THE OKLAHOMA BAR
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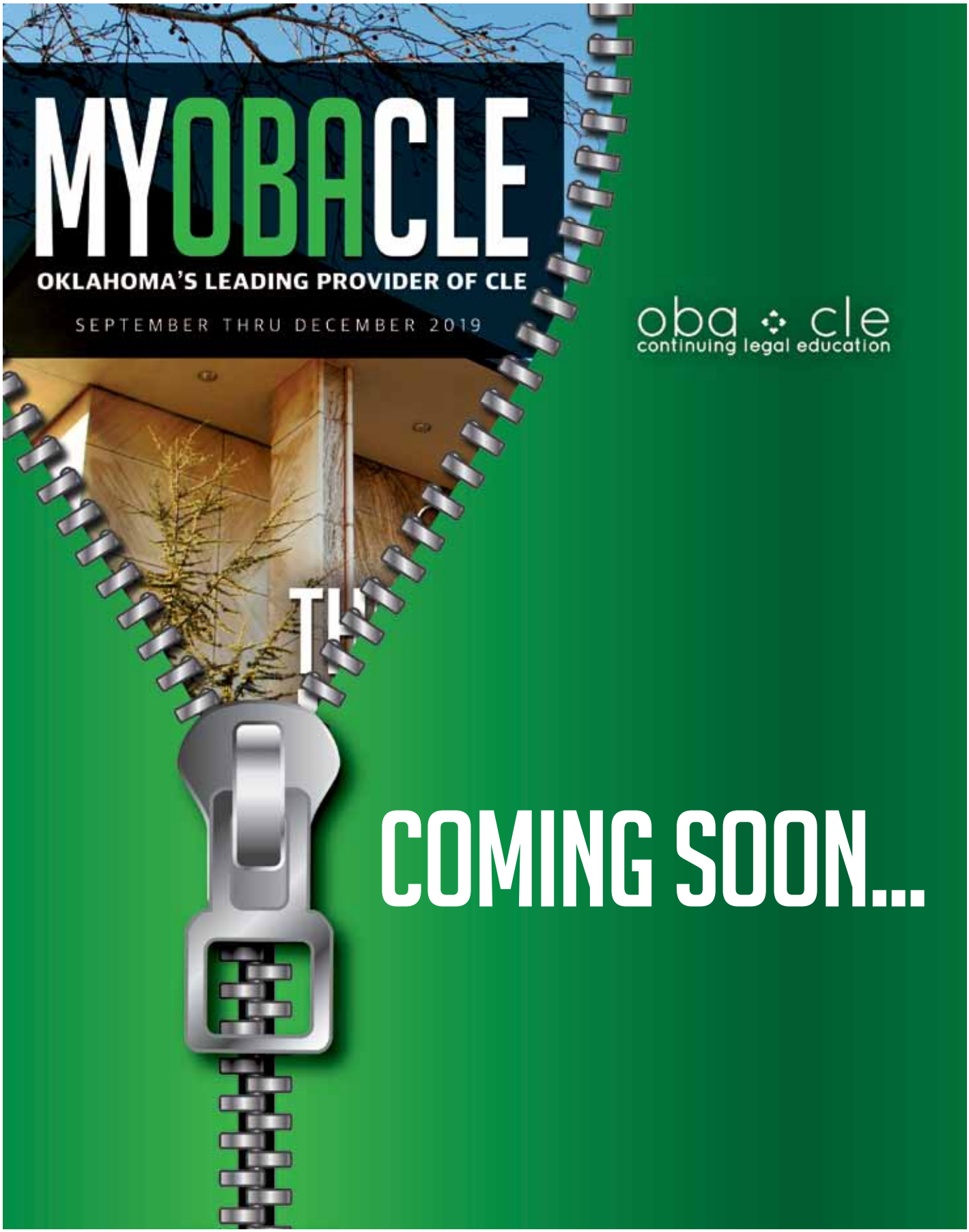
Court Issue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THE OKLAHOMA BAR
Journal

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ADA LOIS SIPUEL FISHER

DIVERSITY AWARDS

Nominations due July 31

Send to diversityawards@okbar.org

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

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

Oklahoma Bar Association

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2019 OK 49

In re: Amendments to Rule 10 and Rule 11 of the State Board of Examiners of Certified Courtroom Interpreters, 20 O.S. 2011, ch. 23, app. II

No. SCAD-2019-57. June 24, 2019

ORDER

Rule 10 and Rule 11 of the State Board of Examiners of Certified Courtroom Interpreters, 20 O.S. 2011, ch. 23, app. II, are hereby amended as shown on the attached Exhibit "A." Rules 10 and 11 with the amended language noted are attached as Exhibit "B". The amended rules shall be effective June 28, 2019.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 24TH 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

Rules of the State Board of Examiners of Certified Courtroom Interpreters

Title 20, Chapter 23, Appendix II

Rule 10. Fees

The applicable fee must be paid for each examination or orientation training taken by a candidate. The fee will be forfeited if the candidate fails to appear for the examination or training, fails to cancel before the applicable deadline, or fails to complete the examination or training, unless an exception is granted by the Board.

Rule 11. Certified Courtroom Interpreter Requirements and Oral Interpreter Examination

a) To become a Certified Courtroom Interpreter in a spoken language, the candidate must:

1) Be currently enrolled as a Registered Courtroom Interpreter in Oklahoma in accordance with these Rules; and

2) Pass the NCSC Court Interpreter Oral Examination in the language being certified.

b) The NCSC Court Interpreter Oral Examination prescribed in the paragraph above shall be conducted at least once per calendar year and shall consist of the following three sections: Simultaneous Interpreting, Consecutive Interpreting, and Sight Translation of Documents. The Sight Translation section of the exam consists of two parts – sight translation of a document written in English interpreted orally into the non-English language and sight translation of a document written in the non-English language interpreted into oral English.

1) To pass the Court Interpreter Oral Examination, the candidate shall receive an overall score of seventy percent (70%) or better in each of the three sections of the examination. The scores of Part I and Part II of the Sight Translation section are combined for one overall score for that section.

2) The oral examination shall be administered and rated in accordance with the test administration and rating protocols of the NCSC.

3) The Board shall charge the applicant a fee in an amount approved by the Supreme Court for each section of the oral examination.

4) A candidate must initially take all three sections of the oral exam in the same test sitting, and may retain credit for passing score(s) on each section of the exam for twenty-four (24) months, unless an exception is granted by the Board. During the 24-month period, the candidate must retest at least once per year, and may take only the exam section(s) the candidate has not passed.

5) If more than one version of the NCSC oral examination for the same language is available, an applicant who fails to pass the oral examination must wait six (6) months to re-test, and must take a different version of the examination. An applicant may not take the same version of the oral examination more than once in a twelve (12) month period.

6) An applicant who has passed the NCSC oral examination in another state within the past twenty-four (24) months may apply to the Board for recognition of the score. The applicant shall prove to the satisfaction of the Board that the passing score is substantially comparable to that required by this Rule.

c) For languages in which the NCSC oral exam is unavailable, the Board may utilize an abbreviated NCSC oral examination, if one is available. If no abbreviated NCSC oral examination is available, the Board may, at its discretion, recognize other oral proficiency examinations or interviews on a per-language basis.

EXHIBIT B

Rules of the State Board of Examiners of Certified Courtroom Interpreters

Title 20, Chapter 23, Appendix II

Rule 10. Fees

The applicable~~full~~ fee must be paid for each examination or orientation training taken by a candidate. The fee will be forfeited if the candidate fails to appear for the examination or training, fails to cancel before the applicable deadline, or fails to complete the examination or training, unless an exception is granted by the Board.

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1) To pass the Court Interpreter Oral Examination, the candidate shall receive an overall score of seventy percent (70%) or better in each of the three sections of the examination. The scores of Part I and Part II of the Sight Translation section are combined for one overall score for that section.

2) The oral examination shall be administered and rated in accordance with the test administration and rating protocols of the NCSC.

3) The Board shall charge the applicant a fee in an amount approved by the Supreme Court for each section of the oral examination.

4) A candidate must initially take ~~pass~~ all three sections of the oral exam in the same test sitting, and may retain . ~~A candidate who fails to achieve a passing score on one or more of the three sections~~ credit for passing score(s) on each section of the exam for twenty-four (24) months, unless an exception is granted by the Board. During the 24-month period, the candidate must ~~must~~ retest at least once per year, and may~~-~~ take only the exam section(s) the candidate has not passed ~~entire oral exam~~.

5) If more than one version of the NCSC oral examination for the same language is available, an applicant who fails to pass the oral examination must wait six (6) months to re-test, and must take a different version of the examination. An applicant may not take the same version of the oral examination more than once in a twelve (12) month period.

6) An applicant who has passed the NCSC oral examination in another state

within the past twenty-four (24) months may apply to the Board for recognition of the score. The applicant shall prove to the satisfaction of the Board that the passing score is substantially comparable to that required by this Rule.

c) For languages in which the NCSC oral exam is unavailable, the Board may utilize an abbreviated NCSC oral examination, if one is available. If no abbreviated NCSC oral examination is available, the Board may, at its discretion, recognize other oral proficiency examinations or interviews on a per-language basis.

2019 OK 51

IN RE: Establishment of Rule 1.19 of the Oklahoma Supreme Court Rules - Use of Credit Cards, Debit Cards and Other Forms of Electronic Payment

SCAD-2019-59. June 24, 2019

ORDER ESTABLISHING NEW OKLAHOMA SUPREME COURT RULE 1.19 CONCERNING USE OF CREDIT CARDS, DEBIT CARDS AND OTHER FORMS OF ELECTRONIC PAYMENT AND ADOPTION OF FORM NO. 4A, RULE 1.301 OF THE OKLAHOMA SUPREME COURT RULES

The following new Rule 1.19 of the Oklahoma Supreme Court concerning use of credit cards, debit cards and other forms of electronic payment, is hereby adopted and codified at Part I of the Oklahoma Supreme Court Rules, Okla. Stat. tit. 12, ch. 15, app. 1, and is attached as Exhibit "A" to this order.

The following new Form No. 4A, Rule 1.301, an affidavit of intent to remit cost deposit via credit card or debit card or other forms of electronic payment, is hereby adopted and codified at Part X, Oklahoma Supreme Court Rules, Okla. Stat. tit. 12, ch. 15, app. 1, and is attached as Exhibit "B" to this order.

Rule 1.19 is immediately effective and shall apply to all pending cases before this Court or the Court of Civil Appeals.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 24th day of June, 2019.

/s/ Noma D. Gurich
CHIEF JUSTICE

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

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

EXHIBIT A

Oklahoma Statutes Citationized

Title 12. Civil Procedure

Appendix 1 - Oklahoma Supreme Court Rules

Article Part I. Rules of General Application

Section RULE 1.19 – USE OF CREDIT CARDS, DEBIT CARDS AND OTHER ELECTRONIC PAYMENTS

A. Payment for any fee, fine, forfeiture, cost, penalty assessment or other charge or collection to be assessed or collected by the Clerk of the Supreme Court under the laws of this state, may be made by a personal or business check, U.S. currency or a nationally recognized credit or debit card or other electronic payment method meeting the criteria authorized by the Administrative Office of the Courts and the criteria below.

1. The Clerk of the Supreme Court accepts the following nationally recognized credit cards: Visa, MasterCard, Discover and American Express. Debit cards will be processed as a credit card without the use of a PIN number. The Clerk of the Supreme Court shall not collect a fee for the acceptance of the nationally recognized credit or debit card.

2. The term "nationally recognized credit card" means any instrument or device, whether known as a credit card, credit plate, charge plate, or by any other name, issued with or without fee by an issuer for the use of the cardholder in obtaining goods, services, or anything else of value. The term "debit card" means an identification card or device issued to a person by a business organization which permits such person to obtain access to or activate a consumer banking electronic facility.

B. If payment is made in person, payment in the form of a nationally recognized credit or debit card or other electronic payment method must be tendered and accepted concurrently with the initial pleadings by a person authorized to tender said form of payment in person at the office of the

Clerk of the Supreme Court, pursuant to Rule 1.23(b). In the event of a power outage, processing failure, equipment failure or other unforeseen circumstance which prevents the immediate processing of the remittance, the filer may file an affidavit as set forth in subparagraph C.

C. In the event the initial pleadings are being sent to the Clerk of the Supreme Court pursuant to Rule 1.4(c) for filing by any method other than appearing in person at the office of the Clerk of the Supreme Court, the filer shall include an affidavit of intent to remit cost deposit via credit or debit card or other form of electronic payment which shall be filed concurrently with the initial pleadings.

1. The affidavit of intent to remit cost deposit with a credit or debit card or other electronic payment shall be in substantial compliance with the form prescribed by Rule 1.301 Form No. 4A. The filer shall provide the requested contact information but shall not include the actual card numbers or other sensitive information. A photocopy of the credit or debit card shall not be sent with the pleadings.

2. It shall be the responsibility of the filer to ensure the Clerk of the Supreme Court has received and successfully processed the cost deposit and any failure to do so is the sole responsibility of the filer. The Clerk of the Supreme Court may extend the time for payment by two business days in order to complete payment, in the event of a power outage, processing failure, equipment failure or other unforeseen circumstance which prevents the immediate processing of the remittance.

D. It is anticipated that initial pleadings may be filed on the due date. As long as payment or the Form 4A affidavit is received on or before the due date, the initial pleadings will be considered timely filed. In any instance in which a filer submits an affidavit of intent to remit cost deposit with a nationally recognized credit or debit card or other electronic payment, the initial pleading will be filed as if a cost deposit was actually provided. Submission of the affidavit alone without subsequent communication with the Clerk of the Supreme Court to provide any and all information necessary to process the cost deposit, or failure to provide an alternate form of payment in the event of a declination of the cost deposit, may result in dismissal of the initial pleadings.

EXHIBIT B

Form No. 4A. Affidavit of intent to remit cost deposit via credit or debit card or other form of electronic payment

AFFIDAVIT OF INTENT TO REMIT COST DEPOSIT VIA CREDIT CARD OR DEBIT CARD OR OTHER FORM OF ELECTRONIC PAYMENT

STATE OF OKLAHOMA

In the Supreme Court of Oklahoma:

I, _____, depose and say that I am the _____, in the above-entitled case. I further state that it is my intent to remit the cost deposit for this cause of action via credit card, debit card or other form of electronic payment, and that I am authorized to utilize the provided method of payment.

I understand that it is my responsibility to remit the cost deposit and to ensure that the Clerk of the Supreme Court has received and successfully processed the cost deposit not later than two business days after the date of filing this Form 4A. I accept full responsibility to provide the Clerk of the Supreme Court with any and all information needed for the processing of my remittance. I further understand that if I fail to timely and successfully remit the cost deposit for this cause of action in the form and manner prescribed by the Rules of the Supreme Court, my cause of action may be dismissed for failure to remit the cost deposit as required by Oklahoma law.

I further understand that I should not provide, on this Form 4A, the actual credit or debit card numbers or any other sensitive information for the processing of this cost deposit. I understand that the Clerk of the Supreme Court will not retain any of this information for any use other than the processing of this cost deposit after I have communicated with the Clerk and provided it.

I state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct.

Date Affiant

Contact Information:

Name (Printed):_____

Address: _____

_____

Phone Number: _____

E-mail address: _____

DO NOT PUT THE ACTUAL CREDIT OR DEBIT CARD NUMBERS ON THIS FORM, AND DO NOT SEND A PHOTOCOPY OF THE CREDIT OR DEBIT CARD

ETHICS COUNSEL SOUGHT

The Oklahoma Bar Association, an agency of the Oklahoma Supreme Court, seeks to hire Ethics Counsel. Ethics Counsel is primarily responsible for advising OBA members on ethical matters and issues related to the Oklahoma Rules of Professional Conduct. Preference will be given to applicants with the following qualifications:

- **Ten (10) or more years of active legal practice in the state of Oklahoma**
- **Thorough knowledge of the Oklahoma Rules of Professional Conduct**
- **Exemplary discipline record**
- **Proficient in Word and Excel**
- **Exceptional people skills**
- **Ability to problem solve**
- **Excellent recordkeeping and telephone skills**
- **Teaching and public speaking experience**

Most of the tasks assigned to the position are to be performed at the Oklahoma Bar Center in Oklahoma City during regular business hours. However, some travel, evening and weekend work is required. Salary commensurate with experience; health insurance and other benefits included, plus a great work environment.

Interested applicants should send a cover letter and resume to OBA Executive Director John Morris Williams via email at johnw@okbar.org. The deadline for applications is 5 p.m. Friday, Aug. 9, 2019. The Oklahoma Bar Association is an equal opportunity employer.

Want to Get Involved With the YLD?

Run for the OBA/YLD Board of Directors

By Nathan D. Richter

Each year the Young Lawyers Division holds elections for its officer and director positions. Per the bylaws, the YLD is composed of a chairperson, chairperson-elect, immediate past-chairperson, 20 voting directors and the ex-officio members. The directors and ex-officio members consist of one representative from each Supreme Court Judicial District and Oklahoma and Tulsa counties each having two additional representatives; seven at-large representatives, five of whom are to be elected at large from the division without regard to geographic residence and two of whom are to be elected from counties other than Oklahoma and Tulsa counties; and four ex-officio, nonvoting members. The YLD board's full composition can be found at www.okbar.org/ YLD/ Bylaws.

NOMINATING PROCEDURE

Article 5 of the division bylaws requires that any eligible member wishing to run for office must submit a nominating petition to the Nominating Committee. The petition must be signed by at least 10 members of the OBA/YLD. The original petition must be submitted by the deadline set by the Nominating Committee chairperson. A separate petition must be filed for each opening, except a petition for a directorship shall be valid for one-year and two-year terms and at-large positions. A person must be eligible for division membership for the entire term for which elected.

2020 YLD Board Vacancies

OFFICERS

Officer positions serve a one-year term.

Chairperson-Elect: any member of the division having previously served for at least one year on the OBA/YLD Board of Directors. The chairperson-elect automatically becomes the chairperson of the division for 2021.

Treasurer: any member of the OBA/YLD Board of Directors may be elected by the membership of the division to serve in this office.

Secretary: any member of the OBA/YLD Board of Directors may be elected by the membership of the division to serve in this office.

BOARD OF DIRECTORS

Board of Director positions serve a two-year term.

District 2: Atoka, Bryan, Choctaw, Haskell, Johnson, Latimer, LeFlore, McCurtain, McIntosh, Marshall, Pittsburg, Pushmataha and Sequoyah counties (one seat)

District 3: Oklahoma County (one seat)

District 4: Alfalfa, Beaver, Beckham, Blaine, Cimarron, Custer, Dewey, Ellis, Garfield, Harper, Kingfisher, Major, Roger Mills, Texas, Washita, Woods and Woodward counties (one seat)

District 6: Tulsa County (one seat)

District 8: Coal, Hughes, Lincoln, Logan, Noble, Okfuskee, Payne, Pontotoc, Pottawatomie and Seminole counties (one seat)

At-Large: all counties (three seats)

At-Large Rural: any county other than Tulsa or Oklahoma counties (one seat)

ELIGIBILITY

All OBA members in good standing who were admitted to the practice of law 10 years ago or less are members of the OBA/YLD. Membership is automatic – if you were first admitted to the practice of law in 2009 or later, you are a member of the OBA/YLD!

ELECTION PROCEDURE

Article 5 of the division bylaws governs the election procedure. In September, a list of all eligible candidates and ballots will be published in the *Oklahoma Bar Journal*. Deadlines for voting will be published with the ballots. All members of the division may vote for officers and at-large directorships. Only those members with OBA roster addresses within a subject judicial district may vote for that district's director. The members of the Nominating Committee shall only vote in the event of a tie. Please see OBA/YLD Bylaws for additional information.

DEADLINE

Nominating petitions, accompanied by a photograph and bio (in electronic form) for publication in the OBJ, must be received by Nathan Richter, Nominating Committee Chairperson, 925 West State Highway 152, Mustang, OK 73064 or nathan@dentonlawfirm.com no later than 5 p.m. Friday, Aug. 2, 2019.

Results of the election will be announced at the November YLD meeting at the OBA Annual Meeting.

TIPS FROM THE NOMINATING COMMITTEE CHAIRPERSON

- A sample nominating petition can be found at www.okbar.org/ YLD/elections. This will help give you an idea of format and information required by OBA/YLD Bylaws (one is also available from the Nominating Committee).
- Signatures on the nominating petitions do not have to be from young lawyers in your own district (the restriction on districts only applies to voting).
- Take your petition to local county bar meetings or to the courthouse and introduce yourself to other young lawyers while asking them to sign – it's a good way to start networking.
- You can have more than one petition for the same position and add the total number of original signatures – if you live in a rural area, you may want to fax or email petitions to colleagues and have them return the petitions with original signatures by U.S. mail.
- Don't wait until the last minute – I will only accept faxes or emails of the petitions if the original petitions are postmarked by the deadline.
- Membership eligibility extends to Dec. 31 of any year which you are eligible.
- Membership eligibility starts from the date of your first admission to the practice of law, even if outside of the state of Oklahoma.
- All candidates' photographs and brief biographical data are required to be published in the OBJ. All biographical data must be submitted by email or on a disk, no exceptions. Petitions submitted without a photograph and/or brief bio are subject to being disqualified at the discretion of the Nominating Committee.

ABOUT THE AUTHOR

Nathan Richter practices in Mustang. He serves as the YLD immediate past chair and as the YLD Nominating Committee chairperson. He may be contacted at nathan@dentonlawfirm.com.

Calendar of Events

July

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

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

26 **OBA Awards Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Kara Smith 405-923-8611

OBA Law Day Committee meeting; 12 p.m.; BlueJeans; Contact Kara Pratt 918-599-7755

29 **OBA Communications Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with BlueJeans; Contact Dick Pryor 405-740-2944

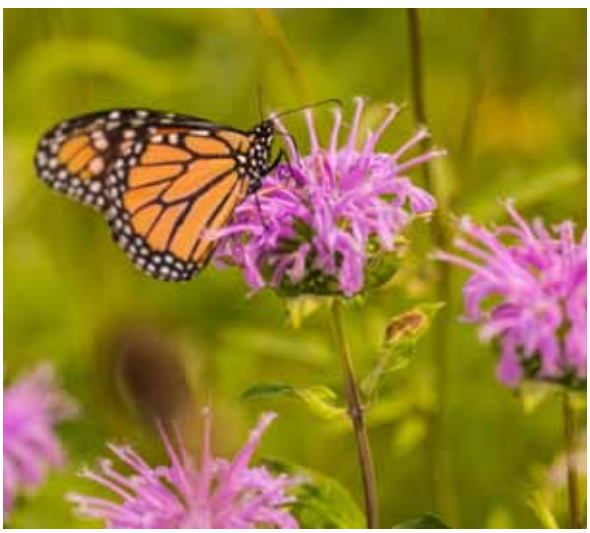
August

1 **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

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

9 **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

13 **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

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

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

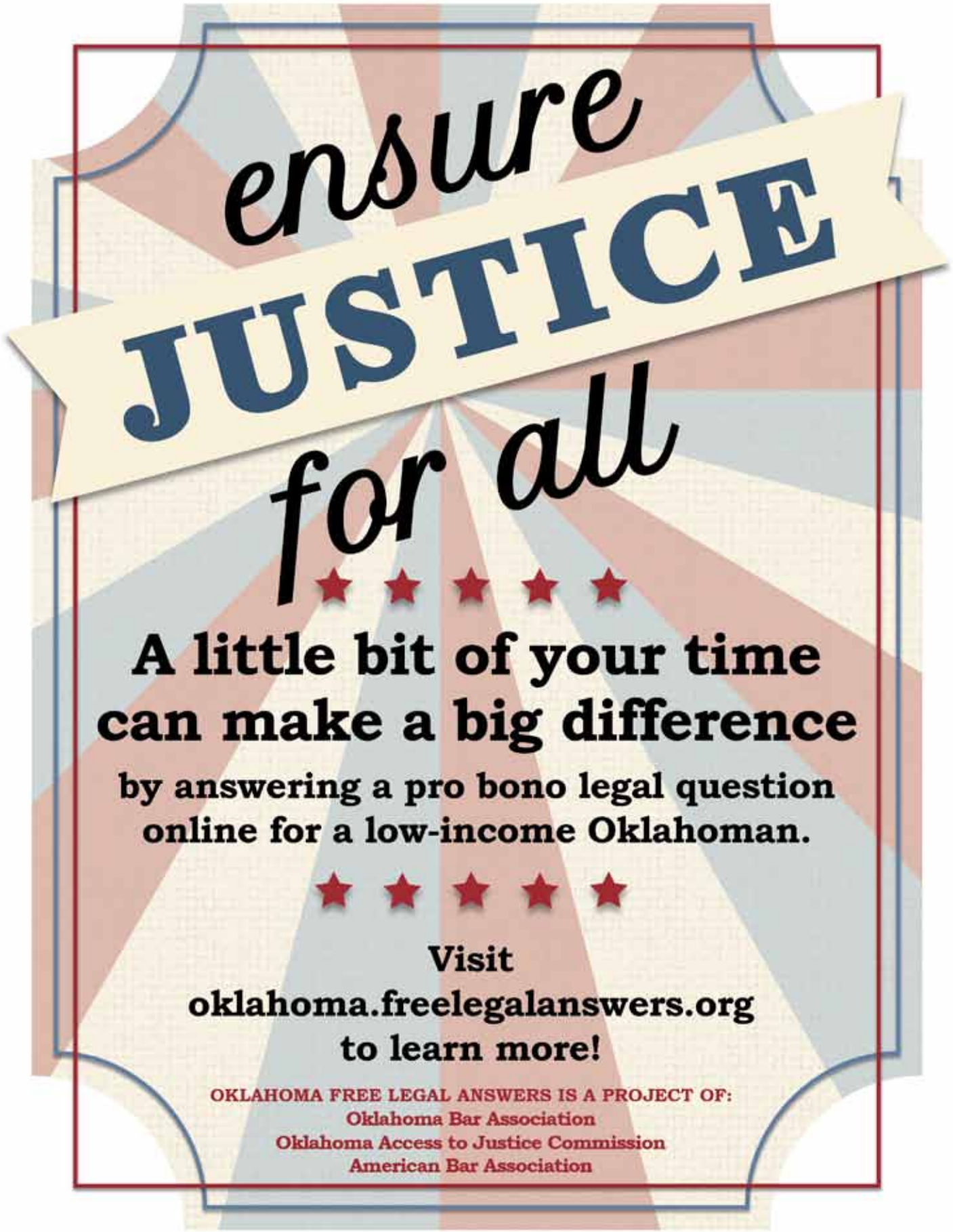
20 **OBA Bench and Bar Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact David B. Lewis 405-556-9611 or David Swank 405-325-5254

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

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

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

23 **OBA Board of Governors meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City; Contact John Morris Williams 405-416-7014


ensure
JUSTICE
for all
A little bit of your time
can make a big difference
by answering a pro bono legal question
online for a low-income Oklahoman.
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OKLAHOMA FREE LEGAL ANSWERS IS A PROJECT OF:
Oklahoma Bar Association
Oklahoma Access to Justice Commission
American Bar Association

In Memoriam

John Leslie Arrington Jr. of Tulsa died May 15. He was born Oct. 15, 1931, in Pawhuska. He graduated from The Lawrenceville School in 1949 and Princeton University in 1953. He received his J.D. in 1956 and his Masters of Law in 1967, both from Harvard Law School. He was a partner and CEO of Arrington, Kihle, Gaberino and Dunn from 1957 to 1996, general counsel for ONEOK Inc. from 1997 to 1998 and of counsel with GableGotwals from 1998 until 2019. He was a member of the American Bar Association and Tulsa County Bar Association.

Linda Sue (Prine) Brown of Sand Springs died May 6. She was born Dec. 16, 1945. She attended OSU and graduated in 1967 and received her J.D. from the OCU School of Law in 1989. She worked at several law firms in Oklahoma City and finished her legal career at the Office of the Oklahoma Attorney General in 2011. She also worked in the literacy program with the Tulsa City County Library System, teaching students to read and write. Memorial donations may be made to the Tulsa City County Library Literacy Program, the food bank of your choice or the Tulsa Animal Welfare Shelter.

William Burkett of Oklahoma City died May 23. He was born Nov. 2, 1925, in Oklahoma City. **He graduated from OCS at Fort Benning, Georgia, as a second lieutenant, after which he served in the Philippines and Japan.** Upon his return, he graduated from the OU College of Law. He served as Woodward County attorney, Republican county chairman, state representative for Woodward County and city attorney for Woodward, Fort Supply and Seiling. In 1969, he moved to Oklahoma City and was appointed U.S. attorney for the Western District of Oklahoma, serving in that office for six years. Memorial donations may be made to The Urban Mission or Covenant Presbyterian Endowment Fund.

Donald Erwin Herrold of Tulsa died May 4. He graduated from Tulsa Central High School in 1958, received his B.A. from OU in 1962 and received his J.D. from the TU College of Law in 1966. **He served as lieutenant commander with the U.S. Naval Service between 1966 and 1970 when he was honorably discharged.** He was a member of the Tulsa County Bar Association and a life-long member of Asbury United Methodist Church. He practiced law for more than 50 years, beginning as assistant attorney general for the state of Oklahoma and then in his private practice law firm where he served his clients for more than 35 years. Memorial donations may be made to The University of Texas MD Anderson Cancer Center, P.O. Box 4486, Houston, 77210.

Tommy Lee Holland of Tulsa died May 6. He was born Sept. 11, 1938, in Delaware, Arkansas. He was a 1956 graduate of Conway Springs High School and obtained his B.A. from Friends University in 1961, his J.D. from the TU College of Law in 1971 and his LL.M. from the University of Illinois in 1976. **Following college, he served in the United States Army Finance Corps from 1961 to 1964.** After his graduation from law school, he served as a law clerk for the Oklahoma Supreme Court. In 1973, he began his 40-year career as a professor of law at the TU College of Law, teaching various courses in the commercial law area until his retirement. Memorial donations may be made to Clarehouse, Neighbor for Neighbor, Parkinson Foundation of Oklahoma or TU.

Billy Arthur Mickle of Durant died May 6. He was born July 7, 1945, in Wood Bridge, England. He graduated from Wilburton High School, Eastern State College and Northeastern Oklahoma State University. **He served in the U.S. Marines and was a Vietnam veteran.** He received his J.D. from the OCU School of Law in 1972. Upon obtaining his license to practice law, he moved to Durant and began a law practice. He served as Durant city judge and was elected to the Durant City Council where he served as mayor for two years. He was elected associate district judge and to the Oklahoma Senate in 1987. Memorial donations may be made to the Durant High School Scholarship Fund.

John Michael Nordin of Nichols Hills died May 19. He was born Feb. 21, 1957, and received his J.D. from the OU College of Law in 1982. He will be remembered as a patient and kind man and will be missed by his family, friends and clients.

J. David Rambo of Norman died May 13. He was born June 13, 1936. He graduated

from Norman High School in 1954 and from OU with a B.S. in geology in 1958. **After serving as an officer in the U.S. Army from 1958 to 1960**, he returned to Norman and received his J.D. from the OU College of Law in 1962. During his legal career, he served as both a prosecutor and a judge. He was an association district judge as well as county attorney and municipal judge before returning to private practice. Memorial donations may be made to Big Brothers and Sisters of Cleveland County, Crossroads Youth & Family Services or Center for Children and Families.

Jim Rowan of Oklahoma City died May 6. He was born May 25, 1944, in Oklahoma City. He graduated from Norman High and earned a Bachelor of Arts in history from Kansas State University. **He joined the U.S. Army where he served for two years before attending the OU College of Law**. He worked as a public defender in Oklahoma City and for the Oklahoma Indigent Defense System in Norman, followed by a brief stint as a solo practitioner. Never shying away from tough cases, he took more than 40 capital cases to trial and saved dozens of lives from the death penalty. Memorial donations may be made to The Coalition to Abolish the Death Penalty or VOICE.

Dennis Frank Seacat of Tulsa died April 4. He was born Nov. 19, 1938, in Oklahoma City and graduated from the TU College of Law in 1977. **He was a veteran of the U.S. Army.** He will be remembered as a good attorney who worked hard and for his character and good sense of humor.

Veronica Surrell of West Roxbury, Massachusetts, died April 29. She was born April 15, 1958, in Kirkwood, Missouri. She graduated from TU in 1980 with a B.S. in psychology and from the TU College of Law in 1985. She dedicated her entire legal career to serving the public, working for several nonprofit organizations, including the Disability Law Center and Legal Aid Services of Eastern Oklahoma Inc. In 2004, she founded Advocacy Resources Inc., a nonprofit organization that focused on client advocacy and dispute resolution involving client rights before administrative agencies, such as the Social Security Administration. She will be remembered as a loving, nurturing mother, a faithful servant of Christ and as an advocate for many.

David A. Walker of Oklahoma City died May 15. He was born Jan. 6, 1937, in Oklahoma City. He graduated from John Marshall High School and received his Bachelor of Science from UCO. He later received his J.D. from the OCU School of Law and practiced law for over 40 years. **He served as a navigator in the U.S. Air Force and enjoyed flying throughout his life.** He was a faithful member of Church of the Servant, volunteer at Mercy Hospital and enjoyed playing the piano.

2019 OK CIV APP 35

STATE OF OKLAHOMA, ex rel. JOHN D. DOAK, Insurance Commissioner, Plaintiff/Appellee, vs. RED ROCK INSURANCE COMPANY, a licensed insurer in the State of Oklahoma, Respondent/Appellee, and THE BANKERS BANK, Appellant.

Case No. 115,716. December 7, 2018

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY

HONORABLE THOMAS E. PRINCE, JUDGE

AFFIRMED

Ryan Leonard, Robert Edinger, Jason A. Reese, EDINGER, LEONARD & BLAKLEY, PLLC, Oklahoma City, Oklahoma, for Plaintiff/Appellee,

Jon Epstein, Tami J. Hines, HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, P.C., Oklahoma City, Oklahoma, for Appellant.

ROBERT D. BELL, PRESIDING JUDGE:

¶1 Appellant, The Bankers Bank, appeals from the trial court's order denying Appellant's proofs of claim in this receivership proceeding to liquidate Respondent, Red Rock Insurance Company. At issue in this proceeding is the interpretation of an insurance contract. For the reasons set forth below, we affirm.

¶2 Appellant is an Oklahoma state banking corporation engaged primarily in the business of making banking and bank-related products and services available to other financial institutions. In 2010, BancInsure, Inc., issued the Extended Professional Liability Policy in question here (Policy) to Bankers Bancorp of Oklahoma, Inc., and certain of its subsidiaries, including Appellant. The Policy provided coverage for, among other things, acts done by Appellant "in the performance of services for or on behalf of a customer." BancInsure later changed its name to Red Rock Insurance Company, Inc.

¶3 LendingTools.com (LT) is a software company that licenses its own banking software systems to financial institutions. In 2010 and 2011, two of LT's customers (UBB and FNBB) chose not to renew their banking software contracts with LT and instead entered into contracts with Appellant. Each of the customers asked Appellant to develop correspondent software systems for them and to customize certain elements of Appellant's software platform.

¶4 In February 2012, Appellant was joined as a co-defendant in a suit filed by LT in Kansas state court. LT's suit alleged Appellant and the Bankers Bank of Kansas (BBOK) entered into a joint venture to develop and sell a banking software product; BBOK executed an agreement with LT that included non-compete and non-disclosure provisions; Appellant and BBOK pursued two of LT's customers (UBB & FNBB) in violation of the non-compete provision; and both UBB and FNBB allowed Appellant and BBOK access to LT's software in violation of the non-disclosure provision. LT sought monetary damages and injunctive relief, asserting claims for breach of contract, tortious interference with contract, misappropriation of trade secrets, civil conspiracy, fraud, and breach of the covenant of good faith and fair dealing.

¶5 In March 2012, Appellant submitted its first claim for coverage to Red Rock in connection with the Kansas litigation. Red Rock denied coverage under the Policy, explaining there were no allegations in the litigation of wrongful acts covered by the Policy. Between July 2012 and January 2014, Appellant renewed its request for coverage multiple times. Each time, Red Rock denied coverage.

¶6 In August 2014, upon application by the Oklahoma Insurance Commissioner and pursuant to the Oklahoma Uniform Insurers Liquidation Act, 36 O.S. 2011 §1901 *et seq.*, Red Rock was placed into liquidation and receivership by the District Court of Oklahoma County. Insurance Commissioner John D. Doak was appointed as Receiver. Thereafter, Appellant filed two proofs of claim with the Receiver in an attempt to recover litigation costs and any potential judgment arising out of the Kansas litigation; the first proof of claim represented any loss payment that may arise from the litigation and the second represented attorney fees and defense costs incurred by Appellant in the litigation.

¶7 The Kansas litigation culminated in 2016 with a jury verdict finding Appellant did not breach any alleged contract with LT and did not misappropriate any of LT's trade secrets.

Appellant's first proof of claim in the receivership proceeding was thereafter reduced to $0.00 because no liability in the Kansas litigation was established. The second proof of claim sought $7,262,105.22 for Appellant's attorney fees and defense costs. The Receiver recommended denial of the claims.

¶8 Following a hearing, the trial court denied Appellant's proofs of claim. In an exhaustive ruling, the court held the Policy's "professional services" coverage did not apply because the definition of "professional services" was limited to wrongful acts committed by Appellant "in the performance of services for or on behalf of a customer," not against its competitor. The trial court also rejected Appellant's argument that its alleged conduct fell within the scope of an "electronic banking wrongful act" provision of the Policy, because the electronic system at issue was not owned, licensed by or licensed to Appellant. Finally, although of little consequence because the court held no coverage was available to Appellant, the court rejected the Receiver's argument that the "profit or advantage exclusion" barred any coverage for Appellant. From said judgment, Appellant appeals. Oral argument was held before this Court on August 29, 2018.

¶9 In *State ex rel. Fisher v. Heritage Nat'l Ins. Co.*, 2006 OK CIV APP 119, ¶12, 146 P.3d 815, the Court described litigation brought pursuant to the Insurers Liquidation Act as "a special proceeding in the nature of equity." "Accordingly, the trial court's judgment will be affirmed unless it is against the clear weight of the evidence or is contrary to law or established principles of equity." *Id.* Further:

> An insurance policy is a contract. The rules of construction and analysis applicable to contracts govern equally insurance policies. The primary goal of contract interpretation is to determine and give effect to the intention of the parties at the time the contract was made. In arriving at the parties' intent, the terms of the instrument are to be given their plain and ordinary meaning. Where the language of a contract is clear and unambiguous on its face, that which stands expressed within its four corners must be given effect. A contract should receive a construction that makes it reasonable, lawful, definite and capable of being carried into effect if it can be done without violating the intent of the parties. We review the meaning assigned by the trial court to a contract as a legal question. Questions of law are reviewed by a *de novo* standard.

May v. Mid-Century Ins. Co., 2006 OK 100, ¶22, 151 P.3d 132 (footnotes omitted). "A basic rule of insurance law provides that the insured has the burden of showing that a covered loss has occurred, . . ." *Pitman v. Blue Cross and Blue Shield of Okla.*, 217 F.3d 1291, 1298 (10th Cir. 2000).

¶10 At issue in this case is whether Appellant's acts fall within the Policy's coverage definitions. The Policy covers an insured for any "loss that is the result of a claim for a professional services wrongful act . . . ." The term "professional services wrongful act" is defined by the Policy to mean, *inter alia:*

> any actual or alleged error, misstatement, misleading statement, act or omission, or neglect or breach of duty by the company in the performance of services for or on behalf of a customer . . . .

¶11 Appellant argues LT's allegations against it in the Kansas litigation fall squarely within the definition of a "professional services wrongful act" because the allegations charged that Appellant committed wrongful acts "in the performance of services for or on behalf of a customer." Stated otherwise, the Kansas suit alleged Appellant committed wrongful acts against LT while Appellant was developing and customizing banking software systems for two of its customers. Appellant does not challenge the trial court's denial of coverage under the "electronic banking wrongful act" Policy provision.

¶12 Receiver argues the trial court properly denied Appellant's claims because the conduct giving rise to the Kansas litigation was not performed by Appellant "for or on behalf of a customer," but rather was performed by Appellant for its own commercial purpose and business advantage. Receiver contends the alleged conduct was not to the detriment of Appellant's customer, but rather was to the detriment of a competitor, "an entity with whom [Appellant] did not have a professional relationship and for whom it did not provide professional services." Receiver insists the alleged unauthorized use by Appellant of LT's trade secrets and confidential information to develop software "is not a *mistake* or an *error inherent* in the banking profession, but rather an *intentional act* by [Appellant] for its own monetary gain, outside the scope of providing professional banking services." Both parties assert the Policy terms are unambiguous.

¶13 We agree with Receiver and the trial court that the Policy does not provide coverage for Appellant's loss. The clear terms and intent of the Policy is to provide coverage for mistakes or errors inherent in the practice of Appellant's profession of providing bank-related products and services to its banking customers. The acts alleged in the Kansas litigation all relate to Appellant's conduct regarding LT. Those allegations included breach of a purported contract with LT, tortious interference with LT's contracts, misappropriation of LT's trade secrets, civil conspiracy with BBOK against LT, fraud committed against LT, and breach of an alleged covenant with LT to deal fairly and in good faith. Accordingly, we hold the acts Appellant was alleged to have performed in the Kansas litigation were not undertaken "in the performance of services for or on behalf of a customer."

¶14 On the basis of the foregoing, we hold the trial court's ruling is neither against the weight of the evidence nor contrary to law or established principles of equity. It is therefore affirmed.

¶15 AFFIRMED.

JOPLIN, J., concurs.

BUETTNER, J., dissents.

¶1 I believe the language of the Policy is clear and unambiguous. Assigning the plain and ordinary meaning to the Policy's terms, the Policy provides coverage for Appellant's acts as alleged in the Kansas litigation. Appellant was alleged to have committed wrongful acts *while it was* developing and customizing banking software systems for two of its customers. The Policy language does not limit coverage to only alleged wrongs committed *against* a customer, nor does it appear to provide coverage only for *unintentional* acts. The term "professional services wrongful act" includes "any . . . alleged . . . act . . . by the company in the performance of services for or on behalf of a customer . . ." The alleged wrongful acts by Appellant were "in the performance of services for or on behalf of a customer" within the meaning of the Policy. I would hold that the policy covered the Appellant's claim.

2019 OK CIV APP 36

CIT BANK, N.A., Plaintiff/Appellee, vs. THE HEIRS, PERSONAL REPRESENTATIVES, DEVISEES, TRUSTEES, SUCCESSORS AND ASSIGNS OF EDWARD J. MCGEE, DECEASED; AND THE UNKNOWN SUCCESSORS, THE HEIRS, PERSONAL REPRESENTATIVES, DEVISEES, TRUSTEES, SUCCESSORS AND ASSIGNS OF LAURA MCGEE, DECEASED, AND THE UNKNOWN SUCCESSORS; et al., Defendants, and FALCONHEAD PROPERTY OWNERS ASSOCIATION, INC., Defendant/Appellant.

Case No. 116,324. June 5, 2019

APPEAL FROM THE DISTRICT COURT OF LOVE COUNTY, OKLAHOMA

HONORABLE TODD HICKS, TRIAL JUDGE

AFFIRMED

A. Grant Schwabe, Brian J. Rayment, KIVELL, RAYMENT AND FRANCIS, P.C., Tulsa, Oklahoma, for Plaintiff/Appellee

Richard A. Cochran, Jr. For the Edward J. McGee

RICHARD A. COCHRAN, JR., P.C., Marietta, Oklahoma, for the Edward J. McGee Defendants

G. Timothy Armstrong, Edmond, Oklahoma, for Defendant/Appellant

JOHN F. FISCHER, PRESIDING JUDGE:

¶1 The Falconhead Property Owners Association, Inc., appeals a judgment in this foreclosure action granting CIT Bank, N.A. priority over the Falconhead lien. Because the Falconhead lien did not mature into an enforceable lien and was not perfected until after the Bank's mortgage, it is not entitled to priority over the Bank's lien. The judgment of the district court is affirmed.

BACKGROUND

¶2 The real property at issue in this case is located in Love County, Oklahoma, and subject to restrictive covenants described in a Dedication of Restrictions, Conditions, Easements, Covenants, Agreements, Liens and Charges, Falconhead, Phase 1. The Dedication is dated March 10, 1971, and was recorded with the County Clerk on March 15, 1971. Falconhead is a residential and golf course development. Edward and Laura McGee purchased property in 1996 subject to the Falconhead Dedication.[1] The Dedication provided for a lien to secure the payment of any charges assessed by the Falconhead Owners Association.

¶3 On October 4, 2005, the McGees executed an Adjustable Rate Note and Adjustable Rate Home Equity Conversion Mortgage in favor of

Financial Freedom Senior Funding Corporation and granted a mortgage on their property in the Falconhead addition to secure repayment of any funds advanced pursuant to the Note. The mortgage was recorded on November 14, 2005, and assigned to CIT Bank on December 8, 2015. The Bank recorded its assignment on January 6, 2016. The Bank filed this action on May 13, 2016, alleging that the McGees had defaulted on the loan. On May 20, 2016, Falconhead recorded a statement of lien with the Love County Clerk alleging that the McGees had failed to pay $1,339.47 in monthly assessments beginning in December 2015.

¶4 The Bank amended its petition to add the Falconhead Owners Association as an additional defendant and moved for summary judgment. Falconhead responded and filed its own motion for summary judgment. The district court granted judgment in favor of both lien claimants. The sole issue in this appeal is whether the Bank's mortgage has priority over the Falconhead lien. The district court subordinated the Falconhead lien to the Bank's mortgage. Falconhead challenged that ruling by filing a motion for new trial, which the district court denied. Falconhead appeals that order and the judgment in favor of the Bank.

STANDARD OF REVIEW

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

¶6 A trial court's denial of a motion for new trial is also reviewed for abuse of discretion. *Head v. McCracken*, 2004 OK 84, ¶ 2, 102 P.3d 670. "Where, as here, our assessment of the trial court's exercise of discretion in denying defendants a new trial rests on the propriety of the underlying grant of summary judgment, the abuse-of-discretion question is settled by our *de novo* review of the summary adjudication's correctness." *Reeds v. Walker,* 2006 OK 43, ¶ 9, 157 P.3d 100 (footnote omitted).

ANALYSIS

¶7 Neither party disputes the fact that the other party has a valid lien. "A lien is a charge imposed upon specific property, by which it is made security for the performance of an act." 42 O.S.2011 § 1. In this case, both liens were created "[b]y contract of the parties" as authorized by 42 O.S.2011 § 6. The Bank's lien was created by the 2005 mortgage. Falconhead's right to create a lien was established by the 1971 Dedication. The parameters of Falconhead's lien rights are stated in section XVI of the Dedication:

> Each purchaser of a lot . . . by acceptance of a deed thereto . . . whether from [Falconhead] or a subsequent owner . . . bind [sic] himself, his heirs, personal representatives and assigns, to pay all charges and assessments as shall be determined and levied upon such lot by and/or purchaser by … Falconhead Property Owners Association, Inc. … and the obligation to pay such charges, assessments, interest and costs thereby constitute a lien upon and an obligation running with the land.

Falconhead's lien rights regarding this particular lot were created when the decedents' predecessors in title, Edward and Opal Blacketer, purchased the property from Falconhead. The McGees agreed to be bound by that lien in 1996, when they accepted a deed to the property from the Blacketers. *Accord Falconhead Prop. Owners Ass'n v. Fredrickson*, 2002 OK CIV APP 67, ¶ 6, 50 P.3d 224. That fact, however, does not resolve the priority issue.

¶8 The Bank contends that its 2005 mortgage has priority over the Falconhead lien because the statement of the Falconhead lien was not recorded until 2016. According to the Bank, Falconhead did not obtain a lien until the McGees failed to pay their assessments. Falconhead contends that its lien was created by the Dedication and because that document was recorded prior to the Bank's mortgage, Falconhead's lien has priority.

¶9 In many respects, Oklahoma lien law is clear: "A lien may be created by contract, to take immediate effect, as security for the performance of obligations not then in existence." 42 O.S.2011 § 9. The Bank's mortgage was created in 2005, when the McGees executed the home equity note and mortgage. Contracts of

mortgage are subject to the same provisions of Title 42 applicable to Falconhead's lien. 42 O.S.2011 § 5. Falconhead's lien rights were created in 1971 and affirmed by the McGees when they accepted a deed to the property in 1996. "Other things being equal, different liens upon the same property have priority according to the time of their creation . . . ." 42 O.S.2011 § 15. However, the 1971 Falconhead lien and the Bank's 2005 mortgage are not equal.

¶10 The Bank's mortgage was granted to secure repayment of a promissory note documenting a loan to the McGees. The Dedication merely documents that the Falconhead Property Owners Association had the future right to assess Falconhead property owners and, on the occurrence of that contingency, the Property Owners Association would have a lien to secure the payment of any assessment.

¶11 Despite the settled nature of Oklahoma law regarding the creation and nature of liens, no Oklahoma case has previously considered the priority of a home owners association's lien for unpaid assessments. We find instructive cases determining the nature and priority of other liens.[2]

¶12 For example, a home owners association's lien is similar to the lien that attaches to real property for payment of ad valorem taxes. *See, e.g., First Nat'l Bank of Tulsa v. Scott*, 1925 OK 986, 249 P. 282 (holding that although ad valorem taxes are assessed as of January 1, the lien securing payment of those taxes does not attach until the amount of the assessment is subsequently determined and the tax becomes due and delinquent). Following this analysis, Falconhead's maintenance fee "lien" as described in the 1971 Dedication was inchoate; "it was not one that could be ascertained as to amount, and paid and discharged . . . ." *Allen v. Henshaw,* 1946 OK 51, ¶ 26, 168 P.2d 625. The Oklahoma Supreme Court has recognized that, although inchoate liens may become certain and attach at some subsequent moment in time, they do not take priority over a previously perfected lien. *U.S. v. Home Fed. Sav. & Loan Ass'n of Tulsa*, 1966 OK 135, ¶¶ 15-17, 418 P.2d 319 (citing *U.S. v. City of New Britain, Conn.*, 347 U.S. 81, 86, 74 S. Ct. 367, 371 (1954). "Possible contingencies" might arise and prevent an attachment lien from becoming perfected; so, it is merely "lis pendens notice" that a right to perfect a lien exists. *Id.* ¶ 9 (citing *U.S. v. Sec. Tr. & Sav. Bank of San Diego*, 340 U.S. 47, 50, 71 S. Ct. 111, 113 (1950)).

¶13 We also find analogous Oklahoma law governing mechanics and materialmen's liens. Although the record does not disclose the details regarding how the money Falconhead collected after an assessment was used, it appears that at least one use was for the maintenance of the common areas. To that extent, the Falconhead lien would operate in a manner similar to the materialmen's lien provided for in 42 O.S. Supp. 2013 § 141.[3] Even so, "a prior recorded mortgage takes precedence over a materialmen's lien accruing after the recording of such mortgage, even to the extent of attaching to the improvements placed upon the mortgaged premises afterwards by the materialman." *Thompson v. Smith,* 1966 OK 214, ¶ 17, 420 P.2d 526 (citations omitted).

¶14 Falconhead points out that the Bank's mortgage is a "'reverse mortgage' made to borrow funds on an existing house." But that fact is not critical, as this Court has previously observed: "A mortgage securing future advances has priority over an intervening lien . . . if the mortgagee is obligated under the original agreement to make future advances, such as when the mortgage secures a line of credit …." *Quail Creek Bank, N.A. v. Americrest Bank,* 2006 OK CIV APP 42, ¶ 5, 135 P.3d 822 (citing *Paschal & Bro. v. Bohannan*, 1916 OK 652, 158 P. 365). The Bank stated in its summary judgment submissions that its note "was not in any particular amount, as the amounts advanced under the 'reverse mortgage' loan depended upon the draws the borrower makes on the account." The Bank was obligated to advance funds whenever the McGees asked the Bank to do so.

¶15 Both liens in this case were created by contract. Because the Dedication was recorded in 1971, the Bank had notice of Falconhead's right to perfect its lien when the Bank took an assignment of the McGees' home equity loan and mortgage. However, a review of the County Clerk's title records regarding this property shows that Falconhead did not perfect its lien until May 20, 2018, after the Bank had recorded its mortgage. Consequently, the district court did not err in granting the Bank's mortgage priority over the Falconhead lien and in denying Falconhead's motion for new trial.

CONCLUSION

¶16 Falconhead's lien right on this property was created in 1971 by the Dedication to secure the payment of "charges and assessments." That right was affirmed in 1996, when the McGees accepted a deed subject to that Dedica-

tion. However, Falconhead's lien was inchoate and did not mature into an enforceable lien until December 2015, after the McGees failed to pay amounts assessed by the Owners Association. Falconhead perfected its lien on May 20, 2018, well after the Bank's mortgage had been recorded. Because the Bank's lien was "first in time," it takes priority over the 2018 Falconhead lien. *See U.S. v. Home Fed. Sav. & Loan Ass'n of Tulsa,* 1966 OK 135, 418 P.2d 319. The district court's judgment is affirmed, as is its order denying Falconhead's motion for new trial.

¶17 AFFIRMED.

GOODMAN, J., and THORNBRUGH, J., concur.

JOHN F. FISCHER, PRESIDING JUDGE:

1. The McGees are now deceased. However, neither their heirs nor their representatives claim any interest in this dispute.

2. In 1975, Oklahoma adopted The Real Estate Development Act, 60 O.S.2011 §§ 851 through 857. The Act applies only to home owners associations created after the effective date of the Act and, therefore, does not apply to Falconhead. Further, the Act simply provides that any lien in favor of the owners association "may be foreclosed in any manner provided by law for the foreclosure of mortgages or deeds of trust, with or without a power of sale." 60 O.S.2011 § 852(C).

3. Title 42 O.S. Supp. 2013 § 141 provides:

> Any person who shall, under oral or written contract with the owner of any tract or piece of land, perform labor, furnish material or lease or rent equipment used on said land for the erection, alteration or repair of any building, improvement or structure thereon or perform labor in putting up any fixtures, machinery in, or attachment to, any such building, structure or improvements; or who shall plant any tree, vines, plants or hedge in or upon such land; or who shall build, alter, repair or furnish labor, material or lease or rent equipment used on said land for buildings, altering, or repairing any fence or footwalk in or upon said land, or any sidewalk in any street abutting such land, shall have a lien upon the whole of said tract or piece of land, the buildings and appurtenances in an amount inclusive of all sums owed to the person at the time of the lien filing, including, without limitation, applicable profit and overhead costs.

2019 OK CIV APP 37

HSBC, USA, NATIONAL ASSOCIATION, as Trustee for the Registered Holder of Ace Securities Corp. Home Equity Loan Trust, Series 2006-NC3, Assets Backed Pass-Through Certificates, Plaintiff/Appellee, vs. JACK TUGGLE and BRENDA TUGGLE, Defendants/Appellants, and JOHN DOE, as Occupant of the Premises and JANE DOE, as Occupant of the Premises, Defendants.

Case No. 116,592. June 3, 2019

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

HONORABLE DANA LYNN KUEHN, TRIAL JUDGE

AFFIRMED

John F. Heil, III, Dustin L. Perry, Carson K. Glass, HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, P.C., Tulsa, Oklahoma, for Plaintiff/Appellee

Michael W. McCoy, MCCOY LAW OFFICE, Broken Arrow, Oklahoma, for Defendants/Appellants

P. THOMAS THORNBRUGH, JUDGE:

¶1 Jack and Brenda Tuggle (the Tuggles) appeal the district court's denial of their motions to vacate and dismiss following summary judgment against them in a mortgage foreclosure case. On review, we affirm the decisions of the district court.

BACKGROUND

¶2 On January 14, 2016, Appellee HSBC, as trustee of the "Ace Securities Corp. Home Equity Loan Trust" (Trust), filed a petition for foreclosure alleging the Tuggles had defaulted on a mortgage. The petition included the required copy of a facially correct note demonstrating initial standing. The Tuggles responded, *pro se*, with what amounted to a general denial. Parts of the answer denied HSBC's standing because of a failure to follow "mandatory requirements of the applicable controlling federal regulations." The answer also denied the authenticity of the note; the proper endorsement of the note; and the claim of default. The answer was not verified. On September 3, 2016, HSBC moved for summary judgment. The summary judgment motion contained the required affidavits swearing to the authenticity of the note and the fact of default. The Tuggles did not reply to the summary judgment motion. On January 10, 2017, the district court granted summary judgment in favor of HSBC.

¶3 On February 9, 2017, the Tuggles, now represented, filed a "motion to vacate and to dismiss case," alleging that the six-year statute of limitations on collection after acceleration had run "on the face of the pleadings" because the note had first been declared in default and accelerated in 2010. HSBC responded, noting that a previous foreclosure based on the 2010 acceleration had been dismissed less than a year before the current foreclosure was filed, and hence it had a year to re-file pursuant to 12 O.S. § 100 before any statute of limitations became effective.

¶4 The Tuggles responded with an argument that HSBC was not entitled to use the savings clause because the previous foreclosure had been dismissed on the grounds that the Tug-

gles had reached an agreement with HSBC to become current on their mortgage payments and pay the cost of suit. Hence, the Tuggles argued, the suit had not "failed other than on the merits" and § 100 was not applicable. The district court was not convinced by this argument, and, on April 6, 2017, denied the motion to vacate and dismiss.

¶5 Undeterred, on August 29, 2017, the Tuggles filed a motion to "dismiss case for lack of standing," and a second motion to vacate. This motion argued (1) that the denial of HSBC's standing and the denial of the authenticity of the note pled in the Tuggles' answer created a jurisdictional question or question of fact that prevented summary judgment; and (2) a complex allegation that the judgment was obtained by fraud, because the foundational documents of the Trust prevent a mortgage and note "not transferred at the same time" being assigned to the Trust, and also imposed time limitations on the Trust accepting assets. The Tuggles argued that the Trust could not hold the note according to its rules of operation, and hence HSBC committed fraud on the court by stating that the Trust was the holder of the note. The trial court remained unconvinced, and denied this motion on December 4, 2017. The Tuggles now appeal.

STANDARD OF REVIEW

¶6 This matter originates in a summary judgment. Summary judgment is reviewed *de novo*. In this case, however, the journal entry of summary judgment was filed on January 10, 2017, and the Tuggles filed their first motion to vacate on February 9, 2017. Title 12 O.S. § 990.2 provides:

> [W]hen a post-trial motion . . . to vacate . . . is filed within ten (10) days after the judgment, decree or final order is filed with the court clerk, an appeal shall not be commenced until an order disposing of the motion is filed with the court clerk.

¶7 The Tuggles did not file their first motion to vacate within 10 days of the journal entry of summary judgment being filed, and the time to appeal the underlying summary judgment was not tolled. The Tuggles did not file an appeal in this Court until December 4, 2017, eleven months after the summary judgment. The summary judgment is now beyond review. The Tuggles' first motion to dismiss was denied on April 6, 2017. This decision is also now beyond review.

¶8 The only matter for review is, therefore, the Tuggles' second motion to vacate/dismiss alleging a lack of trial court jurisdiction and/or fraud in procuring the judgment. The standard of review for a trial court's ruling either vacating or refusing to vacate a judgment is abuse of discretion. *Ferguson Enterprises, Inc. v. Webb Enterprises, Inc.*, 2000 OK 78, ¶ 5, 13 P.3d 480; *Hassell v. Texaco, Inc.*, 1962 OK 136, 372 P.2d 233. A clear-abuse-of-discretion standard includes appellate review of both fact and law issues. *Christian v. Gray*, 2003 OK 10, ¶ 43, 65 P.3d 591. An abuse of discretion occurs when a court bases its decision on an erroneous conclusion of law, or where there is no rational basis in evidence for the ruling. *Fent v. Oklahoma Natural Gas Co.*, 2001 OK 35, ¶ 12, 27 P.3d 477. Issues of law such as jurisdictional allegations are therefore reviewed by a *de novo* standard as part of the abuse-of-discretion inquiry.

ANALYSIS

I. STANDING

¶9 The Tuggles' first argument revolves around a misapprehension of both the requirements announced in *Wells Fargo Bank, N.A. v. Heath*, 2012 OK 54, ¶ 9, 280 P.3d 328, and the burden on summary judgment. In 2012-2013, the Oklahoma Supreme Court issued several substantive opinions requiring an initial demonstration of the standing of a party to enforce a note and foreclose the associated mortgage. Those opinions held that, in order to demonstrate standing to sue for foreclosure, a plaintiff must have, and demonstrate, a *prima facie* right to enforce the subject note *at the time of filing*. *Wells Fargo Bank* notes:

> To commence a foreclosure action in Oklahoma, a plaintiff must demonstrate it has a right to enforce the note and, absent a showing of ownership, the plaintiff lacks standing . . . Appellee has the burden of showing it is entitled to enforce the instrument . . . . Unless the Appellee was able to enforce the note at the time the suit was commenced, it cannot maintain its foreclosure action against the Appellants.

Id. (citation omitted).

¶10 The Supreme Court set a simple procedure to enforce these requirements by requiring that a copy of a suitably endorsed note facially demonstrating possession and a right to enforce (or some other paper demonstrating the rights of a holder) is attached to the peti-

tion. Possession of a note facially endorsed in blank, or endorsed to the possessor, is *prima facie* evidence of ownership and a right to enforce. *Cahill v. Kilgore*, 1960 OK 88, ¶ 15, 350 P.2d 928.

¶11 The effect of this series of rulings was to require a *prima facie* showing of a justiciable question before the case commences, a rule made in response to prior situations in which plaintiffs were suing to enforce notes that they did not currently possess, or which had not been endorsed or otherwise assigned to them at the time of suit. This initial showing does not establish a right to enforce as a matter of law, or settle questions as to the validity of the note or its endorsements. It merely establishes a *prima facie* showing of the right to enforce *at the time of filing*, and hence, the existence of a justiciable issue. *See Deutsche Bank Nat. Tr. Co. v. Roesler,* 2015 OK CIV APP 36, ¶ 15, 348 P.3d 707.

¶12 We emphasize this distinction because this Court continues to receive submissions arguing that, post *Wells Fargo Bank, N.A. v. Heath,* any and all questions regarding the validity or enforceability of a note and mortgage have become "standing" issues, and hence "jurisdictional" issues that can be raised for the first time post-judgment or on appeal. We repeat emphatically that attaching a copy of a *facially* enforceable note to a petition establishes a *prima facie* case for standing and satisfies the requirements of *Wells Fargo*. All further questions regarding the validity of any endorsement, and the legal right of the plaintiff to enforce the note, remain *merits questions, not questions of "standing."*[1]

¶13 The Tuggles next argue that, even if the petition demonstrated the initial standing required to make the case justiciable, the denials contained in their answer were sufficient to raise a merits issue on summary judgment regarding the right to enforce. "*Prima facie* evidence is such evidence as in the judgment of law is sufficient to establish a fact, and **if not rebutted**, remains sufficient to establish that fact." *In re Estate of Hardaway*, 1994 OK 30, ¶ 15, 872 P.2d 395 (emphasis added; citation omitted). A rebuttal of the *prima facie* case requires contrary *evidence*, and allegations and denials in unverified pleadings are *not evidence*. A party may not simply stand on the allegations or denials of its pleadings as evidence in a summary judgment proceeding. We find no error in the court's decisions that the Tuggles failed to present evidence sufficient to avoid summary judgment.

II. FRAUD

¶14 The Tuggles next argue that HSBC committed fraud during the proceedings, and this requires vacation of the summary judgment. The alleged "fraud" is a claim this Court analyzed in *Roesler,* 2015 OK CIV APP 36. As we noted in ¶ 25 of that opinion, the general situation is one in which "the defendant argues that the owner of the note is some form of specialized trust which, according to its trust agreement, can only accept assets during a limited period." "The defendant then argues that the note was not transferred to the trust within this time frame, and hence the trust has no right to hold or enforce according to its internal rules and structure." *Id.* In *Roesler,* the defendants characterized this claim as a "standing" issue by arguing that the trust cannot be the holder of the note because holding this asset is contrary to the trust agreement. In this case, the Tuggles resurrect this theory as a "fraud" issue by arguing that the Trust claimed to be the holder or owner of the note when holding this asset is contrary to the Trust agreement, and hence the Trust committed fraud.

¶15 We reach the same conclusion here that we reached in *Roesler*. Whether the Trust may suffer adverse regulatory or tax consequences, or even be subject to suit by its beneficiaries or owners for accepting a transfer outside of the stated period for accepting assets is not a claim the Tuggles have standing to raise. The note presented was *endorsed in blank*, and hence is enforceable by its *possessor,* the Trust, and its Trustee, HSBC, *irrespective* of whether the Trust's internal regulations may allow the note to be included in Trust assets for other purposes. The Tuggles were given an opportunity to dispute HSBC's right of enforcement in the summary judgment proceeding. They did not do so, and cannot revive this claim of disputed facts or disputed legal effect by characterizing it as fraud. We are properly wary of any attempt to allow collateral attacks on such a basis.[2]

CONCLUSION

¶16 We find no error in the decisions of the district court, and affirm its decisions.

¶17 **AFFIRMED**.

FISCHER, P.J., and GOODMAN, J., concur.

P. THOMAS THORNBRUGH, JUDGE:

1. If a party may re-litigate questions of contractual rights after a judgment by arguing that the right to enforce any particular provision is a "standing issue" and hence a "jurisdictional issue" that may be raised at any time, the finality of judgments in this area would become largely illusionary.

2. The Tuggles essentially argue that a party who does not answer a summary judgment motion may claim, months or years after the fact, that it **could** have presented contrary facts and the movant thereby committed fraud by *characterizing the facts as undisputed*. The finality of summary judgment would be seriously impaired if this type of attack is allowed.

2019 OK CIV APP 38

RONNIE KEITH, D.O., Plaintiff/Appellant, vs. PERRY MARRS, JR.; BENJAMIN BUTTS; and BUTTS & MARRS, P.L.L.C., Defendants/ Appellees, and CYNTHIA GOOSEN; DANA MORGAN; and COOPER & SCULLY, P.C., Defendants.

Case No. 117,255. June 14, 2019

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE DON ANDREWS, TRIAL JUDGE

AFFIRMED

Andrew D. Schwartz, WEST, YLLA, GOSNEY, Oklahoma City, Oklahoma, for Plaintiff/ Appellant

George S. Corbyn, Jr., CORBYN, HAMPTON, BARGHOLS, PIERCE, PLLC, Oklahoma City, Oklahoma, for Defendants/Appellees

DEBORAH B. BARNES, PRESIDING JUDGE:

¶1 The present case concerns a law firm that previously served as defense counsel for Ronnie Keith, D.O. (Dr. Keith). That law firm subsequently served as counsel for a plaintiff in a medical malpractice suit in which Dr. Keith was a defendant. Dr. Keith did not seek disqualification of the law firm, and the malpractice suit ultimately settled. Dr. Keith has now filed this suit against that law firm alleging various theories of recovery stemming from the law firm representing the plaintiff in the malpractice action despite allegedly having a conflict in the form of confidential information obtained from Dr. Keith. Dr. Keith appeals from the trial court's order denying his motion to reconsider the trial court's order granting summary judgment to Perry Marrs, Jr., Benjamin Butts, and Butts & Marrs, P.L.L.C. (collectively, Defendants).[1] Based on our review, we affirm.

BACKGROUND

¶2 Mr. Marrs, who had served as Dr. Keith's attorney in prior matters, entered an appearance as attorney for Dr. Keith in a case filed against him in 2009. The plaintiff in the 2009 case – a nurse – alleged that Dr. Keith committed an assault and battery against her.

¶3 Mr. Marrs asserts that in June 2012, he "sent a letter to Dr. Keith stating that he would be required to withdraw as Dr. Keith's counsel in the [2009] case because Dr. Keith had not paid the retainer or communicated with Mr. Marrs about settlement." An order allowing Mr. Marrs to withdraw as counsel in the 2009 case was filed on July 5, 2012.[2] As stated by Dr. Keith, the 2009 case was later "dismissed by the plaintiff without any further meaningful legal work and without settlement."

¶4 In 2011, a separate medical malpractice action was filed. In the 2011 case, the plaintiff sought damages for medical negligence that allegedly occurred in January 2011 when the plaintiff underwent gastric bypass surgery. Dr. Keith was not named as a defendant in the original petition, but was named as a defendant in the amended petition filed in February 2012. The plaintiff in the 2011 case was originally represented by attorney Jason Ryan; however, as stated by Defendants, "[i]n August 2012 [Mr.] Butts advised [Mr.] Marrs that Jason Ryan had asked Mr. Butts if Mr. Butts could get involved representing the plaintiff in the [2011] case[.]" According to Defendants, Mr. Marrs and Mr. Butts "conferred" at that time and "concluded that they could get involved in representing the plaintiff in the [2011] case" which named Dr. Keith as a defendant "because Dr. Keith was a former client in the [2009] case and the [2009] case was completely unrelated to the [2011] case."

¶5 Dr. Keith asserts that the August 2012 conversation between Mr. Marrs and Mr. Butts "was not the *first* such discussion they had regarding the topic," and he points out that in Mr. Butts' interrogatory responses Mr. Butts admits that "he first heard about the [2011] case in January 2012" – several months prior to Mr. Marrs withdrawing from representation of Dr. Keith in the 2009 case – "when [Mr. Butts] was contacted by Jason Ryan who was representing the plaintiff and inquired if [Mr.] Butts could get involved." Dr. Keith also asserts that although the two cases are not "the same," they are "'substantially related' for purposes of

determining potential conflicts under Rule 1.9, Oklahoma Rules of Professional Conduct,"[3] and he asserts "Defendants gained information as a result of representing Dr. Keith in the [2009] case, and in prior cases, that would be useful and relevant to the handling of the [2011] case," "including talking to Dr. Keith about the [2011] case while he was still their client[.]"[4]

¶6 Nevertheless, the parties agree that on October 18, 2012, Mr. Butts and Mr. Marrs entered their appearance for the plaintiff in the 2011 case, that Dr. Keith was represented by other counsel in the 2011 case, and that "Dr. Keith never filed a Motion to Disqualify against [Mr.] Butts, [Mr.] Marrs or Butts & Marrs, P.L.L.C. in the [2011] case which Dr. Keith ultimately settled."

¶7 In October 2014, Dr. Keith filed the present action against Defendants. In Dr. Keith's amended petition, he sets forth theories against Defendants of breach of fiduciary duty, professional negligence/legal malpractice, false representation/deceit, and intentional infliction of emotional distress.

¶8 In January 2018, Defendants filed a motion for summary judgment asserting that

> for two separate reasons Defendants are entitled to summary judgment. First, as a matter of law, a lawyer is free to represent a client adverse to the lawyer's former client in an unrelated matter. Second, Dr. Keith failed to file a motion to disqualify Defendants in the [2011] case, and Dr. Keith is therefore precluded as a matter of law from pursuing this malpractice case.

¶9 At the hearing on the motion for summary judgment, the trial court stated that "these types of fact patterns" in which an attorney represents a new client that is suing the attorney's former client "just at first blush aren't the easiest for this Court to digest"; however, the court emphasized that "there was nothing done to disqualify the firm of Butts & Marrs in the [2011] case." The court stated, "I just think that is a prerequisite." In its order filed on April 20, 2018, the trial court sustained Defendants' motion for summary judgment.

¶10 On April 30, 2018, Dr. Keith filed a motion to reconsider, stating that "[t]he entire reputation of the legal profession, as well as the sanctity of the client's ability to trust their attorney is at stake." He asserted there could be no waiver based on a failure to seek disqualification of Defendants in the 2011 case because "there was no fully informed waiver[.]" Nevertheless, he acknowledged that

> When Dr. Keith found out that [Defendants], his former lawyers, were suing him, he told [his counsel in the 2011 case]. . . . The summary judgment evidence shows [his counsel in the 2011 case] told Dr. Keith there was nothing she could do, and did not move to disqualify Defendants.

Dr. Keith states in his affidavit that his counsel in the 2011 case "advised me . . . it was allowed and that there was nothing that could be done about it." Dr. Keith asserted, however, that

> waiver requires full knowledge and understanding of the facts and rights waived. Taking the facts in Dr. Keith's favor, he is a layperson and does not know or understand his rights, over and above the fact that he does not like his former lawyers suing him. He clearly did not understand, as a matter of law, what he was waiving, so cannot form the intent to waive that right in his mind for summary judgment purposes.[5]

¶11 In its order filed on July 30, 2018, the trial court denied Dr. Keith's motion to reconsider. Dr. Keith appeals.

STANDARD OF REVIEW

¶12 As explained by a separate division of this Court:

> Absent some pure error of law, the trial court's ruling on a motion to reconsider will not be disturbed unless affected by an abuse of discretion. . . . Where, as here, the assessment of the trial court's exercise of discretion in denying a motion to reconsider depends on the propriety of the underlying grant of summary judgment, the abuse-of-discretion question is settled by our *de novo* review of the summary adjudication's correctness. *Reeds v. Walker,* 2006 OK 43, ¶ 9, 157 P.3d 100 . . . .

Waldrop v. Hennessey Utilities Auth., 2014 OK CIV APP 106, ¶ 7, 348 P.3d 213. "Summary judgment is proper only when it appears that there is no substantial controversy as to any material fact, and that one of the parties is entitled to judgment as a matter of law." *Seitsinger v. Dockum Pontiac Inc.*, 1995 OK 29, ¶ 7, 894 P.2d 1077 (citation omitted). *See also* 12 O.S. 2011 § 2056(C).

ANALYSIS

¶13 Defendants state that "Oklahoma does not yet appear to have decided a malpractice case based upon the client's failure to move to disqualify the attorney," but assert that "Oklahoma has held that a client waives his objection to his former attorney's representation by failing to file a motion to disqualify objecting to the adverse representations by his former attorney." Defendants cite to *Deupree v. Garnett*, 1954 OK 110, 277 P.2d 168, which they summarize as holding, in part, that a "client could not defend a suit for attorney's fees on the grounds that his attorney abandoned employment by representing a conflicting party, where [the] client was aware of his attorney's adverse representation and did not object."

¶14 *Deupree* was cited by the Oklahoma Supreme Court in State ex rel. Howard v. Oklahoma Corporation Commission, 1980 OK 96, 614 P.2d 45. The *Howard* Court noted that other courts have stated that the "rule has long been firmly established that an attorney cannot represent conflicting interests or undertake to discharge inconsistent duties," but further stated: "This Court has held to a similar effect in two cases[, including *Deupree*,] *but excused the attorney in each instance because the point was not timely presented.*" *Howard*, ¶ 23 n.6 (emphasis added).[6] The *Howard* Court indicated that the rule against representing conflicting interests exists alongside other rights and interests, including "the right to be represented by counsel . . . whose views are consonant with one's own or who at least will present the client's interests." *Id.* ¶ 23.

¶15 Defendants also cite to *Hayes v. Central States Orthopedic Specialists, Inc.*, 2002 OK 30, 51 P.3d 562, a case which is particularly illuminating because Dr. Keith's primary contention is that Defendants obtained confidential factual information during their representation of Dr. Keith that materially advanced their client's position in the 2011 case.[7] In *Hayes*, an employee who "worked as a secretary" resigned from her employment for two attorneys who were representing a doctor in litigation between that doctor and an orthopedic center. Soon after her resignation, the secretary began working for a lawyer who worked for the law firm that was representing the opposing party – the orthopedic center – in that litigation. Eight months after the secretary's resignation, the two attorneys representing the doctor sent a letter to the law firm representing the orthopedic center requesting that the law firm withdraw from the case. One month later, the doctor filed a motion in the case asking the trial court to require the law firm representing the orthopedic center to withdraw on the basis that, according to the doctor and his counsel, the secretary "worked on documents [while working for the doctor's counsel] containing attorneys' work product and was 'intimately familiar' with documents relating to settlement negotiations between the parties." *Hayes*, ¶ 2. The trial court granted the doctor's motion and disqualified the opposing law firm from any further representation of the orthopedic center in the litigation.

¶16 On appeal, the Oklahoma Supreme Court concluded, in pertinent part, that the trial court erred when it declined to find that the doctor had waived his claim that the orthopedic center's law firm should be disqualified. *Id.* ¶¶ 6-7. The Court stated: "It is our view that the trial court erred in holding that [the doctor] had not waived his right to seek the disqualification of [the opposing law firm] *by waiting eight months to raise the issue.*" *Id.* ¶ 8 (emphasis added).

¶17 Similar to the *Howard* Court's emphasis that a client should ordinarily be allowed to choose its counsel and obtain counsel "whose views are consonant with [the client's] or who at least will present the client's interests," the *Hayes* Court stated as follows:

> We begin our discussion of this issue by observing,
>
> Legal practitioners are not interchangeable commodities. Personal qualities and professional abilities differ from one attorney to another, making the choice of a legal practitioner critical both in terms of the quality of the attorney-client relationship and the type and skillfulness of the professional services to be rendered.

Hayes, ¶ 9 (citation omitted). In *Arkansas Valley State Bank v. Phillips*, 2007 OK 78, 171 P.3d 899, the Oklahoma Supreme Court similarly stated:

> An individual's decision to employ a particular attorney can have profound effects on the ultimate outcome of litigation. Legal practitioners are not interchangeable commodities. Personal qualities and professional abilities differ from one attorney to another, making the choice of a legal practitioner critical both in terms of the quality of the attorney-client relationship and the

> type and skillfulness of the professional services to be rendered.

Id. ¶ 12 (footnotes omitted). The *Hayes* Court explained that, "[t]hus, the barrier a party must surmount to secure the disqualification of his opponent's counsel is high." *Hayes*, ¶ 9.

¶18 In fact, the *Hayes* Court described disqualification of opposing counsel as a "drastic measure," and explained that courts should ensure that motions to disqualify, or delays in filing such motions, "are not used for strategic purposes" or "as procedural weapons." *Id.* ¶ 10 (footnote omitted). The *Hayes* Court explained that "disqualification is such a drastic measure that it should be invoked if, and only if, the Court is satisfied that real harm is likely to result from failing to invoke it." *Id. See also Jensen v. Poindexter*, 2015 OK 49, ¶ 11, 352 P.3d 1201 ("A litigant has a fundamental right to be represented by counsel of his or her choice," but "a litigant's right to choose his or her counsel is not absolute and may be set aside under limited circumstances, where honoring the litigant's choice would threaten the integrity of the judicial process." (internal quotation marks omitted) (citations omitted) (footnote omitted)).

¶19 The *Hayes* Court emphasized that the doctor in that case and his counsel "discussed what to do about the fact [that the secretary] was going to work for the firm that was representing [the orthopedic center] but decided to take no action whatever for eight months," *Hayes*, ¶ 11, and took no action despite the fact that there was a great deal of activity in the case during those eight months in the form of "intense settlement negotiations between the parties," the filing of an amended petition and a second amended petition by the doctor, the filing of an answer and counterclaim by the orthopedic center, and "extensive discovery requests," *id.* ¶ 3.

¶20 Regarding the eight-month delay prior to seeking disqualification, the doctor cited to a decision of the United States Court of Appeals for the First Circuit – *Kevlik v. Goldstein*, 724 F.2d 844 (1st Cir. 1984) – and the *Hayes* Court agreed that the *Kevlik* Court "noted, correctly, that delay alone would not necessarily prejudice the non-moving party." *Hayes*, ¶ 13. The *Hayes* Court further stated: "Here, however, [the doctor and his counsel] remained silent about the disqualification issue during a period of intense settlement negotiations followed by an exchange of pleadings, all of which required [the opposing law firm's] continuing deep involvement in the case and for which [the orthopedic center] had to pay." *Id.* The *Hayes* Court concluded that "[the doctor] waived any right he might have had to disqualify [the opposing law firm]," and was "satisfied that [its] decision declining to disqualify [the opposing law firm] does not threaten the integrity of the judicial process."

Id. ¶ 14 (internal quotation marks omitted) (citation omitted).

¶21 More recently, the Oklahoma Supreme Court has explained:

> While disqualification of counsel is a drastic measure, it is used when necessary to preserve the integrity of the judicial process. The standard for disqualifying counsel is whether real harm to the integrity of the judicial process is likely to result if counsel is not disqualified. This is a high standard to meet and the burden rests with the moving party to establish the likelihood of such harm by a preponderance of the evidence. If disqualification is to be based on an alleged conflict of interest or improper possession of confidential information, then we have required the trial court to hold an evidentiary hearing and make specific findings that the attorney whose disqualification is sought had knowledge of material and confidential information.

Miami Bus. Servs., LLC v. Davis, 2013 OK 20, ¶ 12, 299 P.3d 477 (footnotes omitted). *See also McGee v. Amoco Prod. Co.*, 2019 OK 7, 438 P.3d 355 (mem.). The *Davis* Court also stated that a determination that a counsel should have been disqualified which is made only after a case has concluded would "result[] in an unjustified waste of judicial resources and taxpayer dollars." *Id.* ¶ 13. The Court stated: "This Court has a long history of rejecting the unnecessary waste of judicial resources." *Id.* ¶ 16 (footnote omitted).

¶22 In the present case, it is undisputed that Dr. Keith altogether failed to seek disqualification of Defendants in the 2011 case, a case which ultimately settled. Had Dr. Keith sought disqualification of Defendants in the 2011 case (and if Defendants refused to withdraw), an evidentiary hearing would have been required to have been held in that proceeding to determine whether Defendants "had knowledge of

material and confidential information" relevant to the 2011 case.

Id. ¶ 12.

> Before the trial court can determine that an attorney should be disqualified based on conflict of interest or improper possession of confidential information, it must hold an evidentiary hearing and make a specific factual finding in its order of disqualification that the attorney had knowledge of material and confidential information. This evidentiary hearing is required before any decision on whether to disqualify the attorney can be made.

Id. ¶ 19 (footnotes omitted). Having failed to move for disqualification in the 2011 case, Dr. Keith now essentially seeks a trial, after the fact, on this very issue. Essential to his theories of recovery in his amended petition is his allegation that Defendants "received a wealth of intimate and confidential personal and professional information from Dr. Keith . . . and used that to their economic benefit and to the detriment of Dr. Keith" in the 2011 case – *i.e.*, that Defendants "obtain[ed] confidential information from Dr. Keith as his defense attorneys, and then us[ed] such confidential information to their benefit" in representing the plaintiff in the 2011 case. Dr. Keith asserts, in essence, that Defendants should never have represented the plaintiff in the 2011 case, and he bases all of his theories on the fact that Defendants nevertheless inappropriately served as counsel for the plaintiff.

¶23 In support of his argument, Dr. Keith cites to *Prospective Investment & Trading Company, Ltd. v. GBK Corporation*, 2002 OK CIV APP 113, 60 P.3d 520, but admits that in that case "the plaintiff had sought disqualification of the defendant law firm who had represented another party against the plaintiff and had formerly represented the plaintiff[.]" In fact, in that case the Court explained that the moving party "sought to disqualify [a law firm] from representing [the opposing party] in the instant lawsuit due to [a] conflict of interest. After a full two day evidentiary hearing on the merits and substantial briefing by the parties, the district court entered a . . . well-reasoned and thoroughly researched order," *id.* ¶ 7, in which it

> addressed several competing considerations: balancing [the opposing party's] interest in retaining counsel of its choice against [the moving party's] concern for protection of its confidential information; protecting and upholding the attorney-client relationship and protecting an attorney who is representing a current client against a former client from being accused of wrongdoing; preventing the potential misuse of the disqualification motion as a litigation tactic; and protecting and preserving the attorney-client relationship and client confidences.

Id. ¶ 8. In the present case, by contrast, Dr. Keith failed to seek disqualification of Defendants in the 2011 case, and the parties in the 2011 case were provided with no such opportunity in that action to resolve the fundamental issue which Dr. Keith now seeks to litigate in this new action.

¶24 We conclude Dr. Keith waived this fundamental issue by failing to move for disqualification in the 2011 case.[8] As stated by the trial court, "We might not be here today if that had been done then." Dr. Keith asserts that he did not have full knowledge and understanding of the facts and rights waived because, in essence, he was provided with, and followed, what he clearly now views as faulty legal advice from his attorney at the time. However, it is undisputed that certain key events, including Dr. Keith's alleged conversations regarding the 2011 case with Defendants prior to Mr. Marrs withdrawing as Dr. Keith's counsel in the 2009 case, and Dr. Keith being made aware in October 2012 that Defendants "were representing the plaintiff in the [2011] case against [him]," occurred either prior to or during the pendency of the 2011 case. Dr. Keith even admits he discussed with his counsel during the pendency of the 2011 case whether "it was permissible" for Defendants, who formerly served as his counsel, to represent the plaintiff in the 2011 case, and he admits his counsel advised him that "there was nothing that could be done about it." We are not persuaded by Dr. Keith's argument that he, or his counsel at the time, lacked sufficient knowledge and understanding of the facts to excuse their failure to seek disqualification based on a potential conflict.[9]

¶25 Thus, we conclude that in failing to timely seek disqualification of Defendants in the 2011 case, Dr. Keith not only waived the issue of disqualification but also waived his ability to assert theories of recovery based entirely on his assertion that Defendants improperly represented the plaintiff in the 2011 case. Dr. Keith states in his response to the

motion for summary judgment that Defendants improperly represented the plaintiff in the 2011 case, that Defendants, in representing that plaintiff, represented "someone whose interests are materially adverse to [a] former client," and that Defendants violated the Oklahoma Rules of Professional Conduct because the 2011 case was "a substantially related matter" under Rule 1.9 of the Oklahoma Rules of Professional Conduct. Dr. Keith argues that a comment to Rule 1.9 "clearly sets forth that . . . knowledge" of the type he asserts Defendants obtained from him "would create a conflict that should have prevented Defendants from representing [the plaintiff in the 2011 case]." These issues clearly would have been resolved had a motion to disqualify been timely filed.

¶26 Dr. Keith further asserts that a breach of fiduciary duty by a lawyer "may give rise to liability to a client, independent of any legal malpractice or ethical rules," but, once again, the basis of this theory, like the basis of his deceit and intentional infliction of emotional distress theories, is that Defendants improperly represented the plaintiff in the 2011 case. Dr. Keith waived any objection to this underlying occurrence, and in waiving objection to Defendants' representation of the plaintiff in the 2011 case, we conclude Defendants' representation of the plaintiff in the 2011 case is unavailable as a basis for the theories asserted in the present action, theories which are founded upon the existence of Defendants' representation to which Dr. Keith is deemed to have consented.[10]

¶27 Consistent with the Oklahoma Supreme Court's "long history of rejecting the unnecessary waste of judicial resources," *Davis*, 2013 OK 20, ¶ 16, and consistent with the interest of preserving the integrity of the judicial process, which was not questioned in the 2011 case in the form of a motion for disqualification, we conclude the trial court properly entered summary judgment in favor of Defendants.

CONCLUSION

¶28 We affirm the trial court's order denying Dr. Keith's motion to reconsider the trial court's order granting summary judgment to Defendants.

¶29 AFFIRMED.

WISEMAN, V.C.J., and RAPP, J., concur.

DEBORAH B. BARNES, PRESIDING JUDGE:

1. According to the docket sheet in the appellate record, the other named Defendants in this action were dismissed without prejudice in 2017.

2. Mr. Marrs filed his motion to withdraw as counsel for Dr. Keith on June 18, 2012. Dr. Keith asserts, however, that he "did not receive any letters from Defendants regarding their motion to withdraw or the order allowing withdrawal."

3. 5 O.S. 2011, ch. 1, app. 3-A.

4. (Emphasis omitted.)

5. Dr. Keith also asserted that Defendants "caused [Dr. Keith] to be sued, trumped up a bogus excuse to withdraw, joined the lawsuit against Dr. Keith, and managed to stuff their pockets with $242,177.56 as a result." In support of these particular assertions, Dr. Keith cited only to the following statement in Mr. Butts' interrogatory responses: "[T]he law firm of Butts & Marrs, P.L.L.C. earned $242,177.56 in fees in the [2011] case."

6. The other of the two cases to which the Court referred is *Suttle v. Chadwell*, 1945 OK 356, 164 P.2d 880.

7. Dr. Keith states in his affidavit that prior to Mr. Marrs' withdrawal from the 2009 case, Dr. Keith "had numerous discussions with him about information concerning the [2011] case as well as other issues such as personal information concerning my financial information and asset management, as well as my personal medical history."

8. Waiver is defined as "[t]he voluntary relinquishment or abandonment – express or implied – of a legal right or advantage[.]" *Black's Law Dictionary* (11th ed. 2019).

9. Dr. Keith states elsewhere that

> Defendants have failed to meet their burden to prove as a matter of law that Dr. Keith *knowingly* chose not to file a Motion to Disqualify them from representing [the plaintiff in the 2011 case], nor that he was aware that such representation constituted a conflict that would have supported such disqualification[.]

(Emphasis in original.) Dr. Keith also states "he *did* object as soon as he found out about it, but that [his counsel in the 2011 case] told him that it was permissible[.]" (Emphasis in original.) Dr. Keith attempts to separate his knowledge from that of his lawyer in the 2011 case, claiming personal ignorance as to the legal issues and consequences. However, "while [a] lawyer continues to hold the status as counsel of record, it is the lawyer alone who holds the position of magister litis – the master of the client's litigation." *Watson v. Gibson Capital, L.L.C.*, 2008 OK 56, ¶ 8, 187 P.3d 735 (footnote omitted). "Clients possess unlimited power to discharge a lawyer," *id.*, but until that occurs, "a party who is represented by an attorney of record will not be recognized by the court as an actor *in propria persona* in the conduct of his own case," *id.* ¶ 9. Any complaint regarding the legal services provided to Dr. Keith during the 2011 case would need to be directed at Dr. Keith's counsel in the 2011 case and is not material to our analysis here.

10. In addition to the Oklahoma cases discussed above, *see Grant v. Thirteenth Court of Appeals*, 888 S.W.2d 466, 468 (Tex. 1994) (A party that fails to seek disqualification in a timely manner waives any complaint regarding the representation.); *NCNB Texas Nat. Bank v. Coker*, 765 S.W.2d 398, 399 (Tex. 1989) ("A motion to disqualify counsel is the proper procedural vehicle to challenge an attorney's representation …."); *In re Estate of Gillies*, 830 So. 2d 640, 649 (Miss. 2002) (Where "the potential conflict was apparent early on in the action," and the complaining party was "at all times represented by separate counsel who failed to object to the conflict," that party "is not to be permitted to hold [the] issue in reserve for tactical purposes until it would be most helpful to its position," and it "waived this issue by failing to seek . . . disqualification when the conflict became apparent."); *Wilbourn v. Stennett, Wilkinson & Ward*, 687 So. 2d 1205, 1217 (Miss. 1996) ("The client cannot hold the right in reserve for tactical purposes until it would be most helpful to his position. Failure to move for disqualification at the earliest practical opportunity will constitute a waiver." (citation omitted)); *Tr. Corp. of Montana v. Piper Aircraft Corp.*, 701 F.2d 85, 87 (9th Cir. 1983) ("[T]he former client may expressly or impliedly waive his objection and consent to the adverse representation," and "[i]t is well settled that a former client who is entitled to object to an attorney representing an opposing party on the ground of conflict of interest but who knowingly refrains from asserting it promptly is deemed to have waived that right."); *Cent. Milk Producers Co-op. v. Sentry Food Stores, Inc.*, 573 F.2d 988, 992 (8th Cir. 1978) ("This court will not allow a litigant to delay filing a motion to disqualify in order to use the motion later as a tool to deprive his opponent of counsel of his choice after substantial preparation of a case has been completed," and a litigant who fails to timely object "waive[s] their right to object to the hiring of [that counsel].").

Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS
Thursday, June 27, 2019

RE-2018-0366 — Appellant, Adrian David Ray Gerdon, pled guilty on June 21, 2016, in the following cases in the District Court of Pottawatomie County:

CF-2015-820: Count 1 – Domestic Assault and Battery by Strangulation and Count 3 – Threaten to Perform Act of Violence. He was sentenced to three years suspended and fined $250.00 on Count 1, and fined $100.00 on Count 3.

CF-2015-925: Count 1 – Burglary in the First Degree and Count 2 – Domestic Assault and Battery Resulting in Great Bodily Harm. He was sentenced to twelve years and a $250.00 fine on Count 1 and five years and a $250.00 fine on Count 2.

CF-2016-94: Count 1- Assault with a Dangerous Weapon; Count 2 – Larceny From the House; Count 3 – Unauthorized Use of a Vehicle; and Count 4 – Domestic Abuse – Assault and Battery. He was given a ten year suspended sentence on Count 1, 5 years suspended on Counts 2 and 3, and one year suspended on Count 4.

CF-2016-150: Count 1 – Bringing Contraband (Drugs) Into Jail/Penal Institution and Count 2 – Possession of Controlled Dangerous Substance. He was given a five year suspended sentence in each count.

CF-2016-245: Count 1 – Domestic Assault and Battery By Strangulation and Count 2 – Interference with Emergency Telephone Call. He was sentenced to three years suspended and a $250.00 fine on Count 1 and fined $100.00 on Count 2.

Appellant was given credit for time served and all cases and all counts were ordered to run concurrently. The State filed a second motion to revoke Appellant's suspended sentences on November 2, 2017. Following a revocation hearing Appellant's suspended sentences were revoked in full. Appellant appeals the revocation of his suspended sentences. AFFIRMED. Opinion by: Kuehn, V.P.J.: Lewis, P.J.: concur; Lumpkin, J.: concur; Hudson, J.: concur; Rowland, J.: concur.

F-2018-91 — Ray Roger Jordan, Appellant, was tried by jury for the crime of First Degree Malice Aforethought Murder, after former conviction of two or more felonies in Case No. CF-2015-629 in the District Court of Wagoner County. The jury returned a verdict of guilty and recommended as punishment life imprisonment with the possibility of parole. The trial court sentenced accordingly. From this judgment and sentence Ray Roger Jordan has perfected his appeal. AFFIRMED. Opinion by: Kuehn, V.P.J.; Lewis, P.J., concur; Lumpkin, J., concur; Hudson, J., concur; Rowland, J., concur.

RE-2018-89 — Brandon Christopher Looney, Appellant, appeals from the revocation of his twenty year suspended sentence in Case No. CF-2016-143 in the District Court of Garvin County, by the Honorable Steven C. Kendall, Associate District Judge. AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs.

F-2018-411 — Before the Court is Appellant Joey Elijo Adames' joint direct appeal and revocation appeal. The two cases are related insofar as the commission of the offenses challenged in his direct appeal served as the basis for the revocation of his suspended sentences in his revocation appeal. Specifically, he appeals his Judgment and Sentence from the District Court of Canadian County, Case No. CF-2017-256, for Conspiracy to Distribute a Controlled Dangerous Substance (Count 1), and Unlawful Possession of a Firearm by a Convicted Felon (Count 3), each after former conviction of two or more felonies. The Honorable Paul Hesse, District Judge, presided over Adames' jury trial and sentenced him, in accordance with the jury's verdict, to thirty-five years imprisonment on Count 1 and ten years imprisonment on Count 3. Judge Hesse ordered the sentences to be served consecutively. Adames also appeals his order of revocation from the District Court of Canadian County, Case No. CF-2015-112, on two counts of Domestic Assault and Battery with a Dangerous Weapon, After Former Conviction of Two or More Felonies (Counts 1 & 2) and one count of Possession of a Controlled Dangerous Substance

(misdemeanor). Following the entry of a negotiated plea of guilty to the charges, the district court sentenced Adames to six years imprisonment on each of Counts 1 and 2 and to one year imprisonment on Count 3, with all of the sentences suspended. The State sought to revoke the suspended sentences based upon Adames' commission of the crimes alleged in Case No. CF-2017-256. At the formal sentencing hearing in Case No. CF-2017-256, Judge Hesse revoked in full the suspended sentences imposed in CF-2015-112 and ordered the revoked sentences to be served concurrently with the sentences in CF-2017-256. Joey Elijo Adames has perfected his appeal. AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs in results; Hudson, J., concurs.

F-2017-1099 — Willie Donnell Jackson, 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 Jackson to life imprisonment with the possibility of parole. From this judgment and sentence, Willie Donnell Jackson has perfected his appeal. AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs; Rowland, J., Concurs.

C-2018-834 — Tammera Rachelle Baker, Petitioner, entered a blind plea of guilty to first degree manslaughter in Case No. CJ-2017-157 in the District Court of Delaware County. The Honorable Robert G. Haney accepted the plea and found Petitioner guilty. The Honorable Barry V. Denny later sentenced Petitioner to thirty years imprisonment with ten years suspended and a $1,000.00 fine. Petitioner filed an application to withdraw the plea, which was denied. Petitioner, Tammera Rachelle Baker, 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.

F-2018-646 — Ashley Dawn Bost, Appellant, was tried by jury, in Case No. CF-2015-94, in the District Court of LeFlore County, for the crimes of Count 1: Trafficking in Illegal Drugs – Methamphetamine; Count 2: Possession of a Controlled Dangerous Substance – Oxycodone; Count 3: Possession of a Firearm During the Commission of a Felony; and Count 4: Unlawful Possession of Drug Paraphernalia. The jury returned a verdict of guilty and recommended as punishment six years imprisonment on Count 1, two years imprisonment and a $2,500.00 fine on Count 2, two years imprisonment and a $1,000.00 fine on Count 3, and a $1,000.00 fine on Count 4. The Honorable Jonathan Sullivan, District Judge, sentenced Bost in accordance with the jury's verdicts. Judge Sullivan also ordered that Counts 1, 2 and 3 run consecutively each to the other. The court further imposed various costs and fees. From this judgment and sentence, Ashley Dawn Bost has perfected her appeal. AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs; Rowland, J., Concurs.

Thursday, July 11, 2019

F-2018-284 — Carl Wayne Gundrum, Jr., Appellant, was tried by jury for the crimes of Count 1, first degree rape, and Count 2, lewd acts with a child under 16 in Case No. CF-2016-739 in the District Court of Cleveland County. The jury returned a verdict of guilty and set punishment at thirty years imprisonment on Count 1 and twenty years imprisonment on Count 2. The trial court sentenced accordingly and ordered the sentences to be served consecutively. From this judgment and sentence Carl Wayne Gundrum, Jr. has perfected his appeal. The Judgment and Sentence is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs in results; Hudson, J., concurs; Rowland, J., concurs.

RE-2018-0144 — Appellant, Julius Lamar Wright, entered a plea of guilty in the District Court of Oklahoma County, Case No. CF-2009-228, to Count 1 – Possession of a Controlled Dangerous Substance With Intent to Distribute (Marijuana) and Count 2 – Possession of Drug Paraphernalia. On April 28, 2009, Appellant received a five year deferred sentence on each count. On March 6, 2012, Appellant pled guilty to the State's allegations in the application to accelerate his deferred sentences. He was sentenced to ten years suspended except for the first five years on Count 1 and one year in the Oklahoma County Jail on Count 2. The sentences were ordered to run concurrently with each other and with CF-2011-1457. Appellant was charged with Domestic Abuse by Strangulation on December 9, 2015, in Oklahoma

County District Court Case No. CF-2015-8860. Appellant entered a plea of no contest and was given a ten year suspended sentence with rules and conditions of probation. The sentence was ordered to run concurrent with CF-2009-228 and CF-2011-1457, with credit for time served. On June 29, 2017, the State filed a motion to revoke Appellant's suspended sentences in Case Nos. CF-2009-228 and CF-2015-8860. Following a revocation hearing on January 31, 2018, Appellant's suspended sentences in both cases were revoked in full. Appellant appeals the revocation of his suspended sentences. The revocation of Appellant's suspended sentences is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J.: Concur; Lumpkin, J.: Concur; Hudson, J.: Concur; Rowland, J.: Concur.

M-2018-335 — Sydni Michelle Dunn, Appellant, appeals from her misdemeanor judgment and sentence entered after a non-jury trial before the Honorable Edward Hasbrook, Municipal Judge, in Case No. 17-3923013 in the Municipal Court of the City of Oklahoma City. Appellant was convicted of Dangerous Animal and was sentenced to a fine of $400.00. AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs in results; Hudson, J., concurs.

F-2018-336 — Donnie Graham, Appellant, was tried by jury for the crime of first degree rape in Case No. CF-2016-446 in the District Court of Comanche County. The jury returned a verdict of guilty and set punishment at fifteen years imprisonment and a $1,000.00 fine. The trial court sentenced accordingly. From this judgment and sentence Donnie Graham has perfected his appeal. The Judgment and Sentence is MODIFIED to include a term of three years post imprisonment community supervision and otherwise AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs; Rowland, J., specially concurs.

F-2018-595 — Garret Taylor Mankin, Appellant, was tried and convicted in a nonjury trial, in Case No. CF-2015-347, in the District Court of Pontotoc County, of two counts of Lewd Acts with a Child Under Twelve. The Honorable C. Steven Kessinger, District Judge, sentenced Appellant to twenty-five years imprisonment on each count, with the last five years of both sentences suspended. Judge Kessinger also ordered the sentences to run concurrently with each other. The court further imposed various fines, fees, and costs. From this judgment and sentence, Garret Taylor Mankin has perfected his appeal. AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs; Rowland, J., Concurs.

S-2018-1026 — On April 4, 2018, Appellee Nicholas Lowell Turner was charged with two counts of Unlawful Possession of a Controlled Drug with Intent to Distribute (Counts I and II); Possession of a Firearm While in Commission of a Felony (Count III); Acquire Proceeds from Drug Activity (Count IV); Possession of a Controlled Drug Without Tax Stamp Affixed (Count V); and Unlawful Possession of Drug Paraphernalia (Count VI), in the District Court of Tulsa County, Case No. CF-2018-1235. On June 18, 2018, the Appellee filed Defendant's Motion to Suppress Evidence Obtained from Search Warrant and to Dismiss Case arguing the "affidavit failed to allege probable cause as required by constitution, statute, and case law." On July 17, 2018, a hearing was held before the Honorable Deborah Ludi Leitch, Special Judge. After hearing arguments, Judge Leitch denied the motion to suppress finding that the affidavit for the search warrant was deficient, but that the search warrant itself survived under the good faith exception to the exclusionary rule. The Appellee subsequently waived his rights to a Preliminary Hearing and was bound over for District Court Arraignment before the Honorable James Caputo, District Judge. Appellee re-urged his Motion to Suppress before Judge Caputo. After a hearing held on September 25 and 27, 2018, Judge Caputo sustained the Motion to Suppress, finding that the good faith exception to the exclusionary rule did not apply. The State announced its intent to appeal pursuant to 22 O.S.2011, § 1053(5). The ruling of the District Court granting the Motion to Suppress is REVERSED and the case is remanded to the District Court for further hearings proceedings consistent with this opinion. The State's Application for Oral Argument is DENIED. Opinion by: Lumpkin, J.; Lewis, P.J., Specially Concur; Kuehn, V.P.J., Concur; Hudson, J., Concur; Rowland, J., Concur.

S-2018-164 — Don Arneilus Ingram, Appellee, was charged in the District Court of Oklahoma County, Case No. CF-2016-5581, with Count 1: Trafficking in Illegal Drugs; Count 2: Felon in Possession of a Firearm; and Count 3: Possession of Proceeds Derived from a Violation of the Uniform Controlled Dangerous

Substances Act. The State alleged that these felony crimes were all committed by Ingram after former conviction of two or more felonies. Ingram waived preliminary hearing and was bound over on all three counts. Ingram thereafter filed a motion to quash for insufficient evidence and to suppress evidence arising from his detention and from the search of his car. The State filed a responsive pleading opposing Ingram's motion. After a hearing before the Honorable Michele D. McElwee, District Judge, Ingram's motion to suppress was granted. Appellant, the State of Oklahoma, now appeals. The District Court's order sustaining Appellee's motion to suppress is REVERSED and this case is REMANDED for further proceedings not inconsistent with this Opinion. Opinion by: Hudson, J.; Lewis, P.J., Concur in Results; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs; Rowland, J., Concurs.

COURT OF CIVIL APPEALS
(Division No. 1)
Tuesday, July 9, 2019

116,848 — Tanya Jones, Petitioner/Appellee, vs. Bruce Jones, Respondent/Appellant. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Anthony Miller, Trial Judge. Father appeals the trial court decree in which, among other things, the trial court awarded sole custody of Child to Mother and awarded Father visitation on alternating weekends on Sundays from 9:00 a.m. to 5:00 p.m. and Wednesdays from 5:30 p.m. to 8:30 p.m. In a divorce action, the trial court is vested with discretion in awarding custody and visitation. The best interest of the child must be a paramount consideration of the trial court when determining custody and visitation. On issues regarding the best interest of the child, the standard of review is whether the decision of the trial court is against the clear weight of the evidence or an abuse of discretion. We AFFIRM the order of the trial court. Opinion by Goree, C.J.; Joplin, P.J., and Buettner, J., concur.

116,962 — In Re Matter of L Dillard Dale "Bo" Johnston, Petitioner/Appellant, v. Jennifer Faye Cherry, Respondent/Appellee. Appeal From the District Court of Beckham County, Oklahoma Honorable F. Pat Versteeg, Judge. Petitioner/Appellant Dillard Dale "Bo" Johnston (Father) appeals from the trial court's order granting his motion to modify child support. Father challenges the trial court's computation of child support based on income in excess of the child support guidelines. Respondent/Appellee Jennifer Faye Cherry (Mother) asserts the trial court correctly determined child support. The record on appeal does not show that the trial court's decision is against the clear weight of the evidence or an abuse of discretion and we AFFIRM. Opinion by Buettner, J.; Goree, C.J., and Joplin, P. J., concur.

117,220 — Wells Fargo Bank, N.A., Plaintiff/Appellee, v. Don R. Germany and Pamela L. Germany, Defendants/Appellants. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Richard Ogden, Trial Judge. In a foreclosure action, homeowners Don R. and Pamela L. Germany, Defendants/Appellants, appeal summary judgment in favor of Wells Fargo Bank, N.A. (Wells Fargo), Plaintiff/Appellee, alleging Plaintiff lacks the requisite standing. The note is lost; Wells Fargo does not have possession of the instrument and attempts to show it is a person entitled to enforce pursuant to 12A O.S. §3-309. To demonstrate its entitlement to enforce the lost note by means of §3-309(a)(1)(B), Wells Fargo must make, among others, a prima facie showing of ownership. In the evidentiary materials presented, Wells Fargo does not claim or demonstrate it acquired ownership of the instrument. It has not presented documentation sufficient to demonstrate it was a person entitled to enforce the instrument at the time it commenced the action. Therefore, Wells Fargo failed to meet its burden to show standing. Reversed and remanded. Opinion by Goree, C.J.; Joplin, P.J., and Buettner, J., concur.

117,227 — In Re Estate of Flora Nell Smith: Floyd Smith, Petitioner/Appellee, v. Dennis L. Smith, Sr., Appellant. Appeal from the District Court of Oklahoma County, Oklahoma. Flora Nell Smith (Decedent) passed away March 5, 2015. One of Decedent's sons, Floyd Smith (Floyd), petitioned for the probate of Decedent's will allegedly executed August 19, 2003 (the Will). Floyd did not possess an original copy of the Will. Another of Decedent's sons, Dennis Smith (Dennis), claimed to possess an original copy of the Will. The court appointed Floyd as personal representative of the Decedent's estate and ordered that Dennis produce the original Will. Dennis did not produce the Will and the court issued Letters of Administration determining heirs of the estate under the law of intestacy. Dennis appeals. We AFFIRM trial court's order. Opinion by Buettner, J.; Goree, C.J., and Joplin, P. J., concur.

117,523 — Luttrell Concrete Construction, Petitioner/Appellant, v. Adam Swinburne and The Workers' Compensation Court of Existing Claims, Respondents/Appellees. Proceeding to review an order of a three-judge panel of the Workers's Compensation Court of Existing Claims. Appellee Adam Swinburne (Swinburne) was injured on the job at his place of employment, Luttrell Concrete Construction (Employer), resulting in the partial amputation of his right ring finger. Two revision surgeries were performed on the finger. Swinburne continued to complain of pain in the finger, but was released from the care of his treating physician "at full duty without restriction." A court-appointed doctor then examined Swinburne and suggested he undergo additional surgery in an effort to alleviate some of his symptoms. The trial court affirmed the court-appointed doctor's conclusions and determined that Swinburne had sustained an injury to his right hand as a result of the workplace incident. Employer appealed and the Workers' Compensation Court of Existing Claims En Banc affirmed the trial court. Employer appeals. We VACATE the panel's order. Opinion by Buettner, J.; Goree, C.J., and Joplin, P.J., concur.

Friday, July 12, 2019

117,662 — Dale B. Smith, Plaintiff/Appellee, v. Linda Bailey-Wall, Trustee of the Charles C. Bailey or Esther E. Bailey Trust No. 956745096, Defendant, and John W. Hardzog, Intervenor Plaintiff/Counter-Defendant/Appellant, v. Dale B. Smith, Intervenor Defendant/Counter-Claimant/Appellee, and Linda Bailey, Trustee of the Charles C. Bailey or Esther E. Bailey Trust, No. 956745096, Defendant. Appeal from the District Court of Comanche County, Oklahoma. Honorable Scott D. Meaders, Judge. Intervenor/Counter-Defendant/Appellant John W. Hardzog appeals from summary judgment granted to Plaintiff/Counter-Claimant/Intervenor Defendant/Appellee Dale B. Smith. After Defendant Linda Bailey-Wall, as Trustee of the Charles C. Bailey or Esther E. Bailey Trust No. 956745096 (Trustee or Trust) entered an agreement to sell real property to Hardzog, Trust's tenant, Smith, asserted that he had a contractual right of first refusal to purchase the property and that Trustee had breached that right by entering the agreement with Hardzog. Trustee did not answer and was therefore found to be in default. Hardzog asserted he had an equitable interest in the property and sought to intervene to argue Smith did not have a right of first refusal because his lease had expired. The trial court allowed Hardzog to intervene, but ultimately found that Smith's lease was renewed on the same terms when Trustee accepted his yearly rent payment. The trial court found Smith had a first right of refusal and was entitled to specific performance by Trust. After *de novo* review, we find there is no substantial controversy as to any material fact, and Smith was entitled to judgment as a matter of law. Because we find no reversible errors of law and the trial court's Journal Entry of Judgment sets forth extensive findings of fact and conclusions of law adequately explaining its decision, we AFFIRM under Oklahoma Supreme Court Rule 1.202(d), 12 O.S. 2011 Ch. 15, App. 1. Opinion by Buettner, J.; Goree, C.J., and Joplin, P.J., concur.

(Division No. 2)
Tuesday, June 25, 2019

116,398 — In the Marriage of: Sarah Walter, now Jordan, Petitioner/Appellee, vs. Chris Walter, Respondent/Appellant. Appeal from Order of the District Court of Seminole County, Hon. Timothy L. Olsen, Trial Judge. Appellant Chris Walter appeals the district court's order modifying child support. After review of the record, we conclude that the district court's order modifying child support was not against the clear weight of the evidence and, therefore, not an abuse of discretion. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Fischer, P.J., Goodman, J., and Thornbrugh, J., concur.

116,333 — In re the Marriage of Savannah Momilani Tolbert, Petitioner/Appellee, vs. Barry Eugene Tolbert, Respondent/Appellant. Appeal from an Order of the District Court of Comanche County, Hon. Gerald Neuwirth, Trial Judge. Father appeals from a trial court divorce decree that awarded to Mother the primary custody of the couple's minor Child. He also seeks review of trial court decisions dismissing the parties' protective orders against each other and refusing to enter a "no-contact" order prohibiting Mother from contact with a third party. We find no legal error in the court's decision to award primary custody to Mother. We reject Father's claim that he was entitled to a presumption that custody was proper in him and that Mother failed to rebut that presumption. Further, the court's dismissal of the protective orders and its refusal to enter a no-contact order were not abuses of discretion, given the insufficiency of evidence to support those

matters. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Thornbrugh, J.; Fischer, P.J., and Goodman, J., concur.

116,232 — Tim Elliott, an individual; Equine Sports Medicine & Surgery Weatherford Division, PLLC, a Texas professional limited liability company; Absolute Waste Systems, LLC, an Oklahoma limited liability company, and Oklahoma Loan Collection, LLC, an Oklahoma limited liability company, Plaintiffs/Appellees, vs. Robert Williams, an individual, and Jon Brown, an individual, Defendants/Appellants, and Marcia M. Williams, an individual, and Shelli D. Brown, an individual, Defendants. Appeal from Order of the District Court of Grady County, Hon. Michael C. Flanagan, Trial Judge. Appellant Jon Brown filed a Notice of Pendency of Action (Lis Pendens) involving real property which was the subject of a separate quiet title action. The district court entered an order releasing and discharging lis pendens. A division of this Court affirmed the district court's order quieting title to the real property in favor of Tim Elliott. The resolution of the ownership of the real property fully resolves, adjudicates, and renders moot the issue presented in this appeal. APPEAL DISMISSED AS MOOT. Opinion from the Court of Civil Appeals, Division II, by Fischer, P.J., Goodman, J., and Thornbrugh, J., concur.

Wednesday, June 26, 2019

116,964 — Multiple Injury Trust Fund, Petitioner, vs. Anita Mills and the Workers' Compensation Court of Existing Claims, Respondents. Proceeding to Review an Order of the Workers' Compensation Court of Existing Claims, Hon. Michael W. McGivern, Trial Judge. The Multiple Injury Trust Fund (Fund) seeks review of an order of a three-judge panel of the Workers' Compensation Court of Existing Claims, which affirmed the trial court's award of permanent total disability (PTD) in favor of Claimant Anita Mills. The Fund has preserved these issues for review: (1) whether Claimant met her burden of establishing an obvious and apparent injury that would qualify her as a physically impaired person prior to her September 2011 injury and authorize jurisdiction to proceed against the Fund; and (2) whether the Workers' Compensation Court erred in combining Claimant's injuries, the *Crumby* finding of pre-existing psychological injury and the back and hand injuries, to render Claimant permanently and totally disabled. The Oklahoma Supreme Court has explained that "if a claimant can otherwise meet one of the threshold requirements of a physically impaired person, then 'a *Crumby* finding of preexisting disability may be combined with other impairments in determining whether an employee is permanently totally disabled and entitled to an award against the Fund.'" *Multiple Injury Trust Fund v. Tweedy*, 2018 OK 81, ¶ 2, 429 P.3d 996 (quoting *Multiple Injury Trust Fund v. Sugg*, 2015 OK 78, ¶ 11, 362 P.3d 222). The Workers' Compensation Court of Existing Claims found that Claimant was a physically impaired person due to an obvious and apparent injury to her right hand that pre-existed her last job-related injury on September 14, 2011. Based on that finding, the Court had jurisdiction, pursuant to 85 O.S.2011 § 402(A)(3), to award Claimant benefits against the Fund. The Court further found Claimant was permanently and totally disabled due to combination of her impairments and, based on those findings, the Court ordered the Fund to pay Claimant PTD compensation. The panel's order is not contrary to law or against the clear weight of the evidence. Opinion from Court of Civil Appeals, Division II by Fischer, P.J.; Goodman, J., and Thornbrugh, J., concur.

Monday, July 1, 2019

115,366 — Richard Presley and Lonnette Presley, Plaintiffs/Appellants, vs. Scott Looper and Jimsie Looper, Defendants/Appellees. Appeal from an order of the District Court of Sequoyah County, Hon. Matt Orendorff, Trial Judge, granting Scott and Jimsie Looper's demurrer to the evidence. The primary issue is whether the trial court erred in concluding that the Loopers were entitled to judgment after the Presleys' presentation of evidence at trial. The Presleys' petition asserted a claim of adverse possession of a rectangle of property that the Presleys assert was part of Lot 33 purchased from Ralph King in 1988. They brought suit against the Loopers as subsequent purchasers of an adjacent piece of King's property. We conclude the Loopers' demurrer to the evidence was properly granted as to the Presleys' adverse possession claim. The Presleys, however, presented sufficient evidence to meet the elements of their claims of boundary by acquiescence and mutual mistake, and it was error to grant judgment in favor of the Loopers on these issues. We affirm the trial court's decision in part, reverse in part, and remand for further proceedings consistent with the Opinion. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEED-

INGS. Opinion from the Court of Civil Appeals, Division II, by Wiseman, P.J.; Thornbrugh, C.J., and Fischer, J., concur.

Monday, July 8, 2019

117,151 — Joey Allen Watkins, Plaintiff/Appellant, vs. HRT Transport, Inc., Defendant/Appellee. Proceeding to review a judgment of the District Court of Le Flore County, Hon. Jonathan K. Sullivan, Trial Judge. Joey Allen Watkins appeals the district court's dismissal of his suit against HRT Transport, Inc. alleging retaliatory discharge against public policy. Watkins sued, alleging that he had been discharged in retaliation for seeking unemployment compensation during a furlough. The trial court found that Watkins had not been "discharged" because it was not possible to collect unemployment benefits while "employed." This conclusion contravenes 40 O.S. 20011 § 1-217, and 40 O.S. § 2-105.1, which clearly contemplate eligibility for unemployment benefits during a furlough. Because of this decision, the trial court did not go on to analyze whether such a dismissal contravenes public policy. The question of law before the district court is whether terminating an employment relationship in retaliation for an employee seeking unemployment compensation during a furlough offends the public policy of this State. We reverse the dismissal of Plaintiff's case and remand this matter for determination of this question by the trial court. REVERSED. Opinion from Court of Civil Appeals, Division II, by Thornbrugh, J.; Fischer, P.J., concurs, Goodman, J., dissents.

Friday, July 12, 2019

116,788 — Avaya, Inc., Petitioner, vs. David Hediger and the Workers' Compensation Court of Existing Claims, Respondents. Proceeding to review an Order of a Three-Judge Panel of the Workers' Compensation Court of Existing Claims, Hon. Carla Snipes, Trial Judge. Employer seeks review of the panel's order which vacated the trial court's order granting Claimant David Hediger's requests for continuing medical maintenance and change of physician following a finding of change of condition for the worse, but denying his request for additional permanent partial disability. The panel, without further explanation or comment, found the trial court's order was "contrary to law AND against the clear weight of the evidence." The trial court's order contained five numbered paragraphs. The panel did not specifically identify any single paragraph it may have intended to vacate. On its face, the panel's order leaves no part of the trial court's order intact, including paragraph 5, which orders Employer to provide Claimant with continuing medical maintenance and designates a continuing medical maintenance physician, and to which Employer has not objected. The order of the three-judge panel is too indefinite and uncertain to afford meaningful review by this Court. VACATED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division II by Fischer, P.J.; Goodman, J., and Thornbrugh, J., concur.

115,743 — Lewis R. Metcalf, Petitioner/Appellee, vs. Bonnie I. Watson Metcalf, Respondent/Appellant. Appeal from Order of the District Court of Grady County, Hon. John E. Herndon, Trial Judge. Appellant Bonnie Metcalf appeals those portions of the Decree of Dissolution of Marriage establishing the separation date, granting certain separate property to Lewis Metcalf, and denying her request for support alimony. The district court's determination of the separation date is not against the clear weight of the evidence. Further, there was sufficient evidence before the district court to support its finding that Lewis did not intend to gift the property to Bonnie and it was not error for the court to award the property to Lewis as separate property. Finally, the district court acted within its discretion to weigh the evidence presented and determine that an award of alimony was not warranted. The Decree of Dissolution of Marriage is affirmed. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Fischer, P.J.; Goodman, J., and Thornbrugh, J., concur.

(Division No. 3)
Thursday, June 27, 2019

115,257 — (Comp. w/115,913) City of Henryetta, and Henryetta Municipal Authority, Plaintiffs/Appellants, vs. Wynn Construction, Defendant/Appellee, and NRS Inc., fka Mehlburger Brawley, Robert D. Vaughan, Jackson & Jackson Engineering, Inc., and John Derek Jackson, Defendants. Appeal from the District Court of Okmulgee County, Oklahoma. Honorable Ken Adair, Trial Judge. In this multi-claim, multi-party breach of contract and negligence action, Appellants City of Henryetta and Henryetta Municipal Authority appeal separate trial court orders granting the motion for arbitration filed by Defendant Wynn Construction Inc., denying their motion to vacate the award, and granting Wynn's motions to confirm the

arbitration award. They seek review of post-arbitration attorney fee award in the trial court's final judgment on the arbitration award. We AFFIRM IN PART, REVERSE IN PART, AND REMAND FOR FURTHER PROCEEDINGS. Opinion by Swinton, J. Mitchell, P.J., concurs; Bell, J., concurs in result.

115,913 — (Comp. w/115,257) City of Henryetta, and Henryetta Municipal Authority, Plaintiffs/Appellants, vs. Wynn Construction, Defendant/Appellee, and NRS Inc., fka Mehlburger Brawley, Robert D. Vaughan, Jackson & Jackson Engineering, Inc., and John Derek Jackson, Defendants. Appeal from the District Court of Okmulgee County, Oklahoma. Honorable Ken Adair, Trial Judge. Plaintiffs City of Henryetta (City) and Henryetta Municipal Authority (Authority, collectively Appellants) appeal a post-judgment award of post-arbitration attorney fees and costs to Defendant Wynn Construction. We conclude the parties' failure to present proof of indebtedness for the fiscal year in which a judgment is rendered against a municipality results in a jurisdictional defect that makes the judgment void. The trial court's post-judgment award of post-arbitration attorney fees and costs, since it was founded upon its entry of judgment, we conclude the award is void, and the merits of that decision will not be addressed. The post-judgment order is REVERSED and the case REMANDED for further proceedings. Opinion by Swinton, J.; Mitchell, P.J., and Bell, J., concur.

117,221 — Deby Lyon McCreary, Plaintiff/Appellant, vs. Great West Casualty Company, Custard Insurance Adjusters, Inc., and Mike Jaramillo, Defendants/Appellees, and G.D.S. Express, Inc. and Kenneth Lee Pace, Defendants. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Trevor Pemberton, Judge. Plaintiff/Appellant, Deby Lyon McCreary, appeals from the trial court's grant of summary judgment in favor of Defendants/Appellees, Great West Casualty Company, Custard Insurance Adjusters, Inc. and Mike Jaramillo, in Plaintiff's action claiming Defendants fraudulently induced her into entering a release of claims. Plaintiff was a passenger in a vehicle involved in an accident. Great West is the tortfeasor's liability insurance carrier, Custard is a third party adjustor hired by Great West to resolve Plaintiff's claim, and Jaramillo is Custard's employee. Plaintiff thereafter executed a Release wherein she agreed to accept $1,500.00 plus payment of her accident-related medical bills in exchange for releasing all claims arising therefrom. She later sued, alleging Appellees never intended to comply with the terms of the Release, and the trial court granted summary judgment to Appellees. When fraud is properly alleged by one party and denied by the other party, the existence or non-existence of fraud becomes a question of fact where the party who brings the claim presents evidence of each element of fraud. In the present case, Plaintiff satisfactorily alleged fraud and presented factual support in response to Appellees' motion for summary judgment. Although Appellees presented compelling evidence to dispute Plaintiff's claim, the evidence of fraud was nevertheless conflicting. Upon *de novo* review of the record, we conclude there exist disputed issues of material fact regarding fraud. Accordingly, the trial court's summary judgment is REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion by Bell, J.; Mitchell, P.J., and Swinton, J., concur.

117,434 — Candace Joan Brown, Plaintiff/Appellant, vs. Scott Douglas Thompson, Defendant/Appellee. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Patricia G. Parrish, Judge. Plaintiff/Appellant Candace Joan Brown (Brown) appeals from an order dismissing her case against Defendant/Appellee Scott Douglas Thompson (Thompson). Brown sought recovery from Thompson for fraudulent inducement to enter into a settlement agreement Brown, Thompson, and other parties reached in a previous lawsuit. The trial court found that Brown was required to seek relief by an action to vacate in the prior case pursuant to 12 O.S. 2011 §1031. After *de novo* review, we find Brown is not limited to the relief provided by §1031. Because Brown seeks redress for alleged fraud in connection with the settlement agreement, which must be treated as a contract, we find she has stated a claim for which relief may be granted. Accordingly, we REVERSE AND REMAND. Opinion by Mitchell, P.J.; Bell, J., and Buettner, J. (sitting by designation), concur.

(Division No. 4)
Thursday, June 20, 2019

117,681 — Edward Savoid, Plaintiff/Appellant, v. Eckroat Seed, Inc., an Oklahoma Corporation, and Robert A. Eckroat, Defendants/Appellees. Appeal from an Order of the District Court of Oklahoma County, Hon. Patricia G. Parrish, Trial Judge. Plaintiff, Edward Sa-

void, (Savoid) appeals the trial court's Journal Entry of Final Judgment granting summary judgment in favor of defendants, Eckroat Seed, Inc., an Oklahoma Corporation, (Eckroat Seed) and Robert Eckroat (Eckroat) on Plaintiff's negligence claim. This Court previously resolved the issue of whether Plaintiff's incident qualified as an accident under the AWCA and the Constitutional issue. Plaintiff did not appeal COCA's original decision. The Court's decision on these issues became final. Thus, this Court refuses to revisit these allegations of error. Plaintiff next alleges the trial court erred in finding Defendant Eckroat Seed qualifies as a principal employer per 85A O.S. Supp. 2014 § 5(E) and is entitled to immunity from Plaintiff's tort claims under the statute. The trial court did not err in finding Defendant Eckroat Seed qualified as a principal employer pursuant to Section 5(E) and was immune from tort liability under Section 5. As to Eckroat individually, Plaintiff's Petition does not set forth any facts pertaining to Eckroat nor does it assert any allegations individually against Eckroat. Plaintiff provides no citation to any authority supporting his argument concerning Eckroat. Thus, this Court will not address this issue. This Court finds the trial court did not err in granting summary judgment in favor of defendants, Eckroat Seed, Inc., and Robert Eckroat, individually. The trial court's Journal Entry of Final Judgment is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., and Wiseman, V.C.J., concur.

116,734 — Doerner, Saunders, Daniel & Anderson, LLP, Plaintiff/Appellee, v. James Roberts, Defendant/Appellant. Appeal from an Order of the District Court of Tulsa County, Hon. Mary Fitzgerald, Trial Judge. The defendant, James Roberts (Roberts), appeals an Order denying his motion to reconsider an Order which denied his motion to vacate a judgment awarding the plaintiff, Doerner, Saunders, Daniel & Anderson, LLP (Law Firm) attorney fees as prevailing party in Law Firm's suit to collect attorney fees. The first argument briefed is that Law Firm failed to follow the notice of default provision of District Court Rule 10, and therefore the trial court erred by not vacating the decision awarding prevailing party fees and costs. Rule 10 directs that notice be given of a motion for default and that such notice may be given by email to the email address provided in the appearance. Here, only the motion to tax the costs is shown as mailed. The Record does not contain a notice of hearing the motion due to a default in response. By its own terms, Rule 10 does not apply to "any statutory proceeding following the rendition of final judgment in a case." Taxation of costs is a proceeding following entry of a final judgment. 12 O.S.2011, §§ 928, 936. No legal authority to the contrary has been presented. Next, Attorney Burr argues that entry of the Decision pursuant to District Court Rule 4 was error. District Court Rule 4(e) permits the trial court to deem a motion confessed in the absence of a timely response. This Court holds that Rule 4(e) does not apply to avoid an evidentiary hearing in separate statutory proceedings, such as the assessment of prevailing party attorney fees. When the factors, including invited error, are carefully considered in light of the strong policy of Oklahoma jurisprudence that cases be tried on the merits, this Court concludes that the trial court erred by not vacating the judgment, in part. The only part of the Decision which is reversed is the amount of the award of attorney fees. The award of costs, other than attorney fees, was not appealed. The ruling that Law Firm is the prevailing party and the ruling that Law Firm has a statutory right to receive litigation-related attorney fees is affirmed. The cause is remanded for further proceedings for a *Burk* hearing to determine a reasonable fee to be awarded Law Firm. AFFIRMED IN PART, AND REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., and Wiseman, V.C.J., concur.

117,484 — In the Matter of J.O.O., Alleged Deprived Child: Jolie Rhodes, Appellant, v. State of Oklahoma, Appellee. Appeal from the District Court of Love County, Hon. Todd Hicks, Trial Judge. In this proceeding to adjudicate the minor child J.O.O. deprived, Jolie Rhodes (Mother) appeals from an order of the court adjudicating J.O.O. deprived and ordering that custody remain with the Department of Human Services (DHS). Mother asserts on appeal the trial court erred in adjudicating J.O.O. deprived because State failed to present "credible evidence" that J.O.O. was deprived and State failed to show it needed to intervene in this family dispute. Mother also asserts State's evidence demonstrated J.O.O. would not be in danger if returned to Mother's custody, "nor did [State] present necessary documentation and evidence to the Trial Court to show the child was unsafe in the home and the

risk to the child resulted in the need for removal." Based on our review of the record on appeal and applicable law, competent evidence was presented by State in support of its petition seeking to adjudicate J.O.O. deprived. Further, we conclude a preponderance of the evidence presented supports the trial court's deprived adjudication and finding that such adjudication and placement of J.O.O. in DHS custody is in J.O.O.'s best interests. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Wiseman, V.C.J., and Rapp, J., concur.

Friday, June 21, 2019

116,637 — In re the Marriage of: Laura Elaine Stafford, Petitioner/Appellant, vs. Paul Ryan Stafford, Respondent/Appellee. Appeal from an order of the District Court of Tulsa County, Hon. Stephen R. Clark, Trial Judge, denying Laura Elaine Stafford's (Mother) request to relocate her minor children from Tulsa, Oklahoma, to Blanchard, Oklahoma, pursuant to 43 O.S.2011 § 112.3(K). The trial court found Mother's explanation of when she decided to move to Blanchard was not credible and that she did not act in good faith. That decision is not against the clear weight of the evidence. However, pursuant to the Supreme Court's decision in *Boatman v. Boatman*, 2017 OK 27, 404 P.3d 822, the trial court's inquiry does not end with the good faith determination. The *Boatman* Court stated: "If the parent seeking relocation is unsuccessful in demonstrating good faith, then the burden of demonstrating that relocation is in the child's best interest remains with him or her." The trial court decided Mother did not act in good faith, but it did not decide if the relocation was in the minor children's best interests. We will not decide this issue for the first time on appeal. Pursuant to *Boatman*, we must remand this matter to the trial court to consider the best interests of the children. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, V.C.J.; Barnes, P.J., and Rapp, J., concur.

Wednesday, July 3, 2019

117,072 — In re the Marriage of: Richard Steven Worley, Petitioner/Appellant, v. Sharlene Renee Worley, Respondent/Appellee. Appeal from the District Court of Garvin County, Hon. Trisha A. Misak, Trial Judge. In this dissolution of marriage case, Richard Steven Worley (Husband) appeals from the trial court's order determining the marital debts and valuing and dividing the marital estate. Husband argues the trial court abused its discretion thus requiring reversal of the decree of dissolution because it erred in valuing the marital residence; it erred in failing to consider a $40,000 debt he incurred in settling a foreclosure action against the marital residence as a marital debt or equitable debt against the marital residence; and it erred in the division of the marital estate because the trial court awarded an inequitable "net property" to Wife. From our review of the record, the valuation placed on the marital residence was within the range of values offered in evidence; therefore, we conclude the trial court's valuation was not against the clear weight of the evidence. As to the $40,000 debt, according to the evidence presented, the marital residence was put into foreclosure because Husband failed to pay an ex-spouse a judgment awarded to her in a divorce action between Husband and that ex-spouse. Husband borrowed $50,000 during the pendency of the current divorce action, without Wife's knowledge or consent and while the temporary stay was in place, and used $40,000 of that indebtedness to settle the foreclosure action. That $40,000 debt, used to pay a debt Husband personally and singularly owed, however, was not a marital debt and thus is not factored into a determination of the marital estate. Husband relies on his valuation of the marital estate and his contention that the $40,000 is an equitable debt of the marriage are the primary arguments for his argument concerning the net value of the marital estate awarded to each party. Having found those arguments unpersuasive and having reviewed the record, we conclude the trial court's division of the marital estate was not clearly against the weight of the evidence. Based on our review of the law and facts and the equities, we conclude the trial court did not abuse its discretion in its valuation of the marital residence, its determination that the $40,000 debt was Husband's separate debt and not attributable to the marital residence, and in its division of the marital estate between the parties. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Wiseman, V.C.J., and Rapp, J., concur.

117,016 — Roger Gaddis, Plaintiff/Appellant, vs. Todd Woods, Defendant/ Appellee. Appeal from an order of the District Court of Pontotoc County, Hon. C. Steven Kessinger, Trial Judge, granting judgment in favor of both Gaddis and Todd Woods, directing each party to pay his own attorney fees, and denying Gaddis' motion

for new trial. Gaddis asserts: (1) the trial court erred in disallowing his attorney fee request because he is the prevailing party; (2) his offer of judgment entitled him to an award of costs, (3) he is entitled to sanctions; (4) the trial court abused its discretion in denying his motion for new trial; and (5) "cumulative error requires reversal." We conclude Gaddis failed to show error or an abuse of discretion by the trial court. Accordingly, we affirm the trial court's orders. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, V.C.J.; Barnes, P.J., and Rapp, J., concur.

Friday, July 5, 2019

116,364 (comp. w/ Case No. 116,984) — Karla Forbush, an individual, Plaintiff/Appellant, v. Edward L. Coyle, Ph.D., an individual, and Edward L. Coyle, Ph.D., Inc., an Oklahoma corporation, Defendants/Appellees, and Transitions, Inc., an Oklahoma corporation, Defendant. Appeal from the District Court of Oklahoma County, Hon. Patricia G. Parrish, Trial Judge. In this negligence action, Karla Forbush appeals from a judgment memorializing a jury verdict finding she did not sustain any damages as a result of the negligent conduct of Defendants/Appellees (collectively, Dr. Coyle). Ms. Forbush asserts the trial court was required to award nominal damages, but this argument is based solely on the premise that the trial court found as a matter of law that she satisfied all elements of her professional malpractice claim against Dr. Coyle. Because the trial court properly found that only two of the three elements of her negligence theory were satisfied as a matter of law, and that the issue of whether any damages were the proximate result of Dr. Coyle's conduct constituted a question of fact for the jury, we reject this nominal damages argument. Ms. Forbush also argues the trial court erred in limiting the amount of attorney fees and costs she could request as damages. However, various fees sought by Ms. Forbush were shown not to flow from Dr. Coyle's negligence conduct; moreover, no probability exists that the jury would have awarded additional damages in the form of other attorney fees even if the jury had been instructed in the manner forwarded by Ms. Forbush. Ms. Forbush also asserts the trial court erred in declining to instruct the jury on emotional damages. However, no evidence was introduced of any physical injury, and Ms. Forbush was required to present evidence of a physical injury in order to recover for emotional harm. We affirm the trial court's judgment memorializing the jury's unanimous verdict. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Wiseman, V.C.J., and Rapp, J., concur.

116,984 (comp. w/ Case No. 116,364) — Karla Forbush, an individual, Plaintiff/Appellant, v. Edward L. Coyle, Ph.D., an individual, and Edward L. Coyle, Ph.D., Inc., an Oklahoma corporation, Defendants/Appellees, and Transitions, Inc., an Oklahoma corporation, Defendant. Appeal from the District Court of Oklahoma County, Hon. Patricia G. Parrish, Trial Judge. In the companion appeal, we affirmed the trial court's judgment memorializing a jury verdict finding Karla Forbush did not sustain any damages as a result of the negligent conduct of Defendants/Appellees (collectively, Dr. Coyle). The present appeal was taken from the trial court's order granting costs to Dr. Coyle. In this appeal, Ms. Forbush asserts that if the companion appeal is reversed, then Dr. Coyle cannot be considered the prevailing party and the award of costs should be reversed. Ms. Forbush also argues that the trial court erred in awarding certain costs totaling $265. Because we did not reverse the trial court in the companion appeal, and because we are not persuaded by Ms. Forbush's argument attacking certain costs awarded in amount of $265, we must affirm the trial court's order granting costs. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Wiseman, V.C.J., and Rapp, J., concur.

ORDERS DENYING REHEARING
(Division No. 4)
Friday, July 5, 2019

116,782 — Paulette Houston, Plaintiff/Appellee, vs. State of Oklahoma, ex rel., Department of Human Services, Defendant/Appellant, Oklahoma Merit Protection Commission, Defendant/Appellant. Appellee's Petition for Rehearing is hereby *DENIED*.

Thursday, July 11, 2019

117,148 — Wildcat Wellhead Services, LLC; Larry Wade Pruitt; and Russell Tarlton, Plaintiffs/Appellees, vs. Canary, LLC; Canary Drilling Services, LLC; Canary Production Services, LLC; and Canary Wellhead Equipment, Inc., Defendants/Appellants. Appellants Canary, LLC, Canary Drilling Services, LLC, Canary Production Services, LLC, and Canary Wellhead Equipment, Inc.'s Petition for Rehearing is *DENIED*.

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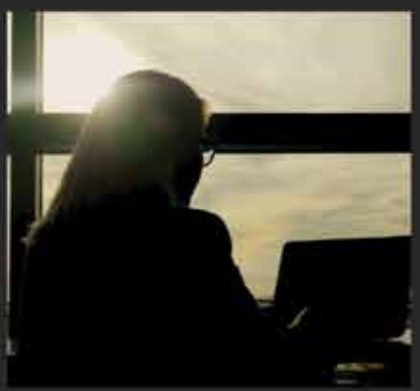

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