 OK 89, 381 P.3d 768, Gurich, J., concurring specially, and joined by Colbert, J., at ¶¶ 5, 15, 26, 381 P.3d at 777-778, 783, 786.

24. See the degrees of negligence discussed *infra* at note 20.

25. *Rush Implement Co. v. Vaughn*, 1963 OK 215, 386 P.2d 177, 179.

26. *Mullins v. Tanksleary,* 1962 OK 239, 376 P.2d 590, 591-592; *B & B Nursing Home v. Blair,* 1972 OK 28, 496 P.2d 795. *See also American Management Systems, Inc. v. Burns*, 1995 OK 58, 903 P.2d 288, 290-291 (the workers' compensation injury must be based upon an employment-related risk as opposed to a purely personal risk).

27. 85 O.S. 2001 § 11 (A). *Parret,* 2005 OK 54, ¶ 20, 127 P.3d at 578.

28. *Davis v. CMS Continental Natural Gas, Inc.*, 2001 OK 33, ¶¶ 11-13, 23 P.3d 288, 293-294.

29. *Boyle v. ASAP Energy, Inc.*, 2017 OK 82, n. 40, 408 P.3d 183 citing *In re Estate of Dicksion*, 2011 OK 96, ¶ 5, 286 P.3d 283, 294, quoting *Owings v. Pool Well Service,* 1992 OK 159, ¶ 8, n. 10, 843 P.2d 380, 382 ("Failure to amend a statute after its judicial construction constitutes legislative acquiescence to that construction ... 'Legislative silence, when it has the authority to speak may be considered as an understanding of legislative intent.' ").

30. *In re Initiative Petition No. 397, State Question No. 767*, 2014 OK 23, ¶ 9, 326 P.3d 496, 501 (only when the legislative intent cannot be ascertained from the statutory language in cases of ambiguity or conflict does the Court utilize rules of statutory construction); *Deffenbaugh v. Hudson,* 1990 OK 37, 791 P.2d 84, (the statutory liability for a workers' compensation statutory claim is exclusive, citing 85 O.S.Supp.1985 § 11 and 85 O.S.Supp.1984 § 12); *Tate v. Browning-Ferris, Inc.*, 1992 OK 72, n. 66, 833 P.2d 1218, 1230 (workers' compensation statutes express exclusivity of a created statutory remedy).

31. 2016 OK 20, 373 P.3d 1057.

32. *Sinclair Refining Co. v. Brumett*, 1954 OK 65, 267 P.2d 576, 578.

KAUGER, J., with whom COMBS, joins, dissenting:

In 2005, we decided Parret v. Unicco Service Co., 2005 OK 54, 127 P.3d 572. The injury (death) in Parret occurred on July 20, 1999. At that time, the exclusivity provisions of the Workers Compensation Act (the Act), 85 O.S. Supp. 1991 §12 made liability "exclusive and in place of all other liability of the employer."[1] Nevertheless, the Act did not address intentional torts[2] or negligence which was so malicious, wilful, and gross that it equated to an intentional tort.[3] Consequently, Parret held that when the employer's knowledge that an injury was substantially certain to occur, the resulting injury would be removed from the Act's exclusive remedy provisions and the worker would be allowed to proceed in district court.[4]

In 2012, we decided Jordan v. Western Farmers Electric Cooperative, 2012 OK 94, 290 P.3d 9, wherein we again addressed the substantial certainty standard and exclusivity provisions of the Act. The claimant's claim accrued in August of 2009 which also applied the same statutory provisions as those involved in Parret, supra. I concurred specially in Jordan, noting that on August 27, 2010, the Legislature amended the Act to overrule Parret, by repealing an employee's ability to bring an intentional tort claim under the substantial certainty standard.[5]

I also expressly noted that because the accrual of the employee's action occurred in August of 2009, Parret, supra, applied rather than the 2010 statutory change. I also said that "[soon], the few cases in the pipeline, if any, will be decided and any backlog of lawsuits begun before the August 2010 Legislative change will be exhausted. At that point, Parret, supra, will be inapplicable and the 2010 Legislative changes will control." The point that is critical here is that the 2010 Legislative changes, 85 O.S. Supp. 2010 §12, while doing away with substantial certainty, also added a provision which provides:

> I. If the employer has failed to secure the payment of compensation as provided in Section 51 of this act or **in the case of an intentional tort, the injured employee or his or her legal representative may maintain an action either in the Workers' Compensation Court or in the district court, but not both**. (Emphasis supplied).

This provision remains in the current Workers' Compensation statutes.[6]

The incident in this cause happened in 2010 after the statutory amendments granted the right of an injured party to bring a cause of action for intentional tort either before the commission or in district court. The statutes have been amended twice since 2010 and the same provision remains.

There is no need to try to equate substantial certainty with an intentional tort. Apparently, as a result of Parret, supra, the Legislature has clearly and repeatedly enacted statutes which provide that "allegations or proof that the employer had knowledge that the injury was substantially certain to result from the employer's conduct shall not constitute an intentional tort." Rather, the Legislature replaced substantial certainty with a more certain, bright line rule of purpose to cause injury or conscious object to cause such injury.[7]

The answer to the question before us is rooted in our traditional negligence jurisprudence and the definition of intentional tort. The equaling factor here is not that substantial certainty equals an intentional tort, but rather negligence may be in such reckless disregard of the consequences or in callous indifference to the life of another that the intentional failure to perform a manifest duty may result in such a gross want of care for the rights of others that a finding of a wilful, wanton and deliberate act may amount to negligence so gross it is deemed the equivalent to evil intent justifying an action for intentional tort.[8]

This is precisely the circumstances presented by this cause. The claimant has the option of pursuing the matter before the Workers' Compensation Commission following the standards set forth by the Act, or the traditional negligence standards applied in district court, but not both.

In Adams v. Iten Biscuit Co., 1917 OK 47, ¶17, 162 P. 938, the Court very clearly described how intentional torts remained in the realm of the district court. The Court said:

> It is urged that the injuries covered by the act are only those of an accidental nature, and that the employee cannot recover thereunder for a willful injury caused by his employer, and thus he is deprived of the equal protection of the laws. The act does not undertake to regulate willful injuries of the character mentioned, but leaves the injured employee to his remedy as it existed when the act was passed. Considering the various provisions of the act together, there does not seem to be any ambiguity as to its meaning. It embraces all kinds of accidental injuries not resulting in death, whether occurring from the negligence of the employer or not, arising out of and in the course of employment, but does not include willful or intentional injuries inflicted by the employer, nor injuries resulting from an intent upon the part of the employee to injure himself or another or for a willful failure to use a guard or other protection against accident required by statute or furnished pursuant to an order of the state labor commissioner. **A willful or intentional injury, whether inflicted, by the employer or employee, could not be**

considered as accidental, and therefore is not covered by the act. If it were merely intended to cover accidental injuries for which the employee had no right of action, no reason is perceived why the Legislature would abolish the defenses of contributory negligence, negligence of a fellow servant, or assumption of risk, or why it should abrogate the employee's right of action for damages for injuries not resulting in death occurring in said hazardous occupation. The compensation afforded by the act and the procedure by which the same is determined were intended to be exclusive as to all of the injuries therein embraced, and the right of action theretofore possessed by the injured employee was abolished, leaving to him such right of action in the courts for willful injuries as he may have had prior to its passage, and the act, as thus construed, does not deprive plaintiff of the equal protection of the laws. (Emphasis supplied.)

Clearly, with the 2010 amendment to 85 O.S. §12 (now 85A §5) the Legislature did not deprive the employee equal protection of the laws because it allows intentional torts to be brought in the district court. The issue of whether an act is an intentional tort shall be a question of law.[9] The issue of negligence and the degree thereof are questions for the trier of facts.[10] The employee in this cause had the option of pursuing the action before the Workers' Compensation Commission under the pleading standards of the Workers' Compensation Act or in the District Court under the general pleading standard of the District Court.

1. Title 85 O.S. 1991 §12 provides:
The liability prescribed in Section 11 of this title shall be exclusive and in place of all other liability of the employer and any of his employees, any architect, professional engineer, or land surveyor retained to perform professional services on a construction project, at common law or otherwise, for such injury, loss of services, or death, to the employee, or the spouse, personal representative, parents, or dependents of the employee, or any other person. If an employer has failed to secure the payment of compensation for his injured employee, as provided for in this title, an injured employee, or his legal representatives if death results from the injury, may maintain an action in the courts for damages on account of such injury, and in such action the defendant may not plead or prove as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee; provided:
(i) The immunity created by the provisions of this section shall not extend to action by an employee, or the spouse, personal representative, parents, or dependents of the employee, or any other person against another employer, or its employees, on the same job as the injured or deceased worker where such other employer does not stand in the position of an intermediate or principal employer to the immediate employer of the injured or deceased worker;
(ii) The immunity created by the provisions of this section shall not extend to action against another employer, or its employees, on the same job as the injured or deceased worker even though such other employer may be considered as standing in the position of a special master of a loaned servant where such special master neither is the immediate employer of the injured or deceased worker nor stands in the position of an intermediate or principal employer to the immediate employer of the injured or deceased worker; and
(iii) This provision shall not be construed to abrogate the loaned servant doctrine in any respect other than that described in paragraph (ii) of this section. This section shall not be construed to relieve the employer from any other penalty provided for in this title for failure to secure the payment of compensation provided for in this title.
(iv) For the purpose of extending the immunity of this section, any architect, professional engineer, or land surveyor shall be deemed an intermediate or principal employer for services performed at or on the site of a construction project, but this immunity shall not extend to the negligent preparation of design plans and specifications.

2. Adams v. Iten Biscuit Co., 1917 OK 47, ¶17, 162 P. 938 [The Act does not undertake to regulate willful injuries, but leaves the injured employee to the remedy as it existed when the Act was passed. A willful or intentional injury, whether inflicted, by the employer or employee, could not be considered as accidental and therefore was not covered by the Act. The compensation afforded by the Act and the procedure by which the same is determined were intended to be exclusive as to all of the injuries therein embraced, and the right of action theretofore possessed by the injured employee was abolished, leaving the employee such right of action in the courts for willful injuries as the employee may have had prior to its passage.].

3. Fox v. Oklahoma Memorial Hosp., 1989 OK 38, ¶5, 774 P.2d 459 (Okla. 1989) [[The question is whether negligence was either so flagrant or deliberate, or so reckless that it is removed from the realm of mere negligence. The intentional failure to perform a manifest duty in reckless disregard of the consequences or in callous indifference to the life, liberty or property of another, may result in such a gross want of care for the rights of others and of the public that the finding of a wilful, wanton, deliberate act is justified.]; Mitchell v. Ford Motor Credit Co., 1984 OK 18, ¶8, 688 P.2d 42; Thiry v. Armstrong World Industries, 1983 OK 28, ¶¶25-26; Wootan v. Shaw, 1951 OK 307, ¶9, 237 P.2d 442.

4. For example, see Price v. Howard, 2010 OK 26, ¶10, 236 P.3d 82 which was post-Parret, but pre-dated the 2010 amendments to the Act. [To remove the injured worker's claim from the exclusive remedy provisions of the Workers' Compensation Act and allow the worker to proceed in district court, nothing short of a demonstration of the employer's knowledge of the substantial certainty of injury will suffice.]

5. The language of 85 O.S. Supp. 2010 was amended effective August 27, 2010, and later repealed, but recodified in 2011 as 85 O.S. 2011 §302 provides in pertinent part:
A. The liability prescribed in this act shall be exclusive and in place of all other liability of the employer and any of his or her employees, at common law or otherwise, for such injury, loss of services, or death, to the employee, or the spouse, personal representative, parents, or dependents of the employee, or any other person, except in the case of an intentional tort, or where the employer has failed to secure the payment of compensation for the injured employee.
B. An intentional tort shall exist only when the employee is injured as a result of willful, deliberate, specific intent of the employer to cause such injury. Allegations or proof that the employer had knowledge that such injury was substantially certain to result from the employer's conduct shall not constitute an intentional tort. The issue of whether an act is an intentional tort shall be a question of law for the Court.

6. Title 85A Supp. 2014 §5 (the current version of 85 O.S. §12) provides in pertinent part:
I. If the employer has failed to secure the payment of compensation as provided in this act or in the case of an intentional tort, the injured employee or his or her legal representative may maintain an action either before the Commission or in the district court, but not both.
The 2019 Legislative changes to the act did not make any modifications to this section.

7. Matthew Brown, *How Exclusive is the Workers' Compensation Exclusive Remedy? 2010 Amendments to Oklahoma Workers' Compensation Statute Shoot Down Parret*, Vol. 65 Okla. L. Rev. 75, 102 (2012).

8. Fox v. Oklahoma Memorial Hosp., see note 3, supra; Mitchell v. Ford Motor Credit Co., see note 3, supra; Thiry v. Armstrong World Industries, see note 3, supra; Wootan v. Shaw, see note 3, supra.

9. Title 85A O.S. Supp. 2014 §5B(2) provides:
B. Exclusive remedy shall not apply if: . . .

2. The injury was caused by an intentional tort committed by the employer. An intentional tort shall exist only when the employee is injured as a result of willful, deliberate, specific intent of the employer to cause such injury. Allegations or proof that the employer had knowledge that the injury was substantially certain to result from the employer's conduct shall not constitute an intentional tort. The employee shall plead facts that show it is at least as likely as it is not that the employer acted with the purpose of injuring the employee. The issue of whether an act is an intentional tort shall be a question of law.

10. Fox v. Memorial Hospital, see note 3, supra at ¶7; Flanders v. Crane Co.,1984 OK 88, ¶10, 693 P.2d 602, 605 (Okla. 1984); Prickett v. Sulzberger & Sons Co., 1916 OK 387, ¶51, 57 Okl. 567, 157 P. 356, 365 (1916).

WINCHESTER, J., dissenting:

¶1 I respectfully dissent. When the Legislature modified 85 O.S.Supp.2010, § 12, it determined that proof of an employer's intent under a "substantial certainty" standard was insufficient to take a case outside the exclusive purview of workers' compensation jurisdiction and into an intentional tort cause of action.[1] Today's majority opinion blindly ignores the Legislature's express, unambiguous exclusion of "substantial certainty" from the definition of intentional torts falling under the exclusivity provision of the workers' compensation system.

¶2 The majority finds that a very specific portion of § 12, dealing with intentional torts, does not fall within the walls of workers' compensation jurisdiction and that, because of this, the Legislature is apparently without authority to define what constitutes an "intentional tort" for purposes of workers' compensation exclusivity. Section 12, as amended, simply clarifies when employees are covered by workers' compensation and removes "substantial certainty" as a measure for determining what constitutes an intentional tort within the confines of the workers' compensation system. It is illogical for the majority to conclude that the Legislature is constitutionally prohibited from drawing the line for workers' compensation at one point on the tort liability continuum and not another.

¶3 The Legislature made a policy choice, in response to this Court's decision in *Parret v. UNICCO Service Co.*, 2005 OK 54, 127 P.3d 572, to remove "substantial certainty" from the definition of "intentional tort" within the workers' compensation system. The majority opinion overrides this authority and, in the process, thwarts legislative policy and preference. The Court's decision effectively curtails the Legislature's authority to define what actions fall under the workers' compensation system despite acknowledging that the "disparity be-tween the rights and remedies of persons injured while in the course and scope of their employment and those who are injured elsewhere" has long been "properly confined within the workers' compensation system." It is not the role of this Court to question the Legislature's policy-making authority and the Legislature's ability to legislate doesn't end at the walls of the workers' compensation system. *See Fent v. Oklahoma Capitol Authority,* 1999 OK 64, ¶3, 984 P.2d 200, 204 (It is "firmly recognized that it is not the place of the Court, or any court, to concern itself with a statute's propriety, desirability, wisdom, or its practicality as a working proposition."); Okla. Const. art 5, § 36 ("The authority of the Legislature shall extend to all rightful subjects of legislation, and any specific grant of authority in this Constitution, upon any subject whatsoever, shall not work a restriction, limitation, or exclusion of such authority upon the same or any other subject or subjects whatsoever.")

¶4 This Court has consistently held that the "judiciary must abstain from intrusion into legislative policymaking. *Fent v. Oklahoma Capitol Authority*, 1999 OK 64, ¶3, 984 P.2d 200, 204. In keeping with this rule of law, we have long-recognized the Legislature's ability to alter or modify the statutory provisions of the workers' compensation system. *See, e.g., Kentucky Fried Chicken of McAlester v. Snell*, 2014 OK 35, ¶15, 345 P.3d 351, 356 ("It is within the prerogative of the legislature to make changes to the workers' compensation statutes.") *Patterson v. Sue Estell Trucking Co., Inc*., 2004 OK 66, ¶6, 95 P.3d 1087, 1088 ("The Worker's Compensation Act is in derogation of the common law and those statutes are the exclusive provisions governing benefits. Workers' eligibility for benefits, limitations on benefits, and circumstances which will cause those benefits to cease have been determined by our legislature. We may not employ rules of common law or equity to change those provisions."); *Graham v. D & K Oilfield Services, Inc*., 2017 OK 72, ¶20, 404 P.3d 863, 870 ("Limitations on the specific amounts of benefits to be received for a particular injury are well within the Legislature's power."); *Cities Service Gas Co. v. Witt*, 1972 OK 100, ¶14, 500 P.2d 288, 291 (Workers' Compensation Court possesses jurisdiction conferred by statutes and jurisdiction may not be enlarged by application of a common-law equitable estoppel).

¶5 The instant case is no different. In fact, this Court has previously acknowledged that the Legislature's revisions to § 12 effectively

superseded *Parret* and that, thereafter, "the substantial certainty standard is unavailable to an injured worker." *Tiger v. Verdigris Valley Elec. Coop.*, 2016 OK 74, ¶14, fn 2, 410 P.3d 1007, 1011. Likewise, in *Jordan v. Western Farmers Electric Cooperative*, the concurring opinion recognized: "[s]oon, the few cases in the pipeline, if any, will be decided and any backlog of lawsuits begun before the August 2010 Legislative change will be exhausted. At that point, *Parret, supra*, will be inapplicable and the 2010 Legislation changes will control." *Jordan v. Western Farmers Electric Cooperative*, 2012 OK 94, ¶7, 290 P.3d 9 (Kauger, J., concurring opinion). Nothing has changed to require a deviation from these perspectives.

¶6 Today's majority opinion revisits *Parret* as if the Legislature's express amendment to § 12, eliminating the "substantial certainty" standard from the intentional tort exclusivity, doesn't even exist. The majority proclaims that *Parret's* substantial certainty standard did not recognize "two types or levels of intentional torts." Instead, the Court finds, "substantial certainty" and "specific intent" are "one and the same" and that the "belief that one has a different level or degree of a tortious act, and thereby concluding that specific intent and substantial certainty are different animals, is a fallacy." The majority further reasons, "[s] pecific intent, like its counterpart substantial certainty, is purely a subjective fact ***never*** susceptible to direct proof." (emphasis added) This flawed reasoning flies in the face of the Legislature's clear statutory intent as well as case law recognizing the contrary.[2] *See, e.g., Parret v. UNICCO Service Co.*, 2005 OK 54, ¶22, 127 P.3d 572, 578 ("Today, Oklahoma joins those jurisdictions which have rejected the proposition that the specific intent to harm is required for an employer's conduct to be actionable in tort.").

¶7 The plain language of *Parret* created two separate tests that an employee could utilize to prove an intentional tort. In *Parret*, the Court held that the employer must have either (1) desired to bring about the worker's injury ("specific intent") **OR** (2) acted with the knowledge that such injury was substantially certain to result from the employer's conduct ("substantial certainty"). *Parret v. UNICCO Service Co.*, 2005 OK 54, ¶24, 127 P.3d 572, 579.

¶8 The Legislature's 2010 amendment to § 12 very clearly eliminates "substantial certainty" from the workers' compensation rule of exclusivity. This Court has previously acknowledged the Legislature's power to change the common law "to reflect a change of time and circumstances." *St. Paul Fire & Marine Ins. Co. v. Getty Oil Co.*, 1989 OK 139, ¶14, 782 P.2d 915, 918-919 (The Legislature has the power to define what constitutes an actionable wrong, including, within constitutional limits, the ability to abolish or modify common law.). Further, the workers' compensation system "is a valid exercise of the power of the Legislature." *Missouri Valley Bridge Co. v. State Indus. Comm'n,* 1922 OK 143, ¶14, 207 P. 562; *see also Rivas v. Parkland Manor*, 2000 OK 68, ¶19, 12 P.3d 452 (recognized as superseded by statute on other grounds in *Evans & Associates Utility Services v. Espinosa*, 2011 OK 81, 264 P.3d 1190)("The formulation of the particular elements and details of the Workers' Compensation Act clearly falls within the Legislature's province."). Section 12's plain language trumps the majority's "belief" that the Legislature didn't intend "to bifurcate the sphere of intentional torts constitutionally reserved as common law rights of actions which predate the inception of" the workers' compensation scheme.[3]

¶9 Today's majority opinion attempts to obfuscate the clear intent of the Legislature with erroneous, unsupported findings that "specific intent" and "substantial certainty" are one in the same. Regardless, the statutory language and its meaning are clear – proof of "substantial certainty" is insufficient to take a work-related injury outside of the workers' compensation system. The plain meaning of § 12's amendment leaves no room for this Court to reach an opposite result. I respectfully dissent.

1. Section 12, as applicable herein, specifically provides: "An intentional tort shall exist only when the employee is injured as a result of willful, deliberate, specific intent of the employer to cause such injury. **Allegations or proof that the employer had knowledge that such injury was substantially certain to result from its conduct shall not constitute an intentional tort**." 85 O.S.Supp.2010, § 12 (emphasis added).

2. As I indicated in my dissent in *Parret*, the substantial certainty standard is an elusive, subjective test that is used by only a minority of jurisdictions. I urged the adoption of the "true intentional tort" or "specific intent" standard which the Legislature opted to utilize as evidenced by the passage of the amendment codified in 85 O.S. Supp.2010, § 12.

3. When examining a statute's construction, it is presumed that the Legislature has expressed its intent in the statute and that it intended what it so expressed. *Comer v. Preferred Risk Mut. Ins. Co.*, 1999 OK 86, ¶18, 991 P.2d 1006, 1013-1014; *Darnell v. Chrysler Corp.*, 1984 OK 57, ¶5, 687 P.2d 132, 134. Further, the Court will not assume that the Legislature has done a vain and useless act. Effect to every word and sentence must be given to avoid rendering a provision nugatory. *Comer v. Preferred Risk Mut. Ins. Co.*, 1999 OK 86, ¶18, 991 P.2d 1006, 1013-1014.

2019 OK 46

CINDY ESQUEDA VELASCO, Petitioner/ Appellee, v. JAIRO VARGAS RUIZ, Respondent/Appellant.

Case No. 117,706. June 18, 2019

ON APPEAL FROM THE DISTRICT COURT FOR OKLAHOMA COUNTY

¶0 Mother filed a paternity petition seeking a determination of parentage, custody, visitation and child support. Attempts to serve alleged father were fraught with procedural errors. The trial court authorized service by publication; however, mother's publication notice did not comply with the timing requirements outlined in 12 O.S.Supp. 2017 § 2004(C)(3)(c). Finally, after attempting service by publication, mother's counsel filed a motion seeking a default but failed to serve the motion on father's attorney. After the trial court issued a default paternity ruling, father sought to vacate the judgment. Cumulative problems with service of process and notice warranted vacating the judgment but the trial court refused to set it aside. Father filed the instant appeal. We retained the matter and now reverse.

TRIAL COURT'S ORDER DENYING MOTION TO VACATE DEFAULT JUDGMENT IS REVERSED; MATTER REMANDED TO THE TRIAL COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION

Aharon Hernandez Manley, Hernandez Manley, Oklahoma City, OK, for Jairo Vargas Ruiz, Appellant

-and-

Richard Parr, Tomerlin, High & High, Oklahoma City, OK, for Jairo Vargas Ruiz, Appellant

Haley V. Potts, The Potts Law Office, PLLC, Oklahoma City, OK, for Jon Christian, Appellee

GURICH, C.J.

Facts & Procedural History

¶1 This case originated as a paternity proceeding involving Petitioner Cindy Esqueda Velasco ("Mother") and Respondent Jairo Vargas Ruiz ("Father"). On February 15, 2018, Mother filed a petition against Father seeking an order to establish his legal paternity to two minor children, Y.A.V.E., born February 2015, and Y.V.E., born August 2017. As evidence of parentage, the petition alleged that Father executed an "Acknowledgment of Paternity" for each child and that his name appears on each birth certificate. Her petition further requested sole legal custody over both children, limited visitation rights to Father, and an order requiring monthly payment of child support.[1]

¶2 Mother attempted service of the petition by delivering a copy of the pleadings to three different addresses via *certified mail, return receipt for merchandise*: one attempted mailing to Calvillo, Mexico and two attempts in Riverside, California. None of the attempts was made by "delivery restricted to the addressee" as required in 12 O.S.Supp. 2011 § 2004(C)(2)(b). Counsel for Father filed a Special Appearance and Motion to Dismiss contesting Oklahoma's jurisdiction to hear the parentage case and challenging the sufficiency of service of process. On May 9, 2018, despite noting the problems with service, the trial court overruled Father's motion to dismiss and adjudicated the issue of Father's parentage.

¶3 In response to the court's concerns about the sufficiency of service of process, Mother's attorney filed an affidavit of due diligence and moved for permission to serve Father via publication. The motion was not mailed to Father's attorney. On June 26, 2018, the trial court issued an order authorizing service by publication; nevertheless, the order was not filed until July 6, 2018. Again, nothing in the record indicates this order was delivered to Father's attorney. In the notice, Father was given until August 6, 2018 to file an answer to Mother's petition, otherwise the "petition [would] be taken as true and judgment for [Mother would] be rendered against [Father] according to the prayer of [Mother's] petition." The notice was published for three consecutive weeks in the Journal Record of Oklahoma City.[2]

¶4 When no answer was filed, Mother filed a motion seeking a default judgment on August 14, 2018. The motion was set for hearing on September 19, 2018, but again, was not mailed to opposing counsel. Mother appeared at the hearing and secured a default judgment against Father. The trial judge approved a Decree of Paternity which was filed on September 21, 2018. The Decree concluded subject matter and personal jurisdiction were proper; determined Father's acknowledgment of paternity necessitated a finding of parentage to both children; awarded Mother sole legal custody of the children; suspended Father's visitation until fur-

ther order; and awarded Mother current and past due child support.

¶5 On October 1, 2018, just ten days after the final order was filed, Father entered another special appearance and urged the trial court to vacate the default paternity judgment. Father again argued that service of process was defective. In particular, Father maintained that the publication notice was defective, as it shortened Father's statutorily allotted time to answer. On November 2, 2018 arguments were heard and offers of proof were made on Father's motion to vacate. On December 20, 2018, a journal entry was filed overruling Father's motion to vacate. Father filed a timely appeal of the judgment. We retained the matter, and now reverse the trial court's decision.

Standard of Review

¶6 Our role in reviewing a trial court decision either vacating or refusing to vacate a judgment is to assess whether there has been an abuse of discretion. Ferguson Enters. v. H. Webb Enters. Inc., 2000 OK 78, ¶ 5, 13 P.3d 480, 482. An abuse of discretion occurs when a decision is based on an erroneous conclusion of law or where there is no rational basis in evidence for the ruling. Spencer v. Okla. Gas & Elec. Co., 2007 OK 76, ¶ 13, 171 P.3d 890, 895. When reviewing a lower court ruling either vacating or refusing to vacate a default judgment, we have consistently recognized that default judgments are disfavored. Ferguson Enters., ¶ 5, 13 P.3d at 482; see also Midkiff v. Luckey, 1966 OK 49, ¶ 6, 412 P.2d 175, 176 (quoting the syllabus of State Life Ins. Co. v. Liddell et al., 1936 OK 662, 61 P.2d 1075). Our decisions also distinguish between seeking to vacate a default judgment and urging the court to vacate a judgment when the parties have had at least one opportunity to be heard on the merits. Ferguson Enters., ¶ 5, 13 P.3d at 482. Judicial discretion to vacate a default judgment should always be exercised so as to promote the ends of justice. Id.

Analysis

¶7 Under the Oklahoma Uniform Parentage Act, the "court shall issue an order adjudicating the paternity of a man who: 1. [a]fter service of process is in default; and 2. [i]s found by the court to be the father of the child." 10 O.S.Supp. 2006 § 7700-634. As such, the court had authority to order default judgment, ***only*** if service of process was proper. In the present case, the Decree of Paternity purports to have been entered by default because "[Father] failed to appear after being properly served on February 20, 2018." However, this language in the Decree of Paternity is inconsistent with the record; issues with service by certified mail are the reason Mother requested authorization to perform service via publication. Mother never properly accomplished service in any manner as outlined by Section 2004. Accordingly, it was an abuse of discretion by the trial judge in refusing to vacate the default judgment under the circumstances presented.

¶8 The rules for proper service are delineated in 12 O.S.Supp. 2017 § 2004. Service by mail shall be made by "certified mail, return receipt requested and *delivery restricted* to the addressee." 12 O.S.Supp. 2017 § 2004(C)(2)(b) (emphasis added). Additionally, service by mail should not be "the basis for an entry of a default or a judgment by default unless the record contains a return receipt showing acceptance [or refusal] by the defendant . . .." 12 O.S.Supp. 2017 § 2004(C)(2)(c). If "the defendant demonstrates to the court that the return receipt was signed or delivery was refused by an unauthorized person" then any "judgment by default shall be set aside upon motion of the defendant" within thirty days of such judgment. Id.

¶9 Mother's attempts to serve Father by mail failed to meet the standard outlined in 12 O.S. Supp. 2017 § 2004(C)(2), which provides service "**shall** be accomplished by mailing a copy of the summons and petition by certified mail, return receipt requested and delivery restricted to the addressee."[3] Our cases make clear that the Legislature's use of the word shall is considered mandatory. Okla. Pub. Emps. Ass'n v. State ex rel. Okla. Office of Pers. Mgmt., 2011 OK 68, ¶ 13 n. 18, 267 P.3d 838, 845. Accordingly, in order to properly serve Father, Mother was responsible for sending a copy of the summons and petition by certified mail with **delivery restricted to the addressee.** See Woods v. Woods, 1992 OK 64, ¶ 5, 830 P.2d 1372, 1374 ("Oklahoma's Pleading Code, 12 O.S.1991 2004(C)(2)(b) mandates that service of process can only be effected when delivery is restricted to the addressee.").[4]

¶10 Although Mother sent each of the mailings by certified mail and requested a return receipt, she did not select "restricted delivery" as required by Section 2004(C)(2)(b). Moreover, Father denies signing for any of the three defective attempted deliveries. Because Mother's counsel failed to comply with the statutory

requirements for service by mail, the record demonstrates insufficient service of process on Father. The trial court highlighted this very problem in its order denying Father's motion to dismiss, noting "service may still be an issue."[5]

¶11 After recognizing the apparent defects in Mother's attempted service of process by mail, the trial court authorized service by publication. Service by publication may be made if the plaintiff's attorney files a separate affidavit with the court stating "that with due diligence service cannot be made upon the defendant by any other method." 12 O.S.Supp. 2017 § 2004(C)(3)(a). In other words, the very act of seeking permission to serve a party by publication requires an acknowledgment that diligent efforts to obtain service by other means have failed. In re Turkey Creek Conservancy Dist., 2008 OK 8, ¶ 20, 177 P.3d 558, 563 (quoting Bomford v. Socony Mobil Oil Co., 1968 OK 43, ¶ 12, 440 P.2d 713, 718). Service by publication "shall be made by publication of a notice, signed by the court clerk, one (1) day a week for three (3) consecutive weeks in a newspaper authorized by law to publish legal notices which is published in the county where the petition is filed." 12 O.S.Supp. 2017 § 2004(C)(3)(c). The statute also requires the notice to:

> state that the named defendant[ ]. . . [has] been sued and must answer the petition on or before a time to be stated (***which shall not be less than forty-one (41) days from the date of the first publication***), or judgment, the nature of which shall be stated, will be rendered accordingly. (emphasis added).

Id. Accordingly, Mother was responsible for providing sufficient notice by publication and allowing Father at least forty-one days from the date of the first publication to answer her petition. This did not occur.

¶12 After obtaining an order allowing service by publication, Mother's notice was published in an Oklahoma City legal newspaper on July 9, July 16, and July 23, 2018. The notice stated that Father "must answer Plaintiff's petition filed herein *on or before the* ***6th day of August, 2018***, or said petition will be taken as true and judgment for said Plaintiff will be entered against [Father] according to prayer of Plaintiff's petition."[6] (emphasis added). The August 6 deadline was only twenty-eight days from the date of the first publication and Mother's subsequent Motion for Default Judgment based on Father's failure to answer was filed only thirty-six days after the date of the first publication. The answer deadline should have been set no sooner than August 19, 2018. "This is a plain violation of this statute, which provides that the time stated in the publication notice for the defendant to answer shall not be less than 41 days from the date of its first publication. This length of time is a matter of right...." Aggers v. Bridges, 1912 OK 156, 122 P. 170, 171, overruled in part by Spears v. Preble, 1983 OK 8, 661 P.2d 1337 (overruling the holding in Aggers to the extent it prevented a trial court from *correcting a mistake in process* where doing so would not change the nature of the transaction or occurrence which is the subject of the claim or defense). The violation of such a substantial right undermines jurisdiction and is a reversible error. Aggers, 1912 OK 156, 122 P. 107, 171 ; see also Zipperle v. Smith, 1956 OK 303, ¶ 19, 304 P.2d 310, 313 ("In Davis v. Rowland, 206 Okl. 257, 242 P.2d 716,717, it is said in the third paragraph of the syllabus: 'Where jurisdiction of the defendant in an action is sought to be obtained by publication service alone, the affidavit for publication, as well as the publication notice, are matters jurisdictional, and, in order to obtain jurisdiction of the defendant in such case, both the affidavit for publication and the publication notice must comply with the provisions of the statute.'").

¶13 Further, Mother did not provide Father's counsel with copies of the pleadings pertaining to service by publication. Even more troubling is the failure to provide Father's attorney with notice of the motion seeking judgment by default.[7]

¶14 If "the defendant demonstrates to the court that the return receipt was signed or delivery was refused by an unauthorized person" then any "judgment by default shall be set aside upon motion of the defendant" within thirty days of such judgment. Id. When this Court reviews an order refusing to vacate a default judgment, we consider the following factors:

> 1) default judgments are not favored; 2) vacation of a default judgment is different from vacation of a judgment where the parties have had at least one opportunity to be heard on the merits; 3) judicial discretion to vacate a default judgment should always be exercised so as to promote the ends of justice; 4) a much stronger showing of

abuse of discretion must be made where a judgment has been set aside than where it has not.

Ferguson, 2000 OK 78, ¶ 5, 13 P.3d 480, 482. We also consider "whether substantial hardship would result from granting or refusing to grant the motion to vacate." Id.

¶15 Considering the multitude of legal errors, weighing public policy and other equitable factors, we find it was error to deny Father's timely Motion to Vacate Default Judgment. Further, no substantial hardship would have resulted from granting Father's motion to vacate.

Conclusion

¶16 The trial court's denial of Father's motion to vacate the default judgment constituted an abuse of discretion. Accordingly, we reverse the order denying Father's motion to vacate the default judgment, and the matter is remanded to the trial court to proceed in a manner consistent with this opinion.

TRIAL COURT'S ORDER DENYING MOTION TO VACATE DEFAULT JUDGMENT IS REVERSED; MATTER REMANDED TO THE TRIAL COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION

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

GURICH, C.J.

1. Mother acknowledged that the Oklahoma Department of Human Services was entitled to notice as a necessary party, due to Mother's receipt of state financial assistance. See 43 O.S.Supp. 2011 § 112(F). However, the notice to OKDHS was sent via facsimile. Section 112(F) requires service "according to Section 2004 of Title 12 of the Oklahoma Statutes." However, counsel for OKDHS signed the September 21, 2018, Decree of Paternity, thereby curing any defect in the notice.

2. Notice was published on July 9, 2018, July 16, 2018, and July 23, 2018. Publisher's Affidavit filed July 24, 2018, O.R. at 41.

3. 12 O.S.Supp. 2017 § 2004(C)(2) reads:

2. SERVICE BY MAIL.

a. At the election of the plaintiff, a summons and petition may be served by mail by the plaintiff's attorney, any person authorized to serve process pursuant to subparagraph a of paragraph 1 of this subsection, or by the court clerk upon a defendant of any class referred to in division (1), (3) or (5) of subparagraph c of paragraph 1 of this subsection. Service by mail shall be effective on the date of receipt or if refused, on the date of refusal of the summons and petition by the defendant.

b. Service by mail shall be accomplished by mailing a copy of the summons and petition by certified mail, return receipt requested and delivery restricted to the addressee. When there is more than one defendant, the summons and a copy of the petition or order shall be mailed in a separate envelope to each defendant. If the summons is to be served by mail by the court clerk, the court clerk shall enclose the summons and a copy of the petition or order of the court to be served in an envelope, prepared by the plaintiff, addressed to the defendant, or to the resident service agent if one has been appointed. The court clerk shall prepay the postage and mail the envelope to the defendant, or service agent, by certified mail, return receipt requested and delivery restricted to the addressee. The return receipt shall be prepared by the plaintiff. Service by mail to a garnishee shall be accomplished by mailing a copy of the summons and notice by certified mail, return receipt requested, and at the election of the judgment creditor by restricted delivery, to the addressee.

c. Service by mail shall not be the basis for the entry of a default or a judgment by default unless the record contains a return receipt showing acceptance by the defendant or a returned envelope showing refusal of the process by the defendant. Acceptance or refusal of service by mail by a person who is fifteen (15) years of age or older who resides at the defendant's dwelling house or usual place of abode shall constitute acceptance or refusal by the party addressed. In the case of an entity described in division (3) of subparagraph c of paragraph 1 of this subsection, acceptance or refusal by any officer or by any employee of the registered office or principal place of business who is authorized to or who regularly receives certified mail shall constitute acceptance or refusal by the party addressed. A return receipt signed at such registered office or principal place of business shall be presumed to have been signed by an employee authorized to receive certified mail. In the case of a state municipal corporation, or other governmental organization thereof subject to suit, acceptance or refusal by an employee of the office of the officials specified in division (5) of subparagraph c of paragraph 1 of this subsection who is authorized to or who regularly receives certified mail shall constitute acceptance or refusal by the party addressed. If delivery of the process is refused, upon the receipt of notice of such refusal and at least ten (10) days before applying for entry of default, the person elected by plaintiff pursuant to subparagraph a of this paragraph to serve the process shall mail to the defendant by first-class mail a copy of the summons and petition and a notice prepared by the plaintiff that despite such refusal the case will proceed and that judgment by default will be rendered against him unless he appears to defend the suit. Any default or judgment by default shall be set aside upon motion of the defendant in the manner prescribed in Section 1031.1 of this title, or upon petition of the defendant in the manner prescribed in Section 1033 of this title if the defendant demonstrates to the court that the return receipt was signed or delivery was refused by an unauthorized person. A petition shall be filed within one (1) year after the defendant has notice of the default or judgment by default but in no event more than two (2) years after the filing of the judgment.

4. See also Hukill v. Okla. Native Am. Domestic Violence Coal., 542 F.3d 794, 802 (10th Cir. 2008) (finding service to be invalid and not in substantial compliance with 12 O.S. § 2004(C)(2) when plaintiff failed to obtain restricted delivery to an authorized person.).

5. Journal Entry Respondent's Application to Dismiss, O.R. at 30.

6. Publisher's Affidavit, O.R. at 41.

7. "In matters in default in which an appearance, general or special, has been made or a motion or pleading has been filed, default shall not be taken until a motion therefore has been filed in the case and five (5) days notice of the date of the hearing is mailed or delivered to the attorney of record for the party in default." Okla.Dist.Ct. Rule 10. "Rule 10's requirement for filing a motion and giving notice is applicable any time a party appears before a court, whether by filing a document or physically participating in a hearing." Schweigert v. Schweigert, 2015 OK 20, ¶ 15, 348 P.3d 696, 701 (emphasis added). Failing to give notice as required by Rule 10 is an irregularity in the proceedings that affects the aggrieved party's substantial rights and is cause for vacating the district court's default judgment. Id. ¶ 8, 348 P.3d at 699. This notice requirement equally applies when counsel has first appeared through a special appearance. See Vaillencourt v. Vaillencourt (1979) 93 Mich App 344, 287 NW2d 230 ("one who 'appears', be it a 'special appearance' or a 'general' one, is required to have notice . . . before the taking of a default judgment. It is immaterial that a defendant entitled his original pleading a 'special appearance'; only the generic term' appearance' retains signficiance.").

2019 OK 47

STATE OF OKLAHOMA, ex rel. OKLAHOMA BAR ASSOCIATION, Complainant v. SHAD K. WITHERS, Respondent.

SCBD No. 6480. June 18, 2019

BAR DISCIPLINARY PROCEEDINGS

¶0 In this disciplinary proceeding against a lawyer, the complaint alleges one count of unprofessional conduct deemed to warrant disciplinary sanctions. A trial panel of the Professional Responsibility Tribunal found that the Respondent's actions merit the imposition of professional discipline. It is recommended that Respondent be suspended from the practice of law for ninety days and that he pay the costs of this proceeding. Upon de novo review of the evidentiary materials presented to the trial panel,

RESPONDENT IS ORDERED DISCIPLINED BY SUSPENSION FOR A PERIOD OF NINETY DAYS AND DIRECTED TO PAY THE COSTS OF THIS PROCEEDING. THE LATTER SHALL BE DUE NO LATER THAN ONE HUNDRED TWENTY DAYS AFTER THIS OPINION BECOMES FINAL.

Tommy Humphries, Assistant General Counsel, Oklahoma Bar Association, Oklahoma City, Oklahoma, for Complainant

Shad Withers, Attorney, Wichita, Kansas, for Respondent, pro se

COLBERT, J.

¶1 This disciplinary proceeding against a lawyer poses two questions: (1) Does the record submitted for our examination provide sufficient evidence for a meaningful de novo consideration of the complaint and its disposition?[1] and (2) Is suspension for ninety days together with payment of costs an appropriate disciplinary sanction for Respondent's breach of acceptable professional behavior? We answer both questions in the affirmative.

¶2 Following a grievance filed by client Jackie Miller (Ms. Miller) on January 26, 2016, the Oklahoma Bar Association (Complainant) commenced an investigation against Shad K. Withers, a licensed lawyer (Respondent). On December 16, 2016, the OBA filed a formal complaint under Rule 6 of the Rules Governing Disciplinary Proceedings (RGDP), 5 O.S. 2011, Ch. 1, App. 1-A.[2] The Complainant charged Respondent with one count of professional misconduct in violation of the Oklahoma Rules of Professional Conduct (ORPC), 5 O.S. 2001, Ch. 1, App. 3-A,[3] and are cause for professional discipline under the RGDP. The Complainant recommended suspension from the practice of law for a period of one year. Respondent answered the Complaint on January 3, 2017.

¶3 A trial panel of the Professional Responsibility Tribunal (PRT) conducted a PRT Hearing on February 2, 2017. Upon conclusion of the hearing, consideration of testimony (Respondent was the sole witness) and admitted exhibits, the PRT issued its Report (PRT Report) on April 24, 2017. The PRT Report found generally that Respondent had violated the ORPC Rules 1.15,[4] 8.4(a), and 8.4(c),[5] but did not find clear and convincing evidence to support the other allegations of misconduct against Respondent asserted by the Complainant, namely violations of ORPC Rules 1.1,[6] 1.3,[7] 1.4,[8] and 1.5.[9] The PRT recommended suspension of Respondent's license to practice law for one hundred twenty days and assessed to Respondent the payment of costs incurred in this proceeding. The Complainant filed a one-count complaint to our Court in Complainant's Brief-In-Chief on May 16, 2017. Withers responded with Respondent's Brief-In-Chief on May 30, 2017.

STANDARD OF REVIEW

¶4 The Oklahoma Supreme Court has exclusive original jurisdiction regarding OBA proceedings. In re Integration of State Bar of Okla., 1939 OK 378, ¶ 5, 95 P.2d 113, 114. The Court's review is de novo and takes into consideration all relevant facts in determining whether discipline is merited and what measures, if any, should be imposed for the misconduct. State ex rel. Okla. Bar Ass'n v. Donnelly, 1992 OK 164, ¶ 11, 848 P.2d 543, 546. The Court implements its constitutionally invested, nondelegable power to regulate and control the practice of law and the legal practitioners. Tweedy v. Okla. Bar Ass'n, 1981 OK 12, ¶ 2, 624 P.2d 1049, 1052. Under a de novo examination, the Trial Panel's findings and its recommendations are not binding nor are they persuasive upon this Court. State ex rel. Okla. Bar Ass'n v. Raskin, 1982 OK 39, ¶ 11, 642 P.2d 262, 265. This Court has a duty to be the final arbiter for adjudication and must conduct a full-scale examination of all the relevant facts. State ex rel. Okla. Bar Ass'n v. Johnston, 1993 OK 91, ¶ 13, 863 P.2d 1136, 1142 ("In a de novo consideration, in which the court exercises its constitutionally invested, nondelegable power to regulate both the practice of law and the legal practitioners, a full-scale exploration of all relevant facts is mandatory. The Court's task cannot be discharged unless the PRT panel submits a com-

plete record of proceedings for a de novo examination of all material issues.").

¶5 Before a decision to discipline an offending attorney, the misconduct presented must be demonstrated by clear and convincing evidence, as required by Rule 6.12 of the RGDP, 5 O.S. 2001, Ch.1, App. 1-A. To make this determination of evidence and to fully discharge the court of its duty, the Trial Panel must present a complete record of the proceedings. State ex rel. Okla. Bar Ass'n v. Eakin, 1995 OK 106, ¶ 9, 914 P.2d 644, 648. The Court must determine whether the presented record is sufficient for an independent determination of the relevant facts and to craft an appropriate discipline. State ex rel. Okla. Bar Ass'n v. Perceful, 1990 OK 72, ¶ 5, 796 P.2d 627, 630. The record in this case consists of the pleadings filed with this Court, the exhibits admitted into the record at the PRT Hearing, the Report of the Trial Panel filed on April 24, 2017, and the transcript of the district court hearing held on February 2, 2017. After examination of the record on appeal, this Court determines that the record submitted is sufficient for the Court's de novo consideration of Respondent's alleged misconduct.

FACTUAL BACKGROUND

¶6 The chronology of this case is detailed and complex so it is necessary to provide a thorough summary of the facts. This case arises from Respondent's representation of a client who went to an emergency room for treatment of heart-related symptoms. The treatment given was alleged to have triggered a cardiac arrest which necessitated a readmission to the medical facility. Thereby this medical negligence action was filed in response to that incident.

¶7 Jackie Miller (Ms. Miller) sought medical assistance when she went to the emergency room of the Oklahoma University Medical Center (OUMC) on December 31, 2007. Experiencing pain and tenderness over her pacemaker, Ms. Miller was prescribed the medication Zofram, which allegedly caused cardiorespiratory arrest and readmission to the hospital with severe injuries as a result.

¶8 On September 30, 2009, Ms. Miller hired attorney David Van Meter to pursue a medical negligence action against the hospital and doctors involved in her case. Defendants included OUMC, Healthcare Services, Inc., Tarek Dernaika, M.D., Moeen Abedin, M.D., Regi Matthew Pappy, M.D., Bradley J. Johnson, M.D., and S. Brent Barnes, M.D. The claim which was filed by Mr. Van Meter on Ms. Miller's behalf asserted an attorney's lien in favor of Mr. Van Meter. On February 25, 2013, after Mr. Van Meter had spent a period of years on the case, Ms. Miller terminated the client relationship with Mr. Van Meter after she failed to accept his advice that she accept a settlement offer for a total of $25,000, as to all defendants in total. Mr. Van Meter indicated that if Ms. Miller did not accept the settlement offer, he would no longer represent her in the matter and thereafter, counsel withdrew from the case. Ms. Miller, of her own initiative on May 6, 2013, dismissed the action without prejudice.

¶9 On January 21, 2014, Ms. Miller retained Respondent to represent her in the previously filed medical malpractice case. Respondent at the time was employed by the law firm of Brown and Gould. Initially, Respondent and Mr. Van Meter had some preliminary email discussions regarding the attorney's lien Mr. Van Meter possessed on Ms. Miller's case. Mr. Van Meter stated that he was entitled to 50% of any proceeds for the case or a flat amount of $25,000 plus his expenses. Respondent and his firm's partner (Tony Gould) refiled the action for Ms. Miller on May 6, 2014, with all the initially named defendants but also adding a new defendant, Dr. Brian Plaxico, D.O.

¶10 Subsequent to the refiling of the medical malpractice action, Respondent left Brown and Gould in August of 2014, and by an agreement on August 13, 2014, Mr. Gould withdrew from the case and Respondent continued representation of Ms. Miller as a sole practitioner. This was Respondent's first experience as a sole practitioner. Mr. Gould made no attorney lien claim, offering instead that he would be satisfied with recoupment of costs incurred - approximately $705.64 - if the case resulted in recovery.

¶11 Respondent then pursued a conclusion to the medical malpractice case for Ms. Miller. On April 28, 2015, he was able to reach a settlement agreement with OUMC for $75,000, and with the doctors, Pappy, Abedin, Dernaika, and Johnson (Pappy, et al.), for $7,000 "in verified litigation expenses." The agreements were initially handwritten and both agreements were executed by Ms. Miller personally. Doctors Barnes and Plaxico did not participate in the initial settlement agreement and the claims against them remained unresolved.

¶12 On May 3, 2015, Respondent and Ms. Miller executed a second attorney-client contractual agreement whereby the attorney fees due to Respondent was amended to 40% rather than 50% in the original agreement. The new amended section in the second contractual agreement stated that the Respondent would receive no more than 40% of the client's recovery and 10% would remain in escrow in order to satisfy the two attorney liens of Van Meter and Gould. If after the satisfaction of all lien claimants, there was still a remainder in the 10% withheld for escrow, that amount would go to the client. Ms. Miller disputes this explanation, alleging the second agreement specified 60% go to her rather than the initial 50%.

¶13 On August 31, 2015, a formal release of OUMC's medical claim was completed and executed in order to finalize the settlement agreement that was reached with OUMC on April 28, 2015. The forms were sent directly to Ms. Miller by email and she was able to sign the documents and return the same by fax.

¶14 When Respondent received the settlement check of $75,000 from OUMC on September 21, 2015, he endorsed the check with both his name and Ms. Miller's name as the check was made out to both of them. Respondent alleges that he signed Ms. Miller's name with her consent. He then deposited the check into his operating account. On September 23rd, Respondent sent a cashier's check to Ms. Miller in the amount of $22,594.56 drawn from his operating account and he contends that he sent a settlement statement along with the check. Ms. Miller alleges that she never received the settlement statement. Ms. Miller received the check in the amount of $22,594.56, leaving in escrow $11,863.43, for a potential CMS Medicare claim, and $3,042.01 for a potential Oklahoma Healthcare Authority (OHCA) claim, thus totaling $37,500.00, or 50% of the settlement paid.

¶15 In November and December of 2015, both CMS Medicare and OHCA waived their lien rights and Respondent proceeded to issue checks in the amounts of $11,863.43 and $3,042.01 to Ms. Miller representing their respective lien amounts. This brought the total amount of funds disbursed to Ms. Miller to $37,500.00 or 50% of the OUMC settlement amount.

¶16 The formal release of claims against Pappy, et al. (excluding Barnes and Plaxico), was signed by Respondent (using Ms. Miller's name) and the "signature" was caused to be notarized by Respondent on September 17, 2015. Respondent admits that he tried to replicate Ms. Miller's signature as close as possible before having it notarized. Respondent also admits that he had no power of attorney or other legal authority authorizing him to sign this agreement using Ms. Miller's name. However, Respondent alleges that he did have oral authorization to execute the formal release. However, Ms. Miller contended that she did not give Respondent permission to sign this formal release of claims against Pappy, et al.

¶17 On September 21, 2015, Respondent received and deposited a check made out to him from Pappy, et al., in the amount of $3,320.03, for his litigation expenses with these defendants. In both settlements (OUMC and Pappy, et al.), Respondent acknowledges that he commingled trust funds with his personal funds, knowing that it was inappropriate and thus violated RGDP rules 1.15 and 8.4(a).

¶18 On November 2, 2015, Ms. Miller's claim against Defendant Plaxico was dismissed with prejudice.

¶19 In early December of 2015, Ms. Miller called Respondent, agreeing to accept a settlement offer from Barnes. Then, on December 4, 2015, Ms. Miller subsequently attempted by email to retract the decision to agree to settle. On December 9, 2015, Ms. Miller emailed Respondent to ask if the Barnes settlement check would have her name on it. Following that, on January 6, 2016, Ms. Miller emailed Respondent again to tell him not to dismiss her case against Barnes. Later, on August 1, 2016, Barnes filed a motion to enforce settlement and the district court held a hearing regarding enforcement of the Barnes' settlement on October 28, 2016. The court concluded that the settlement agreement was valid and should be enforced because Respondent had both actual and apparent authority from Ms. Miller to accept the settlement offer from Barnes.

PROCEDURAL HISTORY

¶20 Ms. Miller filed a formal complaint with the OBA against Respondent on January 26, 2016, alleging multiple infractions of attorney misconduct. Ms. Miller terminated Respondent's representation in the spring of 2016. On September 8, 2016, Respondent filed a Motion for Substitution of Plaintiff's Counsel as Ms. Miller's attorney of record and the Order

Allowing Withdrawal was issued on September 21, 2016.

¶21 The OBA formally opened a complaint and the PRT Trial Panel initiated a hearing February 2, 2017, to assess the complaints of Ms. Miller against Respondent. Though a substantial number of Exhibits were introduced, the sole witness heard from at the hearing was Respondent. The PRT Report was issued April 21, 2017.

¶22 Complainant agrees that all of the monies due to the client and all lien claimants have now been properly allocated. Respondent directly compensated his client within days of receiving settlement funds or lien releases (from Medicare and OHCA). However, Respondent failed to promptly notify the attorney lien claimant, Mr. Van Meter, or claim holder, Mr. Gould, of settlements in a timely manner, thus delaying the payments owed to them from the settlements. In fact, as Complainant points out, Respondent's total balance in his operating account on December 23, 2015, after full payments had already been disbursed to his client, Ms. Miller, was only $300.08. Claims from neither Gould or Van Meter had been satisfied at that point. Gould received payment from Respondent for the $705.64 owed to him on February 26, 2016. Respondent settled the payment due to Mr. Van Meter on September 29, 2016, for $7,500.00 plus any fees attained in the Barnes settlement.

DISCUSSION

¶23 Rationale for the "disciplinary process, including the imposition of a sanction, is designed not to punish the delinquent lawyer, but to safeguard the interests of the public, those of the judiciary and of the legal profession." State ex rel. Okla. Bar Ass'n v. Combs, 2007 OK 65, ¶ 36, 175 P.3d 340, 351 (citations omitted). The measure of discipline imposed upon an offending lawyer should be consistent with the discipline visited upon other practitioners for similar acts of professional misconduct. Id. (citation omitted).

¶24 When we examine the actions taken by Respondent in the case before us, we hold that Respondent violated ORPC Rule 1.15 when he initially and subsequently received settlement checks from the defendants and deposited each into his operating account, a clear violation of the rules of professional conduct resulting in commingling of client funds and personal funds. Respondent acknowledges this violation and accepts full responsibility for it. We evaluate a commingling infraction based on three different levels of culpability, those being (1) commingling, (2) simple conversion, and (3) misappropriation or theft by conversion; each of which must be proven by clear and convincing evidence. State ex rel. Okla. Bar Ass'n v. Combs, 2007 OK 65, ¶ 13, 175 P.3d 340, 346; see also State ex rel. Okla. Bar Ass'n v. Cummings, 1993 OK 127, ¶ 23, 863 P.2d 1164, 1172; State ex rel. Okla. Bar Ass'n v. Parsons, 2002 OK 72, ¶ 12, 57 P.3d 865, 868. Each level represents a more serious infraction and thus demands more serious disciplinary action. In this case, Respondent not only commingled the settlement money with his personal funds in the operating account, he reached a point after paying his client the monies due to her, on December 23, 2015, where the balance available in his operating account was only $300.08. At that point, while payments were still due and unpaid for outside attorney claim interests (approximately $700.00 to Gould and $7,500.00 to Van Meter), the balance in his operating account was only $300.08. By operation of law, at this point there was clear and convincing evidence that his infraction became more than commingling and included simple conversion. However, we find no clear and convincing evidence that he was guilty of level three commingling which involves theft by conversion or otherwise. He never attempted to misappropriate the monies to his personal benefit.

¶25 Respondent's actions were also a violation of ORPC Rules 8.4(a) and (c). The PRT Report found that Respondent violated Rule 8.4(c) when he endorsed the Formal Release of Claims for the Pappy, et al. settlement, signing his client's name. Although he claimed that the signature was done with his client's permission, she disputed that fact. But more seriously, he acknowledged that after he signed the settlement agreement, he caused that signature of his client's name to be notarized, and by his admission, attempted to make the signature look as much as possible to the client's signature. Though Respondent claimed to have had the client's oral consent to effect the signature, his actions reveal that it was not, at the very least, in accord with legal procedures. He admitted that he no power of attorney or other legal authorization to sign his client's name.

¶26 We have reviewed all cited authority and arguments by Complainant and Respondent in this action. After a thorough review of the

arguments, we must determine the necessary discipline here based upon similar infractions and previous assessments for those violations by this Court. In a review of that authority, we find several cases persuasive in determining Respondent's appropriate discipline and effective remedy. The cases that we find most persuasive and analogous to the instant case are State ex rel. Okla. Bar Ass'n v. Combs, 2007 OK 65, 175 P.3d 340; State ex rel. Okla. Bar Ass'n v. Jacques, 2000 OK 57, 11 P.3d 621; State ex rel. Okla. Bar Ass'n v. Parsons, 2002 OK 72, 57 P.3d 865; and State ex rel. Okla. Bar Ass'n v. Taylor, 2000 OK 35, 4 P.3d 1242.

¶27 In Combs, the respondent was held to have committed, and that he admitted to, were violations of ORPC Rules 1.15 (mishandling funds) and 8.4(a) (professional misconduct), as well as RGDP Rules 1.3 and 1.4(b). 2007 OK 65, ¶ 13, 175 P.3d 340, 346. Contrary to the PRT's recommendation in Combs, the Court did not find an intent to defraud or deceive, and thus did not find clear and convincing evidence of a violation of ORPC 8.4(c). Id. ¶ 19, 2007 P.3d at 351. As in this case, the court found no previous disciplinary violations, a respondent who accepted full responsibility for his actions and fully cooperated with the investigation, and neither the client nor third parties suffered any harm. Id. Though the PRT Report recommended suspension for two years plus one day, the respondent in Combs was disciplined by this Court with a ninety day suspension plus costs incurred in the proceedings. Id. ¶ 39, 2007 P.3d at 352.

¶28 Another recent case decided by this Court involved a respondent who was charged with, and admitted to, fraudulently acknowledging a legal document and causing improper notarization of same. State ex rel. Okla. Bar Ass'n v. Jacques, 2000 OK 57, ¶ 11, 11 P.3d 621, 624. Again, the respondent, never previously disciplined for professional misconduct, fully cooperated with the complainant's investigation and fully admitted the misconduct. Id. ¶ 21, 11 P.3d at 625. In Jacques, the respondent's acts were found not to have been motivated by a desire for personal gain, but rather a result of poor judgment and management. Id. In that instance, the Court ruled that respondent was subject to a thirty day suspension of his license to practice law and required to pay the costs of the proceedings against him. Id. ¶ 26-27, 11 P.3d at 626.

¶29 The Parsons case involved a respondent who, when settling a personal injury case, not only endorsed the two settlement checks without notifying an interested third party (medical provider), but also failed to ever notify the interested party for years, distributing the proceeds of the two settlement checks between himself and his client. State ex rel. Okla. Bar Ass'n v. Parsons, 2002 OK 72, 57 P.3d 865. The respondent there was also found to have violated ORPC Rule 1.15 (commingling) and Rule 8.4(c) (dishonest misconduct). In an evaluation of the 8.4(c) violation, the court held that although a violation occurred, the Complainant had failed to show by clear and convincing evidence that respondent intended to misappropriate funds by fraud or deceit. Id. ¶ 14-16, 57 P.3d at 869. Respondent was ordered disciplined by suspension of his license for one year plus payment of costs incurred for the proceedings. Parsons can be distinguished from the instant case by the fact that, Respondent here never displayed any actions to attempt to hide the settlements from the third parties. He did contact and reimburse one attorney claimant within five months (February 26, 2016) of settlement and did reach an agreement as to settlement terms with the other claimant on March 18, 2016 - although the final settlement was not effectuated for another six months (September 29, 2016). The respondent in Parsons was disciplined by requiring a one year suspension of his licence to practice law and ordered to pay the costs of the investigation. Id. ¶ 22, 57 P.3d at 870.

¶30 In summary, we agree with the PRT finding in this case that there was no clear and convincing evidence that Respondent violated ORPC Rules 1.1,1.3,1.4, or 1.5. The cases cited in support of this proposition along with the evidence and testimony do not support such a finding. Respondent's competency, diligence, communication with client, and assessment of fees were disputed. For example, Respondent was able to achieve a far better settlement than her original attorney, Van Meter, was able to achieve and, there is no evidence of lack of diligence and disputed evidence at best as to any communication or fee arrangement failures. What is supported by the evidence, is a violation of ORPC Rule 1.15 (Safekeeping Property). When Respondent deposited checks into his operating account, he by definition, violated this rule. In fact he never used his trust account, if it was even active, at any time during the case.

¶31 There is also no question that Respondent violated ORPC Rules 8.4(a) and (c). The more serious violation here is 8.4(c) which states that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Respondent here acknowledged that he endorsed the settlement agreement with Pappy, et al. with his client's name, attempting to make it look like his client's signature, and then having that signature notarized. Though he claimed to have oral consent to do this, he acknowledged that he did not have any legal written authority to do it and his client disputes the oral consent. However, the fact that he acknowledges trying to replicate his client's signature for notarization established an attempt at misrepresentation.

¶32 Assessing Respondent's actions and professional conduct violations, we must keep in mind that the disciplinary process is not designed to punish the lawyer but to safeguard the interests of the public, judiciary and the profession itself. Combs, 2007 OK 65, ¶ 36, 175 P.3d at 351. We must also consider that the discipline imposed should bear resemblance to other practitioners for similar violations of misconduct. Id. Although this was Respondent's first experience as a sole practitioner, we cannot and do not excuse the seriousness of his infractions.

MITIGATING FACTORS

¶33 Respondent's client and the other interested parties were made whole by Respondent. There was no involvement of the OBA Client Security Fund in order to accomplish this result. It was noted in the record that Respondent had no previous reprimands or complaints filed prior to this case and Respondent discontinued the practice of law immediately following the case. As was acknowledged in the PRT Report and by the Complainant, Respondent was at all times cooperative with the investigation into this complaint against him. Respondent willingly acknowledged mistakes made and showed remorse for his actions. While these mitigating factors do not excuse Respondent's violations of the rules of professional misconduct, they are to be considered when determining the appropriate discipline required. It is also noted that the client benefitted because Respondent was able to achieve a recovery that was more than 3 times higher than the prior settlement offer. Again, this does not excuse, but is a consideration, when meting out discipline. His actions displayed no purposeful intent to deceive the client or other interested parties. See Combs ¶ 19, 175 P.3d at 347. The two attorney claim holders, though experiencing delay in the satisfaction of their claims, did not file grievances against Respondent.

CONCLUSION

¶34 After a thorough review of the record, the Court concludes that Respondent violated ORPC Rules 1.15 and 8.4(a) and (c). These serious violations of the rules of professional conduct require requisite disciplinary action. Upon consideration of these violations found by clear and convincing evidence, and giving due consideration to the mitigating factors tendered,

RESPONDENT IS ORDERED DISCIPLINED (1) BY SUSPENSION FOR A PERIOD OF NINETY DAYS AND (2) BY IMPOSITION OF COSTS OF THIS PROCEEDING IN THE AMOUNT OF $2,136.39, WHOSE PAYMENT SHALL BE DUE NO LATER THAN ONE HUNDRED TWENTY DAYS AFTER THIS DECISION BECOMES FINAL.

VOTE:

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

Combs, J., dissent.

Combs, J., dissenting:

"I would suspend Mr. Withers for one (1) year."

COLBERT, J.

1. The record consists of the Complaint, Answer, transcript of the PRT Hearing, Report of the Trial Panel, Complainant's Brief in Chief, Respondent's Brief in Chief, Exhibits Not Under Protective Order, and Exhibits Under Protective Order.

2. The Rules Governing Disciplinary Proceedings are found at 5 O.S. 2001, Ch. 1, App. 1-A. The provisions of the RGDP Rule 6.1 state:

> "The proceeding shall be initiated by a formal complaint prepared by the General Counsel, approved by the Commission, signed by the chairman or vice-chairman of the Commission, and filed with the Chief Justice of the Supreme Court."

3. The Oklahoma Rules Governing Disciplinary Proceedings are found in 5 O.S. 2001, Ch. 1, App. 3-A.

4. Rule 1.15 – Safekeeping Property

> (a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the written consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.
>
> (b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account but only in an amount necessary for that purpose.
>
> (c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in connection with a representation, a lawyer possesses funds or other property in which both the lawyer and another person claim interests, the funds or other property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved, and the undisputed portion of the funds shall be promptly distributed.

5. Rule 8.4 – Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

6. Rule 1.1 – Competency

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

7. Rule 1.3 – Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

8. Rule 1.4 – Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

9. Rule 1.5 – Fees

(a) A lawyer shall not make an agreement for, charge or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

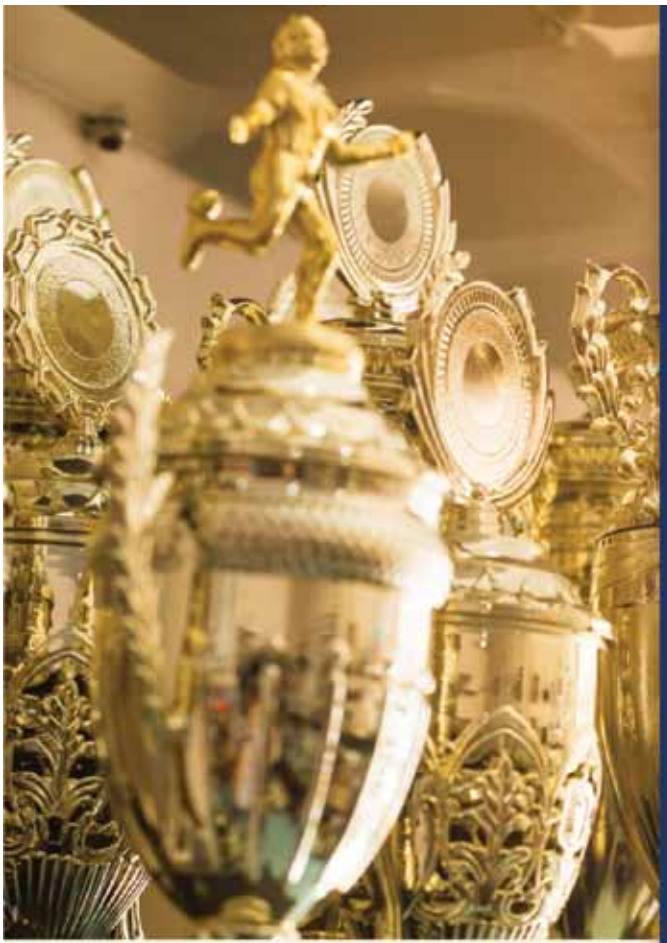
(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.



Oklahoma Bar Association AWARDS

★ Nominations due ★

July 1

Fifteen awards to choose from, including those for lawyers, nonlawyers, organizations and bar associations. All nominations and supporting materials must be received by the deadline.

www.okbar.org/awards

In Memoriam

William Christian of Oklahoma City died April 3. He was born Sept. 17, 1922, in DeQueen, Arkansas. **Following his undergraduate studies, Mr. Christian served voluntarily for three and a half years with the U.S. Army during World War II, rising in rank from corporal to first lieutenant.** After his service, he received his LL.B. from OU in 1949. After a short stint in private practice, **he returned to military service during the Korean Conflict.** He returned to public service after the Korean Conflict and served as county attorney in McCurtain County. He later served as general counsel and conservation attorney for the Oklahoma Corporation Commission.

Judge Lisa Davis of Edmond died April 14. She was born Aug. 31, 1959, in Tulsa, and received her bachelor's degree in business administration from OU in 1981. In 1984, she earned her J.D. from the OU College of Law. She began her legal career in private practice at the law firms of Kimball, Wilson & Walker and Musser and Bunch. From there she moved on to the role of assistant attorney general and general counsel for Gov. Brad Henry. In 2009, she was appointed by Gov. Henry as Oklahoma County district judge and presided over both criminal and civil dockets until 2014 when former Chief Justice Tom Colbert named her presiding juvenile judge of Oklahoma County. She was instrumental in developing numerous programs including the Program for Female Youth on Probation, the Safe Baby Project and many more. Memorial donations may be made to Citizens for Children and Families Inc., c/o Sarah Edwards, 2108 NW 59th Circle, Oklahoma City, 73112.

Christopher S. Heroux of Denver died April 26. He was born Dec. 13, 1958, and earned his J.D. from the TU College of Law in 1986. He was a skilled corporate transactional lawyer who practiced in the oil and gas industry. Prior to joining Lewis Brisbois in 2016, he worked at regional and national law firms in Denver, Tulsa and Houston. He chaired the Denver Corporate Practice and served as vice chair of the firm's corporate practice. He will be remembered for his kind heart, easy-going personality and infectious smile.

Robert Gregory Kirby of Edmond died April 3. He was born in Oklahoma City on Nov. 28, 1967. He attended OU and the University of Central Oklahoma, where he graduated with his Bachelor of Arts in political science in 1992. In 1996, he received his J.D. from the OCU School of Law. He practiced law at Travelers Insurance as their chief general counselor. He enjoyed being a volleyball dad and traveling with their friends and will be remembered as a great father, husband, brother, son and friend.

H. Gregory Maddux of Tulsa died March 25. He was born Nov. 14, 1956, in Lawrence, Kansas, and graduated from OSU in 1979 with a Bachelor of Science in business administration. He went on to receive his J.D. from the TU College of Law in 1983. He was a long-time, well-known and respected attorney in Tulsa. He was a partner in the firm Maddux & Maddux PLLC and focused his practice on real estate law and civil litigation. Mr. Maddux was an active title agent with First American Title Insurance as well as a long-standing member of the American Land and Title Association. He was an avid sports fan and enjoyed playing golf with his friends and colleagues.

John E. Patterson of Oklahoma died Feb. 21. He was born June 22, 1931, in Ardmore. He graduated from Ardmore High School in 1949 and **attended OU for a year and half before joining the United States Air Force**. After serving for several years, he returned to OU and earned his bachelor's degree in accounting and his J.D. from the OU College of Law. **He joined the Oklahoma Air National Guard** and spent many more years having adventures while building his law practice. He retired from the Oklahoma Air National Guard in the early 1970s and from the practice of law in 2010. Memorial donations may be made to St. Luke's UMC, 222 NW 15th St., Oklahoma City, 73103 or Physicians Choice Hospice, 14324 N. Western Ave., Edmond, 73013.

Margaret Swimmer of Tulsa died April 1. She was born Feb. 6, 1944, in Stratford. She graduated from

Wynnewood High School and continued her education at OU majoring in social work. For nearly a decade, she practiced social work in family planning in eastern Oklahoma. She received her J.D. from the TU College of Law in 1983 and began practicing at Hall, Estill, Hardwick, Gable, Golden & Nelson PC in 1984. She later became an equity partner of the firm and until her death served as of counsel following semi-retirement several years go. Among other scholarly endeavors, she co-authored and presented "Business Transactions in Indian Country" at the Sovereignty Symposium. She was appointed by Gov. Henry Bellmon to the Governor's Commission on the Status of Women, serving as the first chairwoman.

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

2019 OK CR 12

ALEX MOORE, Appellant, v. STATE OF OKLAHOMA, Appellee.

No. F-2017-710. June 13, 2019

ORDER GRANTING APPELLEE'S MOTION TO PUBLISH, WITHDRAWING PRIOR OPINION AND SUBSTITUTING ATTACHED OPINION

¶1 On March 28, 2019, this Court affirmed Appellant's conviction and sentence on direct appeal in an unpublished opinion. On April 12, 2019, the State of Oklahoma filed with this Court a Motion for Publication and Brief in Support. In this motion, the State urges that publication of our opinion in this case is warranted on various grounds. Upon review of that request and the opinion, and for good cause shown, we find that the State of Oklahoma's Motion for Publication and Brief in Support should be and hereby is **GRANTED**.

¶2 **IT IS THEREFORE THE ORDER OF THIS COURT** that the prior opinion in the above styled case is **WITHDRAWN**. The Clerk of this Court is hereby directed to designate the attached opinion as "FOR PUBLICATION."

¶3 The Clerk of this Court is directed to transmit a copy of this Order and the attached Opinion to the Court Clerk of Beckham County; the District Court of Beckham County, the Honorable Doug Haught, District Judge; and counsel of record.

¶4 **IT IS SO ORDERED**.

¶5 **WITNESS OUR HANDS AND THE SEAL OF THIS COURT** this 13th day of June, 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

OPINION

HUDSON, JUDGE:

¶1 Appellant, Alex Moore, was tried and convicted at a jury trial in Beckham County District Court, Case No. CF-2015-9, of Murder in the First Degree, in violation of 21 O.S. Supp.2012, § 701.7(A). The jury recommended a sentence of life imprisonment without the possibility of parole. The Honorable Doug Haught, District Judge, presided at trial, and sentenced Moore in accordance with the jury's verdict. Moore now appeals.

FACTS

¶2 The State's evidence showed that Appellant attacked and killed his cellmate, Todd Bush, on the evening of March 6, 2014. Appellant and Bush were inmates from California incarcerated at the privately-run Northfork Correctional Center in Sayre.[1] Appellant and Bush were under lockdown in Cell 261 of the Fox South Unit at approximately 7:45 p.m. when Christopher Hill, a corrections counselor, stopped by to verify their respective account balances. Hill did not unlock the cell door during this process although he had a key. Instead, he knocked on the cell door and spoke with each inmate through the window. Bush was laying on the bottom bunk bed when Hill read Bush's account balance. Bush did not get up but responded with a simple "okay." Appellant was laying on the top bunk, reading a book when Hill asked whether he wanted his balance. Appellant hopped down off his bunk, walked to the door and Hill read his account balance. Appellant said "okay" and returned to the top bunk where he resumed reading. Appellant and Bush were the only two inmates inside the cell.

¶3 Before walking away from Cell 261, Hill tugged at the handle of the cell door to confirm it was locked. Then Hill moved down the line to the other cells, repeating the process of balance checks with the other inmates. At approximately 8:00 p.m., Hill finished his shift and had just walked outside the Fox South Unit when an emergency medical call for Appellant's and Bush's cell was broadcast. Robert Hubbard, a correctional officer, was conduct-

ing a lockdown of the inmates on the bottom row of the Fox South Unit when someone yelled about an inmate down on the top tier.

¶4 Hubbard raced upstairs to Cell 261. There, he observed through the window of the locked cell door Appellant holding onto Bush. Both inmates were on the floor with Appellant's legs folded underneath him; Bush was on his knees. Appellant had his arms wrapped around Bush and was doing something to Bush's chest. According to Hubbard, Appellant was "[k]ind of like shaking" Bush's chest. No other inmates were inside the cell. Hubbard called over the radio for medical assistance then unlocked the cell with his key and went inside. Hubbard quickly determined that Bush had no pulse and that his condition was not good. Hubbard conveyed this information over the radio, laid Bush's body flat on the floor and began CPR while waiting for the medical team to arrive.

¶5 Hill arrived to find Hubbard inside Cell 261 performing CPR on Bush. Hill ushered Appellant away from the cell and told him to sit on a bench in the common area. Hill then relieved Hubbard and commenced CPR on Bush. The prison's medical team soon arrived. Bush was loaded onto a gurney and transported to a local hospital by ambulance. Bush was in full cardiac arrest and never responded to the continuous efforts of the prison medical staff, paramedics and emergency room personnel to save his life. Bush was pronounced dead at the hospital.

¶6 When asked by Northfork officials what happened to Bush, Appellant said he didn't know. Appellant explained that Bush "liked to drink" and had fallen off his bunk bed. Appellant offered too that he and Bush were from the same neighborhood. Bruising and abrasions were observed on Bush's face, neck and upper chest by investigators and medical personnel that were inconsistent with falling roughly two feet off the lower bunk bed. A small laceration was observed at the base of Bush's neck and an abrasion was apparent on Bush's left rib cage where the skin had rubbed off. Petechial hemorrhaging was observed in both of Bush's eyelids. These injuries suggested to investigators evidence of attack, struggle and asphyxia. By contrast, two small scratches were observed on Appellant's neck.

¶7 Inside Cell 261, investigators found utter disarray. Spilt "hooch" or contraband prison alcohol (commonly made from fermented food like bread, fruit and sugar) was spilt on the floor along with one of Bush's overturned tennis shoes. In the corner of the cell near a mounted table and chairs was an overturned cup and wet towel. Passive blood drips were found in this same area suggesting the source was directly above the blood drops. Blood swipes were observed on the cell wall that were consistent with someone trying to get up off the ground.

¶8 Dr. Ruth Kohlmeier, the state medical examiner, autopsied Bush and determined that the manner of death was homicide with the cause of death being asphyxiation due to strangulation. Her external examination revealed bruising on Bush's hands, forearm and chest area. Bush also had an abrasion on his left chest. Bush had bruises on his nose, above his left eyebrow and on his right eyebrow; he also had a black left eye. These injuries were fresh and were inflicted during the same time frame. Dr. Kohlmeier opined that these injuries were consistent with Bush receiving multiple blows to the head and were not consistent with Bush having fallen down.

¶9 Dr. Kohlmeier's internal examination revealed that Bush's brain had swollen but there was no blood on the brain. The absence of blood on the brain meant Bush's head injuries were not lethal. Bush had petechial hemorrhages in both eyes, along with injuries to his neck, which were consistent with strangulation. Indeed, Bush's hyoid bone inside his neck was fractured which, according to Dr. Kohlmeier, would take "tremendous force" to break in a younger person like Bush. Toxicology of Bush's blood showed he was intoxicated: his blood alcohol level was positive for alcohol at 0.18 percent.

¶10 The defense presented no evidence at trial and rested at the conclusion of the State's case. However, the defense theory at trial – advanced both through cross-examination and closing argument – was that the victim's death may have been caused by an accidental fall, consistent with Appellant's statement to prison officials.

ANALYSIS

¶11 **Proposition I**. The trial court admitted evidence under 12 O.S.2011, § 2404(B)[2] showing that Appellant attacked an inmate and a detention officer in separate incidents occurring at the county jail while Appellant awaited trial in the present case. The first incident occurred

on January 9, 2016 when, according to detention officer Chris Yeager, Appellant "balled up" his fists and struck his cellmate, Kevin Ezzell, on the back of the head inside their cell. This incident occurred after Yeager opened the cell door and responded to Ezzell's request for bedding. Appellant and Ezzell were the only two inmates inside the cell. Yeager testified that Appellant "was getting his hands up close to [Ezzell's] neck and shoulder region" while standing behind Ezzell. Yeager intervened and separated the two as Ezzell attempted to run out the open cell door. Yeager testified that Appellant's hands weren't coming off of Ezzell's neck and shoulder area, prompting him to pull Appellant off Ezzell. Appellant later said to the detention officer "tell that dude that I did him a favor because I could have waited 'til y'all did meds and killed him."

¶12 The second incident occurred on February 18, 2016, as detention officer Jason Crook was passing out medications in Appellant's pod. Appellant attempted to walk out of the pod to confront a jail captain about that morning's oatmeal rations when he was stopped by another detention officer. Appellant then knocked off a stack of trays from the medication cart, pushed the cart out of the way and walked towards a hallway door. When Crook stepped around the medicine cart, Appellant came at the officer and put his hands on Crook's "head and shoulder area." Crook and Appellant then fell to the ground. Crook was able to subdue Appellant despite Appellant having both hands on Crook's face with his thumbs going forward into the officer's eyes. When Crook knocked Appellant's hands away, Appellant grabbed the back of the officer's shirt.

¶13 The trial court admitted this evidence under Section 2404(B) as proof showing absence of mistake or accident. The trial court included in the written charge the uniform Oklahoma limiting instruction for other crimes or bad acts evidence.[3] On appeal, Appellant argues the trial court abused its discretion by admitting this evidence. Appellant urges this error denied him due process and was not harmless. Appellant requests either a new trial or modification of his sentence.

¶14 At trial, Appellant timely objected to this evidence on the grounds raised here thus preserving this claim for our review. We review the admission of other crimes or bad acts evidence for abuse of discretion. *Kirkwood v. State*, 2018 OK CR 9, ¶ 3, 421 P.3d 314, 316. An abuse of discretion is a conclusion or judgment that is clearly against the logic and effect of the facts presented. *Id.* We have held that any criminal conviction obtained through a trial "must be based upon evidence establishing that the defendant committed the charged crime(s), rather than evidence of other offenses." *Miller v. State*, 2013 OK CR 11, ¶ 89, 313 P.3d 934, 966.

¶15 Section 2404(B) governs the admission of other crimes or bad acts evidence. This provision "specifically prohibits evidence intended to prove a character trait of a person in order to show the person acted in conformity with that trait." *Cuesta-Rodriquez v. State*, 2010 OK CR 23, ¶ 26, 241 P.3d 214, 226. Other crimes or bad acts evidence is admissible, however, for limited purposes such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. We recently discussed the requirements for the admission of this type of evidence:

> Evidence of other crimes must be (a) probative of a disputed issue of the charged crime; (b) there must be a visible connection between the crimes; (c) the evidence must be necessary to support the State's burden of proof; (d) proof of the evidence must be clear and convincing; (e) the probative value of the evidence must outweigh its prejudicial effect; and (f) the trial court must instruct jurors on the limited use of the testimony at the time it is given and during final instructions.

Kirkwood, 2018 OK CR 9, ¶ 5, 421 P.3d at 316 (citation omitted).

¶16 The principal issue at trial was whether Appellant killed Bush with malice aforethought or whether the victim died from an accidental fall. When asked what happened, Appellant told prison officials that Bush "liked to drink" and had fallen off his bunk bed. Defense counsel's cross-examination of the State's witnesses, like his closing argument, advanced the defense that Appellant's version of events was possible despite the considerable evidence showing Bush was beaten and strangled. Thus, the issue of Appellant's intent was squarely before the jury as was the defense's attempt to show reasonable doubt by defending the case with the notion that the victim's death was an accident.

¶17 Evidence that a defendant committed acts similar to the charged offense may be admissible at trial to prove absence of mistake or accident. Relevant evidence "means evi-

dence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." 12 O.S.2011, § 2401. The probative nature of the other crimes evidence offered in this case depends upon the similarity of the conduct involved. As recently explained by another court in addressing this issue:

> The use of a defendant's other misconduct to prove lack of accident is premised upon Wigmore's theory of improbability. 1 E. Imwinkelried, Uncharged Misconduct Evidence § 5:11 (Updated 2017) (citing 2 Wigmore, Evidence § 363 (3rd ed.)). *See also* 22B Fed. Prac. & Proc. Evid. § 5255. Under the theory of improbability, which is also known as the doctrine of chances, "the credibility of the accident explanation decreases as the number of instances of similar conduct increases." Imwinkelried § 5:11. Stated another way, "the more often an accidental or unusual event occurs, the more likely it is that any subsequent reoccurrence is not the result of a mistake or accident." R. Larsen, Navigating a Federal Trial 10:53.

Swett v. State, 2018 WY 144, ¶ 25, 431 P.3d 1135, 1143.

¶18 We have approved of the use of other crimes or bad acts evidence to prove absence of mistake or accident in this way even where different victims are involved. *See Kirkwood*, 2018 OK CR 9, ¶¶ 4-9, 421 P.3d at 316-18 (evidence of a violent domestic incident that occurred between the defendant and the child victim's mother eight months after the charged offense admissible to counter defendant's claim of accident or mistake in child abuse by injury case); *Cole v. State*, 2007 OK CR 27, ¶¶ 12-26, 164 P.3d 1089, 1094-96 (evidence that defendant was convicted in California eighteen years earlier of aggravated child abuse of his six month old son admissible to disprove absence of mistake of accident in the child abuse murder of his nine month old daughter); *Welch v. State*, 2000 OK CR 8, ¶¶ 7, 13, 2 P.3d 356, 365, 367 (evidence that defendant murdered Debra Stevens in Grady County three months after Talley Cooper's death in Cleveland County was admissible to prove absence of mistake or accident with respect to Cooper's death). Such evidence is not offered to show a defendant's propensity for violence and the defendant's action in conformity therewith. Rather, it is offered for the limited purpose of proving absence of mistake or accident as authorized under the express terms of Section 2404(B).

¶19 In the present case, evidence of Appellant's separate jail altercations occurring after Bush's killing was relevant to prove absence of mistake or accident as to the charged offense. The January 9, 2016, incident is highly similar to the charged offense. The record shows Appellant attacked his cellmate by punching him in the back of the head and grabbing his cellmate around the throat and shoulders. This attack occurred inside the jail cell both men shared. The February 18, 2016, incident is somewhat different from the charged offense but nonetheless similar enough to be admissible. During this second incident, Appellant attacked a detention officer outside his cell, put his hands on the officer's head and shoulder area and both men ended up on the floor before Appellant was subdued.

¶20 The setting and nature of the attacks for these two incidents are highly similar to the circumstances surrounding the charged offense. Although Appellant's subsequent victims were not fatally injured, all three incidents reveal similar attacks in which Appellant confronted a cellmate or detention officer. The repeated commission by Appellant of similar attacks was directly probative of the credibility of his claim that Bush's death was accidental. That is particularly so where, as here, Appellant expressly stated that he could have killed Ezzell, the victim of the January 9th attack, had he waited until the jail staff was handing out medication.

¶21 Despite Appellant's contrary assertions, the similarities of the charged offense and Appellant's attack against Ezzell and the detention officer were substantial enough to create a visible connection between all three. The other crimes evidence introduced in this case was highly probative of a material issue in the present case and was necessary to the State's burden of proof, in particular, refuting the defense claim at trial (based on Appellant's own words) that Bush's death could have been an accident. *See Welch*, 2000 OK CR 8, ¶ 13, 2 P.3d at 367. "In dealing with the relevancy of evidence, we begin with the presumption that in determining whether to admit such evidence, the trial judge should lean in favor of admission." *Id.*, 2000 OK CR 8, ¶ 14, 2 P.3d at 367 (internal quotation omitted). "When balancing the relevancy of evidence against its prejudicial effect, the trial court should give the evidence its maxi-

mum probative force and its minimum reasonable prejudicial value." *Id.*

¶22 In the present case, the State bore the burden of proving that Appellant intentionally killed Bush. The challenged evidence tends to refute Appellant's claim that Bush's death was accidental and bolstered the State's considerable evidence showing malice aforethought. Despite its highly prejudicial nature, we find that the probative value of the other crimes evidence introduced in this case outweighed its prejudicial effect; that the evidence was necessary to the State's burden of proof; and the evidence was properly admitted. There thus was no abuse of discretion. Proposition I is denied.

¶23 **Proposition II**. Appellant complains that the trial court erred in admitting "excessively gruesome photographs which depict the medical examiner's handiwork." Specifically, Appellant challenges the admission of State's Exhibits 116, 117, 118, 129, 130 and 131. Appellant complains that these photographs, which depict various internal injuries suffered by the victim, were at best minimally relevant and that their probative value was outweighed by the danger of unfair prejudice.

¶24 Appellant concedes that he did not object at trial to the admission of these photographs. He has therefore waived review of this claim for all but plain error. *See Tryon v. State*, 2018 OK CR 20, ¶ 59, 423 P.3d 617, 636-37, *cert. denied*, ___U.S.___, 139 S. Ct. 1176, 203 L. Ed. 2d 215 (2019). To show plain error, Appellant must show an actual error, which is plain or obvious, affected his substantial rights. This Court will only correct plain error if the error seriously affected the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Lamar v. State*, 2018 OK CR 8, ¶ 40, 419 P.3d 283, 294; 20 O.S.2011, § 3001.1.

¶25 Appellant fails to show actual or obvious error. We review the trial court's admission of photographic evidence for an abuse of discretion. Photographic exhibits are subject to the same relevancy and unfair prejudice analysis as any other piece of evidence. 12 O.S.2011, §§ 2401-2403. As we have held:

> Photographs may be probative of the nature and location of wounds; may corroborate the testimony of witnesses, including the medical examiner; and may show the nature of the crime scene. Gruesome crimes make for gruesome photographs, but the issue is whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or needless presentation of cumulative evidence.

Martinez v. State, 2016 OK CR 3, ¶ 46, 371 P.3d 1100, 1112-13, (internal citations omitted).

¶26 State's Exhibits 116 and 117 showed Bush's exposed skull and the bruising underneath the hematoma observed externally on the left forehead which was discussed in the medical examiner's testimony. State's Exhibit 118 showed the victim's exposed brain. The medical examiner testified this photograph showed that the victim's brain was somewhat swollen. Further, the medical examiner observed with this photograph that there was no blood on the brain, signifying the blows to the head Bush received were nonfatal. These challenged photographs depicted the victim's injuries, illustrated the testimony of the medical examiner, and demonstrated the nonfatal nature of Bush's head injuries. This was particularly important because of the defense claim that the victim's death may have been accidental from a fall off the bed.

¶27 State's Exhibits 129, 130 and 131 showed the victim's internal neck organ after being removed by the medical examiner. State's Exhibit 129 is an overview of the internal neck organ. State's Exhibits 130 and 131 are close-up photographs showing the broken hyoid bone and the hemorrhage associated with that injury. The medical examiner acknowledged that the neck organ looked like a "red blob" in the overview picture. She used the two close-up shots of the broken hyoid bone and the related hemorrhage, as pointed out by the forceps shown therein, to identify the location of this injury. This helped illustrate the medical examiner's conclusion that the victim died of asphyxia and that it would take a "tremendous amount of force" to break Bush's hyoid bone.

¶28 There is no question that some of these photographs were gruesome. But this alone does not make them inadmissible "so long as they are not so unnecessarily hideous or repulsive that jurors cannot view them impartially." *Bosse v. State*, 2017 OK CR 10, ¶ 48, 400 P.3d 834, 853. None of the challenged photographs can be described as unnecessarily hideous or repulsive. The challenged photographs were relevant and properly admitted. These photographs were not unfairly prejudicial when considered both individually and collectively. Nor were

they cumulative. "[T]he State was not required to downplay the violence involved or its repercussions." *Jones v. State*, 2009 OK CR 1, ¶ 57, 201 P.3d 869, 885. There is no actual or obvious error. Proposition II is denied.

¶29 **Proposition III**. Appellant complains that the prosecutor improperly defined "reasonable doubt" during *voir dire*. Appellant failed to object to any of the questions and comments he now challenges on appeal. Our review is thus limited to plain error. *Robinson v. State*, 2011 OK CR 15, ¶ 16, 255 P.3d 425, 431. Appellant fails to show actual or obvious error.

¶30 In the challenged passages, the prosecutor addressed with the venire panel whether they agreed that not all doubt was reasonable. During this discussion, the prosecutor mentioned the example of an oncoming car on a two-way highway and whether it was reasonable to pull off the road because the prospective juror may have doubt that the oncoming car would cross the center line. The consensus view was (unsurprisingly) that it was unreasonable to pull off the highway for an oncoming car on the mere chance it might cross the centerline. At one point, the prosecutor asked a prospective juror whether he agreed that beyond a reasonable doubt should not be equated to "beyond a shadow of a doubt" or "beyond all doubt" to which the prospective juror responded "[y]eah".

¶31 "The manner and extent of examination of jurors is not 'prescribed by any definite, unyielding rule, but instead rests in the sound discretion of the trial judge.'" *Tryon*, 2018 OK CR 20, ¶ 13, 423 P.3d at 627 (quoting *Mayes v. State*, 1994 OK CR 44, ¶ 15, 887 P.2d 1288, 1298). Here, the prosecutor's questions were well within the limits of proper *voir dire*. We have held that prosecutors may not define "reasonable doubt," *Robinson*, 2011 OK CR 15, ¶ 16, 255 P.3d at 432, but that is not what happened in this case. The State "may distinguish that standard from commonly heard phrases, and ask jurors not to hold the State to a higher burden of proof, as the prosecutor did here." *Id.* The prosecutor used the example of the passing car to illustrate the well-established principle that not all doubt is reasonable. Appellant's jury was not left with an erroneous impression and the prosecutor's actions did not represent actual or obvious error. *See, e.g., Phillips v. State*, 1999 OK CR 38, ¶¶ 21-23, 989 P.2d 1017, 1028; *Stewart v. State*, 1988 OK CR 108, ¶ 21, 757 P.2d 388, 396. Because Appellant fails to show actual or obvious error, there is no plain error. Proposition III is denied.

¶32 **Proposition IV**. Appellant complains there is nothing in the record to indicate he was advised, either by the trial court or by his own counsel, of his right to testify or that he wished to waive that right. Thus, Appellant complains that his constitutional right to testify in his own behalf has been violated. Appellant requests that we reverse his murder conviction and remand his case for a new trial.

¶33 This issue was not raised below. Our review is therefore limited to plain error. *See Wackerly v. State*, 2000 OK CR 15, ¶ 29, 12 P.3d 1, 12. Appellant fails to show actual or obvious error. He acknowledges that we have never imposed a formal requirement that the defendant's waiver of his right to testify be made on the record at trial. Although it is undoubtedly true that non-testifying defendants commonly make such waivers on the record, Appellant cites no authority requiring it. Indeed, the Tenth Circuit has held that:

> [N]othing in this circuit, or any other . . . requires defendants to waive their right to testify on the record and we decline to adopt such a rule now. To the contrary, requiring judges to question each non-testifying defendant about his decision not to testify may result in defendants feeling pressured to give up their right not to testify.

Cannon v. Trammell, 796 F.3d 1256, 1273 n.9 (10th Cir. 2015) (citing *United States v. Pennycooke*, 65 F.3d 9, 13 (3d Cir. 1995)).

¶34 Nothing in the present record indicates that defense counsel frustrated Appellant's desire to testify. Nor does the record suggest in any way that Appellant wanted to testify. We decline Appellant's invitation to create new law and adopt a formal requirement that the trial court in every case advise defendants of their right to testify and obtain an on-the-record waiver of such right from non-testifying defendants. However, trial judges should exercise extreme caution when a defendant's counsel announces during a trial proceeding that their client does not wish to testify. The best practice unquestionably is to take the time to swear in the defendant on the record and outside the presence of the jury and ask simple questions regarding their choice not to testify in their own behalf. The time it takes to do so is a small price to pay for a clean and complete record.

¶35 In the present case, there is no actual or obvious error in light of controlling authority. Thus, there is no plain error. Proposition IV is denied.

¶36 **Proposition V**. Appellant complains that trial counsel was ineffective for failing to object to 1) the photographic exhibits challenged in Proposition II; and 2) the prosecutor's questions and comments during *voir dire* challenged in Proposition III. To prevail on an ineffective assistance of counsel claim, the appellant must show both that counsel's performance was deficient and that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). *See Harrington v. Richter*, 562 U.S. 86, 104, 131 S. Ct. 770, 787-88, 178 L. Ed. 2d 624 (2011) (discussing *Strickland, supra*). We previously rejected Appellant's challenges both to the photographic exhibits as discussed in Proposition II and the prosecutor's *voir dire* as discussed in Proposition III. Trial counsel thus was not ineffective for failing to make these meritless objections. *Jackson v. State*, 2016 OK CR 5, ¶ 13, 371 P.3d 1120, 1123. Proposition V is denied.

¶37 **Proposition VI**. Finally, Appellant complains that relief is warranted based on cumulative error. We have held that a cumulative error argument has no merit when the Court fails to sustain any of the other errors raised by Appellant. *Bivens v. State*, 2018 OK CR 33, ¶ 35, 431 P.3d 985, 996. Such is the case here. Proposition VI is denied.

DECISION

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

AN APPEAL FROM THE DISTRICT COURT OF BECKHAM COUNTY

THE HONORABLE DOUG HAUGHT, DISTRICT JUDGE

APPEARANCES AT TRIAL

Richard L. Yohn, Robert S. Keith, Okla. Indigent Defense System, P.O. Box 1494, Clinton, OK 73601, Counsel for Defendant

Dana Hada, Michael A. Abel, Asst. District Attorneys, Beckham County, P.O. Box 507, Sayre, OK 73662, Counsel for the State

APPEARANCES ON APPEAL

James H. Lockard, Okla. Indigent Defense System, P.O. Box 926, Norman, OK 73070-0926, Counsel for Appellant

Mike Hunter, Attorney General of Oklahoma, Donald D. Self, Asst. Attorney General, 313 N.E. 21st St., Okahoma City, OK, 73105, Counsel for Appellee

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

1. At the time of this incident, Northfork was corporately owned and operated exclusively under a contract with the California Department of Corrections to house inmates. The record shows that Northfork was later acquired by the Oklahoma Department of Corrections and is currently a state-operated prison.

2. Title 12 O.S.2011, § 2404(B) provides:
> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

3. Instruction No. 22 stated:
> Evidence has been received that the defendant has allegedly committed misconduct other than that charged in the information. You may not consider this evidence as proof of the guilt or innocence of the defendant of the specific offense charged in the information. This evidence has been received solely on the issue of the defendant's alleged absence of mistake or accident. This evidence is to be considered by you only for the limited purpose for which it was received.

See OUJI-CR (2d) 9-9 (2000 Supp.)

2019 OK CR 13

JEREMY DWAYNE LAVORCHEK, Appellant, vs. THE STATE OF OKLAHOMA, Appellee.

No. F-2018-263. June 13, 2019

SUMMARY OPINION

KUEHN, VICE PRESIDING JUDGE:

¶1 Appellant, Jeremy Dwayne Lavorchek, was convicted by a jury in Garvin County District Court, Case No. CF-2016-114, of the following crimes, all After Conviction of a Felony:

Count 1	First Degree Robbery 21 O.S.2011, § 797(2)
Count 2	Use of a Firearm in the Commission of a Felony 21 O.S.Supp.2012, § 1287
Count 3	Conspiracy to Commit a Felony 21 O.S.2011, § 421
Counts 4-6	Kidnapping 21 O.S.Supp.2012, § 741
Counts 7-9	Assault with a Dangerous Weapon 21 O.S.2011, § 645

¶2 The jury recommended sentences of life imprisonment on all nine counts. On March 5, 2018, the Honorable Leah Edwards, District Judge, sentenced Appellant in accordance with that recommendation, and ordered Counts 2 through 9 to be served concurrently with one another, but consecutively to Count 1. Appellant must serve 85% of the sentence on Count 1 before parole eligibility. 21 O.S.Supp.2015, § 13.1(9).

¶3 Appellant raises eight propositions of error in support of his appeal:

PROPOSITION I. APPELLANT HAS SUFFERED DOUBLE PUNISHMENT BY HIS CONVICTIONS FOR ROBBERY IN THE FIRST DEGREE AND THREE CONVICTIONS FOR ASSAULT WITH A DANGEROUS WEAPON IN VIOLATION OF DUE PROCESS AND DOUBLE JEOPARDY PROTECTIONS UNDER THE UNITED STATES CONSTITUTION AND OKLAHOMA CONSTITUTION.

PROPOSITION II. APPELLANT HAS SUFFERED DOUBLE PUNISHMENT BY HIS CONVICTIONS FOR ROBBERY IN THE FIRST DEGREE AND THREE CONVICTIONS FOR KIDNAPPING IN VIOLATION OF DUE PROCESS AND DOUBLE JEOPARDY PROTECTIONS UNDER THE UNITED STATES CONSTITUTION AND OKLAHOMA CONSTITUTION.

PROPOSITION III. APPELLANT HAS SUFFERED DOUBLE PUNISHMENT BY HIS CONVICTIONS FOR ROBBERY IN THE FIRST DEGREE AND USE OF A FIREARM DURING COMMISSION OF A FELONY IN VIOLATION OF DUE PROCESS AND DOUBLE JEOPARDY PROTECTIONS UNDER THE UNITED STATES CONSTITUTION AND OKLAHOMA CONSTITUTION.

PROPOSITION IV. APPELLANT WAS DENIED HIS RIGHT TO SELF-REPRESENTATION AS GUARANTEED UNDER THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE II, SECTION 20 OF THE OKLAHOMA CONSTITUTION WHEN THE TRIAL COURT DENIED HIS CLEAR AND UNEQUIVOCAL REQUEST TO PROCEED *PRO SE*.

PROPOSITION V. APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL TO WHICH HE WAS ENTITLED UNDER THE 6TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ART. II, §§ 7 AND 20 OF THE OKLAHOMA CONSTITUTION WHEN THE TRIAL COURT FAILED TO GRANT A CONTINUANCE.

PROPOSITION VI. APPELLANT WAS DENIED A FAIR SENTENCING HEARING WHEN THE TRIAL COURT IMPROPERLY CONSIDERED AGGRAVATING EVIDENCE AT FORMAL SENTENCING.

PROPOSITION VII. THE TRIAL COURT ABUSED ITS DISCRETION IN ORDERING APPELLANT TO SERVE HIS SENTENCES CONSECUTIVELY, THEREFORE RESULTING IN A CONSTITUTIONALLY EXCESSIVE SENTENCE.

PROPOSITION VIII. APPELLANT'S CONVICTIONS SHOULD BE REVERSED AS THE CUMULATIVE EFFECT OF ERRORS DEPRIVED HIM OF A FAIR TRIAL.

¶4 After thorough consideration of these issues, the briefs of the parties, and the record on appeal, we affirm. Appellant's convictions stem from an armed robbery at Legacy Drug, a pharmacy in Pauls Valley, on the morning of March 5, 2016. Two men wearing rubber masks entered the pharmacy, brandished guns, and threatened to harm the three employees if they did not cooperate. During the ordeal, the victims were physically assaulted, threatened with imminent death, and ordered to perform certain tasks. The manager was instructed to lock the store's entrance. All three victims were eventually ordered to lie on the floor, and their hands and feet were bound with duct tape and electrical cords. The two gunmen collected money and controlled drugs from the pharmacy, then left through the back door. Police, having just arrived on the scene, chased the gunmen through a local neighborhood. Appellant was seen discarding items later identified as either having been used in the robbery or taken during the crime. At trial, Appellant took the witness stand and admitted his involvement in the robbery plan (although he claimed he was not one of the gunmen who entered the pharmacy). On appeal, he does not challenge the sufficiency of the evidence to link him to the crimes.

¶5 In Propositions I, II, and III, which we analyze together, Appellant claims that a number of his convictions constitute double punishment, violating 21 O.S.2011, § 11(A) ("in no case can a criminal act or omission be punished under more than one section of law").[1] He claims that making threats to kill the pharmacy employees (three counts of Assault with a Dangerous Weapon) and binding them with tape

and cord (three counts of Kidnapping) were merely means to the ultimate objective of taking drugs and money from the pharmacy (one count of First Degree Robbery). He also claims that because he used a firearm to instill fear in his victims during the robbery, he cannot be convicted separately for Using a Firearm in the Commission of a Felony. At trial, Appellant raised a double-punishment claim only as to the robbery and assault counts (here, Proposition I). Thus, the claims made in Propositions II and III are reviewed only for plain error. Appellant must show a plain or obvious deviation from a legal rule which affected his substantial rights. Even then, this Court will not grant relief unless the error seriously affects the fairness, integrity, or public reputation of the judicial proceedings, or otherwise represents a miscarriage of justice. *Barnard v. State*, 2012 OK CR 15, ¶¶ 25, 31, 290 P.3d 759, 767, 769.

¶6 Double-punishment analysis focuses on the relationship between the crimes. If the offenses truly arise out of one act, 21 O.S.2011, § 11 prohibits prosecution for more than one crime, absent express legislative intent. *Barnard*, 2012 OK CR 15, ¶ 27, 290 P.3d at 767. While Appellant's ultimate objective may have been to rob the pharmacy, that does not insulate him from liability for other, factually distinct crimes committed along the way. *See Davis v. State,* 1999 OK CR 48, ¶ 13, 993 P.2d 124, 126-27. Moreover, when a criminal course of conduct inflicts harm on more than one person, punishments for each victim do not constitute double punishment. *Clay v. State,* 1979 OK CR 26, ¶ 6, 593 P.2d 509, 510, *disapproved of on other grounds in Davis*, 1999 OK CR 48, 993 P.2d 124.

¶7 Appellant and his accomplice placed three people in mortal fear for close to an hour. They did not merely point guns at the victims and demand money and drugs; they repeatedly made verbal threats, pushed the victims around, and directed each victim to do certain acts. All three victims were eventually ordered to lie face-down on the floor, where they were bound with tape and electrical cord. Only after the employees were restrained did the gunmen actually start taking drugs and cash. Considering the length of time the gunmen were in the pharmacy, and the many things they did to terrorize and restrain the victims during that time, separate punishments for Robbery, Assault with a Dangerous Weapon, and Kidnapping were not improper. *Davis v. State,* 2018 OK CR 7, ¶ 5, 419 P.3d 271, 276; *McElmurry v. State,* 2002 OK CR 40, ¶¶ 77-82, 60 P.3d 4, 23-24; *Williams v. State,* 1957 OK CR 114, ¶ 11, 321 P.2d 990, 995.

¶8 As for Appellant's argument that he cannot be separately punished for Robbery and Use of a Firearm in the Commission of a Felony, we make three observations. First, the variant of robbery alleged by the State, 21 O.S.2011, § 797(2), does not require use of a firearm as an element of the crime. Second, while the State did allege that Appellant used "a firearm" to effectuate the robbery (Count 1), several firearms were in fact wielded throughout the event, and the State specifically named two of them in Count 2. Third, our Legislature has made it clear that punishment for using a firearm in the commission of a felony shall be "in addition to the penalty provided by statute for the felony committed or attempted." 21 O.S. Supp.2012, § 1287. *See Barnard*, 2012 OK CR 15, ¶ 27, 290 P.3d at 767 (legislative intent is key to double-punishment analysis). Appellant cites no clear, controlling authority which the trial court should have been aware of, despite defense counsel's failure to raise an objection. We therefore conclude there is no "plain or obvious" error in punishing Appellant for both crimes under these facts. *Irwin v. State,* 2018 OK CR 21, ¶ 4, 424 P.3d 675, 676. Propositions I, II, and III are denied.

¶9 As to Proposition IV, while a defendant has a constitutional right to represent himself, *see generally Faretta v. California*, 422 U.S. 806, 818, 95 S.Ct. 2525, 2532, 45 L.Ed.2d 562 (1975), he may not abuse the privilege by claiming it once trial is underway. *Naum v. State*, 1981 OK CR 76, ¶¶ 11-12, 630 P.2d 785, 788; *Day v. State,* 1980 OK CR 94, ¶ 8, 620 P.2d 1318, 1320. Here, the trial court did not abuse its discretion in denying Appellant's request to give closing argument, particularly since he had elected not to attend the trial until after the State had rested its case. Proposition IV is denied.

¶10 In Proposition V, Appellant claims that by denying defense counsel's request for a continuance, the trial court prevented counsel from delivering reasonably effective assistance as guaranteed by the Sixth Amendment to the United States Constitution. Appellant must show that counsel's performance was constitutionally deficient, and that counsel's deficient performance prejudiced the defense. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Bland v. State,* 2000 OK CR 11, ¶ 112, 4 P.3d 702, 730. Appellant

claims that if the trial court had delayed the trial, defense counsel might have explored additional defenses and had more time to develop "rapport" with his client. But Appellant fails to specify what additional defenses might have been available, or that a better relationship between counsel and client would have made any difference in the outcome.[2] Because Appellant has failed to demonstrate a reasonable probability that he was prejudiced by the trial court's denial of a continuance, we cannot find counsel was rendered ineffective by the action. *Phillips v. State*, 1999 OK CR 38, ¶ 103, 989 P.2d 1017, 1043. Proposition V is denied.

¶11 Propositions VI and VII deal with issues related to sentencing. The prosecutor filed a sentencing memorandum, strenuously arguing that Appellant should serve all nine life sentences consecutively. The court ordered Counts 2 through 9 to be served concurrently, but consecutively to Count 1. The information presented to the court in the prosecutor's sentencing memorandum (some of which was duplicated in the Presentence Report) was entirely proper. The court was authorized to consider evidence presented at trial, the impact of the crimes on the victims, and Appellant's entire criminal history in deciding how to implement the sentences imposed by the jury. 21 O.S.2011, § 142A *et seq*.; 22 O.S.Supp.2017, § 982.

¶12 Appellant's reliance on *Malone v. State*, 2002 OK CR 34, 58 P.3d 208, is inapposite. *Malone* addressed what information is relevant to a fact-finder's verdict. "[W]hen the defendant has demanded the jury to assess punishment or the trial judge has allowed the jury to assess punishment, there simply is no provision allowing for mitigating evidence to be presented *in the sentencing stage of the trial." Id.* at ¶ 7, 58 P.3d at 210 (emphasis added). At issue here is what information is admissible at *sentencing hearings*, held after the jury has rendered its verdict. Appellant neither disputes the trial court's authority to order consecutive or concurrent service of sentences as it sees fit, nor does he dispute that the prosecutor's memorandum and argument went only to that issue.

¶13 The trial court's focused decision to reject the prosecutor's request, and group most of Appellant's sentences for concurrent service, was to Appellant's benefit and hardly an abuse of discretion. *Kamees v. State*, 1991 OK CR 91, ¶ 21, 815 P.2d 1204, 1208-09, *overruled on other grounds in Davis*, 2018 OK CR 7, ¶ 26, 419 P.3d at 281. Propositions VI and VII are denied.

¶14 Finally, since we have identified no error in the preceding propositions, there can be no error by accumulation. *Clayton v. State*, 1995 OK CR 3, ¶ 27, 892 P.2d 646, 657. Proposition VIII is denied.

DECISION

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

AN APPEAL FROM THE DISTRICT COURT OF GARVIN COUNTY

THE HONORABLE LEAH EDWARDS, DISTRICT JUDGE

ATTORNEYS AT TRIAL

Troy R. Cowin, 111 N. Peters Ave., Ste. 500, Norman, OK 73069, Counsel for Defendant

Corey Miner, Asst. District Attorney, District Attorney's Office, District 21, 201 W. Grant St., Rm. 15, Pauls Valley, OK 73075, Counsel for the State

ATTORNEYS ON APPEAL

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

Mike Hunter, Attorney General of Okla., Keeley L. Miller, Asst. Attorney General, 313 NE 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. While Appellant occasionally uses the term "double jeopardy" in these three claims, he never elaborates on how the crimes violate the constitutional protection from double jeopardy. *See generally Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306, 309 (1932); *Logsdon v. State*, 2010 OK CR 7, ¶ 19, 231 P.3d 1156, 1165. This Court will not undertake the analysis for him. *Cuesta-Rodriguez v. State*, 2011 OK CR 4, ¶ 12, 247 P.3d 1192, 1197 (on rehearing); Rule 3.5(A)(5) and (C)(1), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2019). In focusing instead on the statutory "double punishment" protection of 21 O.S. § 11, Appellant observes that it has a "wider scope" than its constitutional cousin because it considers the "relationship" between the crimes.

2. Again, we note that Appellant refused to attend most of his own trial, and testified before the jury (against counsel's advice), admitting his involvement in the crimes. From our review of the record, counsel performed admirably and zealously for his client. The record also shows that Appellant had difficulty getting along with several prior attorneys appointed to his case.

Calendar of Events

June

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

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

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

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

11 **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

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

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

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

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

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

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

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

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

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

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

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

2019 OK CIV APP 29

MARY F. SMITH, Petitioner/Appellant, vs. WAYNE A. SMITH, Respondent/Appellee.

Case No. 116,414. May 10, 2019

APPEAL FROM THE DISTRICT COURT OF JOHNSTON COUNTY, OKLAHOMA

HONORABLE WALLACE COPPEDGE, TRIAL JUDGE

REVERSED AND REMANDED WITH INSTRUCTONS

Chris D. Jones, JONES LAW, PC, Durant, Oklahoma, For Petitioner/Appellant,

D. Michael Haggerty, II, HAGGERTY LAW OFFICE, Durant, Oklahoma, for Respondent/Appellee.

BRIAN JACK GOREE, CHIEF JUDGE:

¶1 Petitioner appeals a trial court order enforcing a settlement agreement and incorporating it into the decree of dissolution. The trial court erred when it (1) declined to judge whether the division of marital property was just and reasonable, (2) accepted a pre-trial mediation memorandum as conclusive without determining whether the agreement was equitable, and (3) placed the burden of proof on the party opposing the motion to enforce the settlement agreement. We reverse and remand.

¶2 In 1972, Petitioner, Mary F. Smith [Wife], and Respondent, Wayne A. Smith [Husband] were married. On March 28, 2015, they separated, and on September 2, 2015, Wife filed a Petition for Legal Separation and Maintenance [FD-2015-34]. On September 17, 2015, a Decree of Legal Separation and Maintenance was entered.

¶3 On December 15, 2016, Wife filed a Petition for Dissolution of Marriage [FD-2016-48]. Following Husband's Motion for Order of Consolidation, on March 15, 2017, the trial court ordered FD-2015-34 and FD-2016-48 consolidated for trial by Order Consolidating Cases. On May 9, 2017, the parties attended early settlement mediation with their attorneys. At the conclusion of the three hour mediation, the mediator drafted a Memorandum of Understanding [Settlement Agreement] in the presence of the parties and attorneys and gave each of them an opportunity to read it while still in the room. Neither party signed the Settlement Agreement. On May 25, 2017, Results of Mediation was filed indicating that an agreement had been reached and the attorneys or Husband or Wife will present the paperwork to the trial court.

¶4 The Settlement Agreement provided that (1) Wife was to receive the marital residence and 200 acres of land; $36,000.00 in support alimony paid at the rate of $1,500.00 per month for 24 months; ½ the parties' mineral rights in McClain and Bryan Counties, Oklahoma and Yoakum, Texas; and personal property in her possession, (2) Husband was to receive the Wells Fargo account; all interest in his retirement accounts; $100,000.00 for his interest in the real property payable within two years; ½ the parties' mineral rights in McClain and Bryan Counties, Oklahoma and Yoakum, Texas; personal property in his possession; and his guns.

¶5 Soon after mediation, Wife retained new counsel. Wife's new counsel entered an appearance and filed Notice of Discovery Submitted. Husband filed a Motion to Suspend Discovery/Protective Order and a Motion to Enforce Settlement Agreement. On July 20, 2017, a hearing was conducted on the Motion to Enforce Settlement Agreement. At the hearing, Wife testified that prior to mediation, she had requested her then attorney to conduct discovery in order to give her some options, but the attorney had not done so. She testified that she was 67 years of age and was going to be living on a small amount of money, and that she needed discovery on Husband's state and federal retirement funds. She testified that during mediation, she told her attorney, " … we needed to just stop right here, right now, not go any further and just bring it to court and settle it there." The trial court took the matter under advisement. On July 22, 2017, in its Court Order, the trial court issued findings of fact and conclusions of law, and granted Husband's motion to enforce the settlement agreement. On September 6, 2017, in the Decree of Dissolution, the trial court incorporated the Settlement Agreement into the Decree. Wife appeals.

¶6 Wife contends because the Settlement Agreement is unenforceable, the trial court erred in incorporating the Settlement Agreement into the Decree and in requiring her to comply with Decree's terms. She claims the

Settlement Agreement is unenforceable absent the approval of the trial court. In *Acker v. Acker*, 1979 OK 67, ¶10, 594 P.2d 1216, the Supreme Court held that such an agreement is not binding on the trial court. In *Dickason v. Dickason*, 1980 OK 24, ¶9, 607 P.2d 674, the Supreme Court held a settlement agreement is not enforceable absent its approval by the trial court. In *Adams v. Adams*, 2000 OK CIV APP 87, ¶5, 11 P.3d 220, the Court of Civil Appeals held that a settlement agreement shall not be approved unless it is fair, just and reasonable. In a divorce case, the trial court has the duty to divide the marital property in a manner "as may appear just and reasonable." 43 O.S. 2011 §121(B). Moreover, in considering whether a divorce settlement agreement is fair and reasonable, the trial court must look beyond the terms of the agreement and consider the relation of the parties at the time of trial, their ages, health, financial conditions, opportunities, and contribution of each to the joint estate. *Seelig v. Seelig*, 1969 OK 160, ¶13, 460 P.2d 433.

¶7 In the present case, the trial court did not approve the Settlement Agreement, but enforced it nonetheless. In its Court Order, the trial court stated that it declined to follow the rationale of *Adams v. Adams, supra.*, and concluded that the party who seeks to rescind or void a settlement agreement bears the burden of convincing the trial court that the agreement is not fair, just, or reasonable. It found that Wife failed to meet her burden of proof showing that the Settlement Agreement was not fair, just or unreasonable, and that she further failed to meet her burden of proof to show that it was obtained by fraud, duress or undue influence on the part of Husband.[1]

¶8 Divorce actions are of equitable cognizance, and the trial court has discretionary power to divide the marital estate. The reviewing court will not disturb the decision absent some abuse of discretion or a finding that the trial court decision is clearly contrary to the weight of the evidence. *Barnett v. Barnett*, OK 60, ¶10, 917 P.2d 473. Legal questions are subject to *de novo* review, *i.e.*, a non-deferential, plenary and independent review of the trial court's legal ruling. *Fulsom v. Fulsom*, 2003 OK 96, ¶2, 81 P.3d 652.

¶9 In *Wheeler v. Wheeler,* 1934 OK 113, 167 Okla. 598, 32 P.2d 305, in its syllabus, the Supreme Court held:

> 1. When a husband and wife enter into an agreement fair and just, free from fraud, coercion or undue influence and they present the same for sanction in a court of equity in settlement and disposition of their property rights in the event a divorce is granted to either of the parties, the court in every case should scrutinize such a transaction very closely to ascertain whether the same was fairly entered into and whether or not the same is reasonable, just and fair to the parties to the agreement. The court in the exercise of its chancery powers and the mandatory statutory duty must look beyond the terms of the agreement to ascertain all the facts and circumstances surrounding its execution and consider the relationship of the parties at the time of the trial, their ages, needs, health, financial conditions, opportunities to provide for themselves, and the part each performed in acquiring and contributing to the joint estate in order that the court may make such a division of the property jointly acquired during their marital relation as may appear just and reasonable.
>
> 2. If a property settlement presented for approval of a court in a divorce proceeding meets all equitable and statutory requirements then there is no reason why the trial court should not approve the agreement entered into between the husband and wife, for in doing so justice is administered. However, if the trial court is of the opinion that such a division of the jointly acquired property does not appear reasonable, just, and fair, it becomes his duty to reject and disapprove said contract in whole or in part, and to make a just, fair, and reasonable division between the parties respecting their jointly acquired property.
>
> 3. A property settlement entered into between husband and wife without regard to a divorce is unquestionably valid and enforceable in the absence of fraud, duress, coercion, and undue influence, but when the same if presented affirmatively or defensively in a divorce proceeding for the sanction of the trial court, the trial court is not required to follow the same in whole or in part, if, in its opinion, the same is not fair and just, viewed from all the facts and circumstances, including the conditions as they appear at the time of trial. *Moog v. Moog*, 203 Cal. 406, 264 P. 490.

¶10 The trial court presumed the Settlement Agreement was enforceable and then cast the burden of proof upon Wife to prove that the

Settlement Agreement was not fair or reasonable.[2] In its Court Order, the trial court stated,

> . . . The *Adams* Court misconstrues the holdings in *Dickason*. The language in *Dickason* which could be construed to mean what *Adams* says it means is 'A pre-divorce property settlement agreement is not enforceable absent its affirmative approval by the Court.' This statement is considered by this Court to be "*dicta.*" It was not a necessary finding needed to reach its conclusion. *Dickason* involved a spouse attempting to modify a Judgment entered by the Court following a pre-divorce settlement agreement. The facts in *Adams* and in the case at bar involve attempts to have a pre-decree settlement agreement voided or not enforced prior to it being made into a judgment.
>
> The Adams Court relying on *Dickason* found that the trial court erred in not ascertaining whether the parties [sic] settlement was fair, just, and reasonable. This Court finds that the party who seeks to rescind or void a settlement agreement bears the burden of convincing the Court that the settlement agreement is not fair, just, reasonable, or was obtained by fraud, duress, or undue influence.

¶11 A settlement agreement is not enforceable absent its affirmative approval by the trial court. This is binding precedent. *Dickason v. Dickason*, 1980 OK 24, 607 P.2d 674; *Hickman v. Hickman*, 1997 OK 49, ¶10, 937 P.2d 85, 88. The Court of Civil Appeals correctly applied *Dickason* in a case with facts nearly identical to the case at bar. *Adams v. Adams*, 2000 OK CIV APP 87, 11P.3d 220. We agree with *Adams* in both its holding and rationale.

¶12 In order to determine whether the Settlement Agreement was enforceable, the trial court had the duty to determine whether it was fair, just, and reasonable. The trial court erred in failing to determine whether the Settlement Agreement was fair, just, and reasonable to the parties.

¶13 Based on the determination of the previous proposition of error, it is unnecessary for this Court to address the proposition of error regarding the Statue of Frauds.

¶14 The matter is REVERSED and REMANDED with instructions for proceedings consistent with this opinion.

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

BRIAN JACK GOREE, CHIEF JUDGE:

1. Previously, at the hearing on the Motion to Enforce Settlement Agreement, the trial court had stated that, "Well yeah, I've got to determine whether its [the Settlement Agreement] fair and reasonable."

2. Wife could hardly produce such proof because she was not permitted to conduct discovery concerning the existence of some of the marital assets or their value.

2019 OK CIV APP 30

IN RE THE MATTER OF E.M., Deprived Child: LACIE ROBISON, Appellant, vs. STATE OF OKLAHOMA, Appellee.

Case No. 117,565. May 17, 2019

APPEAL FROM THE DISTRICT COURT OF ROGERS COUNTY, OKLAHOMA

HONORABLE TERRELL S. CROSSON, JUDGE

AFFIRMED AND REMANDED WITH INSTRUCTIONS

C. Alison Wade, Tulsa, Oklahoma, for Appellant,

Kali Strain, Zachary Cabell, ASSISTANT DISTRICT ATTORNEYS, Claremore, Oklahoma, for Appellee,

Kacie Cresswell, Owasso, Oklahoma, for the Child.

ROBERT D. BELL, JUDGE:

¶1 Appellant, Lacie Robison (Mother), appeals from the trial court's order terminating her parental rights to her minor child, E.M. Appellee, the State of Oklahoma (State), filed a petition to terminate Mother's parental rights on the basis that she failed to correct the conditions for which the child was found to be deprived: Mother failed to correct the conditions of threat of harm, exposure to drug abuse, and failure to protect, even though she was given at least three (3) months to correct the conditions. State also alleged termination of Mother's parental rights would be in the child's best interests. After reviewing the record, we find clear and convincing evidence supports the grounds for termination of Mother's parental rights pursuant to 10A O.S. Supp. 2015 §1-4-904(B)(5) for her failure to correct the conditions of threat of harm, exposure to drug abuse, and failure to protect, even though she was given at least three (3) months to correct the conditions, and that the termination of Mother's parental rights is in the child's best interest. However, the order is remanded to the trial court with instructions to specifically state the

uncorrected conditions with particularity, to identify the statutory basis for the termination, and to require Mother to pay child support.

¶2 The minor child was born August 1, 2016, and taken into emergency custody by the Department of Human Services (DHS) as soon as he was discharged from the hospital. State filed a petition to have the child adjudicated deprived August 19, 2016. State alleged Mother admitted to using drugs, specifically methamphetamine, while pregnant and within the last three months. State also alleged the biological father hit Mother during pregnancy causing her to have a black eye, the parents' previous child was removed from their care under a guardianship filing, the parents have an extensive criminal history, and it would be in the child's best interest to be adjudicated deprived. The child was adjudicated deprived September 27, 2016.[1]

¶3 The trial court ordered an Individualized Service Plan (ISP) for Mother November 22, 2016. The ISP ordered Mother to undergo a mental health evaluation; attend and obtain treatment for substance abuse (methamphetamine); obtain an assessment for battery; attend a victim's assessment; and obtain and maintain legal employment and provide a safe, stable, and clean home for the child.

¶4 During the proceeding, Mother had a warrant out for her arrest for aggravated assault and battery. Mother turned herself into Rogers County Jail on February 7, 2017. On May 23, 2017, a bench warrant for Mother was issued due to her violating terms of her probation. Mother was incarcerated when the pretrial conference was set. Mother was released from Rogers County Jail January 24, 2018.

¶5 On March 3, 2017, State filed a motion to terminate Mother's parental rights pursuant to 10A O.S. §1-4-904(B)(5). State specifically alleged Mother's parental rights should be terminated because Mother failed to correct the conditions of threat of harm, exposure to drug abuse, and failure to protect, even though she was given at least three (3) months to correct the conditions. State also alleged termination of Mother's parental rights would be in the child's best interests.

¶6 On January 9, 2018, the court's permanency review order notes Mother was sworn in and questioned by the court about Mother's stated desire to waive her right to a jury trial. This matter proceeded to a bench trial. A DHS permanency worker and Mother testified at trial. Mother conceded she had not corrected the conditions or worked on the ISP when State filed the motion to terminate. Mother alleged she was incarcerated during this time frame, she did not have a place to live with the child and she had not completed her drug treatment. Mother stated the child was placed in DHS custody at four (4) weeks of age, and now the child is two (2) years old. Mother conceded the child has never lived with her and she has not cared for the child. But, she urged her parental rights should not be terminated because she was sober and had a job. Mother testified she discontinued taking medications prescribed to her for her mental health because she did not believe she needed same. She did not seek a physician's advice before discontinuing the medications.

¶7 The DHS permanency worker testified the child should be adopted by the current foster family. The DHS worker stated the child is happy and does not look to Mother for nurturing. The DHS worker stated Mother addressed some conditions only after the motion to terminate was filed because Mother's incarceration delayed the termination hearing. The DHS worker stated Mother was taken for an assessment and offered inpatient treatment, which Mother refused.

¶8 At the conclusion of trial, the trial court announced considering all the evidence and the mitigation that Mother completed, the clear and convincing evidence shows Mother failed to correct the conditions of threat of harm, exposure to drug abuse and failure to protect for which the child was found to be deprived even though Mother was given at least three months to do so. And, because the child has been in DHS custody for his entire life, the court also found it was in the child's best interests for Mother's parental rights to be terminated. While these detailed findings were announced at the trial, the trial court's order neglected to state the child's date of birth, it failed to specify the conditions that Mother failed to correct and the statutory ground for the termination, and the order failed to order Mother to pay child support. Mother appeals from this order.

¶9 For her first assignment of error, Mother contends the order is fatally deficient because it did not include the statutory basis for termination, nor did it include the specific findings of the conditions she failed to correct. When State seeks to terminate parental rights based

on the grounds set forth at §1-4-904(B)(5), State must prove by clear and convincing evidence that the parent has failed to correct the condition which led to the child's deprived adjudication and the parent has been given at least three (3) months to correct the condition. *In the Matter of S.B.C.*, 2002 OK 83, ¶5, 64 P.3d 1080. State must also prove that termination of the parental rights is in the child's best interests. 10A O.S. Supp. 2015 §1-4-904(A)(2). On appeal, this Court must also find the presence of clear and convincing evidence to support the trial court's decision. *In the Matter of S.B.C.*, 2002 OK 83 at ¶7. Accordingly, this Court will "canvass the record to determine whether a factfinder could reasonably form a firm belief or conviction from the evidence that the grounds for termination were proven." *In re C.D.P.F.*, 2010 OK 81, ¶6, 243 P.3d 21. However, this Court's appellate review does not require a re-weighing of the evidence presented at trial. *Id*.

¶10 Furthermore, "When the State initiates proceedings to terminate a parent-child bond pursuant to 10A O.S. 2011 §1-4-904(B)(5), it must provide parents with detailed allegations, specifying those conditions the State claims were not rectified. Due process demands such charges be included in the State's application to terminate parental rights, jury instructions, verdict forms, and final journal entry of judgment." *In re T.T.S.*, 2015 OK 36, ¶22, 373 P.3d 1022.

¶11 Citing *In re T.T.S.*, Mother argues the instant order – which does not contain the statutory authority and a detailed listing of the uncorrected conditions – is fundamentally deficient and must be reversed and remanded for a new trial. Unlike *In re T.T.S.*, this parental rights termination case was tried by the court. Also, unlike *In re T.T.S.*, the conditions Mother failed to correct were identified in the motion to terminate parental rights, the adjudication and disposition orders, the ISP, and the court's announced findings. Thus, while the order may be fundamentally deficient, we hold *In re T.T.S.* does not prohibit a bench-trial judgment, which is supported by clear and convincing evidence, from being remanded to the trial court, not for a new trial, but with instructions to enter a proper final order correcting the error.

¶12 After reviewing the appellate record, we hold clear and convincing evidence supports the trial court's determination that Mother failed to correct the conditions which led to the deprived child adjudication within the statutory time frame, and, termination is in the child's best interest. We therefore reject Mother's contention that the court erred in finding the child's best interest was served by terminating Mother's parental rights, and her claim that State failed to show, with clear and convincing evidence, that Mother failed to correct the conditions which led to the deprived child adjudication. Accordingly, the trial court's determination to terminate Mother's parental rights is affirmed.

¶13 However, because the order fails to contain the requisite findings, the order is remanded to the trial court to enter an order that states the statutory grounds for termination and the precise conditions which Mother failed to correct. The court is also instructed to remove from its order the reference to the beyond a reasonable doubt standard of proof which is applicable to proceedings involving Indian children. Furthermore, 10A O.S. 2011 §1-4-906 (B)(2) provides the order terminating parental rights shall indicate that the duty of the parent to support his or her minor child will not be terminated unless the child is subsequently adopted as provided by §1-4-906(B)(3).

¶14 For her final assignment of error, Mother contends the record does not demonstrate Mother knowingly and intelligently waived her right to a jury trial. "The right to a jury trial in a child deprivation hearing can be surrendered by voluntary consent or waiver." *Matter of J.L.O., IV*, 2018 OK 77, ¶22, 428 P.3d 881, citing 12 O.S. 2011 §591. "Waiver must be competently, knowingly, and intelligently given." *Matter of J.L.O., IV,* at ¶22 (citation omitted). "The examining court is in the best position to observe an individual who waives a substantial and significant right. The district court is able to observe the person's actions and appearances, looking for any indication of a lack of mental clarity." *Id.* at ¶23 (citations omitted). This Court reviews the trial court's allowance of waiver of the right to a jury trial for abuse of discretion. *Id.* at ¶22.

¶15 After reviewing the transcript of the waiver hearing, we find no evidentiary support for Mother's claim that she did not knowingly or willingly waive her right to a jury trial. The record shows the following colloquy between the trial judge and Mother:

> THE COURT: Okay. You heard the announcement of your attorney; is that in fact what you wish to do?
>
> NATURAL MOTHER: Yes.

THE COURT: Are you under the influence of any drugs, alcohol, or narcotics that would affect your thinking?

NATURAL MOTHER: No.

THE COURT: Are you thinking clearly?

NATURAL MOTHER: Yes.

THE COURT: You understand that you have the right to have a jury trial?

NATURAL MOTHER: Yes.

THE COURT: Okay. At that jury trial you would be represented by your attorney and the jury would – he would have a say in who was selected to appear on the jury, as would the state and the child's attorney. He is telling me that you don't wish to have a jury trial. Instead, you are willing to have what we call a bench trial; where I, the Judge, decides what happens on your case; is that what you want to do?

NATURAL MOTHER: Yes, Ma'am.

THE COURT: Are you doing that of your own freewill?

NATURAL MOTHER: Yes.

THE COURT: Has anyone threatened you, coerced you, or offered you anything of value in order to get you to waive your right to a jury trial?

NATURAL MOTHER: No.

THE COURT: Okay. I'll find your waiver of jury trial freely and voluntarily made.

Based on Mother's responses to the trial judge's questions, we hold the trial court did not abuse its discretion when it determined she voluntarily and knowingly waived her right to a jury trial.

¶16 AFFIRMED AND REMANDED WITH INSTRUCTIONS.

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

ROBERT D. BELL, JUDGE:

1. The biological father's parental rights were terminated August 15, 2017. He is not involved in this appeal.

Notice of Judicial Vacancy

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

Justice of the Supreme Court
District Two

The vacancy will be created by the resignation of the Honorable Patrick R. Wyrick effective April 12, 2019.

To be appointed to the office of Justice of the Supreme Court, an individual must have been a qualified elector of the applicable Supreme Court Judicial District, as opposed to a registered voter, for one year immediately prior to his or her appointment, and additionally, must have been a licensed attorney, practicing law within the State of Oklahoma, or serving as a judge of a court of record in Oklahoma, or both, for five years preceding his/her appointment.

Application forms can be obtained on line at www.oscn.net, click on Programs, then Judicial Nominating Commission or by contacting Tammy Reaves at (405) 556-9300. Applications must be submitted to the Chairman of the Commission at the address below **no later than 5:00 p.m., Friday, June 28, 2019. If applications are mailed, they must be postmarked by midnight, June 28, 2019.**

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

Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS
Thursday, May 23, 2019

F-2017-892 — David Lee Seely, Appellant, was tried by jury for the crime of Murder in the First Degree in Case No. CF-2016-14 in the District Court of McClain County. The jury returned a verdict of guilty and set punishment at life imprisonment without the possibility of parole. The trial court sentenced accordingly. From this judgment and sentence David Lee Seely has perfected his appeal. AFFIRMED. Motion to File and Maintain Under Seal Appellant's Application for Evidentiary Hearing GRANTED. Application for Evidentiary Hearing on Sixth Amendment Claim DENIED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs.

F-2017-1029 — Timothy Brian Bussell, Appellant, was tried by jury for the crime of Rape in the First Degree - Victim Unconscious, in Case No. CF-2015-4151, in the District Court of Tulsa County. The jury returned a verdict of guilty and recommended as punishment life imprisonment without the possibility of parole. The Honorable William D. LaFortune, District Judge, pronounced judgment but deviated from the jury's recommendation, instead sentencing Bussell to life imprisonment with the possibility of parole. From this judgment and sentence Timothy Brian Bussell has perfected his appeal. AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs; Lumpkin, J., Specially Concurs; Rowland, J., Concurs.

F-2017-863 — Joe Zacharias Harp, Appellant, was convicted in a nonjury trial of Child Sexual Abuse, in Case No. CF-2015-15, in the District Court of Creek County. The Honorable Joe Sam Vassar, District Judge, sentenced Harp to thirty years imprisonment and imposed a three year term of post-imprisonment supervision. From this judgment and sentence Joe Zacharias Harp has perfected his appeal. AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs; Rowland, J., Concurs.

F-2018-0398 — Appellant, Steele Grayson Falen, was charged on March 14, 2013, in Beckham County District Court Case No. CF-2013-106 with Count 1 – Unlawful Possession of Controlled Drug with Intent to Distribute, a felony; Count 2- Possession of Controlled Dangerous Substance, a misdemeanor; and Count 3 – Unlawful Possession of Drug Paraphernalia, a misdemeanor. On January 23, 2014, Appellant entered a plea of guilty and was given a deferred sentence for a period of ten years on Count 1 and one year on Counts 2 and 3, with rules and conditions of probation, and with credit for six months served in treatment. The deferments were ordered to run concurrently. On November 12, 2014, Appellant was charged in Beckham County District Court Case No. CF-2014-446 with Counts 1 and 2 – Burglary in the First Degree, a felony, and Count 3 – Possession of Burglary Tools, a misdemeanor. The State filed an application to accelerate Appellant's deferred sentences in Case No. CF-2013-106 based upon these new charges in CF-2014-446. Pursuant to a plea agreement in Case Nos. CF-2013-106 and CF-2014-446, Appellant entered the Beckham County Drug Court Program on June 23, 2015. The State filed an application to terminate Appellant from Drug Court participation on February 21, 2018. Following a hearing on April 6, 2018, Judgment and Sentence was entered in Case No. CF-2013-106. Appellant was sentenced to 20 years on Count 1 and one year on Counts 2 and 3. In Case No. CF-2014-446 Appellant was sentenced to 20 years and a $500.00 fine on Counts 1 and 2 and one year in the County Jail on Count 3. The sentences were all ordered to run concurrently. Appellant appeals from his termination from Drug Court. Appellant's termination from the Beckham County Drug Court Program is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J.: Concur in Results; Lumpkin, J.: Concur; Hudson, J.: Concur; Rowland, J.: Concur.

C-2018-197 — Brian Bradford Clark, Petitioner, entered negotiated pleas of guilty in Case No. CF-2017-5577, in the District Court of Tulsa County, before the Honorable Clifford Smith, Special Judge, to Count 1: Domestic Assault and Battery by Strangulation; Count 2: Domestic Assault and Battery; and Count 3:

Interference with Emergency Telephone Call. Judge Smith accepted these pleas and sentenced Petitioner to three years imprisonment, all suspended, on Count 1; and one year imprisonment, all suspended, each on Counts 2 and 3. Judge Smith imposed various costs and fees and further ordered that the sentences for all three counts run concurrently each to the other. Petitioner filed a motion to withdraw guilty pleas and later an amended motion to withdraw his guilty pleas. After a hearing, Judge Smith denied his motion. Petitioner now seeks a writ of certiorari. The Petition for Writ of Certiorari is DENIED. The Judgments and Sentences of the District Court are AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs; Rowland, J., Concurs.

C-2017-1036 — Dana Mechele Langley, Petitioner, was charged in Case No. CF-2016-2606, in the District Court of Tulsa County, with Counts 1 and 9: Lewd Molestation; Counts 7 and 8: Enabling Child Sexual Abuse; and Counts 12 and 13: Child Sexual Abuse. Langley entered a blind plea of guilty to the charges before the Honorable Sharon K. Holmes, District Judge. The trial court accepted Langley's plea and deferred sentencing pending the completion and filing of a presentence investigation report. After a hearing, Judge Holmes sentence Langley to twenty years imprisonment each on Counts 1 and 9; and life imprisonment each on Counts 7, 8, 12 and 13. The trial court ordered Counts 1 and 9 be served concurrently each to the other. The court futher ordered the Counts 7, 8, 12 and 13 be served concurrently each to the other but consecutive to Counts 1 and 9. Judge Holmes further imposed various fines, costs and fees. Langley filed a timely application to withdraw her guilty plea and after a hearing Judge Holmes denied the motion. Langley now seeks a writ of certiorarti. The Petition for Writ of Certiorari is DENIED. The Judgment and Sentence of the District Court is AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs; Rowland, J., Concurs.

Thursday, May 30, 2019

C-2018-927 — Petitioner Sahib Quietman Henderson entered a blind plea of guilty to Distribution of a Controlled Dangerous Substance within 2,000 feet of a School in the District Court of Stephens County, Case No. CF-2016-393. The plea was accepted by the Honorable Ken J. Graham, District Judge, on April 30, 2018. Sentencing was continued until July 25, 2018. On that date, the trial court sentenced Petitioner to thirty (30) years in prison, all but the first fifteen (15) years suspended and a fine of $2,500.00. On August 2, 2018, Petitioner, represented by counsel, filed an Application to Withdraw Plea of Guilty. At a hearing held on August 20 and 22, 2018, Judge Graham denied the motion to withdraw. The Petition for a Writ of Certiorari is DENIED. The Judgment and Sentence of the District Court is AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur; Hudson, J., Concur; Rowland, J., Concur.

F-2018-547 — Appellant, Carlos Antonio King, was tried by jury and convicted of Unlawful Possession of Controlled Drug with Intent to Distribute (Count 1) (Methamphetamine) and (Count 2) (Marijuana) After Former Conviction of a Felony and Unlawful Possession of a Firearm After a Prior Felony Conviction (Count 3) in the District Court of Choctaw County Case No. CF-2016-108A. The jury recommended as punishment imprisonment for twenty (20) years each in Counts 1 and 2, and incarceration in the county jail for one (1) year in Count 3. The trial court sentenced the defendant in accordance with the jury's verdict and ordered the sentences in Counts 1 and 2 to run concurrently with each other but consecutive to Count 3. From this judgment and sentence Carlos Antonio King has perfected his appeal. The Judgment and Sentence is hereby AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur; Hudson, J., Concur; Rowland, J., Concur.

F-2017-68 — Jonathan D. McKee, Appellant, was tried by jury for the crime of Child Abuse, in Case No. CF-2015-6417, in the District Court of Oklahoma County. The jury returned a verdict of guilty and recommended as punishment fifteen years imprisonment. The Honorable Michele D. McElwee, District Judge, sentenced accordingly. From this judgment and sentence, Jonathan D. McKee has perfected his appeal. AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs in Results; Lumpkin, J., Concurs in Results; Rowland, J., Concurs in Results.

RE-2018-0118 — Samuel Keith Carolina, Appellant, entered a plea of guilty on June 6, 2008, to the amended charge of Burglary 1 in Oklahoma County District Court Case No. CF-2008-1311. He was sentenced to twenty years with all except the first ten years suspended, with

rules and conditions of probation, and with credit for time served. The State filed an application to revoke Appellant's suspended sentence on December 14, 2017. Following a revocation hearing on January 30, 2018, before the Honorable Ray C. Elliott, Appellant's suspended sentence was revoked in full. Appellant appeals the revocation of his suspended sentence. The revocation of Appellant's suspended sentence is AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concurs; Kuehn, V.P.J.:, Concurs; Lumpkin, J., Concurs; Rowland, J., Recuses.

RE-2018-232 — Courtney Quillen, Appellant, appeals from the revocation in full of her concurrent seven year suspended sentences in Case Nos. CF-2015-817 and CF-2016-205 in the District Court of Pontotoc County, by the Honorable Gregory D. Pollard, Special Judge. AFFIRMED. Opinion by: Kuehn, V.P.J; Lewis, P.J., Concur; Lumpkin, J., Concur in Results; Hudson, J., Concur; Rowland, J., Concur.

RE-2018-234 — On March 7, 2008, Appellant Jerry Wayne Lands, represented by counsel, entered a negotiated plea of no contest to a charge of Possession of a Controlled Dangerous Substance (Methamphetamine) After Former Conviction of a Felony in Pittsburg County Case No. CF-2007-420. Lands was sentenced to ten (10) years, all suspended, subject to terms and conditions of probation. On April 13, 2009, the district court revoked five (5) years of Lands' suspended sentence in Pittsburg County Case No. CF-2007-420. On January 27, 2010, Lands entered a guilty plea in Pittsburg County Case No. CF-2008-526 and was sentenced to ten (10) years for Count 1, with all but the first five (5) years suspended. On October 26, 2017, the State filed an Application to Revoke Lands' suspended sentences in Pittsburg County Case Nos. CF-2007-420 and CF-2008-526. On July 11, 2017, the District Court of Pittsburg County, the Honorable Michael W. Hogan, Special Judge, revoked Lands' suspended sentences in full. The revocation of Lands' suspended sentences in Pittsburg County Case Nos. CF-2007-420 and CF-2008-526 is AFFIRMED. Opinion by: Kuehn, V.P.J.; Lewis, P.J., concur; Lumpkin, J., concur in results; Hudson, J., concur; Rowland, J., concur.

F-2018-596 — Worth Lerance Martin, Appellant, received a bench trial on the crimes of Count 1 - Feloniously Pointing a Firearm and Count 2 - Possession of a Firearm After Conviction of a Felony in Case No. CF-2017-136 in the District Court of Stephens County. At the conclusion of the bench trial, the Honorable Ken Graham, District Judge, convicted him of the crimes and sentenced Appellant to 25 years imprisonment and a $1,500 fine on each count and ordered the sentences to be served concurrently. From this judgment and sentence Worth Lerance Martin 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-2018-199 — Mark Anthony Ford, Appellant, was tried by jury on three criminal counts and was convicted of Count III - Possession of a Firearm After Former Felony Conviction in Case No. CF-2015-542 in the District Court of Comanche County. The jury recommended as punishment 10 years imprisonment, and the trial court sentenced accordingly. From this judgment and sentence Mark Anthony Ford has perfected his appeal. AFFIRMED. Opinion by: Kuehn, V.P.J.; Lewis, P.J., concur; Lumpkin, J., concur; Hudson, J., concur; Rowland, J., concur.

Thursday, June 6, 2019

F-2018-541 — Daniel Jeremiah McKay, Appellant, was tried by jury for the crime of Sexual Abuse of a Child, After Former Conviction of a Felony, in Case No. CF-2015-4650 in the District Court of Tulsa County. The jury returned a verdict of guilty and set punishment at seven years imprisonment. The trial court sentenced accordingly. From this judgment and sentence Daniel Jeremiah McKay has perfected his appeal. AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs in results; Kuehn, V.P.J., concurs; Lumpkin, J., concurs in results; Hudson, J., concurs.

C-2018-685 — Orie Daniel Hill, Petitioner, entered a blind plea of nolo contendere to Count 1, first degree rape (victim under age fourteen (14)), Count 2, rape by instrumentation, Count 3, lewd or indecent acts to child under sixteen (16), and Count 4, child sexual abuse, in Case No. CF-2016-88 in the District Court of Seminole County. The Honorable George Butner, District Judge, accepted the plea, found Hill guilty, and sentenced him to thirty years imprisonment on each count with the sentences to be served concurrently. The court also imposed various fees and costs and ordered post-imprisonment supervision. Hill filed a motion to withdraw the plea which the district court denied after evidentiary hearing. Hill 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.

RE-2017-1287 — Darmaecia Brendette Hill, Appellant, appeals from the revocation of three and one-half years of her suspended sentences in Case Nos. CF-2014-506 and CF-2015-773 in the District Court of Payne County, by the Honorable Stephen R. Kistler, Associate District Judge. AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs; Rowland, J., concurs.

J-2019-112 and J-2019-113 — The Appellants, A.W. and I.F., appealed to this Court from an order entered by the Honorable Patrick Pickerill, Associate District Judge, adjudicating them delinquent in Case Nos. JDL-2018-3 and JDL-2018-4 in the District Court of Pawnee County. AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., concur; Kuehn, V.P.J., concur; Hudson, J., concur; Rowland, J., concur.

C-2018-861 — Petitioner, Bobby Ray Lewis, was charged by Information in District Court of Okfuskee County Case No. CF-2017-17 with Driving Under the Influence (Count 1), Leaving the Scene of an Accident with Injury (Count 2), and Failure to Report a Personal Injury Accident (Misdemeanor) (Count 3). In District Court of Okfuskee County Case No. CF-2018-21, Petitioner was charged with Assault and Battery on a Police Officer (Counts 1 & 2) and Assault and Battery on an Emergency Medical Care Provider (Count 3). On June 20, 2018, Petitioner entered a blind plea of guilty to all charges in both cases. The Honorable Lawrence W. Parish, District Judge, accepted Petitioner's plea and scheduled sentencing for June 27, 2018. On that date, the District Court sentenced Petitioner in CF-2017-17 to imprisonment for five (5) years in Count 1, two (2) years in Count 2, and incarceration in the county jail for ten (10) days in Count 3 but suspended each of the sentences. In CF-2018-21, the District Court sentenced Petitioner to imprisonment for five (5) years each in Counts 1 and 2, and imprisonment for two (2) years in Count 3. The District Court ordered the sentences in CF-2018-21 to run consecutive with one another and with the sentences in CF-2017-17. On July 17, 2018, Petitioner filed a motion to withdraw his previously entered plea of guilty and the District Court appointed conflict counsel to represent Petitioner. On August 15, 2018, the District Court held an evidentiary hearing and denied Petitioner's motion to withdraw. On August 20, 2018, Petitioner filed his Notice of Intent to Appeal seeking to appeal the denial of his motion to withdraw plea. Petitioner's Petition For Writ of Certiorari is not properly before this Court and is hereby DISMISSED. Opinion by: Lumpkin, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur; Hudson, J., Concur; Rowland, J., Concur.

F-2017-769 — Tyrees Dotson, Appellant, was tried by jury for the crime of Murder in the Second Degree, in Case No. CF-2015-3942, in the District Court of Oklahoma County. The jury returned a verdict of guilty and recommended as punishment thirty years imprisonment. The Honorable Timothy R. Henderson, District Judge, sentenced accordingly, and ordered this sentence to run consecutively with Appellant's sentence in Oklahoma County District Court, Case No. CF-2009-5977. Judge Henderson also imposed various costs and fees and ordered credit for time served. From this judgment and sentence, Tyrees Dotson has perfected his appeal. The Judgment and Sentence of the District Court is AFFIRMED. This matter is REMANDED to the District Court with instructions to enter an order nunc pro tunc correcting the Judgment and Sentence document in conformity with this opinion Opinion by: Hudson, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs; Rowland, J., Recuses.

RE-2018-30 — On October 15, 2015, Appellant Marty Wayne Green entered a plea of guilty to Domestic Assault and Battery by Strangulation, in violation of 21 O.S.Supp.2014, § 644(J), in Seminole County District Court Case No. CF-2015-225. Appellant was convicted and sentenced to seven years imprisonment, with all seven years suspended, and admitted to the Seminole County Anna McBride Court Program. On December 20, 2017, the State filed a 2nd Amended Motion to Revoke Suspended Sentence seeking to terminate Appellant's participation in mental health court. Following a hearing on the application, Appellant's participation in mental health court was terminated and he was sentenced to seven years imprisonment. Appellant appeals. The termination of Appellant's participation in mental health court is AFFIRMED. Opinion by: Kuehn, V.P.J.: Lewis, P.J., concur; Lumpkin, J., concur; Hudson, J., concur; Rowland, J., concur.

RE-2018-231 — Latarsha Grant, Appellant, appeals from the revocation of the balance of her concurrent suspended sentences (3117 days) in

Case Nos. CF-2007-359 and CF-2011-269 in the District Court of Pontotoc County, by the Honorable Gregory D. Pollard, Special Judge. AFFIRMED. Opinion by: Kuehn, V.P.J; Lewis, P.J., concur; Lumpkin, J., concur; Hudson, J., concur; Rowland, J., concur.

C-2018-675 — Rayvon Latroy Johnson, Petitioner, entered a negotiated plea for the crime of Assault and Battery with a Deadly Weapon and was sentenced to 20 years imprisonment, all suspended in Case No. CF-2011-7038 in the District Court of Oklahoma County. He filed a motion to withdraw his plea and after a June 25, 2018 hearing, the motion was denied as untimely. From the denial of his motion to withdraw plea, Rayvon Latroy Johnson has perfected his certiorari appeal. Petition for Certiorari GRANTED; case REMANDED to the District Court of Oklahoma County for a hearing on Petitioner's Motion to Withdraw Plea of Guilty. Opinion by: Kuehn, V.P.J.; Lewis, P.J., concur; Lumpkin, J., concur; Hudson, J., concur; Rowland, J., recuse.

Thursday, June 13, 2019

F-2018-280 — Richard Wayne Sparks, Appellant, was tried by jury for the crime of Grand Larceny After Former Conviction of a Felony in Case No. CF-2017-219 in the District Court of Custer County. The jury returned a verdict of guilty and recommended as punishment five years imprisonment. The trial court sentenced accordingly. From this judgment and sentence Richard Wayne Sparks has perfected his appeal. AFFIRMED. Opinion by: Kuehn, V.P.J.; Lewis, P.J., concur; Lumpkin, J., concur in results; Hudson, J., concur; Rowland, J., concur.

RE-2018-425 — On April 9, 2015, Appellant Robert Joseph Clark, represented by counsel, entered a guilty plea to Count 1, of Possession of a Controlled Dangerous Substance (CDS) (Methamphetamine) and Count 2, Possession of a CDS (Psilocybin) in Oklahoma County Case No. CF-2014-8289. Sentencing was deferred for five (5) years. On September 9, 2015, Clark's sentence in Case No. CF-2014-8289 was accelerated and he was sentenced to eight (8) years each for Counts 1 and 2, all suspended. That same date, Clark entered a guilty plea to Count 1, Assault and Battery with a Dangerous Weapon and Count 2, Possession of a CDS in Oklahoma County Case No. CF-2015-3126. He was sentenced to eight (8) years for each count, all suspended. Clark also entered a guilty plea in Oklahoma County Case No. CF-2015-3693, Possession of a CDS, and was sentenced to three (3) years, all suspended, to be served consecutively to his sentence in Case No. CF-2015-3126. On March 24, 2017, the State filed an Application to Revoke Clark's suspended sentences in all three cases alleging Clark committed new offenses as alleged in Oklahoma County Case Nos. CF-2016-7039 and CM-2016-2833. At the conclusion of a revocation hearing held April 17, 2018, the District Court of Oklahoma County, the Honorable Ray C. Elliott, District Judge, revoked Clark' suspended sentences in full. The revocation of Clark's suspended sentences in Oklahoma County Case Nos. CF-2014-8289, CF-2015-3126 and CF-2015-3693 is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs; Rowland, J., concurs.

ACCELERATED DOCKET
Thursday, May 23, 2019

J-2019-65 — Appellant G.E.J. was charged as a juvenile in Rogers County District Court with Soliciting for First Degree Murder, in violation of 21 O.S.2011, § 701.16 (Count 1) and Reckless Conduct with a Firearm, in violation of 21 O.S.Supp.2012, § 1289.11 (Count 2), in Case No. JDL-2018-76. Appellant entered a stipulation of no contest and was adjudicated a delinquent child. Appellant filed Defendant's Motion to Withdraw Stipulation/Plea that was denied by the trial court. Appellant appeals. The trial court's denial of Appellant's motion to withdraw his stipulation is AFFIRMED. Opinion by: Rowland, J.: Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs.

Thursday, June 13, 2019

J-2019-0092 — Appellant, I.I.S., born April 23, 2003, was charged as a Youthful Offender in Pottawatomie County District Court Case No. YO-2018-9 with First Degree Manslaughter, a felony. On November 9, 2018, Appellant filed a motion for certification as a juvenile pursuant to Section 2-5-206(F)(1) of Title 10A. Following a certification hearing February 5, 2019, the Honorable David Cawthon, Special Judge, denied Appellant's motion for certification as a juvenile and bound Appellant over for arraignment on the Second Amended Information charging Appellant as a Youthful Offender with First Degree Manslaughter. Appellant appeals from the denial of her certification as a Juvenile. The District Court's order is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn,

V.P.J.: Concur; Lumpkin, J.: Concur; Hudson, J.: Concur; Rowland, J.: Concur.

COURT OF CIVIL APPEALS
(Division No. 1)
Thursday, May 23, 2019

116,133 — In Re The Marriage of Kierl, Susan Kierl, Petitioner/Appellee, v. T. Philip Kierl, Jr., Respondent/Appellant. Appeal from the District Court of Oklahoma County, Oklahoma. Husband/Appellant, T. Philip Kierl, Jr., seeks review of the trial court's Decree of Dissolution of Marriage, filed in the District Court of Oklahoma County on March 3, 2017. Husband asserts eight propositions of error on appeal. Wife/Appellee filed a Petition for Legal Separation on May 8, 2015 and an Amended Petition for Dissolution of Marriage on August 19, 2015, after thirty-six (36) years of marriage; the parties were married on March 31, 1979. None of the couple's children were minors at the time of the divorce. The marital estate was valued in excess of four million dollars. Wife was awarded accounts and property in excess of $850,000, the marital home, estimated to be worth approximately $350,000, as well as furnishings and other items in her possession at the time of trial. Wife was also awarded $1,177,637.50 of alimony in lieu of property, to be paid at no less than $19,627.30 per month for sixty (60) months. Wife was awarded support alimony in the amount of $3,500 per month for sixty (60) months, for a total of $210,000. Husband asserts the trial court erred in its valuation of the marital estate by an amount in excess of $2,100,000. As a result, Husband asserts Wife's award was disproportionate to the actual value of the marital estate, making it inequitable under the terms of 43 O.S. Supp. 2012 §121, which requires the division of marital assets to be just and reasonable. In his first proposition on appeal, Husband asserted the trial court's chosen valuation date, April 30, 2015, marked an abuse of discretion. The trial court's order states it used the April 30, 2015 date to value the entire marital estate. This date appears to be closely tied to the date of separation. The appellate court will review the trial court's determination of the valuation date under an abuse of discretion standard. *See Thielenhaus v. Thielenhaus*, 1995 OK 5, 890 P.2d 925, 933; *Dorn v. Heritage Trust Co.*, 2001 OK CIV APP 64, ¶17, 24 P.3d 886, 891. The Oklahoma Supreme Court in *Thielenhaus* determined the most sound approach to setting a date for the valuation of the marital estate is to "afford the litigants flexibility," allowing the court to determine the date of valuation "after due consideration to all of the circumstances in a case." *Thielenhaus*, 890 P.2d at 933 (emphasis in original). The trial court's order specifically stated the court used a single valuation date, when it in fact did not, we reverse the trial court's order and remand this cause to allow the trial court to determine the valuation date or dates it would use and craft the order according to such determination. Next, Husband asserted an account awarded to him (SNB accounting ending #3452) in the division of the marital estate was credited to his awarded portion of the estate twice, credited in the form of both the account itself and also as part of the value attributed to the TPK Jr. 1996 "Irrevocable" Trust. We agree the record indicates the value of this account was attributed twice in the framework of Husband's marital estate award, with a value of $112,088.50 duplicated within the decree. Mathematical error in the computation and award of property of the marital estate is error. *See Brown v. Brown*, 1978 OK CIV APP 37, 586 P.2d 83, 87. We remand these proceedings to the trial court to correct the duplicate accounting which exists in the award of property to Husband and to permit the trial court to evaluate what changes the court may make in the distribution and division of the marital estate assets based on the correction of this duplication error. With respect to Husband/Appellant's remaining allegations of error we do not find any relief is warranted on these remaining propositions. This cause is AFFIRMED IN PART, REVERSED IN PART AND REMANDED. This cause is remanded to allow the trial court to consider its valuation date determination, as the decree erroneously states the trial court used only a single valuation date, April 30, 2015, when a later date was used for at least two marital assets. Also on remand, the trial court must correct its mathematical error in double counting the SNB account (account ending #3452), as this account was twice added to Husband's portion of the marital estate. After the math error is corrected, the trial court will need to consider what changes, if any, will be made to the distribution of marital assets between the parties. In all other respects, the decision of the trial court is AFFIRMED. Opinion by Joplin, P.J.; Goree, C.J., and Mitchell, J. (sitting by designation), concur.

116,837 — (Comp. w/116,431 and 117,226) Michael Armand Hammer, Plaintiff/Appellee/Counter-Appellant/Cross-Appellant, vs. Speed-

sportz, LLC, Defendant/Appellant/Counter-Appellee, and John Reaves, Defendant/Cross-Appellee. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Rebecca B. Nightingale, Trial Judge. Plaintiff Michael Armand Hammer (Hammer) filed an action against a restorative automotive shop, Speedsportz, LLC, (Speedsportz) and its owner, John Reaves (Reaves), seeking a declaratory judgment that Hammer was the sole owner of two highly valuable classic cars – a 1927 Bentley and a 1959 Mercedes Benz – as well as replevin of the vehicles. Speedsportz counterclaimed for an accounting of proceeds from the sale of a third vehicle, a 1966 Shelby Cobra. The trial court granted summary judgment in favor of Hammer with regard to the Bentley. The disposition of the remaining two vehicles went to jury trial. At the close of evidence at trial, the court granted Reaves's motion for a directed verdict. The jury then returned a verdict in favor of Hammer with regard to the Mercedes and Shelby Cobra. Speedsportz appeals, challenging the trial court's grant of summary judgment to Hammer regarding the Bentley, as well as the award of attorney's fees to Hammer. Hammer counter appeals against Speedsportz regarding attorney's fees and cross appeals against Reaves regarding the directed verdict. We AFFIRM IN PART AND REVERSE IN PART. Opinion by Buettner, J.; Goree, C.J., and Joplin, P.J., concur.

117,226 — (Comp. w/116,431 and 116,837) Michael Armand Hammer, Plaintiff/Appellee, v. Speedsportz, LLC, Defendant, and John Reaves, Defendant/Appellant. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Rebecca Nightingale, Trial Judge. Plaintiff Michael Armand Hammer (Hammer) filed an action against a restorative automotive shop, Speedsportz, LLC, (Speedsportz) and its owner, John Reaves (Reaves), seeking a declaratory judgment that Hammer was the sole owner of two highly valuable classic cars – a 1927 Bentley and a 1959 Mercedes Benz – as well as replevin of the vehicles. Speedsportz counterclaimed for an accounting of the proceeds from a third vehicle, a 1966 Shelby Cobra. The court granted summary judgment to Hammer with regard to the Bentley. The matters of the Mercedes and the Shelby Cobra went before a jury. At the close of evidence at trial, the court granted Reaves's motion for a directed verdict on Hammer's claims against him. The jury then returned a verdict in favor of Hammer against Speedsportz with regard to the Mercedes and Shelby Cobra. The court awarded attorney fees to Hammer and Reaves. Reaves appeals the award of attorney fees. We AFFIRM the trial court's award. Opinion by Buettner, J.; Goree, C.J., and Joplin, P.J., concur.

(Division No. 2)
Wednesday, May 29, 2019

116,842 — In re the Guardianship of: K.R.D., M.L.D., and K.R.D., Minor Children, Kelly Dawson, Appellant, vs. Krystal Balsters, Appellee. Appeal from an order of the District Court of Marshall County, Hon. Gregory L. Johnson, Trial Judge, appointing Krystal Balsters (Balsters) as guardian of Kelly Dawson's (Father) minor children. The trial court found Father unfit because of improper and excessive discipline, lack of substantial and positive relationship with the children, and improper utilization of the Social Security benefits. The Court finds there is clear and convincing evidence to support the trial court's ruling that Father is unfit. Accordingly, the order appointing Balsters as guardian of the minor children is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Goodman, J.; Fischer, P.J., and Thornbrugh, J., concur.

Thursday, May 30, 2019

117,410 — In the Matter of M.K., E.K., and A.K., Deprived Children. Jennifer Kegg, Appellant, vs. State of Oklahoma, Appellee. Appeal from an Order of the District Court of LeFlore County, Hon. Jennifer H. McBee, Trial Judge, entering judgment on a jury verdict terminating Mother's parental rights to her three Children based on Mother's failure to correct the conditions that led to Children's adjudication as deprived. The record does not contain clear and convincing evidence that Mother failed to correct two of the conditions that were alleged, i.e., concerning Mother's alleged use or possession of illegal drugs and her failure to properly tend to Children's medical needs. However, clear and convincing evidence does support the jury's determination that Mother failed to correct conditions of failing to protect Children from violence and abuse, failing to provide a safe and stable home and proper parental care, and failing to deal with her own mental health issues. Clear and convincing evidence also supports the court's decision that termination was in Children's best interests. Therefore, we affirm the trial court's judgment as modified. AFFIRMED AS MODIFIED. Opinion from the

Court of Civil Appeals, Division II, by Thornbrugh, J.; Fischer, P.J., and Goodman, J., concur.

Monday, June 3, 2019

116,070 — Lo Vangseng and Nao Vang, Individually and as Representative of the Estate of Madisyn Vangseng, deceased, Plaintiffs/Appellees, vs. Michael Lee Chang, M.D., and Warren Clinic, Inc., Defendants/Appellants, and Cynthia Lundt, M.D., and Pediatric Cardiology of Tulsa, PLLC, Defendants/Counter-Appellees. Proceeding to review a judgment of the District Court of Tulsa County, Hon. Linda Morrissey Trial Judge. Defendants Michael Lee Chang, M.D., and the Warren Clinic, Inc., appeal the result of a jury trial in a medical malpractice case and the district court's denial of the motion for new trial. On review, we find that 1) alleged juror misconduct during voir dire was not a source of material prejudice sufficient to require a new trial; 2) Dr. Chang is entitled to such an offset for the amount paid in settlement by settling defendant Dr. Mather, but not to a new trial based on any "offset" argument, or argument that the jury was required to find the settling defendant negligent; 3) there was no error in the district court's refusal to give a supervening cause instruction; and 4) the 2013 version of 12 O.S. § 727.1 is controlling as to the calculation of pre-judgment interest in this case, and this matter is remanded for a new calculation of pre-judgment interest pursuant to this statute. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED. Opinion from Court of Civil Appeals, Division II, by Thornbrugh, J.; Fischer, P.J., and Goodman, J., concur.

117,066 — Deborah Lewis, Plaintiff/Appellant, vs. Kersi J. Bharucha, M.D., State of Oklahoma ex rel. Board of Regents of the University of Oklahoma, and John Does 1-5, Defendants/Appellees. Proceeding to review a judgment of the District Court of Oklahoma County, Hon. Lisa T. Davis, Trial Judge. Plaintiff Deborah Lewis appeals the dismissal of part of her petition against certain Governmental Tort Claims Act (GTCA) entities on notice/statute of limitations grounds. Plaintiff, who suffers from Parkinson's disease, alleged that she was subject to sexual assault on several occasions by Kersi Bharucha, who was a physician at the neurology clinic of the University of Oklahoma Health Sciences Center at the time. Plaintiff sued Bharucha, and also the OU Health Sciences Center. The OU defendants filed a motion to dismiss, alleging that Plaintiff had not given notice of her GTCA claims for sixteen months after the last incident. Plaintiff responded with various arguments, including that the one-year GTCA notice period should be tolled by disability, and that a *Bosh* claim is not subject to the GTCA notice period. Title 51 O.S. § 156(H) provides that the time for giving written notice of claim pursuant to the GTCA does not include the time during which the person injured is unable, due to incapacitation from the injury, to give such notice, not exceeding ninety days of incapacity. We find this mandate clear, and plaintiff gave notice approximately one month outside of this extended period. We also find it clear that, after *Barrios v. Haskell Cty. Pub. Facilities Auth.*, 2018 OK 90, 432 P.3d 233, *Bosh* claims have a remedy within the GTCA, and are subject to the GTCA notice provisions. We find no error in the decisions of the trial court in this matter. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Thornbrugh, J.; Fischer, P.J., concurs, and Goodman, J., concurs in result.

117,222 — DDDD, LLC, an Oklahoma limited liability company, Plaintiff/ Appellee, vs. BFL-PENN, LLC, an Oklahoma limited liability company, Defendant/Appellant. Proceeding to review a judgment of the District Court of Oklahoma County, Hon. Thomas E. Prince, Trial Judge. BFL-Penn, LLC, appeals a summary judgment of the district court finding in favor of DDDD, LLC, in a breach of commercial lease case. The lease in this case was contractually set to automatically renew unless BFL-Penn actively terminated the renewal. The question before the district court was whether BFL terminated the automatic renewal, or, if not, was there any agreement to waive this provision, extend the time during which the Lessee was required to give notice of termination, or go on to a month-to-month tenancy? We find no evidence sufficient to create a jury question as to whether the lease automatically renewed, or any other issue raised by BFL-Penn. As such, we find no error in the summary judgment of the district court in this case. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Thornbrugh, J.; Fischer, P.J., and Goodman, J., concur.

Tuesday, June 4, 2019

115,854 (Companion with Case No. 114,652) — In re the Marriage of: Charles Wade Wiseley, Petitioner/Appellee, vs. Allisha Gae Wiseley, Respondent/Appellant. Appeal from Order of the District Court of Tulsa County, Hon. James

Keeley, Trial Judge. Allisha Wiseley appeals the district court's order denying her application for attorney fees and costs incurred in this dissolution of marriage action. The facts and circumstances in this case support a finding that Allisha is a victim of domestic violence. The legislative directive in 43 O.S.2011 § 112.6 makes the award of attorney fees and costs mandatory in this action. Therefore, the district court's order is reversed and this matter is remanded to the district court for a determination of reasonable attorney fees and costs. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from the Court of Civil Appeals, Division II, by Fischer, P.J., Goodman, J., and Thornbrugh, J., concur.

Friday, June 7, 2019

116,400 — Texas Mutual Insurance Company, Petitioner, vs. Andres Carbajal, Precision Builders/Mark Dickerson, Hoover Construction Company and The Workers' Compensation Court of Existing Claims, Respondents. Proceeding to Review an Order of Three Judge Panel of The Workers' Compensation Court of Existing Claims, Hon. Jim D. Filosa, Trial Judge. Claimant Andres Carbajal, a Texas resident, alleged he was injured while working on a construction site in Oklahoma. His immediate employer, subcontractor Precision Builders/Mark Dickerson, did not have a valid policy providing workers' compensation insurance coverage in effect on the date of Claimant's injury. The trial court found the project's general contractor, Hoover Construction Company, had statutory secondary liability for the claim pursuant to 85 O.S. Supp. 2006 § 11(B). The trial court further found that Hoover's workers' compensation insurer, Texas Mutual Insurance Company (TMIC), was required to reimburse Hoover for any workers' compensation benefits Hoover might be required to pay Claimant, and therefore denied TMIC's motion to dismiss it from the case. A three-judge panel affirmed the trial court's order. We vacate that portion of the Workers' Compensation Court's order which denied TMIC's motion to dismiss. Although Claimant has elected to file his claim and pursue benefits under Oklahoma's workers' compensation statutory scheme, this state's Workers' Compensation Court cannot alter the contractual rights between Hoover and TMIC. The TMIC policy did not provide coverage or confer any benefits that would subject it to the jurisdiction of Oklahoma's Workers' Compensation Court. Based on our de novo review of the record, we find the Workers' Compensation Court erred in denying TMIC's defenses of lack of jurisdiction and venue and concluding that TMIC must remain a party. Hoover has failed to establish any basis for the Workers' Compensation Court to exercise jurisdiction over TMIC. VACATED IN PART, SUSTAINED IN PART, AND REMANDED WITH INSTRUCTIONS. Opinion from Court of Civil Appeals, Division II by Fischer, P.J.; Goodman, J., and Thornbrugh, J., concur.

(Division No. 3)
Friday, May 31, 2019

117,351 — The State of Oklahoma, *ex rel.* Department of Education, Plaintiff/Appellee, vs. Little Angels Daycare and Kristie McGee, Defendants/Appellants. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Thomas E. Prince, Judge. Defendants/Appellants Little Angels Daycare and Kristie McGee appeal from an order granting summary judgment to Plaintiff/Appellee The State of Oklahoma *ex rel*. Department of Education (the State) in the State's action to recover unearned payments made to Little Angels as part of the Child and Adult Care Food Program. After *de novo* review, we find there is no dispute of material fact and the State is entitled to judgment as a matter of law. We AFFIRM. Opinion by Mitchell, P.J.; Bell, J., and Swinton, J., concur.

Friday, June 7, 2019

116,574 — Kerry Ray, Plaintiff/Appellant, vs. Shirley Troglin, Defendant/Appellee. Appeal from the District Court of Mayes County, Oklahoma. Honorable Terry H. McBride, Trial Judge. Plaintiff/Appellant Kerry Ray (Plaintiff) appeals from an order dismissing his action to set aside an alleged forged deed. Plaintiff filed suit against Defendant/Appellee Shirley Troglin (Defendant) asserting that he had not discovered the 2002 deed until 2016. Defendant filed a motion to dismiss on the basis of the statute of limitations, which the court granted. Plaintiff argues that the court erred in sustaining Defendant's motion to dismiss based on the statute of limitations, and that the court should have determined that a genuine issue of material fact existed, precluding entry of the order. We AFFIRM. Opinion by Swinton, J., and Bell, J., concur. Mitchell, P.J., dissent.

(Division No. 4)
Thursday, May 30, 2019

117,134 — Blue Dolphin Energy, LLC, AC Exploration LLC, BCF Group Fund I, LP, DN

Exploration, LLC, Muskie Group, LLC, Ned/Oil, LLC, Phlan Enterprises, LLC, Bodman Oil and Gas, LLC, JRM Investments, LLC, Morris Properties 08, LLC, Port James Capital, Ltd., Terry L. Gorman Living Trust dtd 7/26/03, and Wellbore Capital, LLC, Plaintiffs/Appellants, vs. Devon Energy Production Company, LP, Defendant/Appellee. Appeal from an order of the District Court of Canadian County, Hon. Paul Hesse, Trial Judge, granting summary judgment in favor of Defendant Devon Energy Production Company, LP. The issue before us requires us to determine the meaning of a provision in the contract – *i.e.*, the "Term Assignment of Oil and Gas Leases." We examine the Assignments as we would any contract. Plaintiffs' position is that the Assignments require completion of the well by May 1, 2017, and if not completed by this date, the Assignments expire and the interests revert to Plaintiffs. Plaintiffs argue it is undisputed that Defendant failed to complete the well by May 1, 2017. Defendant's "position is that the Primary Term did not expire on May 1, 2017, as it was 'otherwise' destined to, because it was extended under the plain language of the Assignments to allow [Defendant] to see ongoing drilling operations through to their completion." In short, the issue is whether the Assignment provision allows the primary term to be extended. Defendant argues the Assignments explain that it can perpetuate its rights in two different ways – *i.e.*, (1) by completing the well before the primary term expires ("Upon the completion" provision), or (2) by extending "the primary term if 'operations are being conducted' for purposes of completing said operations" (the "Otherwise" provision). After examining the contract as a whole, we agree that the clear, unambiguous language of the Assignments expressly requires extension of the primary term past May 1, 2017, if Defendant is conducting drilling or completion operations. We conclude that the record and applicable law are as the trial court described them, requiring the entry of summary judgment. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, V.C.J.; Barnes, P.J., and Rapp, J., concur.

Friday, May 31, 2019

117,571 — Sooner Hospice, LLC and Accident Insurance Co., Inc., Petitioners/Appellants, v. William J. Howse, III and The Workers' Compensation Court of Existing Claims, Respondents/Appellees. Proceeding to Review an Order of a Three-Judge Panel of The Workers' Compensation Court of Existing Claims, Hon. Carla Snipes, Trial Judge. Sooner Hospice, LLC (Employer) and its workers' compensation insurer (Accident Insurance Co., Inc.) appeal an Order requiring Employer to provide to William J. Howse, III (Claimant) a medical procedure prior to surgery for a work-related injury. Claimant sustained a work-related injury and requires neck surgery. Claimant suffers heart issues unrelated to the work injury. The unanimous opinions of the medical experts, including the IME, are that a precursor heart procedure should be performed, otherwise Claimant has a significant chance of not surviving the work-related surgery. Employer has refused to provide the precursor surgery. Claimant presented the issue to the Workers' Compensation Court of Existing Claims. The trial judge and the Court En Banc ruled that Employer must provide the surgery. Claimant's work-related injury necessitated the heart procedure as a precursor to the neck surgery. The unrefuted facts show that the precursor heart procedure is an integral, necessary part of the overall surgical process for treatment of Claimant's work-related injury. Therefore, the decision of the Workers' Compensation Court of Existing Claims En Banc is sustained. SUSTAINED. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., and Wiseman, V.C.J., concur.

Monday, June 3, 2019

115,653 — Aletha K. Baker, Plaintiff/Appellee, v. Kenny Paul Balthrop, Defendant/Appellant. Appeal from an Order of the District Court of Stephens County, Hon. Jerry Herberger, Trial Judge. The defendant, Kenneth Paul Balthrop (Balthrop) appeals a Small Claims Court Judgment in an action brought by the plaintiff, Aletha K. Baker (Baker). Baker received a zero judgment but was awarded attorney fees and court costs. This is a Small Claims Court matter and the record on appeal consists of the Small Claims Court Affidavit and Judgment. Baker has not filed a Brief. Baker did not prevail. Therefore, an award of attorney fees and court costs is error. The judgment awarding attorney fees and costs is reversed. REVERSED. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., and Wiseman, V.C.J., concur.

Thursday, June 6, 2019

116,409 — In the Matter of the Estate of Wahnne C. Clark, Deceased. Steven Wahnne Clark, an individual, and Terri Lyn Clark, an individual, Appellants, v. Rosemarie Clark, an individual, Appellee. Appeal from an Order of the District Court of Comanche County, Hon. Gerald Neuwirth, Trial Judge. The plaintiffs, Steve Wahnne Clark (Steve) and Terri Lyn Clark (Terri), appeal the judgment denying their petition to determine that beneficiary changes to two Individual Retirement Accounts (IRA) were induced by fraud, undue influence, and duress perpetrated by Rosemarie Clark (Rosemarie) against her husband, Wahnne C. Clark, deceased (Wahnne), the owner of the IRAs. This is an action where the children of Wahnne Clark, deceased, seek to set aside his re-designation of IRA beneficiaries. They maintain that his wife, Rosemarie, used undue influence and duress to accomplish the changes, all to her benefit. Substantial contradictory evidence was presented. This evidence was presented to show that Wahnne was fully competent at all times, a fact conceded by the children. The evidence also contradicted the characterization of Rosemarie as the dominant person and provided an explanation about why Wahnne did not sign the IRA forms when the lawyer was present. The evidence was offered to prove that Wahnne knew exactly what he was doing and why he wanted to do it, including his desire to take care of Rosemarie and his reasons why the children received less or nothing from the IRAs. The evidence also serves to rebut any presumption that might arise from the spousal relationship and the facts surrounding the signing of the IRA forms. The judgment of the trial court is not against the clear weight of the evidence or contrary to law. Under the standard of review, 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, June 7, 2019

117,011 (Companion to Case No. 116,782) — Paulette Houston, Plaintiff/ Appellee, vs. State of Oklahoma *ex rel.* Department of Human Services, Defendant/Appellant. Appeal from an order of the District Court of Bryan County, Hon. Mark R. Campbell, Trial Judge, awarding attorney fees to Appellee Paulette Houston. Houston was a classified employee of DHS in Bryan County discharged "for cause." She appealed to the Oklahoma Merit Protection Commission (MPC), which upheld her discharge. Houston appealed, filing her Petition for Judicial Review in February 2011, but in December 2012, the trial court dismissed her case for failure to prosecute. In November 2013, Houston filed a new Petition for Judicial Review, claiming jurisdiction under Oklahoma's "savings statute," 12 O.S.2011 § 100. The trial court ultimately reversed the MPC, ordered Houston reinstated to her former position with back pay, and awarded her attorney fees and court costs. As discussed at length in our previous Opinion in the companion case, we concluded that the trial court lacked jurisdiction to resolve Houston's refiled petition for judicial review of the MPC's decision. The judgment in Houston's favor was reversed with instructions to dismiss her appeal for lack of jurisdiction as untimely. For this reason, the trial court was likewise without authority to award Houston attorney fees and costs. We reverse the order of the district court and instruct the trial court on remand to vacate its award of attorney fees and costs based on our holding in Case No. 116,782. REVERSED AND REMANDED WITH INSTRUCTIONS. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, V.C.J.; Barnes, P.J., and Rapp, J., concur.

ORDERS DENYING REHEARING
(Division No. 3)
Friday, June 7, 2019

116,319 — Jennifer Thompson, Petitioner/ Appellee, vs. Rick Thompson, Respondent/ Appellant. Appellant's Petition for Rehearing, filed May 10, 2019, is *DENIED*.

116,041 — In Re: the Marriage of Leslie Little, (now Staubus), and Chad Garrett Little, Leslie Little (now Staubus), Petitioner/Appellant, vs. Chad Garrett Little, Respondent/Appellee. Appellee's Petition for Rehearing, filed March 29, 2019, is *DENIED*.

(Division No. 4)
Monday, June 3, 2019

115,100 — Signature Leasing, LLC, an Oklahoma limited liability company, Plaintiff/ Appellant, vs. Buyer's Group, LLC, an Oklahoma limited liability company; Buyer's Group Operating Company, Inc., an Oklahoma corporation; and Williams and Williams Marketing Services, Inc., an Oklahoma corporation, Defendants/Appellees. Appellees' Petition for Rehearing is hereby *DENIED*.

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OCU SCHOOL OF LAW IS ACCEPTING APPLICATIONS FOR THE LEGAL DIRECTOR OF THE CRIMINAL JUSTICE REFORM CENTER (CCJ). The legal director is responsible for the implementation and support of the long-term and strategic plan to sustain the work of the CCJ. In addition, the legal director is responsible for the day-to-day management and operation of the CCJ. The legal director will also teach and supervise students in the Bail and Bond Clinic and other related clinics. The center focuses on all aspects of the criminal justice process, from pretrial hearings to post-trial conviction relief, to address the need to create a more equitable criminal justice system. The center sponsors research and policy proposals on the underlying causes of crime, the disparate effect of the law on specific communities, and the very high rate of incarceration in Oklahoma County and the state. The center also sponsors a student clinic focusing on the representation of indigent defendants in the post-arrest process and an annual conference on criminal justice reform. The legal director must have the legal background and experience to competently represent clients in criminal proceedings in Oklahoma. The legal director must also have the legal and academic experience to teach law school clinical courses related to the work of the Center for Criminal Justice (CCJ) and supervise others who either teach such courses or who supervise law students working in the Bail and Bond Clinic. The legal director must hold a J.D. from an ABA accredited law school and licensed to practice law in Oklahoma. This is a full-time position with competitive benefits. Apply at https://jobs.silkroad.com/OKCU/StaffCareers/JobDetail/959.

POSITIONS AVAILABLE

ASSOCIATE ATTORNEY needed for busy OKC firm. Practice areas include lender's rights, business transactions, estate planning and probate. Email resume, cover letter and salary requirements to kgrow@nashfirm.com.

MUNICIPAL PROSECUTOR. City of Midwest City is hiring a municipal prosecutor. Qualifications: requires a J.D. or equivalent from an accredited law school and at least three years court experience, must be a member in good standing of the Oklahoma Bar Association and admitted to practice in all necessary courts; possess a valid Oklahoma driver's license, be insurable and be able to attend evening meetings. Full-time position with starting salary range of $74,644-79,036. Job requires representation in municipal, district and state appellate courts; draft resolutions, ordinances and legal opinions; provide legal advice and representation to city council, city administrator, department directors and boards and commissions. See job announcement at: www.midwestcityok.org/jobs. Apps accepted until filled. E.O.E.

DIVISION CHIEF. The Oklahoma Department of Public Safety has an opening for division chief in the Legal Division. This position is an unclassified, full-time position within the Legal Division in Oklahoma City, OK with a salary of $6,250/monthly. This position directly assists the general counsel in general legal operations and supervises attorneys and staff. Key areas of practice: open records, administrative law, tort litigation and legal research. Duties: Interpret and advise on complex factual or policy issues, state and federal law and regulations, and opinions of the courts and the attorney general; prepare or direct interpretations of legal, administrative or executive decisions; and analyze and assist in drafting proposed rules and legislation. Work is performed under general direction with considerable latitude for independent judgment and decision-making within the framework of existing policies and procedures. Applicants must be licensed to practice law in the state of Oklahoma. The ideal applicant has prior experience as a supervisor and minimum of three years' experience in criminal or civil litigation. Employment is contingent on passing a thorough background investigation. Please read instructions carefully and include all required documents when you submit your application. No additional information will be accepted after the application has been submitted. Veteran's Preference Points Apply only for initial appointment in the Classified Service. Please forward a resume and cover letter to Joseph Nett at joseph.nett@dps.ok.gov.

AN ESTABLISHED TULSA AREA LAW FIRM IS NOW SEEKING EXPERIENCED CANDIDATES for attorney and paralegal positions. Full benefits are included. Compensation is negotiable based upon experience. Send replies to "Box U," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

POSITIONS AVAILABLE

NORMAN WORKERS' COMPENSATION DEFENSE FIRM seeks associate attorney. Experience with WC is preferred, but not required. Salary is dependent upon experience. Some other civil litigation work may be required. We are looking for a hard-working, detail oriented individual with excellent communication skills, professional demeanor and the willingness to fight hard for our clients. Both in office and in court work will be required. Some day travel. Local applicants only please. Please send letter of interest, resume, expected salary range, writing sample and references by email, only, to cbarnum@coxinet.net.

OKLAHOMA CITY AV RATED MEDICAL MALPRACTICE AND INSURANCE DEFENSE FIRM seeks an associate attorney with zero to five years' experience for immediate placement. Candidate must be highly motivated, possess the ability, experience and confidence to interview expert witnesses, take depositions and appear in court for motion hearings and trial. Position requires strong communication, research and writing skills. We offer excellent benefits and a competitive compensation package commensurate with experience. All replies are kept in strict confidence. Applicants should submit resume, cover letter and writing sample to emcpheeters@johnsonhanan.com.

ASSISTANT U.S. ATTORNEY. The U.S. Attorney's Office for the Western District of Oklahoma is seeking applicants for one or more assistant U.S. attorney positions which will be assigned to the Civil Division. Salary is based on the number of years of professional attorney experience. Applicants must possess a J.D. degree, be an active member of the bar in good standing (any U.S. jurisdiction) and have at least two years post-J.D. legal or other relevant experience. See vacancy announcement 19-OKW-10520766-A-03 at www.usajobs.gov (Exec Office for US Attorneys). Applications must be submitted online. See "How to Apply" section of announcement for specific information. Questions may be directed to Denea Wylie, Human Resources Officer, via email at Denea.Wylie2@usdoj.gov. This announcement is open from June 20, 2019 – July 3, 2019.

POSITIONS AVAILABLE

THE LAW OFFICES OF JEFF MARTIN IS SEEKING AN ASSOCIATE WITH 0-5 YEARS OF EXPERIENCE. We handle all injury cases, motor vehicle accidents, slip and falls, social security disability and veterans' benefits. Competitive salary with health, dental, vision, life insurance and 401k benefits. Paid vacation. Customer service, sales, insurance or medical background is a plus. This is NOT a research/writing position. You will be regularly interacting with clients. We are a team-oriented firm committed to positive outcomes for our clients. Send resumes to hansen@jeffmartinlaw.com. All resumes are strictly confidential.

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

FOR SALE

SPECTACULAR 1930'S VINTAGE LAWYER'S SOLID OAK ROLL TOP DESK. Refinished. Near-perfect condition. 6 feet wide. Perfect as a conversation piece in a law firm library or reception area. Photos available. $1,500. 405-740-1261.

CLASSIFIED INFORMATION

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

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

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

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BUSINESS GROWTH
COLLABORATIVE CLINIC

A Workshop about law firm business development: The good, the bad, and the dangerous

This is a no-credit educational course.

It's not about CLE compliance…it's about learning ideas that will help lawyers improve their business

THURSDAY, SEPTEMBER 19, 2019
8:30 A.M. - 12:30 P.M.

Oklahoma Bar Center
1901 N. Lincoln Blvd.
Oklahoma City, OK 73106

FEATURED INSTRUCTOR:
Stuart I. Teicher

Stuart I. Teicher has been a practicing attorney for over two decades. His career is now dedicated to helping fellow attorneys survive the practice of law and thrive in the profession. Stuart helps attorneys get better at what they do (and enjoy the process) through his entertaining and educational CLE Performances.

PROGRAM DESCRIPTION:

Every lawyer wants to hear new ideas for developing and growing their business. This unique, limited attendance program led by Stuart Teicher will not only give you the opportunity to hear new ideas on law firm business development. Besides leading the workshop discussions, Stuart will bring his own law practice experience, as well as his entertaining teaching style, to bear on solutions to common and not-so-common dilemmas in law firm marketing, advertising and business development. You will get concrete ideas to implement in your own practice to improve business, including: using social media and YouTube to grow your practice and developing a business plan that makes a difference. Plus, Stuart will provide powerful insights on the kinds of communications skills that lawyers need to connect with clients. After all, a strong attorney-client relationship based on solid communication is the best referral tool.

So, if you want to grow your business by hearing from and sharing with your peers, the "best practices" that can bring you success, don't miss this opportunity.

TUITION: Early registration by September 12, 2019 is $229 for the program. Registration received after September 12, 2019 will be $254 and $279 for walk-ins. Registration includes breakfast.

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TO REGISTER GO TO WWW.OKBAR.ORG/CLE

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TUTION: $50
MCLE 1/0

FEATURED INSTRUCTOR:
K. Clark Phipps

Clark Phipps grew up in Ponca City, Oklahoma. There was always a working farm in his family. He graduated from the University of Oklahoma with a degree in Mathematics. He later received his Law degree from Tulane University in 1986. He is a former shareholder and owner of Atkinson, Haskins, Brittingham, et. al., in Tulsa, now Of Counsel. In Phipps' sparetime he manages a farm in Kay County. He is currently participating in the Oklahoma Industrial Hemp Pilot Program. He owns and operates Somatic Hemp, LLC, a business focused on hemp-infused products for health.

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THE 2018 FARM BILL

REDEFINING INDUSTRIAL HEMP AND UNDERSTANDING THE DIFFERENCE BETWEEN CANNABIS AND CBD

PROGRAM DESCRIPTION:

As you probably realize, hemp is the basis for the hot new CBD market, the focus of the Agricultural Pilot Program and the source of lots of confusion in regulations and law enforcement. This program gives a brief look into industrial hemp, separate but related to the marijuana industry. Clark Phipps offers an insight to hemp/cannabis as a lawyer, a farm operator, and a partner in a joint venture in hemp based products.