THE OKLAHOMA BAR
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Court Issue

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THE OKLAHOMA BAR
Journal

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Subscriptions $60 per year that includes the Oklahoma Bar Journal magazine published monthly, except June and July. Law students registered with the OBA and senior members may subscribe for $30; all active members included in dues.

Notice of Judicial Vacancy

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

Judge for Oklahoma Court of Civil Appeals
District One, Office One

This vacancy is created by the retirement of the Honorable Jerry L. Goodman effective July 31, 2019.

To be appointed to the office of Judge of the Court of Civil Appeals, one must be a legal resident of the respective district at the time (s)he takes the oath of office and assumes the duties of office. Additionally, prior to appointment, such appointees shall have had a minimum of four years experience as a licensed practicing attorney, or as a judge of a court of record, or both within the State of Oklahoma.

Application forms can be obtained on line at www.oscn.net, click on Programs, then Judicial Nominating Commission or by contacting Tammy Reaves at (405) 556-9300. Applications must be submitted to the Chairman of the Commission at the address below **no later than 5:00 p.m., Friday, September 20, 2019. If applications are mailed, they must be postmarked by midnight, September 20, 2019**.

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

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

2019 OK 53

Re: CREATION OF THE TASK FORCE ON THE UNIFORM REPRESENTATION OF CHILDREN AND PARENTS IN CASES INVOLVING ABUSE AND NEGLECT; AND THE APPOINTMENT OF MEMBERS THERETO

SCAD-2019-65. July 22, 2019

ORDER

¶1 The Supreme Court of Oklahoma, pursuant to its general administrative authority, Okla. Const. Art. 7 §6, and in order to more fully implement SCAD-2014-06, hereby establishes the Task Force on the Uniform Representation of Children and Parents in Cases Involving Abuse and Neglect. The Task Force is charged with determining models of legal representation conducted pursuant to the Oklahoma Children's Code, to assess training, compensation, practice standards and make recommendations on the development of rules and procedures, to address uniform compensation and evaluation processes, training requirements, and improving appellate advocacy, as well as other related issues in order to protect the rights of children and parents and improve outcomes.

¶2 In order to carry out this assignment, the Task Force shall have twelve (12) members as follows:

The Honorable Michael C. Flanagan, Associate District Judge Cotton County, to serve as Chair.

Voting members:

1. The Honorable Robert A. Ravitz, Chief Public Defender of Oklahoma County
2. The Honorable Corbin C. Brewster, Chief Public Defender of Tulsa County
3. Ronald Baze, Oklahoma Department of Human Services General Counsel
4. Donna Glandon, Attorney, Lawton, OK
5. The Honorable Rebecca Gore, Associate District Judge, Mayes County
6. Lisa Bohannon, Attorney, Pryor, OK
7. Mark Morrison, Attorney, Durant, OK
8. Holly Iker, Attorney, Norman, OK.
9. Tsinena Thompson, Chairperson, OBA Juvenile Law Section
10. Michael Figgins, Executive Director, Legal Aid of Oklahoma
11. Gwendolyn Clegg, Attorney, Tulsa
12. Timothy R. Beebe, Attorney, Enid

Non-voting members:

1. Sharon Hsieh, Deputy General Counsel of the Administrative Office of the Courts
2. The Honorable Doris Fransein, Consultant
3. Felice Hamilton, Court Improvement Program Director
4. Casey Family Program support staff
5. Julie Rorie, Attorney, Oklahoma Supreme Court

¶3 The Chair of the Task Force shall convene the Task Force with all due speed. Members appointed by the Supreme Court may be reimbursed for all expenses incurred in the performance of their duties pursuant to the State Travel Reimbursement Act. The standing meeting will be the 4th Friday of the month. **The Task Force shall prepare an interim report to the Supreme Court no later than February 1, 2020, with a final report on December 1, 2020.**

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

/s/ Noma D. Gurich
CHIEF JUSTICE

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

Kauger, J., not voting.

2020 OBA Board of Governors Vacancies

Nominating Petition deadline: 5 p.m. Friday, Sept. 6, 2019

OFFICERS
President-Elect
Current: Susan B. Shields, Oklahoma City
Ms. Shields automatically becomes OBA president Jan. 1, 2020
(One-year term: 2020)
Nominee: **Vacant**

Vice President
Current: Lane R. Neal, Oklahoma City
(One-year term: 2020)
Nominee: **Vacant**

BOARD OF GOVERNORS
Supreme Court
Judicial District Two
Current: Mark E. Fields, McAlester
Atoka, Bryan, Choctaw, Haskell, Johnston, Latimer, LeFlore, McCurtain, McIntosh, Marshall, Pittsburg, Pushmataha and Sequoyah counties
(Three-year term: 2020-2022)
Nominee: **Vacant**

Supreme Court
Judicial District Eight
Current: Jimmy D. Oliver, Stillwater
Coal, Hughes, Lincoln, Logan, Noble, Okfuskee, Payne, Pontotoc, Pottawatomie and Seminole counties
(Three-year term: 2020-2022)
Nominee: **Vacant**

Supreme Court
Judicial District Nine
Current: Bryon J. Will, Yukon
Caddo, Canadian, Comanche, Cotton, Greer, Harmon, Jackson, Kiowa and Tillman counties
(Three-year term: 2020-2022)
Nominee: **Robin L. Rochelle, Lawton**

Member At Large
Current: James R. Hicks, Tulsa
Statewide
(Three-year term: 2020-2022)
Nominee: **Vacant**

SUMMARY OF NOMINATIONS RULES

Not less than 60 days prior to the annual meeting, 25 or more voting members of the OBA within the Supreme Court Judicial District from which the member of the Board of Governors is to be elected that year, shall file with the executive director, a signed petition (which may be in parts) nominating a candidate for the office of member of the Board of Governors for and from such judicial district, or one or more county bar associations within the judicial district may file a nominating resolution nominating such a candidate.

Not less than 60 days prior to the annual meeting, 50 or more voting members of the OBA from any or all judicial districts shall file with the executive director a signed petition nominating a candidate to the office of member at large on the Board of Governors, or three or more county bars may file appropriate resolutions nominating a candidate for this office.

Not less than 60 days before the opening of the annual meeting, 50 or more voting members of the association may file with the executive director a signed petition nominating a candidate for the office of president elect or vice president, or three or more county bar associations may file appropriate resolutions nominating a candidate for the office.

If no one has filed for one of the vacancies, nominations to any of the above offices shall be received from the House of Delegates on a petition signed by not less than 30 delegates certified to and in attendance at the session at which the election is held.

See Article II and Article III of OBA Bylaws for complete information regarding offices, positions, nominations and election procedure

Elections for contested positions will be held at the House of Delegates meeting Nov. 8, during the Nov. 6-8 OBA Annual Meeting.

Terms of the present OBA officers and governors will terminate Dec. 31, 2019.

Nomination and resolution forms can be found at www.okbar.org/governance/bog/vacancies.

Oklahoma Bar Association Nominating Petitions

(See Article II and Article III of the OBA Bylaws)

BOARD OF GOVERNORS
Supreme Court
Judicial District No. 9
Robin L. Rochelle, Lawton

Nominating Petitions have been filed nominating Robin L. Rochelle for election of Supreme Court Judicial District No. 9 of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2020. Twenty-five of the names thereon are set forth below:

John Kinslow, Steven Robinson, Ana Basora Walker, Stephen K. Newcombe, Robert L. Ross, Eddie D. Valdez, Taylor C. Stein, James R. Wilson, Luwana John, Clay Hillis, Graham Fishburn, William Ramsey, John Fleur, Fred Smith, Michael Wilson, Tyler Johnson, Kathryn McClure, Kade A. McClure, Lawrence Corrales, A. Brad Cox, John C. Mackey, Teresa Williams, John Roose and Dietmar Caudle

A total of 27 signatures appear on the petitions.

A Nominating Resolution has been received from the following county: Comanche County

2019 OK CR 14

DANIEL RYAN CHADWELL, Appellant, v. THE STATE OF OKLAHOMA, Appellee

Case No. F-2017-1142. July 18, 2019

SUMMARY OPINION

ROWLAND, JUDGE:

¶1 Appellant Daniel Ryan Chadwell was tried by a jury in the District Court of Cleveland County, in Case No. CF-2014-2296, for forty counts of Lewd Acts with Child Under 16, in violation of 21 O.S.Supp.2013, § 1123(A). He was convicted on all but Counts 25 and 26.[1] The jury assessed punishment at one hundred years imprisonment on each of Counts 1, 2, 4-15, 27-32, and 38-40; seventy-five years imprisonment on each of Counts 34-35; fifty years imprisonment on each of Counts 3, 16-19, 22-24, 33, and 36; and twenty-five years imprisonment on each of Counts 20, 21, and 37. The Honorable Thad Balkman, District Judge, presided over Chadwell's jury trial and sentenced him, in accordance with the jury's verdicts, ordering the sentences to be served consecutively.[2] Chadwell appeals raising the following issues:

(1) whether the trial court gave erroneous jury instructions in sentencing; and

(2) whether prosecutorial misconduct deprived him of a fair trial.

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

1.

¶3 Chadwell was charged with forty counts of lewd acts with a child under 16, in violation of 21 O.S.Supp.2013, § 1123(A). He complains on appeal that error occurred because the jury was instructed on the range of punishment for lewd acts committed with a child under the age of 12. This was error, he asserts, because he was not charged with or convicted of the crime of lewd acts with a child under 12 and because the jury was not instructed on the age element.

¶4 "It is settled law that trial courts have a duty to instruct the jury on the salient features of the law raised by the evidence with or without a request." *Hogan v. State*, 2006 OK CR 19, ¶ 39, 139 P.3d 907, 923 (citing *Atterberry v. State*, 1986 OK CR 186, ¶ 8, 731 P.2d 420, 422). *See also Soriano v. State*, 2011 OK CR 9, ¶ 36, 248 P.3d 381, 396. Because the record does not show that trial counsel objected to the instructions at issue, review on appeal is for plain error. *See Rutan v. State*, 2009 OK CR 3, ¶ 78, 202 P.3d 839, 855. To be entitled to relief for plain error, an appellant must show: "(1) the existence of an actual error (i.e., deviation from a legal rule); (2) that the error is plain or obvious; and (3) that the error affected his substantial rights, meaning the error affected the outcome of the proceeding." *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923. "This Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice." *Stewart v. State*, 2016 OK CR 9, ¶ 25, 372 P.3d 508, 514.

¶5 Title 21 O.S.Supp.2013, § 1123(A) prohibits a broad range of sexual conduct with minors. Lewd acts with a child under 12 is not a different or separate crime from lewd acts with a child under 16 as Chadwell argues. Rather, the paragraph at the end of Section 1123(A) simply provides different ranges of punishment for lewd acts committed with a child under 16 and for those committed with a child under 12. This paragraph provides as follows:

> Any person convicted of any violation of this subsection shall be punished by imprisonment in the custody of the Department of Corrections for not less than three (3) years nor more than twenty (20) years, except when the child is under twelve (12) years of age at the time the offense is committed, and in such case the person shall, upon conviction, be punished by imprisonment in the custody of the Department of Corrections for not less than twenty-five (25) years.

Thus, Chadwell was convicted for the crimes with which he was charged which were lewd acts with a child under 16. However, his argument that his jury should have been instructed that in order to assess punishment at not less than twenty-five years imprisonment they had to find that the victims were under twelve years of age at the time that the crimes were committed is not without merit.

¶6 In *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 2362-63, 147 L.Ed.2d 435 (2000) the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." The Supreme Court further provided, in *Alleyne v. United States*, 570 U.S. 99, 103, 133 S.Ct. 2151, 2155, 186 L.Ed.2d 314 (2013), that "any fact that increases the mandatory minimum [sentence] is an 'element' that must be submitted to a jury." *See also United States v. Ellis*, 868 F.3d 1155, 1169 (10th Cir. 2017)("a district court violates the Sixth Amendment if it imposes a sentence based on a judge-found (and not a jury-found) fact that increases a minimum sentence."). Thus, the age of the victims at the time of the crimes is an element of the crime of lewd acts with a child under 16 for purposes of sentencing and a criminal defendant has a constitutional right to have the jury instructed on this element and the charged offense proved beyond a reasonable doubt.

¶7 Failure to so instruct in the present case was error. This error, however, is subject to harmless error analysis. *See Neder v. United States*, 527 U.S. 1, 4, 15, 119 S.Ct. 1827, 1831, 1837, 144 L.Ed.2d 35 (1999) (the error which occurs when an element of the crime charged is omitted from the jury instructions is subject to harmless error analysis). The harmless error test is "whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Id.* at 15, 119 S.Ct. at 1837 (quoting *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967)). *See also Barnard v. State*, 2012 OK CR 15, ¶ 14, 290 P.3d 759, 764 (where an element of the crime was omitted from the jury instruction this Court reviewed for plain error and applied the harmless error doctrine pursuant to United States Supreme Court's decisions in *Chapman* and *Neder*).

¶8 The evidence presented at trial was that all of the child victims were under the age of twelve at the time Chadwell committed the crimes charged. This evidence was overwhelming and not contradicted. Given the evidence, we find that the instructional error was harmless beyond a reasonable doubt. *See Neder*, 527 U.S. at 17, 119 S.Ct. at 1837 ("where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless"). There is no plain error here and this claim is denied.

2.

¶9 Chadwell complains that the cumulative effect of prosecutorial misconduct deprived him of his right to a fair trial. Because none of the comments at issue were met with objection at trial we review for plain error only. *Harney v. State*, 2011 OK CR 10, ¶ 23, 256 P.3d 1002, 1007. To be entitled to relief for plain error, an appellant must show plain error under the analysis set forth in *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923. "This Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice." *Stewart*, 2016 OK CR 9, ¶ 25, 372 P.3d at 514.

¶10 "[W]e evaluate the alleged misconduct within the context of the entire trial, considering not only the propriety of the prosecutor's actions, but also the strength of the evidence against the defendant and the corresponding arguments of defense counsel." *Hanson v. State*, 2009 OK CR 13, ¶ 18, 206 P.3d 1020, 1028. Both sides have wide latitude to discuss the evidence and reasonable inferences therefrom. *Harmon v. State*, 2011 OK CR 6, ¶ 81, 248 P.3d 918, 943. Relief is only granted where the prosecutor's flagrant misconduct so infected the defendant's trial that it was rendered fundamentally unfair. *Jones v. State*, 2011 OK CR 13, ¶ 3, 253 P.3d 997, 998. It is the rare instance when a prosecutor's misconduct during closing argument will be found so egregiously detrimental to a defendant's right to a fair trial that reversal is required. *See Pryor v. State*, 2011 OK CR 18, ¶ 4, 254 P.3d 721, 722.

¶11 While some of the comments at issue may have bordered upon impropriety, none rose to the level of plain error. This claim is denied.

DECISION

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

AN APPEAL FROM THE DISTRICT COURT OF CLEVELAND COUNTY THE HONORABLE THAD BALKMAN, DISTRICT JUDGE

APPEARANCES AT TRIAL

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

KUEHN, V.P.J., SPECIALLY CONCURRING:

¶1 I agree with the Majority's finding in Proposition 1. In reaching that conclusion, I agree that the appropriate test for alleged Constitutional violations is that required by *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967), rather than the qualitatively different test for nonconstitutional violations found in *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. I agree that, under *Chapman,* the trial court's failure to instruct the jury properly was error, and the State has shown that error was harmless beyond a reasonable doubt. I write separately to more fully address the instruction issue to give guidance to trial courts and counsel.

¶2 As the Majority correctly finds, lewd molestation of a child under the age of 12 is not a "different or separate crime" from lewd molestation of a child under 16, as the age difference only enhances the punishment range. The age of the victim of a lewd molestation crime under any subsection of Title 21 O.S. § 1123 is an element of the crime itself, but that age is 16 years or younger.[1] The trial judge appropriately instructed the jury on the elements of the crime of lewd molestation of a child under the age of 16, as the State charged the Appellant with that specific offense.

¶3 The Majority also correctly holds it was error to exclude from the instructions on punishment that the jury find the State proved the victim was 12 years or younger in order to consider an enhanced punishment. The jury instruction for lewd molestation (OUJI 4-129) should not change, but the instruction on the available punishment range, OUJI 10-13, should. The third paragraph of the instruction should read as follows:

> If you find the defendant guilty, you shall then determine the proper punishment.
>
> The crime of lewd molestation of a child under the age of 16 is punishable by imprisonment in the custody of the Department of Corrections for not less than three years nor more than twenty (20) years. You may also impose a fine up to $10,000.00.
>
> If you find the defendant guilty, and find beyond a reasonable doubt that the victim(s) (insert either initials of victim(s) or count(s) of the Information here if multiple victims) (was) (is) (were) (are) the age of twelve or under, then you may sentence the defendant to custody in the Department of Corrections for not less than twenty-five (25) years. You may also impose a fine up to $10,000.00.

Although not raised in this appeal, the State must put a defendant on notice that it is seeking enhanced punishment.[2] Therefore, the Information should state that the child is under the age of twelve.

ROWLAND, JUDGE:

1. The jury found Chadwell not guilty on Counts 25 and 26.
2. Under 21 O.S.Supp.2014, § 13.1, Chadwell must serve 85% of his sentence of imprisonment before he is eligible for parole consideration.

KUEHN, V.P.J.

1. OUJI 4-129 notes that element.
2. In this case notice was not an issue. The State first charged Appellant with Sexual Abuse of a Minor Child. That crime, like Lewd Molestation, also includes a finding that the victim was a child under the age of eighteen (18) and carries up to Life in prison. When the State requested to amend the charges to lewd molestation of a child under the age of sixteen (16), they argued that since the victim was under twelve (12) the maximum punishment would not change. Therefore, Appellant was put on notice of the range of punishment.

2019 OK CR 15

JESTIN TAFOLLA, Appellant, v. THE STATE OF OKLAHOMA, Appellee.

Case No. F-2017-802. July 18, 2019

OPINION

ROWLAND, JUDGE:

¶1 Appellant Jestin Tafolla appeals his Judgment and Sentence from the District Court of Tulsa County, Case No. CF-2016-2204, for Assault and Battery with a Dangerous Weapon, After Former Conviction of Two or More Felonies (Count 1), in violation of 21 O.S.2011, § 645, and Carrying a Weapon Unlawfully, a misdemeanor (Count 2), in violation of 21 O.S. Supp.2015, § 1272. The Honorable William D. LaFortune, District Judge, presided over Tafolla's jury trial and sentenced him, in accordance with the jury's verdict, to life imprisonment on Count 1 and thirty days in the county jail on Count 2. The sentences were ordered to be served concurrently. Tafolla appeals raising the following issues:

(1) whether the admission of evidence of his gang affiliation violated his due process right to a fair trial;

(2) whether evidence of his gang affiliation was "aggravating" evidence not permissible under Oklahoma law;

(3) whether the trial court erred in allowing evidence of his gang affiliation in violation of the First Amendment Freedom of Association;

(4) whether the admission of his statement that he was a member of the Aryan Brotherhood was improper and denied him his due process right to a fair trial;

(5) whether admission of the victim's out of court statements violated his constitutional right to confrontation;

(6) whether the admission of evidence of underlying facts and probationary sentences imposed in his prior felony convictions deprived him of his due process right to a fair trial;

(7) whether prosecutorial misconduct deprived him of his due process right to a fair trial;

(8) whether instructional error requires relief;

(9) whether his convictions for both assault and battery with a dangerous weapon and carrying a weapon unlawfully violated the constitutional prohibition against double jeopardy and the state prohibition against double punishment;

(10) whether error occurred when the State charged him with the general crime instead of a more specific "hate" crime;

(11) whether he was denied effective assistance of counsel; and,

(12) whether an accumulation of error deprived him of a fair trial.

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

FACTS

¶3 On the afternoon of April 5, 2016, Tulsa Police Detectives James Dawson and Korey Scott, both with the Organized Gang Unit, were driving in an unmarked car back to the police station at the end of their patrol shift. Around 11th Street and Highway 169 they saw a white male, Jestin Tafolla, straddling a black male who was on his back on the sidewalk. Tafolla was hitting the victim repeatedly in the face and the detectives could see the victim's head bouncing off the sidewalk with each blow. The detectives activated the lights on their car and drove up to the two men. When Tafolla saw the detectives approach, he stood up, pulled brass knuckles off of his hand, and threw them into the grass ten to fifteen feet away. The officers separated and handcuffed both men as they tried to figure out what had happened.

¶4 The victim told the detectives that he had been driving on the highway and had been cut off. This upset him and he followed the car that cut him off. When the car driven by Tafolla pulled over, both men got out of their vehicles and the two engaged in a heated argument. After they exchanged words they walked back to their cars. As the victim walked toward his car, the occupant of Tafolla's car, Lara Maloy, yelled at him and called him a "n----r."[1] The victim lost his cool; he grabbed a QuikTrip cup half filled with soda from his vehicle and threw the soda toward Tafolla's vehicle at Maloy. As the victim was verbally confronting Maloy, Tafolla sucker punched him in the back of the head. The victim did not remember much after

the initial blow. His head was bleeding profusely; he had lacerations in both the front and back of his head. When he spoke with the detectives he was disoriented, dazed, upset, and confused.

¶5 When Detective Dawson approached Tafolla he noticed that Tafolla was heavily tattooed. Dawson thought that the tattoos might indicate a gang affiliation and because he noted a cloverleaf tattoo he asked Tafolla if he was a member of the Irish Mob. Taffolla was angered by the question and pointed out his swastika tattoo; he told Dawson that he was UAB (Universal Aryan Brotherhood). The brass knuckles retrieved from the grass had wolf heads across the knuckle with sharp pointed ears on the wolves. Dawson testified at trial that members of UAB refer to themselves as the "wolf pack." Dawson noted that in addition to significant lacerations on his face, the victim had a row of lacerations across the back of his head in the shape of a wolf's head; the head and sharp ears from the brass knuckles were cut into the back of his head.

¶6 When Tafolla and Maloy told the detectives what had happened, their accounts of how the altercation began were similar to the victim's but their stories of how it escalated at the end were different. Lara testified at trial that after her husband and the victim "had words" in the parking lot they shook hands and went back to their own cars. She testified that the victim backed his car up and started calling her names. She said that he stopped his car, grabbed something from the car and started walking toward her. At this point Tafolla intervened. The victim threw a cup at Tafolla's face and started hitting and punching him. She testified that Tafolla only hit the victim because he was attacked by the victim first. She denied calling the victim a racial epithet.

¶7 Tafolla testified at trial. He said that after he and the victim got within a few feet of each other the victim's demeanor changed; he became less aggressive possibly because he saw Tafolla's visible tattoos. The victim "went from very aggressive to second guessing his behavior." Tafolla said that after their heated exchange of words, he and the victim calmed down and shook hands. When he returned to his car, Lara was standing outside the vehicle. He told her to get back in the car and as he and Lara were bickering back and forth the victim drove by and said, "yeah, get your bitch cuz." Tafolla testified that Lara started yelling at the victim who stopped, got out of his car, reached back into his car and started grabbing for something. Tafolla grabbed his brass knuckles. The victim threw his drink on Tafolla and punched him in the mouth. The two began to fight and were engaged in mutual combat. He testified that they were on their feet "engaging in hand-to-hand combat." Tafolla denied ever hitting the victim from behind and he surmised that the injuries on the back of the victim's head occurred when the victim ducked his head during the fight. Tafolla testified that when the victim fell to the ground he got right back up again. Tafolla denied sitting on the victim and beating his face. He testified that the detectives' testimony to the contrary was wrong.

1.

¶8 Prior to trial the prosecution gave notice that it intended to introduce evidence of other crimes or bad acts at trial. This included evidence that Tafolla was a member of the Universal Aryan Brotherhood (UAB) – a white supremacist prison gang. Tafolla argues that the evidence of his gang affiliation was inadmissible.

¶9 The State asserted below that evidence of Tafolla's involvement in the UAB gang was admissible to show motive, common scheme, design, or purpose, identity, and bias. Despite the extensive pretrial discussion and argument, the gang related evidence about which Tafolla complains in this proposition was not met with objection when it was introduced at trial. Accordingly, we review the admission of this evidence for plain error only. *See Lowery v. State*, 2008 OK CR 26, ¶ 9, 192 P.3d 1264, 1268 (where defense counsel vigorously challenged other crimes evidence during the in-trial hearing but failed to object at the time the evidence was actually offered at trial review was for plain error). To be entitled to relief for plain error, an appellant must show: "(1) the existence of an actual error (i.e., deviation from a legal rule); (2) that the error is plain or obvious; and (3) that the error affected his substantial rights, meaning the error affected the outcome of the proceeding." *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. "This Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice." *Stewart v. State*, 2016 OK CR 9, ¶ 25, 372 P.3d 508, 514.

¶10 In *Dawson v. Delaware*, 503 U.S. 159, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992), the Supreme Court held that evidence introduced in a capital sentencing proceeding that the defendant belonged to the Aryan Brotherhood was constitutional error where such evidence had "no relevance to the issues being decided in the proceeding." *Id.* 503 U.S. at 160, 112 S.Ct. at 1095. The Supreme Court found in *Dawson* that the evidence was not inadmissible *per se*, but rather was irrelevant because the victim and defendant were both white; there was no link between gang membership and the crime – the evidence proved nothing more than the defendant's "abstract beliefs." *Id.* 503 U.S. at 165–67, 112 S.Ct. at 1098. *See also Martinez v. State,* 2016 OK CR 3, ¶ 61, 371 P.3d 1100, 1115; *Torres v. State*, 1998 OK CR 40, ¶¶ 66-68, 962 P.2d 3, 22. While acknowledging Dawson's holding that evidence of gang affiliation may be irrelevant under such circumstances in a second stage proceeding, this Court has found that it may be "relevant to character issues and to establish a plan for the crime in the first stage of the proceeding." *Wood v. State*, 1998 OK CR 19, ¶ 36, 959 P.2d 1, 10-11.

¶11 Although evidence of other crimes or bad acts is not admissible to prove the character of a person in order to show action in conformity therewith, Oklahoma law specifically provides that evidence that a defendant has committed "other crimes" or "bad acts" may be admissible at trial to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. 12 O.S.2011, § 2404(B). This Court has held that before evidence that a defendant has committed another crime or bad act may be admissible, the evidence:

> (1) must be probative of a disputed issue in the case being tried; (2) that there must be a "visible connection" between the charged crime(s) and the evidence sought to be introduced; (3) that the evidence of the other crime(s) must be necessary to support the State's burden of proof in the case being tried; (4) that the evidence of the other crime(s) sought to be introduced must be clear and convincing; and (5) that the probative value of the other crime(s) evidence must outweigh any unfair prejudice to the defendant resulting from its introduction.

Miller v. State, 2013 OK CR 11, ¶ 89, 313 P.3d 934, 966. Additionally, the trial court must issue limiting instructions. *Welch v. State*, 2000 OK CR 8, ¶ 8, 2 P.3d 356, 365.

¶12 In the present case, evidence that Tafolla was a member of the UAB and evidence about the UAB gang was relevant and admissible. There was no error, plain or otherwise, in the admission of this evidence. The claim is without merit and is denied.

2.

¶13 Tafolla asserts that the evidence of his affiliation with the UAB was not relevant to guilt or innocence but, rather, was offered as an aggravating circumstance to encourage the jury to impose a harsh sentence. His argument is not persuasive. The evidence of other bad acts was relevant evidence, its probative value was not outweighed by the danger of unfair prejudice, and it was not simply offered as an aggravating circumstance. Tafolla's argument is rejected.

3.

¶14 The United States Supreme Court has recognized that the First Amendment to the United States Constitution encompasses a right to expressive association which affords "protection to collective effort on behalf of shared goals[;]" i.e., "[the] right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. United States Jaycees*, 468 U.S. 609, 622, 104 S.Ct. 3244, 3252, 82 L.Ed.2d 462 (1984). The right to associate for expressive purposes is not absolute and may be restricted to serve compelling state interests. *Id.* 468 U.S. at 623, 104 S.Ct. at 3252. In *Dawson,* the Supreme Court found that admission of evidence that the defendant was a member of the Aryan Brotherhood was prohibited by the First and Fourteenth Amendments. *Dawson,* 503 U.S. at 160, 112 S.Ct. at 1095. However, the *Dawson* Court did not find that this type of evidence was completely inadmissible, and it specifically held "that the Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment." *Id.* 503 U.S. at 165, 112 S.Ct at 1097. The distinguishing factor in *Dawson* was that the Aryan Brotherhood evidence had "no bearing on the issue being tried," and was therefore irrelevant; both Dawson and the victim were white. *Id.* at 168, 112 S.Ct. at 1099. The gang evidence in this case was not introduced

to label Tafolla as a criminal without showing that he engaged in criminal activity; it was introduced to provide a context and explanation for the criminal act he committed. Because there was evidence suggesting a nexus between Tafolla's association with the UAB and his attack upon the unarmed African American victim the evidence of his association with the white supremacist gang did not infringe upon his constitutional right of association. This claim is denied.

4.

¶15 The trial court ruled prior to trial that Tafolla's statement to Detective Dawson that he was a member UAB was part of the *res gestae* of the charged crime. Tafolla argues on appeal that this ruling was in error. He did not, however, object at trial when the evidence was introduced and consequently, he has waived review of this alleged error on appeal for all but plain error. We review for plain error under the test discussed in *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

¶16 Evidence is considered part of the *res gestae* when (1) it is so closely connected to the charged offense as to form part of the entire transaction; (2) it is necessary to give the jury a complete understanding of the crime; or (3) it is central to the chain of events. *Jackson v. State*, 2006 OK CR 45, ¶ 28, 146 P.3d 1149, 1160. "*Res gestae* are those things, events, and circumstances incidental to and surrounding a larger event that help explain it." *McElmurry v. State*, 2002 OK CR 40, ¶ 63, 60 P.3d 4, 22. This Court has held that evidence of gang involvement or affiliation may be admissible when it is "fundamental to understanding what happened and why it happened." *Thompson v. State*, 2007 OK CR 38, ¶ 34, 169 P.3d 1198, 1209.

¶17 While Tafolla argues that the assault in this case had nothing to do with his affiliation with the UAB or the tenets of that organization, the totality of the evidence suggests otherwise. Tafolla's statement about his gang affiliation was closely connected to the charged offense. It was necessary to give the jury a complete understanding of the crime and was central to the chain of events. Tafolla's statement about his UAB affiliation, viewed with evidence of his numerous tattoos of white supremacist symbols and the brass knuckles also bearing a symbol associated with white supremacists provided an alternative explanation of why the confrontation escalated from an uneventful parting to a brutal beating. Tafilla's statement was part of the *res gestae* and its admission was not error, plain or otherwise.

5.

¶18 The victim did not testify at preliminary hearing or trial. At trial Detective Dawson testified about what the victim told him at the scene. This included the victim's statement to Dawson that as he walked back to his car after he and Tafolla exchanged words, Tafolla's girlfriend called him a racial epithet and when he responded by throwing a cup of soda at her he was attacked from behind by Tafolla. Tafolla complains on appeal that because the victim did not testify at trial the admission of his statements to Detective Dawson violated his constitutional right to confrontation. Because Tafolla failed to raise this specific objection at trial, we review only for plain error on appeal. *See Bench v. State,* 2018 OK CR 31, ¶ 140, 431 P.3d 929, 966. *See also Tryon v. State,* 2018 OK CR 20, ¶ 38, 423 P.3d 617, 632 (where defendant objected below on state law grounds his claim on appeal of constitutional violation is reviewed for plain error only).

¶19 The Sixth Amendment to the United States Constitution requires that in all "criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him…." U.S. Const. amend. VI; *Pointer v. Texas*, 380 U.S. 400, 403, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923 (1965)("the Sixth Amendment's right of an accused to confront the witnesses against him is likewise a fundamental right and is made obligatory on the States by the Fourteenth Amendment"). In *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S.Ct. 1354, 1365, 158 L.Ed.2d 177 (2004), the United States Supreme Court held that the Sixth Amendment's right to confrontation bars the admission of "testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." While the Court in *Crawford* declined to set forth an exhaustive definition for the term "testimonial," it wrote that, at a minimum, the term applies to "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.* 541 U.S. at 68, 124 S.Ct. at 1374. In *Davis v. Washington*, 547 U.S. 813, 822, 126 S.Ct. 2266, 2273-74, 165 L.Ed.2d 224 (2006), the Court expanded on *Crawford*, explaining:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

¶20 In *Michigan v. Bryant*, 562 U.S. 344, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011), the Supreme Court discussed the primary purpose test emphasizing that it requires consideration of all relevant circumstances. The Court held in *Bryant* that when assessing police interrogations courts must "objectively evaluat[e] the statements and actions of the parties to the encounter, in light of the circumstances in which the interrogation occurs" to determine the primary purpose of the interrogation. *Id.* 562 U.S. at 370, 131 S.Ct. at 1162. The Court noted that while the existence of an ongoing emergency is one factor to consider another is the formality of the situation and the interrogation. The Court cautioned, however, that "although formality suggests the absence of an emergency and therefore an increased likelihood that the purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution, informality does not necessarily indicate the presence of an emergency or the lack of testimonial intent." *Id.* 562 U.S. at 366, 131 S.Ct. 1160 (internal quotations and citations omitted). *See also Davis*, 547 U.S. at 822 n.1, 126 S.Ct. at 2274 n.1 (statements that are not the product of a formal interrogation may be testimonial). In any case, the question of whether a statement is testimonial is fact-specific; the circumstances, statements, and actions of both the declarant and the interrogator are to be considered.

¶21 In the present case, when the detectives arrived at the scene of the assault, they separated the victim and Tafolla and searched and handcuffed each of them. After it was determined that the victim did not have a weapon, his handcuffs were removed so that he could hold a t-shirt to his head wounds to apply pressure to the bleeding. The detectives called for an ambulance and while they were waiting for it to arrive Detective Dawson asked the victim what had happened. Clearly, the circumstances under which the victim was questioned cannot be characterized as formal. However, it is fair to say that the victim's statements were not made to enable the police to meet an ongoing emergency; the situation had deescalated and was no longer an emergency. A reasonable person could determine from the fact that detectives had arrived during an ongoing assault, secured the individuals involved, and asked questions to determine what had happened, that the detective's intent was to secure testimonial evidence. Despite the lack of formality, a reasonable person in the victim's position could understand that the detective's questions were investigative in nature and foresee that his response might be used in the prosecution of a crime. Thus, the statements were testimonial and absent a showing that the victim was unavailable and that Tafolla had prior opportunity to cross examine him, Detective Dawson's testimony about what the victim told him had happened violated Tafolla's Sixth Amendment right to confrontation.

¶22 Again, because Tafolla did not raise this issue below, he has waived all but plain error. Detective Dawson's testimony about what the victim told him about the assault repeated testimonial hearsay and violated Tafolla's Sixth Amendment right to confront witnesses against him and was plain error. *See Miller,* 2013 OK CR 11, ¶¶ 104-05, 313 P.3d at 971 (clear violation of Sixth Amendment right to confrontation was plain error). This error, however, does not necessarily require relief. Given the constitutional nature of this claim we must decide whether it was harmless beyond a reasonable doubt. *See Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967) (holding that "before a federal constitutional error can be held harmless, the [reviewing] court must be able to declare a belief that it was harmless beyond a reasonable doubt"). *See Miller,* 2013 OK CR 11, ¶ 106, 313 P.3d at 971-72 (recognizing that violations of the Confrontation Clause are subject to harmless error analysis); *Cuesta-Rodriguez v. State*, 2010 OK CR 23, ¶ 40, 241 P.3d 214, 230 (applying harmless error analysis). In making this determination, we focus upon the specific circumstances of Tafolla's case.

¶23 When the detectives arrived on the scene they saw Tafolla standing over the victim and beating him on the sidewalk. Marks left on the back of the victim's head by the brass knuckles support the finding that the victim was assaulted by Tafolla from behind. Given the properly

admitted evidence, we find that the violation of the Confrontation Clause contributed neither to Tafolla's conviction nor to the punishment assessed; it was harmless beyond a reasonable doubt. This claim is denied.

6.

¶24 Tafolla complains that error occurred when the prosecutor asked him questions on cross-examination which elicited evidence about the details of his prior convictions including that his victims were minorities. He also complains that the prosecutor improperly commented on the fact that he had previously received probationary sentences. Tafolla acknowledges that the questioning complained of was not met with objection and is therefore subject to review for plain error only. Again, under the plain error test, the burden is on Tafolla to show the existence of an actual, obvious error that affected his substantial rights. *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

¶25 The prosecution's theory was that Tafolla's brutal attack on an unarmed black man was motivated, at least in part, by Tafolla's membership in a white supremacist prison gang. He testified at trial, claimed self-defense, and denied that the victim's race played any part in the attack. It was therefore entirely proper for the prosecution to cross-examine him about two prior attacks which also targeted minorities. The testimony at issue was admissible as it was relevant and material to impeach Tafolla's credibility as a witness, to help prove the State's theory of the case, and to rebut his proffered defense. Furthermore, the probative value of this relevant evidence was not outweighed by the danger of unfair prejudice. 12 O.S.2011, § 2403. The introduction of this evidence was not error, plain or otherwise.

¶26 Tafolla also complains that error occurred when the jury learned that he had received suspended sentences on prior convictions. Recently, in *Terrell v. State*, 2018 OK CR 22, ¶ 6, 425 P.3d 399, 401 (internal citations omitted), this Court held:

> Jurors are free to consider the relevant proof of a prior conviction including any evidence that a defendant previously received probation, suspension, or deferral of a sentence and any acceleration or revocation of such a sentence. The receipt of a probationary term may be viewed as supporting both greater and lesser punishment depending on the facts of the case.

¶27 The Court added that the use of this evidence is still limited by 12 O.S.2011, § 2403 which provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *Id.* 2018 OK CR 22, ¶ 8, 425 P.3d at 401. We find that the evidence at issue in the present case was relevant and that its probative value was not outweighed by the danger of unfair prejudice. As there was no error, plain or otherwise, relief is not required.

7.

¶28 Tafolla complains prosecutorial misconduct deprived him of his right to a fair trial. None of the comments at issue were met with objection at trial. Accordingly, we review the alleged misconduct for plain error only. *Harney v. State*, 2011 OK CR 10, ¶ 23, 256 P.3d 1002, 1007. We review his claim under the analysis set forth in *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923. Again, this Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Id.* "[W]e evaluate the alleged misconduct within the context of the entire trial, considering not only the propriety of the prosecutor's actions, but also the strength of the evidence against the defendant and the corresponding arguments of defense counsel." *Hanson v. State*, 2009 OK CR 13, ¶ 18, 206 P.3d 1020, 1028. Both sides have wide latitude to discuss the evidence and reasonable inferences therefrom. *Harmon v. State*, 2011 OK CR 6, ¶ 81, 248 P.3d 918, 943. Relief is only granted where the prosecutor's flagrant misconduct so infected the defendant's trial that it was rendered fundamentally unfair. *Jones v. State*, 2011 OK CR 13, ¶ 3, 253 P.3d 997, 998. It is the rare instance when a prosecutor's misconduct during closing argument will be found so egregiously detrimental to a defendant's right to a fair trial that reversal is required. *See Pryor v. State*, 2011 OK CR 18, ¶ 4, 254 P.3d 721, 722.

¶29 It is first argued that the prosecutor improperly invoked societal alarm by asking jurors to protect others from similar conduct by the defendant. "The prohibited 'societal alarm' argument is one that mentions crimes committed by other persons and not attributable to the defendant on trial such as arguments that the crime rate is increasing." *McElmurry,* 2002 OK CR 40, ¶ 151, 60 P.3d at 34. "The 'societal alarm' argument is therefore irrelevant to the guilt or punishment of the defendant on trial except

that it implies that the jury should 'make an example' out of the defendant on trial to deter other potential criminals." *Id.* The argument at issue here did not appeal to societal alarm and was not error, plain or otherwise.

¶30 Tafolla also complains that the prosecutors improperly stated their personal opinions about his guilt and the appropriate punishment. It is improper for a prosecutor to express his personal opinion of the guilt of the accused. *Bryson v. State,* 1994 OK CR 32, ¶ 45, 876 P.2d 240, 257; *McCarty v. State,* 1988 OK CR 271, ¶ 13, 765 P.2d 1215, 1220. However, a prosecuting attorney may state his opinion as to the defendant's guilt when it is based on the evidence in the case, and where the evidence detailed reasonably tends to support such conclusions. *See Mayes v. State*, 1994 OK CR 44, ¶ 160, 887 P.2d 1288, 1321. Here, taken in context, the prosecutors did not improperly state their personal opinion of guilt, but permissibly argued that the evidence supported a finding of guilt. *See Williams v. State*, 2008 OK CR 19, ¶¶ 106-107, 188 P.3d 208, 228. Furthermore, the prosecutor's request that the jury punish Tafolla severely based upon the facts of the case was not inappropriate. *See Terrell*, 2018 OK CR 22, ¶ 7, 425 P.3d at 401.

¶31 Tafolla also complains that the prosecutor improperly attempted to garner sympathy for the victim. The comments at issue were based upon the evidence and certainly, if bordering upon impropriety, did not rise to the level of plain error.

¶32 Next, Tafolla complains that the prosecutor made improper remarks regarding parole. These comments were addressed above in Proposition Six where we found that there was no error.

¶33 Tafolla argues that the prosecutor engaged in rampant speculation and improperly and repeatedly introduced facts not in evidence. This questioning was proper impeachment under 12 O.S.2011, § 2613(A). The prosecutor's questions were not improper nor were his comments on the witness's responses in closing.

¶34 Finally, Tafolla complains that portions of the prosecutor's argument were improper speculation and that the prosecutor engaged in improper name-calling. Prosecutors are allowed to comment upon and draw logical inferences from the evidence. *See Bench*, 2018 OK CR 31, ¶ 137, 431 P.3d at 966. While the prosecutor should have refrained from name-calling, the argument at issue was largely proper and certainly not plain error. This claim is denied.

8.

¶35 The trial court instructed the jury that "[i]f a person is sentenced to life imprisonment, the calculation of eligibility for parole is based upon a term of forty-five (45) years." Tafolla did not object below but argues on appeal that this instruction was improper because it advised the jury that he would be eligible for parole. Because Tafolla did not object to the instruction at trial we review for plain error only under the analysis set forth in *Hogan,* 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

¶36 As Tafolla correctly asserts, the crime of assault and battery with a dangerous weapon is not an enumerated crime under section 13.1 and accordingly, an instruction on the 85% rule was not warranted. Additionally, the instruction given was not the uniform instruction but rather, was a poorly drafted substitute. Nonetheless, Tafolla has failed to show that the instruction given constituted plain error. This proposition warrants no relief.

9.

¶37 Tafolla argues that his convictions for both carrying a weapon unlawfully and assault and battery with a dangerous weapon violate the statutory prohibition against multiple punishments for a single criminal act under 21 O.S.2011, § 11 and the protections against double jeopardy found in the Oklahoma Constitution and the United States Constitution. Okla. Const. art. II, Section 21; U.S. Const. amends. V, XIV. Defense counsel failed to object on these grounds below, waiving all but plain error. *Head v. State,* 2006 OK CR 44, ¶ 9, 146 P. 3d 1141, 1144.

¶38 Contrary to Tafolla's argument that carrying a weapon unlawfully and assault and battery with a dangerous weapon were a single criminal act, we find that these were separate and distinct offenses committed during a continuing course of conduct. Conviction and punishment for these crimes does not offend section 11. *See Davis v. State*, 1999 OK CR 48, ¶¶ 12-13, 993 P.2d 124, 126-27. Furthermore, because each of these crimes requires proof of one or more elements that the other crime does not, Tafolla was not punished twice for the same offense in violation of double jeopardy. *Id.* 1999 OK CR 48, ¶ 4, 993 P.2d at 125; *Block-*

burger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932). Tafolla has shown no error, plain or otherwise, and relief is not required.

10.

¶39 Tafolla contends that he should have been charged with the specific misdemeanor "hate" crime of malicious intimidation or harassment because of race, color, religion, ancestry, national origin or disability (21 O.S.2011, § 850) instead of the general crime of assault and battery with a dangerous weapon (21 O.S.2011, § 645). Tafolla waived appellate review of this issue for all but plain error when he did not raise this challenge below. Again, to obtain relief, Tafolla must prove plain or obvious error affected the outcome of the proceeding. *Hogan,* 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

¶40 It is true that "where a defendant's conduct is arguably covered by more than one criminal provision, the choice is a matter within the prosecutor's discretion, bounded by the constitutional requirement that the decision not be based on impermissible standards, such as race or religion." *State v. Haworth*, 2012 OK CR 12, ¶ 13, 283 P.3d 311, 316. It is also true, however, that specific statutes should be charged over general statutes in situations where charging under the general statute would thwart the legislative intent in enacting the more specific statute. *See Franks v. State,* 2006 OK CR 31, ¶ 6, 140 P.3d 557, 558-59. *See also Lozoya v. State*, 1996 OK CR 55, ¶¶ 17-18, 932 P.2d 22, 28-29. In interpreting statutory provisions, we look first at the plain meaning of the statutory language. *State v. Farthing*, 2014 OK CR 4, ¶ 5, 328 P.3d 1208, 1210. Furthermore, we construe statutes to determine the intent of the legislature, reconciling provisions, rendering them consistent and giving intelligent effect to each. *King v. State*, 2008 OK CR 13, ¶ 7, 182 P.3d 842, 844. "To determine legislative intent we may look to each part of the statute, similar statutes, the evils to be remedied, and the consequences of any particular interpretation." *Id.*

¶41 The law and facts here do not support Tafolla's claim that the misdemeanor "hate" crime statute prohibiting malicious intimidation or harassment because of race, color, religion, ancestry, national origin or disability is a more specific charge than felonious assault and battery with a dangerous weapon; the statutes at issue prohibit two separate and distinct types of conduct. While Section 850 prohibits the intimidation or harassment, by assault and battery, of another person because of that person's race, color, religion, ancestry, national origin or disability, the fact that this crime is a misdemeanor indicates the legislative intent that the conduct it seeks to prohibit and punish is not as serious as a felony offense. In contrast, Section 645 seeks to prohibit and punish as a felony an assault and battery, committed without justifiable or excusable cause, and committed with the intent to do bodily harm and with a dangerous weapon.

¶42 Tafolla was not prosecuted for the act of committing simple assault and battery upon the victim in order to harass or intimidate him because of his race. Rather, he was prosecuted for the brutal assault and battery he committed upon the victim with a dangerous weapon and with the intent to injure him. The assault and battery in this case was far more serious than a misdemeanor offense and there was no error, plain or otherwise, in the prosecutor's decision to charge Tafolla with the greater felony offense of assault and battery with a dangerous weapon.

¶43 Tafolla argues additionally that because he was charged with assault and battery with a dangerous weapon rather than with the misdemeanor "hate" crime, evidence of his involvement in the UAB gang was irrelevant and inadmissible. For reasons discussed above in Propositions 1 and 4 this argument is rejected. Relief is not required.

11.

¶44 Tafolla contends that he was denied constitutionally effective assistance of counsel. This Court reviews claims of ineffective assistance of counsel *de novo*, to determine whether counsel's constitutionally deficient performance, if any, prejudiced the defense so as to deprive the defendant of a fair trial with reliable results. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Malone v. State,* 2013 OK CR 1, ¶ 14, 293 P.3d 198, 206. Under this test, Tafolla must affirmatively prove prejudice resulting from his attorney's actions. *Strickland,* 466 U.S. at 693, 104 S.Ct. at 2067; *Head,* 2006 OK CR 44, ¶ 23, 146 P.3d at 1148. "To accomplish this, it is not enough to show the failure had some conceivable effect on the outcome of the proceeding." *Id.* Rather, Tafolla must show that there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. *Id.* "A

reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* This Court need not determine whether counsel's performance was deficient if the claim can be disposed of on the ground of lack of prejudice. *See Malone*, 2013 OK CR 1, ¶ 16, 293 P.3d at 207. Tafolla has not shown on the record that but for counsel's actions the result of his trial would have been different. Because he has failed to establish prejudice from his attorney's actions, Tafolla's ineffective assistance of counsel claim is denied.

12.

¶45 Tafolla asserts that even if no individual error in his case merits reversal, the cumulative effect of the errors committed warrants a new trial or sentence modification. The cumulative error doctrine applies when several errors occurred at the trial court level, but none alone warrants reversal. Although each error standing alone may be of insufficient gravity to warrant reversal, the combined effect of an accumulation of errors may require a new trial. *Martinez*, 2016 OK CR 3, ¶ 85, 371 P.3d at 1119. Cumulative error does not deprive the defendant of a fair trial when the errors considered together do not affect the outcome of the proceeding. *Baird v. State*, 2017 OK CR 16, ¶ 42, 400 P.3d 875, 886. A cumulative error claim is baseless when this Court fails to sustain any of the alleged errors raised on appeal. *Id.* There were no errors, either individually or when considered together, that deprived Tafolla of a fair trial. This claim is denied.

DECISION

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

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE WILLIAM D. LaFORTUNE, DISTRICT JUDGE

APPEARANCES AT TRIAL

Toni A. Beach, Attorney at Law, P.O. Box 52755, Tulsa, OK 74152, Counsel for Defendant

Isaac Shields, Kate Hunter, Asst. District Attorneys, 500 S. Denver, Ste. 900, Tulsa, OK 74103, Counsel for State

APPEARANCES ON APPEAL

Ian M. Shahan, Attorney at Law, 1705 S. Baltimore Ave., Tulsa, OK 74119, Counsel for Appellant

Mike Hunter, Attorney General of Oklahoma, Jennifer B. Welch, Assistant Attorney General, 313 N.E. 21st St., Oklahoma City, OK 73105, Counsel for Appellee

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

1. Lara Maloy was Tafolla's girlfriend at the time of the incident. By the time of trial she was married to Tafolla and went by the name Lara Tafolla.

Calendar of Events

August

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

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

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

14 **OBA Bar Center Facilities Committee meeting;** 1 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Bryon J. Will 405-308-4272

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

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

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

September

2 **OBA Closed** – Labor Day

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

Opinions of Court of Civil Appeals

2019 OK CIV APP 39

BULARD AIR SERVICES, LLC, an Oklahoma Limited Liability Company, and DONALD MCDANIEL, d/b/a MCDANIEL AVIATION, Plaintiffs/Appellees, vs. BROWN AVIATION, INC., an Oklahoma Corporation, Defendant/Appellant.

Case No. 116,274. April 18, 2019

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

HONORABLE LINDA MORRISEY, TRIAL JUDGE

AFFIRMED

Noah Fontanez, DUNLAP, BENNETT & LUDWIG, PLLC, Tulsa, Oklahoma, for Appellant,

Sam P. Daniel, III, SAM P. DANIEL, III, PLLC, Tulsa, Oklahoma, for Appellees.

BRIAN JACK GOREE, CHIEF JUDGE:

¶1 This is an action for replevin of an aircraft engine that was in the possession of a mechanic. The trial court issued its writ for immediate return of the property to the owner. We affirm the court's prejudgment order of delivery.

BACKGROUND

¶2 Bulard Air Services, LLC, owns a Cessna 421, a twin-engine propeller aircraft. When Ron Bulard's pilot discovered the left engine had a crack in its crankcase, they hired Donald McDaniel to remove the engine from the plane so it could be repaired. McDaniel spoke to a mechanic named Larry Brown about the problem and eventually transported the engine and logbook to Brown Aviation, Inc.[1] The scope of the work to be performed by Brown and the terms for payment of his services are disputed. The agreement was not in writing.

¶3 Several months passed and Mr. Bulard contacted Mr. Brown about the status of the repair. Brown requested a deposit of $25,000 but Bulard was unwilling to make a payment without the documentation he believed was reasonable. Brown was unwilling to complete the work without payment, nor would he agree to voluntarily return the engine because he claimed a possessory lien. Plaintiffs filed a petition for breach of contract, replevin and injunctive relief. Brown filed a counterclaim for payment of services for $29,812.00

¶4 The trial court conducted a hearing and ruled in favor of Bulard. Brown was required to relinquish possession of the engine and Bulard was required to obtain a bond for $16,000. The next day, Brown filed a motion to stay execution of the writ. The trial court granted the motion in part by (1) modifying the bond amount to $50,000.00, (2) extending the deadline for Brown to release the engine, and (3) requiring Brown to document the components of the disassembled engine. Brown appealed.

APPELLATE JURISDICTION

¶5 The appealed order addresses the writ of replevin. Brown proposes the order is appealable because it is an interlocutory order appealable by right. He argues it is an order modifying or refusing to vacate or modify a provisional remedy which affects the substantial rights of a party. Bulard counters that replevin is not a provisional remedy.[2]

¶6 "The Supreme Court may reverse, vacate, or modify any of the following orders of the district court, or a judge thereof . . . (2) An order that discharges, vacates or modifies or refuses to vacate or modify a provisional remedy which affects the substantial rights of a party…" 12 O.S. §952(b)(2) and 12 O.S. §993(A)(3). For the reasons that follow, we agree with appellant that Bulard was asserting a provisional remedy in this action.

¶7 Identifying provisional remedies is more difficult in modern civil procedure where actions in equity and law are combined.[3] The term "provisional" comes from the former practice of allowing an ancillary suit in equity. *Shadid v. Hammond*, 2013 OK 103, ¶6, 315 P.3d 1008, 1010 (Edmondson, J., concurring). In the court of law a litigant who was particularly at risk of an inequitable loss was obliged to request the temporary relief *provided for* in chancery court.[4] *Id.* The district court now has authority to address all claims arising from a single transaction or set of circumstances, including an alleged need for prejudgment temporary relief.[5]

¶8 Replevin is an action to recover the possession of specific personal property.[6] The stat-

utes allow for an expedited hearing to obtain an order for prejudgment delivery of the property.[7] This evidentiary hearing is preliminary in nature. *Sweeten v. Lawson*, 2017 OK CIV APP 51, ¶33, 404 P.3d 885, 895. Its purpose is only to determine who should have possession of the claimed property pending the final hearing. *Id.*

¶9 In *Hutchings v. Cobble*, 1911 OK 395, ¶2, 120 P. 1013, 1015, the Supreme Court cited Kansas authority which noted that a prejudgment delivery of personal property is a provisional remedy: "'The order for the delivery is ancillary. It is like an order of injunction, which may be the final judgment or provisional remedy'" Hutchings, at ¶6, quoting *Batchelor v. Walburn,* 23 Kan. 734 (Kan. Sup. Ct. 1880).[8]

¶10 A claimant who seeks possession of property before judgment is requesting temporary relief. The prejudgment order is contingent on security in the form of a bond because the court may re-transfer possession after a merits trial.[9] We hold that prejudgment delivery of specific personal property pursuant to 12 O.S. §1571 *et seq.* is a provisional remedy within the meaning of 12 O.S. §952(b)(2) and 12 O.S. §993(A)(3).[10]

¶11 Not all orders disposing of provisional remedies are reviewable. Appellate jurisdiction founded upon §952(b)(2) exists only where the order discharges, vacates, modifies or refuses to vacate or modify a provisional remedy which affects the substantial rights of a party. §952(b)(2). We must examine the effect of the appealed order to determine whether it is reviewable.

¶12 In the writ of replevin, Bulard was directed to execute an undertaking of $16,000. A replevin bond was issued in that amount. Three days later, the court entered an order expressly modifying the amount of the bond to $50,000. The appealed order *modified a provisional remedy* by significantly increasing the replevin bond that secured the prejudgment order of delivery.

¶13 The order also affected the appellant's *substantial rights*. Brown provided aircraft mechanic services on the engine pursuant to a voluntary agreement, and the property was in his possession. He disassembled it, obtained new or remanufactured component parts, and delivered an invoice to Bulard which has not been paid. The trial court noted that any security interest Brown may have is adequately protected by the bond. We conclude the August 4, 2017 order that modified the replevin bond pursuant to a prejudgment order of delivery is an interlocutory order appealable by right. It modified a provisional remedy that affected the substantial rights of a party.

SUFFICIENCY OF THE PETITION

¶14 Brown argues that the order removing the engine from his possession should be reversed because Plaintiffs' petition failed to include all of the specific allegations set forth in §1571(A)(1) and it lacked the verification required by §1571(A)(2). These propositions require statutory construction which is an issue of law, and we review them *de novo* without deference to the trial court. *Sweeten*, ¶16.

¶15 A plaintiff seeking delivery of the property "at the commencement of the suit" must request *immediate* possession and include verified allegations about the property including its description, ownership, value, and wrongful detention without legal justification.[11] Brown correctly points out that Bulard's petition omitted the allegation of §1571(A)(1)(e), that the property was not taken in execution (or for a similar statutory justification). However, because the order for delivery was based on evidence at a hearing, and not solely on the allegations of the petition, we are not persuaded that failure to meet this technical form of pleading requires reversal.[12]

¶16 Section §1571 sets forth the procedure a plaintiff must follow to recover *immediate* possession of specific personal property at the time suit is *commenced*.[13] A verified petition alleging facts showing elements (a) through (f) must be served on the defendant with a summons and a special notice. The notice must direct the defendant to file a written objection within five days. If an objection is not filed in five days, *no hearing is necessary* and the court clerk shall issue the order of delivery. §1571(A)(3). We observe that in a case where property is *immediately* removed from a defendant's possession *at the commencement of a case*, without a hearing, the statute requires a verified petition that includes the specified allegations.[14]

¶17 However, when an objection is filed the court must set the case for a prompt hearing and determine the matter according to the probable merit of the petition. §1571(A)(3). Here, the order of delivery was not made immediately at commencement of the case. Brown objected to the notice and filed an answer with counterclaims. The trial court heard sworn

testimony of witnesses and re-ceived exhibits offered and admitted into evidence. We hold that an order of delivery properly founded upon evidence at the hearing provided for by §1571 is not invalidated by lack of a verified petition.[15] Furthermore, in replevin cases where the order for delivery does not rest solely on the verified allegations of the petition, the sufficiency of the petition is governed by the Oklahoma Pleading Code.[16]

VALUE OF THE PROPERTY

¶18 Brown proposes the replevin order must be reversed because Bulard never presented competent evidence of the engine's value. The value of the property is relevant where prejudgment delivery is sought because the writ may not issue until a replevin bond is executed for double the value of the property. §1573. The valuation is based on the amount stated in the petition or on evidence given at a hearing. §§1573, 1573.1.[17] At the hearing, Bulard testified he obtained an estimate from a different mechanic for $16,000 after receiving Brown's statement requiring a $25,000 deposit. Bulard learned that the engine was disassembled and there was a possibility it was not repairable. Later, Brown sent Bulard a bill for more than $29,000 for work performed plus storage costs. At the close of Bulard's case-in-chief, Brown's counsel demurred to the evidence and the trial court overruled it. Brown contends the trial court's ruling was reversible error.

¶19 When a trial court considers a demurrer to the evidence it must take as true all evidence (together with all reasonable inferences) favorable to the party against whom relief is sought. A demurrer should be overruled unless there is an entire absence of proof tending to show a right to recover. *Jackson v. Jones*, 1995 OK 131, ¶4, 907 P.2d 1067, 1071.

¶20 Brown argues there was no evidence of the value of the engine. He urges that Bulard's only testimony was about the cost of repair which is not the same as value of the property. Bulard testified the engine was dismantled and possibly could not be repaired – Brown informed him, "I don't even know if I can fix your engine because I don't even know if the parts are available." Bulard testified he would be willing to post a bond in the amount of $16,000.

¶21 Accepting Bulard's evidence as true and construing all inferences in his favor, the trial court could have determined the property at issue was a group of disassembled engine components, some broken and possibly irreparable or irreplaceable. The court could reasonably have inferred from Bulard's agreement to post a $16,000 bond that the dismantled and undiagnosed engine had a value of $8,000. The trial court did not commit error when it overruled Brown's demurrer to the evidence.

¶22 At the conclusion of the hearing the trial court pronounced its order granting replevin. The writ issued directing an officer to take the engine with its aircraft log book and delivery it to plaintiffs, and requiring plaintiffs to execute a bond in the amount of $16,000. However, before the time set for delivery, Brown filed a motion to stay to protect his security interest.

¶23 Brown referred to his testimony at the hearing that he has lien rights in the work he performed on the engine while it was in his possession. He argued these rights would be effectively destroyed because his interest was $29,812.00, a sum far greater than the $16,000 bond. In response, the trial court filed an order modifying the bond from $16,000 to $50,000.

¶24 Brown maintains his argument that the bond, even as modified, is not substantiated by evidence and the trial court erred by relying on the petition's allegation that the value is $25,000.[18] We reiterate that there was sufficient testimony concerning the value of the property received in evidence at the hearing to support the order of prejudgment delivery. Considering that the modified bond protected Brown's claimed security interest, we find no error in the court's order.

PRESERVATION OF THE PROPERTY

¶25 When the court modified the bond, it also directed Brown to photographically document the components of the disassembled engine and it extended the time for delivery of the property. Brown asserts Bulard might deliver the engine to a third party to repair it and this would constitute spoliation of evidence. He claims the trial court erred by omitting from its modified order a prohibition against tampering or reassembling the engine.

¶26 Spoliation occurs when evidence relevant to prospective civil litigation is destroyed, adversely affecting the ability of the litigant to prove his or her claim. *Barnett v. Simmons,* 2008 OK 100, ¶21, 197 P.3d 12. Brown cites no authority showing that a trial court must enter a preemptive order to prevent spoliation. We

find no error in the court's order regarding the prospect of spoliation.

¶27 Brown also proposes that the modified order deprived him of property without due process of law guaranteed by the Oklahoma Constitution, Art. 2, §7 and the 14th Amendment of the United States Constitution. His argument is that he was not permitted an opportunity to present evidence on the amount of time it would take him to document the status of the engine, implying that the six days provided by the court was inadequate. We disagree.

¶28 Brown was served with notice of this replevin action approximately one week before the hearing. He testified that the engine is sitting on the shelves of two large carts in his shop. His exhibits included an itemized list of engine parts and the labor he performed. Brown cited authority generally stating the fundamental right to due process of law, but he has not explained why the trial court's order permitting him approximately one week to photograph the engine parts constitutes a deprivation of property without notice and an opportunity to be heard. Actual prejudice is a necessary element of a due process claim which makes the claim ripe for adjudication. *Walters v. Oklahoma Ethics Commission*, 1987 OK 103, ¶19, 746 P.2d 172, 177. Brown has not met this burden.

CONCLUSION

¶29 An action for statutory replevin allows for prejudgment delivery of the property based upon (1) a verified petition at the commencement of the action, or (2) a finding of probable merit at a preliminary evidentiary hearing. 12 O.S. §1571. A writ of replevin properly founded upon evidence at the hearing provided for by §1571 is not invalidated by lack of a verified petition. Unless the writ issues at the commencement of the action and based *solely* on the verified allegations of the petition, the sufficiency of the petition is governed by the Oklahoma Pleading Code. Finally, prejudgment delivery of specific personal property pursuant to 12 O.S. §1571 *et seq.* is a provisional remedy within the meaning of 12 O.S. §952(b)(2) and 12 O.S. §993(A)(3).

¶30 The trial court's Order on Defendant's Emergency Motion to Stay Execution of the Writ of Replevin, filed August 4, 2017, is AFFIRMED.

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

BRIAN JACK GOREE, CHIEF JUDGE:

1. Donald McDaniel, d/b/a McDaniel Aviation, is alleged to be the agent for Bulard. Both are plaintiffs in the action and they are referred to in this opinion as "Bulard."

2. In their response to the petition in error, appellees asserted that other trial issues are still pending and the writ of replevin is not a final appealable order pursuant to 12 O.S. §951, §952, §953, and §994. We ordered appellant to show cause why the appeal should not be dismissed for lack of an appealable order. The parties filed briefs.

3. The Oklahoma Pleading Code governs the procedure in district courts of Oklahoma in all suits of a civil nature whether cognizable as cases at law or in equity. 12 O.S. §2001.

4. "Provisional Remedy" is defined by *Black's Law Dictionary,* Revised Fourth Edition,1968, as "a remedy provided for present need or for the immediate occasion; one adapted to meet a particular exigency. Particularly, a temporary process available to a plaintiff in a civil action, which secures him against loss, irreparable injury, dissipation of the property, etc., while the action is pending. Such are the remedies by injunction, appointment of a receiver, attachment, or arrest. The term is chiefly used in the codes of practice. *Snavely v. Abbot Buggy Co.*, 36 Kan. 106, 12 P. 522." For further discussion of *Snavely v. Abbott see* fn. 8.

5. Both legal and equitable rights may be determined in a statutory action for replevin. *Kansas City Hay Press Co. v. Williams*, 1915 OK 591, ¶2, 151 P. 570, 571.

6. Title 12 O.S. §1571 *et seq.*

7. A plaintiff in an action to recover the possession of specific personal property may claim the delivery of the property at the commencement of the suit. 12 O.S. §1571(A). The court may compel the delivery of the property before or after judgment. §1583. A hearing may be conducted to determine whether an order for prejudgment delivery of the property should issue according to the probable merit of the plaintiff's petition. §1571(A)(3). The order shall not be issued without an undertaking and bond. §§1573-1574.

8. In 1887, the Supreme Court of Kansas, citing the progenitor of 12 O.S. §952, included replevin *pendente lite* (pending the suit) in its recitation of provisional remedies that could result in an interlocutory order. *Snavely v. Abbott Buggy Co.*, 36 Kan. 106, 12 P. 522 (1887).

9. Property held by a party under bond in a replevin action is conditioned on its redelivery in the event he should not prevail in the action. *Mid-Continent Motor Company v. Art Harris Transfer Company,* 1924 OK 107, ¶0, 223 P. 130 (syllabus by the court).

10. Replevin is not, categorically, a provisional remedy. In many cases the determination of possession is made only after a trial on the merits. *See Hopkins v. West*, 2009 OK CIV APP 104, ¶13, 229 P.3d 560, 564. A final order of possession in a replevin case is not a provisional remedy. The provisional remedy is the court's prejudgment (interlocutory) determination of possession based on (1) a verified petition at the *commencement* of the action, or (2) a finding of probable merit at a preliminary *evidentiary hearing*. *See* 12 O.S. §1571.

11. Title 12 O.S. §1571 provides:

> A. The plaintiff in an action to recover the possession of specific personal property may claim the delivery of the property at the commencement of suit, as provided herein.
> 1. The petition must allege facts which show:
> a. a description of the property claimed,
> b. that the plaintiff is the owner of the property or has a special ownership or interest therein, stating the facts in relation thereto, and that he is entitled to the immediate possession of the property,
> c. that the property is wrongfully detained by the defendant,
> d. the actual value of the property, provided that when several articles are claimed, the value of each shall be stated as nearly as practicable,
> e. that the property was not taken in execution on any order or judgment against said plaintiff, or for the payment of any tax, fine or amercement assessed against him, or by virtue of an order of delivery issued under this chapter, or any other mesne or final process issued against said plaintiff; or, if taken in execution or on any order or judgment against the plaintiff, that it is exempt by law from being so taken, and
> f. the prayer for relief requests that the court issue an order for the immediate delivery of the property.
> 2. The above allegations are verified by the party or, when the facts are within the personal knowledge of his agent or attorney and this is shown in the verification, by said agent or attorney.
> 3. A notice shall be issued by the clerk and served on the defendant with the summons which shall notify the defendant that an

order of delivery of the property described in the petition is sought and that the defendant may object to the issuance of such an order by a written objection which is filed with the clerk and delivered or mailed to the plaintiff's attorney within five (5) days of the service of the summons. In the event that no written objection is filed within the five-day period, no hearing is necessary and the court clerk shall issue the order of delivery. Should a written objection be filed within the five-day period specified, the court shall, at the request of either party, set the matter for prompt hearing. At such hearing the court shall proceed to determine whether the order for prejudgment delivery of the property should issue according to the probable merit of plaintiff's petition. Provided, however, that no order of delivery may be issued until an undertaking has been executed pursuant to Section 1573 of this title.

Nothing contained in this act shall prohibit a party from waiving his right to a hearing or from voluntarily delivering the goods to the party seeking them before the commencement of the proceedings or at any time after institution thereof.

B. Where the notice that is required by subsection A of this section cannot be served on the defendant but the judge finds that a reasonable effort to serve him was made and at the hearing the plaintiff has shown the probable truth of the allegations in his petition, the court may issue an order for the prejudgment delivery of the property. If an order for the delivery of the property is issued without actual notice being given the defendant, the defendant may move to have said order dissolved and, if he does not have possession of the property, for a return of the property. Notice of said motion with the date of the hearing shall be served upon the attorney for the plaintiff in the action. The motion shall be heard promptly, and in any case within five (5) days after the date that it is filed. The court must grant the motion unless, at the hearing on defendant's motion, the plaintiff proves the probable truth of the allegations contained in his petition. If said notice is filed before the sheriff turns the property over to the plaintiff, the sheriff shall retain control of the property pending the hearing on the motion.

C. The court may, on request of the plaintiff, order the defendant not to conceal, damage or destroy the property or a part thereof and not to remove the property or a part thereof from the state or county, pending the hearing on plaintiff's request for an order for the prejudgment delivery of the property, and said order may be served with the summons.

D. No action to recover the possession of specific personal property pursuant to this section may be brought against any city, county or state agency or an employee of a city, county, or state agency, if the claim alleges matters arising from incarceration, probation, parole or community supervision.

12. The list of allegations in §1571 appears to be a relic of common law replevin where an affidavit was required in addition to the petition. *See Hutchings v. Cobble*, 1911 OK 395, 120 P. 1013. When replevin first became a statutory remedy the affidavit was relevant only where the plaintiff sought to recover possession of specific personal property at the commencement of the suit, or at any time before an answer was filed. *Hutchins*, 1911 OK 395, ¶5, 120 P. 1013, 1015. The pleading standards for a petition for replevin were examined independently from the requirements of the affidavit. It has always been sufficient for a plaintiff to allege facts describing the property in controversy, showing that he is the owner or has a special interest in it, that he is entitled to its immediate possession, and the defendant wrongfully detains it from him. *Sweeten*, ¶¶26-31, citing *Hivick v. Okla.-Colo. Oil & Gas Co.*, 1923 OK 49, ¶0, 212 P. 420. In this case the petition alleges Bulard is the owner of the aircraft engine, it was delivered to Brown's shop for repair, Brown refused to return it upon demand, its value is $25,000.00, and Bulard is entitled to possession.

13. A civil action is commenced by filing a petition with the court. 12 O.S. §2003.

14. Unless specifically required by rule or statute, pleadings need not be verified or accompanied by an affidavit. *Heirshberg v. Slater*, 1992 OK 84, ¶9, 833 P.2d 269, 274. Generally, a pleading that lacks a verification is not a jurisdictional defect. *State ex rel. Dep't of Pub. Safety v. 1985 GMC Pickup, Serial No. 1GTBS14EOF2525894, OK Tag No. ZPE852*, 1995 OK 75, ¶19, 898 P.2d 1280, 1284. In a case decided before Oklahoma adopted notice pleading, it was held that a verified petition was required for a valid order for delivery made at the commencement of an action. *Parker v. Henry*, 1977 OK 13, ¶2, 559 P.2d 1249, 1250. Nothing in *Parker* suggests there was a hearing or even an appearance by the defendant before the writ of replevin issued.

15. Though it was rendered unnecessary by the sworn testimony at the hearing, the plaintiffs' lawyer filed a Verification of Petition as a separate document after the action was commenced. It states: "Sam P. Daniel III, of lawful age, duly sworn on his oath, deposes and states: That he is the attorney for the Plaintiffs above named; that he has read the foregoing and the allegations contained in the Petition; and believes the testimony and evidence at trial will prove the facts and matters therein set forth are true and correct."

16. In 1984 Oklahoma adopted the Oklahoma Pleading Code and became a notice pleading state. All that is required under notice pleading is that the petition give fair notice of the plaintiff's claim and the grounds upon which it rests. Title 12 O.S. §2008 merely requires that the pleading shall contain "[a] short and plain statement of the claim showing that the pleader is entitled to relief." . . . For most claims, the pleader need not utilize terms of art or legal phraseology. *Gens v. Casady School*, 2008 OK 5, ¶ 9, 177 P.3d 565, 569. Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings or motions are required. 12 O.S. §2008(E)(1).

17. Title 12 O.S. §1573 provides:

> The order shall not be issued until there has been executed by one or more sufficient sureties of the plaintiff, to be approved by the clerk, an undertaking in not less than *double the value of the property as stated in the petition* to the effect that the plaintiff shall duly prosecute the action, and pay all costs and damages which may be awarded against him, including attorney's fees and, if the property be delivered to him, that he will return the same to the defendant if a return be adjudged; provided, that where the State of Oklahoma is party plaintiff, an undertaking in replevin shall not be required of the plaintiff, but a writ shall issue upon petition duly filed as provided by law. The undertaking shall be filed with the clerk of the court.

Title 12 O.S. §1573.1 provides:

> On application of either party which is made at the time of executing the replevin bond or the redelivery bond, or at a later date, with notice to the adverse party, *the court may hold a hearing to determine the value of the property* which the plaintiff seeks to replevy. If the value as determined by the court is different from that stated in the petition, the value as determined by the court shall control for purpose of Sections 1573 and 1577 of this title.

18. Brown proposes the trial court erroneously took judicial notice of the valuation made in an unverified petition. Because we conclude the trial court did not abuse its discretion in setting the amount of the replevin bond, we need not consider the boundaries of judicial notice.

2019 OK CIV APP 40

IN THE MATTER OF THE ADOPTION OF L.F. and B.F., minor children, MATTHEW DAVID SEAY and FARRAH EVENING SEAY, Appellants, vs. STATE OF OKLAHOMA *ex rel.* DEPARTMENT OF HUMAN SERVICES, Appellee.

Case No. 117,116. July 5, 2019

ORDER

This court has determined this opinion should be designated for publication. The opinion is hereby ordered published.

SO ORDERED this 3rd day of June, 2019. ALL JUDGES CONCUR.

/s/ Deborah B. Barnes
Presiding Judge, Division IV

June 19, 2019

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

HONORABLE DORIS L. FRANSEIN, TRIAL JUDGE

AFFIRMED

Catherine Z. Welsh, Jim C. McGough, Mark A. Zannotti, Matthew J. Hall, Rachel J. Ellsworth, WELSH & McGOUGH, PLLC, Tulsa, Oklahoma, for Appellants

Bonnie Clift, DEPUTY GENERAL COUNSEL, OKLAHOMA DEPARTMENT OF HUMAN SERVICES, Oklahoma City, Oklahoma and Larisa Grecu-Radu, ASSISTANT GENERAL COUNSEL, OKLAHOMA DEPARTMENT OF HUMAN SERVICES, Tulsa, Oklahoma, for Appellee

Adam Barnett, ASSISTANT TULSA COUNTY PUBLIC DEFENDER, Tulsa, Oklahoma, for the Minor Children

JANE P. WISEMAN, VICE-CHIEF JUDGE:

¶1 Appellants Matthew David Seay and Farrah Evening Seay appeal the juvenile court's dismissal of their application to set the matter for a best interests hearing and the dismissal of their petition for adoption of minor children. After review of the record and applicable law, we affirm the court's order.

FACTS AND PROCEDURAL BACKGROUND

¶2 On December 12, 2016, DHS obtained emergency legal custody of the minor children as stated in an emergency order issued pursuant to 10A O.S § 1-4-201(D) by the Tulsa County District Court in Case No. JD-2016-594 (deprived case or court). On December 28, 2016, DHS filed a deprived petition requesting immediate termination of parental rights. On April 25, 2017, the parents stipulated to the allegations of the "State's offer of proof" and the minor children, LF and BF, were adjudicated deprived based on heinous and shocking neglect and placed in DHS's temporary legal custody. Both parents also waived jury trial.[1]

¶3 According to the "placement agreement for out-of-home care," on December 16, 2016, DHS placed LF and BF in the foster home of Matthew and Farrah Seay – i.e., Appellants currently seeking the adoption of the children. On June 14, 2017, Appellants received a "Notice of Child's Removal from Out-of-Home Placement" stating the children would be removed from their foster care on June 22, 2017, to be placed in a kinship home. On June 20, 2017, Appellants filed an objection to the removal of the children from their foster home "pursuant to 10A O.S. § 1-4-805," and on June 21, 2017, Appellants filed an amended objection. After a hearing in July 2017, the trial court in the deprived case overruled Appellants' objection to removal by DHS finding "that the move by DHS was not arbitrary, contrary to the permanency plan of the children and is in the best interests of the children." Appellants did not appeal this ruling. DHS removed the children from Appellants' foster home and placed them with a relative where they, according to DHS's appellate brief, still remain.

¶4 On September 1, 2017, Appellants filed a petition to adopt the children in Tulsa County District Court Case No. FA-2017-338 (adoption case or court). That same day, Appellants filed in the deprived case an application for temporary injunction asking the deprived court to prohibit the removal of the children from Oklahoma because they had filed a petition for adoption in the adoption case and would "likely prevail in obtaining a Decree of Adoption" as the children's parents had agreed to the adoption. On September 6, 2017, the deprived court denied the application for temporary injunction stating:

> Specifically, the children are still in the temporary custody of the Department of Human Services as the parental rights of the above-referenced children have not been terminated. The non-jury trial on the issue of immediate termination has not as yet been conducted. Therefore, any petition for adoption is premature and not before the court.
>
> Further, whether the natural parents "agree to consent to the adoption by the Adoptive Parents" is irrelevant for the reason that if the rights of the natural parents are terminated pursuant to the non-jury trial, any ability for the natural parents to consent to the adoption by the Seays are [*sic*] extinguished as a matter of law. It is the consent from the Department of Human Services that is to be obtained and considered by the Court.
>
> Lastly, the likelihood that the Seays will prevail in their Petition for Adoption is questionable considering that the Court approved the removal of the above-referenced children by DHS from the Seays' home for placement in the current foster home.

In September 2017, the minor children's parents consented to the adoption by Appellants.

¶5 On October 17, 2017, DHS filed a "special limited appearance, advice of pending deprived action and automatic stay of action" in the adoption case advising the court of the pending deprived action, that the deprived court had not given consent for the adoption court to exercise jurisdiction over the children, and an automatic stay was therefore required pursuant to 10A O.S. § 1-4-101(A)(2).

¶6 On November 1, 2017, the adoption court entered a court minute finding "The hearing for final decree is stricken and stayed. The matter should be heard at juvenile."

¶7 In an order filed February 20, 2018, following a non-jury trial, the deprived court terminated the parents' rights to LF and BF and placed them in DHS's permanent custody "to make reasonable efforts to finalize the plan of adoption." The final order of judgment for approval as to form was filed March 29, 2018.

¶8 On February 27, 2018, Appellants filed their "application for setting of best interest." The trial court set the application for hearing, but only for purposes of determining "the legal issues of jurisdiction and [Appellants'] standing to adopt" and directing the parties to submit briefs. On March 13, 2018, DHS filed a "motion to intervene and to dismiss application for setting best interest" to which Appellants responded.

¶9 Following a hearing in May 2018, the deprived court granted DHS's motion and dismissed the adoption proceeding after determining Appellants lacked "standing to pursue adoption in a separate proceeding" without consent of the deprived court. It further concluded:

> IT IS THEREFORE THE FINDINGS AND ORDER OF THE COURT that the [Appellants'] Application to set the above-entitled matter for a best interests hearing be dismissed. Further, because [Appellants] are found to lack standing to pursue adoption of the children in the above-entitled separate proceeding and have attempted to do so without the consent of this Court, who maintains the jurisdiction of the children, the above entitled adoption proceeding should be dismissed.

Appellants appeal.

STANDARD OF REVIEW

¶10 "In reviewing the district court's order dismissing [Appellants'] [p]etition, the standard of review is *de novo*." *In re Adoption of M.E.*, 2013 OK CIV APP 18, ¶ 15, 296 P.3d 1267 (citing *Miller v. Miller,* 1998 OK 24, ¶ 15, 956 P.2d 887).

ANALYSIS

I. Jurisdiction

¶11 Appellants assert that given the facts of this case, the adoption court did not lack subject matter jurisdiction to proceed with the adoption even though the children were the subjects of an open deprived proceeding in the deprived court.

¶12 The Oklahoma Children's Code sets forth and explains the court's subject matter jurisdiction over a deprived child when determining custody, support, or visitation:

> A. 1. Upon the filing of a petition, the assumption of the custody of a child, or issuance of an emergency custody order pursuant to the provisions of the Oklahoma Children's Code, t*he district court shall obtain jurisdiction over any child who is or is alleged to be deprived*. Jurisdiction shall also be obtained over any parent, legal guardian, or custodian of and any other person living in the home of such child who appears in court or has been properly served with a summons pursuant to Section 1-4-304 of this title.
>
> 2. When jurisdiction has been obtained over a child who is or is alleged to be a deprived child:
>
> . . . .
>
> c. *all other action then pending or thereafter commenced within the county or state that concerns the custody,* support, or visitation *of the child shall be automatically stayed unless after notice to the parties in the deprived action, the written consent of such court is obtained and filed in the other proceeding;* provided, a child's delinquency action may, in the discretion of the court, proceed pursuant to the Oklahoma Juvenile Code,
>
> d. *all orders entered in the deprived proceeding concerning the custody,* support, or visitation of a child *shall control over conflicting orders* entered in other actions *until such time as the jurisdiction of the court in the deprived proceeding terminates,* and
>
> e. *the judge presiding over a deprived action shall have the authority to make a final determi-*

> *nation* in the matter *and preside over any separate action necessary to finalize a child's court-approved permanency plan including an adoption,* guardianship, or other custody proceeding.

10A O.S.2011 § 1-4-101(A)(1),(2)(c-e)(emphasis added). The Children's Code establishes when the deprived court's jurisdiction terminates:

> If the court terminates the rights of a parent and places the child with an individual or agency, the court may vest in such individual or agency authority to consent to the adoption of the child. Provided, that when the court places the child with the Department of Human Services, it shall vest the Department with authority to place the child and, upon notice to the court that an adoption petition has been filed concerning the child, vest the Department with authority to consent to the adoption of the child, *and the jurisdiction of the committing court shall terminate upon a final decree of adoption.*

10A O.S.2011 § 1-4-907 (emphasis added). The legislative intent in 10A O.S. Supp. 2018 § 1-1-102(B)(7) states that one reason for promulgating such laws for deprived children is to "[e]nsure that . . . the child will be placed in an adoptive home or other permanent living arrangement in a timely fashion."[2] As the deprived court stated in this case: "Further the legislative intent that the court in the Deprived action continue its oversight in finalizing the permanency plan for a child (i.e., reunification, adoption, guardianship, or planned alternative placement) is found in 10A O.S. 1-4-811(D)." This provision states in part:

> At the hearing, the court shall determine or review the continued appropriateness of the permanency plan of the child and whether a change in the plan is necessary, the date by which the goal of permanency for the child is scheduled to be achieved, and whether the current placement of the child continues to be the most suitable for the health, safety, and welfare of the child.

10A O.S. Supp. 2018 § 1-4-811(D).[3]

¶13 Our review of these statutes leads us to only one conclusion: that the deprived court had controlling jurisdiction over the minor children, thus prohibiting the adoption court from proceeding in a separate action without the deprived court's written consent. We agree with the deprived court's order explaining how its decision follows the statutes' legislative intent:

> As previously cited by this Court, 10A O.S. [§] 1-4-101(A)(2) is clear in its intent that finalization of custody, child support and visitation affecting an alleged or adjudicated deprived child cannot proceed in another court – even within the same judicial district – without the juvenile court's consent. This ensures there are not competing court orders; that the child safety threats are not overlooked by another court; that the child's judicially determined permanency plan is not overlooked or disregarded in another judicial venue; or that an individual independently attempts to bypass the juvenile court's oversight by seeking custody of the child in another court ignorant of the allegations/facts in the Deprived action. The juvenile court is permitted to finalize the permanency plan within its court OR may knowingly consent to allow another venue/division to finalize the approved plan.
>
> In this instant Deprived action, the [Appellants] did not seek the express written consent of this Court. Hence [the adoption court] lacked jurisdiction over these children and any action taken to finalize the adoption within the Probate Division was stayed and [is] now voidable.

Appellants failed to obtain written consent from the deprived court, and the deprived court maintained controlling jurisdiction over the children during the pendency of the deprived action.

II. Standing

¶14 Appellants argue the trial court erred in determining they had no legal standing to bring a separate action to adopt the children. They assert they had standing to file an adoption petition "when (1) [they] are prior foster parents and have received the natural parents' consent to adopt, and (2) the minor children are the subjects of a deprived proceeding under the Oklahoma Children's Code."

¶15 As stated in *In re Adoption of I.D.G.*, 2002 OK CIV APP 22, ¶ 12, 42 P.3d 303 (quoting *Cities Serv. Co. v. Gulf Oil Corp.*, 1999 OK 16, ¶ 3, 976 P.2d 545), standing is comprised of three elements:

> (1) A legally protected interest which must have been injured in fact – i.e., an injury which is actual, concrete and not conjectural in nature, (2) a causal nexus between the injury and the complained of conduct, and (3) a likelihood, as opposed to mere speculation, that the injury will be redressed by a favorable decision.

(Emphasis omitted.) "An initial inquiry into standing must reveal, among other things, that 'the interest to be guarded is within a statutorily or constitutionally protected zone.'" *In re Adoption of I.D.G.*, 2002 OK CIV APP 22, ¶ 12 (quoting *Hendrick v. Walters,* 1993 OK 162, ¶ 5, 865 P.2d 1232).

¶16 In *In re Adoption of I.D.G.*, 2002 OK CIV APP 22, 42 P.3d 303, DHS placed the minor child in foster care with petitioners after being removed from the home. *Id.* ¶ 2. I.D.G. was placed "with [p]etitioners because the foster home where his siblings were already living was full." Id. The natural parents' rights were terminated. *Id.* I.D.G. stayed with petitioners for 10 months but was then removed from the home "for reasons unrelated to their care of him." *Id.* ¶ 3. Petitioners then "filed a petition to adopt I.D.G., acknowledging that he was in DHS custody and was the subject of an ongoing deprived proceeding." *Id.* ¶ 4. Then petitioners "filed applications to have the court appoint counsel for I.D.G. and for a temporary restraining order to prevent DHS from placing him with any other prospective adoptive family." *Id.* ¶ 5. Petitioners argued "[t]hey filed these applications because of DHS's plan to place I.D.G. in an adoptive home with his siblings." *Id.*

¶17 DHS filed an objection to the adoption petition "in conjunction with a motion to consolidate the petition with the ongoing deprived proceeding." *Id.* ¶ 6. Petitioners objected to these motions. *Id.* The trial court dismissed the petition for adoption. *Id.* ¶ 8. In addressing the standing issue, the Court on appeal concluded:

> I.D.G. lived with Petitioners for ten months. While this is not an insignificant period of time, particularly in the course of a very young life, it does not convey upon Petitioners the right, independent of their contractual right as foster parents, to control the ultimate placement of I.D.G. Petitioners' rights as foster parents are set out in contract and statutes. Petitioners undoubtedly had standing to contest DHS's decision to remove I.D.G. from their home, but they do not have standing to pursue his adoption in a separate proceeding initiated outside of the deprived proceeding and after I.D.G. was removed from their home.

Id. ¶ 15. The Court noted that the Oklahoma Supreme Court has determined that "foster parents had standing to *intervene* in – not initiate – an adoption proceeding as in loco parentis, where they had been foster parents for seven years and had received repeated assurances from DHS that they would be able to adopt the child." *Id.* ¶ 14 (citing *In re B.C.*, 1988 OK 4, ¶ 20, 749 P.2d 542).

¶18 The Court further noted that "under the current statutory scheme, foster parents have the statutory right to be considered as potential adoptive parents and, if the child has lived with them for twelve months or more, 'great weight' should be given to their desire to adopt." *Id.* (quoting 10 O.S. Supp. 2000 § 7003-5.6h now renumbered as 10A O.S. § 1-4-812).

¶19 The Court concluded that although "[p]etitioners could have intervened in the deprived child proceeding to assert their rights as foster parents and press their desire to be adoptive parents, . . . [t]hey chose not to do so." *Id.* ¶ 22. The court added that "[i]f [p]etitioners had no interest in adopting I.D.G., they would not need to be a party to the deprived proceedings. However, since they did have such an interest, they should have joined the proper proceedings, rather than attempting to create a new one." *Id.* ¶ 23. Because petitioners pursued the "wrong process," the issue was not ripe for determination and the trial court could not consider the child's best interest when it was not a "proper adoption case to begin with." *Id.*

¶23, 25. The Court determined that petitioners lacked standing to pursue the adoption in a separate proceeding. *Id*. ¶ 28.

¶20 Appellants in the present case are no longer foster parents to the children and have not been foster parents to them since their removal in July 2017. Pursuant to 10A O.S. Supp. 2018 § 1-4-807(B):[4]

> If a foster parent, group home, preadoptive parent, or relative is currently providing care for a child, the Department shall give the foster parent, group home, preadoptive parent, or relative notice of a proceeding concerning the child. A foster parent, group home representative, preadoptive parent,

> or relative providing care for a child has the right to be heard at the proceeding. *Except when allowed to intervene,* the foster parent, group home, preadoptive parent, or relative providing care for the child is not considered a party to the juvenile court proceeding solely because of notice and the right to be heard at the proceeding.

¶21 As noted by the deprived court, Appellants never attempted "to intervene in the deprived matter although it is doubtful this Court would permit their permissive intervention having previously approved the removal of the children from their home for placement with relatives. Therefore, [Appellants], having not pursued adoption in the [d]eprived action and knowing that it was ongoing, lack standing to pursue adoption in a separate proceeding." This is to say that Appellants failed to establish a "likelihood, as opposed to mere speculation, that the injury would be redressed by a favorable decision." *In re Adoption of I.D.G.*, 2002 OK CIV APP 22, ¶ 12.

¶22 Although they had certain contractual and statutory rights set forth above, we agree with the deprived court's determination that Appellants could not pursue adoption of the children in a separate proceeding. Although Appellants objected to the children's removal from their home and participated in a hearing, Appellants did not intervene in the deprived action to assert their right to adopt as foster parents.

¶23 The deprived court also determined that the parents' consent provided to Appellants did not affect its decision. "The [Appellants] argue that: 'the natural parent[s'] consent to adoption was specifically limited to the [Appellants]. The [Appellants] are the only individuals to whom the natural parents have given their consent to adopt these minor children ….'" The deprived court correctly addressed this question:

> Consent, or voluntary agreement, *to the termination of parental rights* in a deprived child action is specifically provided for in 10A O.S. [§] 1-4-904(B)(1).[5] The [parents] provided a consent to *adoption* pursuant to the Adoption Code, 10 O.S. [§] 7503-2.1. The effect of a consent to the termination of parental rights terminates, in part, the necessity of a parent to consent to the adoption of their child. 10A O.S. [§] 1-4-907 specifically grants *to the Deprived Court* the right to place a child with an individual or agency and vests in that individual or agency the authority to consent to the adoption of the child. The [parents], at the time of their consent to the adoption of their children, were limited in actions they could take with respect to their children's custody. The children were in the temporary custody of DHS and wards of this Court as Deprived children. The [parents] were awaiting the termination of parental rights trial. The provisions of the Adoption Code were not applicable. And no authority exists within the Children's Code [permitting] a parent to dictate the placement of a child for adoption purposes…. Therefore, the specific statutory procedures found within the Children's Code, a special proceeding that may ultimately result in the use of the Adoption Code for purposes of finalizing the adoption of a Deprived child, applies. The foster parents may not circumvent the authority of DHS and ultimately this Court to determine the permanent placement of these children for purposes of adoption.

¶24 We agree with the deprived court that because the adoption court lacked jurisdiction and Appellants lacked standing to initiate a separate adoption proceeding, the deprived court correctly dismissed both Appellants' application to set the matter for a best interests hearing and their petition for adoption. Appellants, like petitioners in *I.D.G.*, pursued the "wrong process" for adopting the minor children, and the adoption proceeding was not proper from the outset. And, the deprived court properly refused to consider the parents' consent in the adoption proceeding in making its determination.

¶25 For the reasons given in this Opinion, we affirm the deprived court's decision.

CONCLUSION

¶26 The order of the deprived court is affirmed.

¶27 **AFFIRMED.**

BARNES, P.J., and RAPP, J., concur.

JANE P. WISEMAN, VICE-CHIEF JUDGE:

1. According to the order on appeal, the children's parents were convicted "on five [5] counts of [c]hild [n]eglect by jury trial in Tulsa County District Court in Case No. CF-16-6855, each parent was sentenced on November 13, 2017 to a total of 130 years. The conviction is currently being appealed."

2. This statute was last amended on November 1, 2014, and is the same version in effect at the time of these proceedings.

3. This statute was last amended on November 1, 2015, and is the same version in effect during these proceedings.

4. This statute was last amended on November 1, 2015, and is the same version in effect during these proceedings.

5. Section 1-4-904(B)(1) states that, "The court may terminate the rights of a parent to a child based upon the following grounds: (1) Upon the duly acknowledged written consent of a parent, who voluntarily agrees to termination of parental rights." 10A O.S. Supp. 2018 § 1-4-904(B)(1).

2019 OK CIV APP 41

OLIVER DALE DALLAS, Plaintiff/Appellee, vs. GEICO INSURANCE COMPANY, Defendant/Appellee, and THE PAIN MANAGEMENT SOLUTION, PLLC, Claimant/Appellant, and STOVER PHYSICAL THERAPY, PC; OCOMS IMAGING, LLC and OLIVER A. CVITANIC, M.D., P.C., Claimants.

Case No. 116,209. June 24, 2019

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE RICHARD C. OGDEN, TRIAL JUDGE

AFFIRMED IN PART, REVERSED IN PART AND REMANDED WITH INSTRUCTIONS

Chris Sloan, SLOAN LAW OFFICE, P.C., Oklahoma City, Oklahoma, for Plaintiff/Appellee

R. Robyn Assaf, Alia Al-Assaf, Oklahoma City, Oklahoma, for Claimant/Appellant

Gerald F. Pignato, Benjamin M. McCaslin, PIGNATO, COOPER, KOLKER & ROBERSON, P.C., Oklahoma City, Oklahoma, for GEICO

KEITH RAPP, JUDGE:

¶1 The defendant, The Pain Management Solution, PLLC (Pain Management), appeals a judgment adjudicating claims in an action brought by the plaintiff Oliver Dale Dallas (Dallas). The remaining defendants, except Geico Insurance Company (Geico), either did not object to the judgment or did not appear.[1] Geico provided the money which is the subject of this action.[2]

BACKGROUND

¶2 Dallas alleged that he sustained injury as a passenger when his wife, the driver, applied the brakes to avoid a collision. The other vehicle left the scene and that driver has not been identified. Dallas received medical treatments from all of the medical provider defendants.

¶3 Dallas retained his attorney. The attorney pursued an uninsured motorist (UM) claim against Dallas's insurer, Geico. After negotiations, and without a lawsuit, the UM claim was settled for the sum of $60,614.78. This sum was insufficient to pay the attorney fee and the medical providers' charges.

¶4 Dallas's attorney filed this action to adjudicate medical liens and claims and to apportion the fund. The petition set out the source of the funds and the statement that counsel and Dallas had a fifty percent contingency fee contract. Counsel endorsed "Attorney's Lien Claimed" on the petition.[3] The petition listed the medical providers and their claims and liens.

¶5 The trial court conducted a hearing. During the hearing, the trial court inquired of Dallas's attorney if he had a fifty percent, written fee contract, and counsel affirmed that he did have the contract. The trial court clearly accepted the statement without having the contract admitted into evidence. Counsel also explained that the reason for the amount of the contingency was due to the complex case circumstances of no collision, no other driver, and a criminal matter against Mrs. Dallas, which is apparently related to the traffic incident.[4]

¶6 During the course of the hearing, counsel for Pain Management offered into evidence a letter purporting to be a $52,000.00 settlement offer from Geico. Dallas's attorney objected, and the trial court sustained the objection.

¶7 Dallas's attorney presented a proposed division of proceeds. The proposal awarded counsel the full attorney fee and costs and divided, proportionately, the balance among the participating medical claimants. Only Pain Management objected, and it now appeals. As briefed, Pain Management asserts error regarding evidentiary issues and error regarding whether Dallas's counsel has a lien and any legal right to priority.

STANDARD OF REVIEW

¶8 The principle issues in this case do not involve factual questions, but rather interpretations of statutes, rules and prior case law. Thus, the appeal presents questions of law which are reviewed *de novo*. *Kluver v. Weatherford Hosp. Auth.*, 1993 OK 85, ¶ 14, 859 P.2d 1081, 1084. "Issues of law are reviewable by a *de novo* standard and an appellate court claims for itself plenary independent and non-deferential

authority to reexamine a trial court's legal rulings." *Id.*

¶9 "[A] judgment will not be reversed based on a trial judge's ruling to admit or exclude evidence absent a clear abuse of discretion." *Myers v. Missouri Pacific R.R.*, 2002 OK 60, ¶ 36, 52 P.3d 1014, 1032-33. "An abuse of discretion takes place when the decision is based on an erroneous interpretation of the law, on factual findings that are unsupported by proof, or represents an unreasonable judgment in weighing relevant factors." *Oklahoma City Zoological Trust v. State ex rel. Public Employees Relations Bd.*, 2007 OK 21, ¶ 5, 158 P.3d 461, 463-64.

ANALYSIS AND REVIEW

A. Procedural Issues

¶10 The complaint about not requiring the written attorney contingent fee contract does not show error. The trial court specifically inquired and was told by the attorney that there is a contract. The trial court was satisfied as to its existence, and the critical point was the amount of the contingency. Pain Management has not demonstrated any abuse of discretion or absence of critical information for the trial court. Moreover, the Pain Management argument here is addressed more to the propriety of a fifty percent contingency than the existence of the fee contract.

¶11 Pain Management argues that its representative should have been allowed to testify that its bill was for the subject of the accident injuries. Dallas's attorney had mentioned that Pain Management had treated Dallas for unrelated matters. However, counsel further stated that the bills submitted in this case were for the auto injuries. Moreover, the adjudication proposed by Dallas's attorney included all of the charges from Pain Management, without challenge or deduction. No error has been demonstrated.

¶12 Pain Management claims that there was a $52,000.00 settlement offer from Geico and that it would be unethical for Dallas's attorney to claim a contingency on that part of the settlement. The trial court declined to admit the letter into evidence on the ground of hearsay and relevance.

¶13 A review of the letter, Exhibit 1, shows that it is not literally as represented by Pain Management in its argument. The letter appears to be handwritten from Dallas to the physician and asks him to accept a $52,000.00 settlement. Pain Management claims $64,795.62. The source basis of the $52,000.00 is not mentioned in the letter. No effort appears to have been made to call Dallas to identify and authenticate the document. Thus, interpreting the letter to mean that Geico offered to settle is an interpretation which cannot be made under the Record. No error has been demonstrated.[5]

B. Legal Issues

¶14 There are two questions.

¶15 First, does Dallas's attorney have a lien?[6] This question arises because Dallas did not file a UM lawsuit or tort action. Thus, there is no "lien claimed" endorsement or notice of lien based upon a prior UM or tort lawsuit.

¶16 Second, Dallas's attorney did endorse the interpleader action petition with "lien claimed." Does this endorsement establish a priority, or has counsel merely perfected a current lien on the settlement proceeds which is of equal priority with the established medical provider liens?

¶17 In what might be considered a typical case, an injured party files an action against the tortfeasor and recovers a judgment or settlement. The injured party's attorney perfects an attorney's lien by giving notice or endorsing the pleading "Lien Claimed." 5 O.S. Supp. 2018, § 6(A).[7] The medical providers perfect liens. 42 O.S. Supp. 2017, § 46(A). Here, there are physicians' liens which were filed between 2012 and 2017. 42 O.S. Supp. 2017, § 46[8] (amended by 2018 Okla. Sess. Laws, ch. 195, § 2.)[9]

¶18 Thus, under the hypothetical case, the physician perfects a lien against recovery pursuant to Subsection A when the injured party "maintains a claim" *against the tortfeasor. This lien is junior to the perfected attorney's lien according to Subsection A.*[10]

¶19 However, the Subsection A scenario is not what transpired here. This case comes under Subsection B. Subsection B gives the physicians a lien against the Geico settlement proceeds because Dallas asserted and maintained a claim against Geico. *It is noted that Subsection B does not provide for the superiority of the attorney's lien as does Subsection A.* The reason for this difference is not apparent. However, there is here no prior legal action against the tortfeasor for Dallas's attorney to give notice or to endorse "lien claimed."

¶20 The facts are clear that there was no attorney's lien at the point in time when Dallas first asserted and maintained the UM claim against the insurer, Geico. Moreover, according to the Record, Dallas's attorney did not follow the Section 6 alternative to the "lien claimed" endorsement by sending a notice to the physicians.

¶21 Therefore, the answer to the first question is: Prior to the filing of the interpleader, Dallas's attorney did not have an attorney's lien. Dallas's attorney has an attorney's lien only after filing the interpleader. That lien attached to the interpleader cause of action. 5 O.S. 2011, § 6(A). "The attorney's lien attaches to the client's cause of action, and any recovery thereon, albeit the recovery is effected in an action other than the action in which the services were rendered." *Edwards v. Andrews, Davis, Legg, Bixter, Millsten & Murrah*, 1982 OK 72, ¶ 18, 650 P.2d 857, 862.

¶22 Dallas relies upon Edwards to argue that the interpleader is a logical extension of the UM claim and settlement. There are significant differences between the facts in *Edwards* and the facts here. In *Edwards,* the attorney's lien had been established in the original litigation. The parties settled the litigation. The matter on appeal in *Edwards* resulted from an action to enforce the settlement. The Supreme Court ruled that this enforcement action was a continuation of the original action for purposes of the attorney's lien. Here, there is no prior action where an attorney's lien was perfected.

¶23 In addition, Dallas's interpleader is not a continuation of the UM claim or enforcement of the settlement of the UM claim. The UM claim against Geico is a *contract* claim, not a *tort* claim. *Uptegraft v. Home Ins. Co.*, 1983 OK 41, 662 P.2d 681.

> An action is one *ex contractu* when it is derived from (a) an express promise, (b) a promise implied in fact or (c) a promise implied in law. The uninsured motorist coverage constitutes a carrier's direct promise to the insured to pay indemnity for a specified loss. Because it is a promise by the insurer to pay its own insured, rather than a promise to its insured to pay some third party, the uninsured motorist coverage is understood, in insurance parlance, as "first-party coverage" – much like collision, comprehensive, medical payments or personal injury protection – and not as "third-party coverage," such as personal injury or property damage coverage of public liability insurance. In short, we are dealing here with an agreement to indemnify the insured for injuries caused by another – who was uninsured or underinsured – based on a showing that the other motorist was guilty of negligence resulting in injury to the insured. A suit founded upon the insured's allegations (a) that he is entitled to payment under one of the first-party coverage clauses in the contract and (b) that the carrier has refused payment thereby breaching its promise, is clearly a contract action. The circumstances of the uninsured motorist's culpability and of the insured's damages are matters which the insured must prove in order to recover from the insurer, but these are really conditions of the insurer's promise. The recovery of the insured is based ultimately upon the policy without which no liability could be imposed upon the insurer for the tort of another.

Uptegraft, ¶ 7, at 684-85 (citations omitted).

¶24 The statute specifically provides for priority of the attorney's lien in tort actions. 42 O.S. Supp. 2018, § 46(A). The statute is silent about priority when the injured party's claim is against the insurer. 42 O.S. Supp. 2018, § 46(B). The claim made by Dallas is a contract claim against his insurer, Geico.

¶25 Statutes are construed to carry out legislative intent. *Estes v. ConocoPhillips Co.*, 2008 OK 21, ¶ 16, 184 P.3d 518, 526. "We presume that the Legislature expressed its intent and intended what it expressed, and statutes are interpreted to attain that purpose and end, championing the broad public policy purposes underlying them." *Id.* Thus, the Legislature has clearly distinguished tort claims from contract claims for purposes of the priority of liens.

¶26 Last, examination of the underlying purposes for the attorney's lien and the physician's lien reveals no basis for preferring one or the other for priority purposes in the absence of statutory authority. Both liens serve the same purpose for the benefit of the covered profession. "The attorney's charging lien is based upon the equitable doctrine that an attorney should be paid out of the proceeds of the judgment secured by that attorney." *Edwards*, 1982 OK 72 ¶ 18, 650 P.2d at 862. The physician's lien is designed to ensure that physicians are paid for their services once their

patients are compensated for their injuries. *Broadway Clinic v. Liberty Mutual Ins. Co.,* 2006 OK 29, ¶ 15, 139 P.3d 873, 877 (citations omitted).

¶27 Pain Management has not demonstrated any legal reasons to deny payment from the settlement to Dallas's attorney. However, the trial court erred by ruling that the attorney's lien for the attorney fee had priority. It must be noted that some claimants did not appear and some conceded the priority and did not object. Those claimants are now barred from re-litigating their priority.

¶28 Dallas's attorney and Pain Management each has a lien on the settlement proceeds. However, neither has priority. Moreover, the reason for providing a lien is the same for each profession. Thus, there are no statutory (or equitable) bases for priority.

¶29 The deductions from the settlement, for costs and two other claimants, leave a net fund of $58,038.83. Therefore, the judgment is reversed and the case is remanded with instructions to equitably divide this sum between Dallas's attorney and Pain Management.

CONCLUSION

¶30 This is a lien priority cause where the contestants are an attorney and a physician. The attorney pursued a UM claim on behalf of his client, but did not file any lawsuit against the tortfeasor. He settled the UM claim with the insurance company, Geico. The physician provided medical services and perfected a lien. The settlement was insufficient to pay all medical providers' claims and the attorney's fee. The attorney has filed an interpleader and included endorsement of "lien claimed" on the interpleader petition. This is the first, and only, occasion for the establishment of the attorney's lien.

¶31 The physician's lien statute provides that the attorney's lien has priority when a case has been filed against the tortfeasor. The statute does not provide priority when the claim is against the insurance company under the UM clause of the policy, as is the case here. However, the purposes of the two lien statutes are the same, that is, to see that the covered professional is compensated.

¶32 Under the facts of this case, both Dallas's attorney and Pain Management have liens against the UM insurance settlement proceeds. However, neither has priority. Two medical provider's claimants did not appear and received no award. Two other medical providers have accepted the judgment without objection. Therefore, the cause is reversed as to Pain Management and remanded for the trial court to award costs to Dallas's attorney and then equitably divide the balance between Dallas's attorney and Pain Management, after deduction of payments to the two claimants who have accepted the judgment. The judgment as to the two remaining claimants is undisturbed because they either did not file an answer or did not appear at the hearing.

¶33 **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS.**

BARNES, P.J., concurs, and WISEMAN, V.C.J., concurs specially.

WISEMAN, V.C.J., concurring specially:

I concur in the Majority's Opinion, but I write separately to suggest that when, as here, the attorney bases his claim on a written contingency fee contract, the better practice is to require the production and admission of the contract, particularly when the contractual fee is at the outside allowable limit (50%) for contingent fees, and the injured party (Dallas) receives no award in this settlement under the trial court's allocation.

KEITH RAPP, JUDGE:

1. This appeal was assigned to this Judge and this Panel on April 4, 2019.

2. GEICO was dismissed as a party on July 19, 2018.

3. The trial and appellate records show that Geico has retained possession of the fund pending the outcome of the case.

4. Tr., p. 4.

5. Therefore, the parties' argument about whether the exhibit is a part of the appeal record is of no consequence. Moreover, Pain Management's contention that Dallas's attorney is ethically limited to the difference between the actual settlement and the $52,000.00 becomes moot.

6. It is noted that Geico retained possession of the settlement proceeds, so Dallas's counsel does not have a possessory lien.

7. Section 6(A) reads:

> A. From the commencement of an action, or from the filing of an answer containing a counterclaim, the attorney who represents the party in whose behalf such pleading is filed shall, to the extent hereinafter specified, have a lien upon his client's cause of action or counterclaim, and same shall attach to any verdict, report, decision, finding or judgment in his or her client's favor; and the proceeds thereof, wherever found, shall be subject to such lien, and no settlement between the parties without the approval of the attorney shall affect or destroy such lien, provided such attorney serves notice upon the defendant or defendants, or proposed defendant or defendants, in which he or she shall set forth the nature of the lien he or she claims and the extent thereof; and the lien shall take effect from and after the service of such notice, but such notice shall not be necessary provided such attorney has filed such pleading in a court of record, and endorsed thereon his or her name, together with the words "Lien claimed."

8. The statute reads:

> A. Every physician who performs medical services or any other professional person who engages in the healing arts, within their

scope of practice pursuant to Title 59 of the Oklahoma Statutes for any person injured as a result of the negligence or act of another, shall, if the injured person asserts or maintains a claim against such other person for damages on account of such injuries, have a lien for the amount due for such medical or healing arts services upon that part going or belonging to the injured person of any recovery or sum had or collected or to be collected by the injured person, or by the heirs, personal representative, or next of kin of the injured person in the event of his death, whether by judgment, settlement, or compromise. Such lien shall be inferior to any lien or claim of any attorney handling the claim for or on behalf of the injured person. The lien shall not be applied or considered valid against any claim for amounts due pursuant to the provisions of Title 85A of the Oklahoma Statutes.

B. In addition to the lien provided for in subsection A of this section, every physician or professional person licensed under Title 59 of the Oklahoma Statutes who performs medical or healing arts within their scope of practice for any person injured as a result of the negligence or act of another, shall have, if the injured person asserts or maintains a claim against an insurer, a lien for the amount due for such medical or healing arts services upon any monies payable by the insurer to the injured person.

C. No lien which is provided for in this section shall be effective unless, before the payment of any monies to the injured person, the attorney for the injured person, or legal representative as compensation for such injuries or death:

1. A written notice is sent setting forth a statement of the amount claimed, identifying the insurance policy or policies against which the lien is asserted, if any, and containing the name and address of the physician or professional person licensed under Title 59 of the Oklahoma Statutes claiming the lien, the injured person, and the person, firm, or corporation against whom the claim is made, is filed on the mechanic's and materialman's lien docket in the office of the county clerk of the county where the principal office of the physician or professional person licensed under Title 59 of the Oklahoma Statutes is located; and

2. The physician or professional person licensed under Title 59 of the Oklahoma Statutes sends, by registered or certified mail, postage prepaid, a copy of such notice with a statement of the date of filing thereof to the person, firm, or corporation against whom the claim is made and to the injured person. The physician or professional person licensed under Title 59 of the Oklahoma Statutes shall also send a copy of the notice to the attorney for the injured person, if the name and address of such attorney is known to the physician or professional person licensed under Title 59 of the Oklahoma Statutes.

D. The liens provided for in this section may be enforced by civil action in the district court of the county where the lien was filed. Such an action shall be brought within one (1) year after the physician or professional person licensed under Title 59 of the Oklahoma Statutes becomes aware of final judgment, settlement or compromise of the claim asserted or maintained by or on behalf of the injured person. The practice, pleading, and proceedings in the action shall conform to the rules prescribed by the Oklahoma Pleading Code to the extent applicable.

9. The 2018 amendment only recognized the renumbering of the Worker's Compensation Code.

10. Pain Management's reliance on *Hudson v. Fisher*, 2010 OK CIV APP 69, 239 P.3d 970, is misplaced. There, a lawsuit was filed, an attorney's lien perfected, and a settlement was obtained through mediation. Then, counsel filed the interpleader, but failed to notify a physician lienholder, even though this lienholder was known. The trial court apportioned the fund, with priority to the attorney's lien. The omitted lienholder moved to vacate, and the trial court agreed. After a hearing, the trial court ordered a refund from the attorney of the portion of the fund that would have gone to the omitted physician. It was this portion of the fund that the *Hudson* Opinion referenced when it stated that the attorney did not have a priority.

2019 OK CIV APP 42

CANDICE MONTES, Plaintiff/Appellant, vs. STATE OF OKLAHOMA ex rel. OKLAHOMA DEPARTMENT OF HUMAN SERVICES, RESTRICTED REGISTRY REVIEW COMMITTEE, Defendant/Appellee.

Case No. 116,683. June 26, 2019

APPEAL FROM THE DISTRICT COURT OF CANADIAN COUNTY, OKLAHOMA

HONORABLE PAUL HESSE, TRIAL JUDGE

DISTRICT COURT ORDER VACATED; AGENCY ORDER SET ASIDE

Ky D. Corley, BAKER, IHRIG & CORLEY, P.C., Stillwater, Oklahoma, for Plaintiff/Appellant

Bonnie Clift, ASSISTANT GENERAL COUNSEL, DEPARTMENT OF HUMAN SERVICES, Oklahoma City, Oklahoma, for Defendant/Appellee

P. THOMAS THORNBRUGH, JUDGE:

¶1 Plaintiff, Candice Montes, seeks review of an order by the district court affirming a Department of Human Services (DHS) administrative hearing officer's (AHO's) decision that sustained the agency's decision to list Plaintiff's name on Oklahoma's child care "Online Restricted Registry" (Restricted Registry or Registry). For the reasons set forth below, we find the decisions by the trial court and DHS to list Plaintiff on the Registry are erroneous as a matter of law and must be vacated and set aside.

BACKGROUND

¶2 DHS is the state administrative agency required to establish and maintain the Restricted Registry pursuant to 10 O.S.2011 & Supp. 2018 § 405.3. This matter concerns the DHS Restricted Registry Review Committee's decision to list Plaintiff on the Registry following a finding by DHS that allegations of "lack of supervision and threat of harm" to a child while in Plaintiff's care were "substantiated."

¶3 The facts underlying the "substantiated" finding are largely undisputed. In August 2015, Plaintiff, the owner and director of a newly licensed child care facility in Yukon, inadvertently left a sleeping 3-year-old child in a locked vehicle after Plaintiff had returned to the facility and gone inside. Although the length of time the child was left unattended remains unclear, there was no evidence the child, who was awake and crying when he was found, sustained physical harm. The incident occurred on the first day of the school year and Plaintiff had picked the child up, along with several other children, from pre-school before returning to the facility to drop the children off. The children were "unloaded" by a facility worker while Plaintiff waited in the vehicle, and Plaintiff had then gone to Sonic and to

make a drive-through bank deposit without realizing the child in question had mistakenly been left in the back seat. The temperature outside was in the low 70s, which was lower than normal for that time of year.

¶4 After receiving a referral about the incident and making an investigation, DHS child welfare service investigators prepared and submitted a report to the Canadian County District Attorney. The report reflected the investigators' conclusion that "[b]ecause [the child] was carelessly left in an unattended vehicle and made unsafe," the allegations against Plaintiff were "substantiated." Plaintiff did not appeal this finding. The district attorney did not file criminal charges.

¶5 DHS thereafter forwarded its report to the DHS Restricted Registry Review Committee (Committee), together with a copy of the notice sent to Plaintiff and a document indicating that Plaintiff had not appealed. DHS then informed Plaintiff that her name had been "proposed to be recorded" on the Restricted Registry based on "a substantiated or confirmed finding of abuse or neglect that occurred to a child(ren) while in the care of a licensed child care program."

¶6 Under DHS rules, an individual whose name is placed on the Registry – i.e., a "registrant" – is prohibited from ownership or licensure of, or employment in, a child care program as well as from "unsupervised access to children" in a program. Okla. Admin. Code (OAC) 340:110-1-10.1(a). A registrant may not seek removal from the Registry for at least 60 months. OAC 340:110-1-10.1(p).

¶7 Plaintiff appealed the Committee's decision to the DHS Appeals Unit, and an AHO heard the matter in January 2017. DHS called one witness, Jennifer Towell, who described her job as including oversight of the Registry. She stated that the Committee's decision to list Plaintiff was based on its consideration of the DHS investigative report, which was in evidence and included a description of the investigators' interviews with "collateral" witnesses who stated that Plaintiff attempted to "cover up" the incident primarily by instructing staff not to discuss it. Towell also said the Committee had access to the "full child welfare referral report," which was not in evidence, and also considered it significant that Plaintiff had not appealed DHS's "substantiated" finding. She said the Committee conducted no independent interviews with DHS investigators or the collateral witnesses, however. The document entered into evidence reflecting Committee members' votes does not make specific findings concerning criteria the Committee was required to consider. It is not clear from Towell's testimony whether those criteria were considered, and even if they were considered, how they factored into the Committee's decision.

¶8 Plaintiff called three witnesses, including herself. Plaintiff testified that she had not appealed the "substantiated" finding because she admitted that the child had been left in her car unattended, even though she disputed the two-hour time that DHS claimed the child was alone, and stated the time length was no more than 15 to 25 minutes. She said that a DHS investigative worker also told her that appealing the decision would be pointless because Plaintiff admitted the underlying incident; however, Plaintiff said she did not understand that her right to continue in the child care business could be lost.

¶9 Plaintiff also denied attempting to "cover up" the incident, but said she was told by her DHS child care licensing worker not to discuss the matter with anyone until the investigation was complete, and to tell her staff likewise. Plaintiff's other witnesses supported Plaintiff's contention that, after the incident, she took immediate and substantial steps to assure that the facility had more consistent policies and procedures in place to assure that all children were accounted for at all times, and that she had worked with child welfare officials to implement those policies.

¶10 At the close of the evidence, the AHO left the record open to allow Plaintiff to submit additional evidence to support her contention that the time the child was left unattended was no more than 15 to 25 minutes.[1] The transcript of the proceeding reflects confusion as to how the evidence was to be submitted and conveyed to the AHO, but both parties were then allowed to make supplemental, written "closing arguments" that refer to the evidence and are included in the administrative record. The AHO thereafter entered an order affirming the Committee's decision "based on [a] substantiated finding of abuse or neglect … that occurred to a child while in the care of a licensed child care program," but making no further findings.

¶11 Plaintiff appealed to district court. After review of the administrative record, including a transcript of the proceeding before the AHO

and the parties' briefs, the trial court affirmed the AHO's ruling, stating merely that DHS had acted "within [its] statutory authority" by placing Plaintiff's name on the Registry and there was "no error of law" in the proceedings. Plaintiff seeks review here.

STANDARD OF REVIEW

¶12 While the state Child Care Facilities Licensing Act[2] and DHS rules provide for the right of appeal from an agency decision, the Act does not prescribe the standard of review to be used by the district court or by this Court.[3] In addition, DHS is not required to comply with the Oklahoma Administrative Procedures Act's (OAPA's) Article II, governing individual proceedings. 75 O.S.2011 § 250.[4](B)(2). However, this Court, noting that the Oklahoma Supreme Court has consistently recognized the Legislature's intent to provide uniformity in judicial review of administrative proceedings under the OAPA, has applied the OAPA standard in a child care facility licensing appeal. *See Walker v. Okla. Dep't of Human Serv.*, 2001 OK CIV APP 107, ¶¶ 4-5 and 9, 32 P.3d 881 (citing, *inter alia, City of Tulsa v. State ex rel. Pub. Emp. Relations Bd.*, 1998 OK 92, 967 P.2d 1214). The OAPA standard is fully set forth at OAPA §§ 318 through 322, and was described by the Supreme Court in its City of Tulsa opinion as follows:

> Generally, an administrative decision … should be affirmed if it is a valid order and the administrative proceedings are free from prejudicial error to the appealing party. An administrative order, however, is subject to reversal if an appealing party's substantial rights are prejudiced because the agency's decision is entered in excess of statutory authority or jurisdiction, or an order is entered based on an error of law.
>
> Reversal is also appropriate if the agency's findings are clearly erroneous in view of the reliable, material, probative and substantial competent evidence in the record. As to factual questions, neither a district court [nor] this Court is entitled to substitute its judgment for that of the agency as to the weight of the evidence.

1998 OK 92 at ¶¶ 12-13 (citations omitted); *see also Agrawal v. Okla. Dep't of Labor,* 2015 OK 67, ¶ 5, 364 P.3d 618 (order "is subject to reversal, … if the appealing party's substantial rights were prejudiced because the agency's findings, inferences, conclusions or decisions were entered in excess of its statutory authority or jurisdiction, or were arbitrary, capricious, or clearly erroneous in view of the reliable, material, probative and substantial competent evidence").

ANALYSIS

¶13 Plaintiff contends the DHS decision to list her on the Restricted Registry is erroneous as a matter of law because it fails to reflect that the agency, at any step of the proceedings, applied the correct standard of review to the evidence. She further contends the decision was arbitrary and capricious because the record shows the Committee failed to consider the various factors required by DHS rules before placing Plaintiff's name on the Registry.

¶14 Title 10 O.S.2011 & Supp. 2018 § 406 authorizes DHS to investigate a complaint alleging a violation of the Child Care Facilities Licensing Act or any DHS licensing standard. Upon completing that investigation, under § 406(D), DHS "shall clearly designate its findings . . . [which] shall state whether the complaint was substantiated or unsubstantiated." "Substantiated" is defined in the Oklahoma Children's Code[4] within the Code's definition of "Investigation" at 10A O.S.2011 & Supp. 2018 § 1-1-105(39)(b)(1), as follows:

> (1) "substantiated" means the Department has determined, after an investigation of a report of child abuse or neglect *and based upon some credible evidence*, that child abuse or neglect has occurred.

[Emphasis added].[5]

¶15 The meaning of "substantiated" found at 10A O.S. § 1-1-105 is incorporated into the statutory directive for DHS to establish and maintain the Registry, 10 O.S. 2011 & Supp. 2018 § 405.3, which also authorizes DHS to promulgate rules and procedures related to recording individuals on the Registry. The Registry itself is described at OAC 340:110-1-10.1. The rule provides that registration of an individual "may result" after review by the Registry Committee when a "substantiated finding" of abuse or neglect has been made as to a child in the care of a licensed facility. OAC 340:110-1-10.1(b). In addition, the Committee must consider a number of other factors:

> (j) **Restricted Registry Review Committee.** The Restricted Registry Review Committee consists of six DHS staff and one OJA staff, who make a determination of registration

within 30-calendar days of receipt of necessary information from Restricted Registry staff.

(1) Criteria considered for Restricted Registry registration include, the:

(A) individual's age at the time of the offense(s);

(B) length of time since the offense(s) occurred;

(C) number and types of offenses the individual was convicted for, or for findings made;

(D) circumstances surrounding commission of the offense(s) demonstrating willful intent;

(E) likelihood the individual will re-offend; and

(F) other documentation submitted indicating children's health, safety, and well-being are, or are not endangered.

(2) The Restricted Registry Review Committee standard to determine Restricted Registry registration by *clear and convincing evidence* includes consideration of:

(A) the individual's history of behavior likely to create a reasonable risk of harm to children; and

(B) if the individual is unsafe with children; either alone or in a group.

OAC 340:110-1-10.1(j) (emphasis added).

¶16 Thus, the rule is clear that the Committee's authority to list an individual on the Registry must be based on a decision both evaluated under, and supported by, the standard of "clear and convincing evidence." The same standard applies in proceedings governing appeals from the Committee's decision. Pursuant to OAC 340:2-5-119(a), the standard of review applicable to an AHO's review of a DHS action is whether the DHS decision "is supported by clear and convincing evidence and not contrary to the applicable law." Under subpart (b) of the same rule, the burden of proof is on "DHS to show that [a] person should be recorded on the Child Care Restricted Registry." DHS rules define "clear and convincing evidence," in turn, as "the degree of proof that produced in the AHO a firm belief as to the truth of the allegation sought to be established." OAC 340: 2-5-112.

¶17 Here, the administrative record shows on its face that neither the Committee nor the AHO considered any factor other than that DHS deemed "substantiated" the allegation of abuse or neglect by Plaintiff. This is tantamount to allowing a DHS "substantiated" finding, in and of itself, to warrant listing on the Registry. A substantiated finding, however, need only be supported by "some credible evidence," which obviously is not equivalent to "clear and convincing evidence." Allowing a listing on the Registry based solely on a "substantiated" finding runs counter to DHS's own rules, which clearly contemplate that other factors be taken into account when such a decision is made – signaling that a "substantiated" finding alone, whether appealed or not, is insufficient.

¶18 Although this Court may not substitute its own judgment for that of the agency on questions of fact, we may reverse or set aside an administrative order "if an appealing party's substantial rights are prejudiced because the agency's decision is entered in excess of statutory authority or jurisdiction, or an order is entered based on an error of law." *City of Tulsa*, 1998 OK 92 at ¶ 12. A party also may obtain relief from an administrative decision upon a showing to this Court that the "substantial rights of the appellant . . . have been prejudiced because the agency findings, inferences, conclusions or decisions are ... arbitrary or capricious." *State ex rel. Bd. of Trustees of Teachers' Ret. Sys. v. Garrett,* 1993 OK CIV APP 29, ¶ 6, 848 P.2d 1182 (footnote omitted). "Arbitrary and capricious" is defined as action which is "willful and unreasonable without consideration or in disregard of facts or without determining principle," or "unreasoning … in disregard of facts and circumstances." *Id.*; *see also NVI, LLC v. Okla. Dep't of Envtl. Quality,* 2012 OK CIV APP 30, ¶ 8, 276 P.3d 1069.

¶19 We find that the record here shows the agency – at both the Committee and Appeals Unit level – went outside its authority and erred as a matter of law in failing to apply the correct standard of review to the evidence presented by DHS and, at the Appeals Unit level, by Plaintiff – to the extent that, from what appears on the record – it ignored the factors required by DHS rules. We thus hold the agency acted arbitrarily and capriciously by disregarding the requirements of DHS rules, and erred as a matter of law by applying the wrong standard to the evidence as to whether Plain-

tiff's name should be placed on the Registry. Consequently, we hold that the trial court erred in affirming the DHS decision, and vacate the district court's order. Pursuant to 10 O.S.2011 § 408(B), we hold that the DHS decision to place Plaintiff's name on the Restricted Registry also must be set aside.

CONCLUSION

¶20 The decision by DHS to place Plaintiff's name on the Restricted Registry was arbitrary and capricious and erroneous as a matter of law, and must be set aside. Consequently, the district court's order affirming the DHS decision also was in error, and must be vacated.

¶21 **DISTRICT COURT ORDER VACATED; AGENCY ORDER SET ASIDE.**

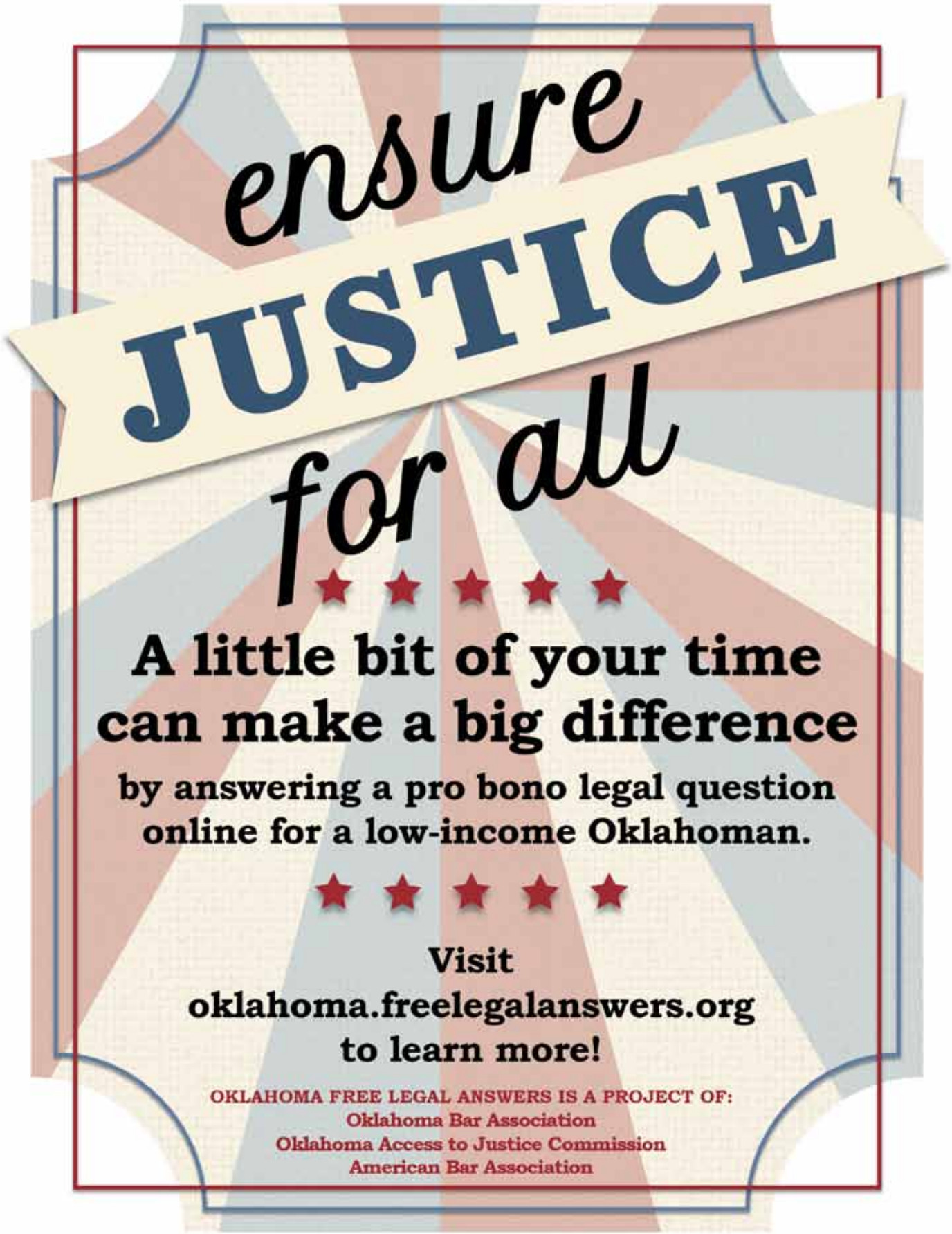
FISCHER, P.J., and GOODMAN, J., concur.

P. THOMAS THORNBRUGH, JUDGE:

1. This procedure is allowed by OAC 340:2-5-117(a)(1).
2. Title 10 O.S.2011 & Supp. 2018 §§ 401 through 418.
3. Title 10 O.S.2011 § 408, governing appeals from DHS administrative decisions that deny or revoke a child care facility license, is made applicable to appeals from DHS decisions to list an individual or facility on the Restricted Registry under DHS's administrative rules. *See* OAC 340:2-5-110. Section 408 states:

> A. Any licensee or applicant aggrieved by the decision of the Department of Human Services . . . may, within ten (10) days after the revocation or denial of the license, appeal to the district court of the county in which the child care facility is maintained and operated . . .
>
> B. The licensee or applicant shall, within twenty (20) days of the filing of the appeal, file with the clerk of such court a transcript of the proceedings . . . . [and] [t]he district court shall thereupon be vested with jurisdiction to review the proceedings of the Department; provided that, if the Department prevails, the judgment of the district court shall be that the decision of the Department be affirmed, and if the licensee or applicant prevails, the judgment of the court shall be that the revocation be set aside or the license issued or renewed, as the case may be. . . .

4. Title 10A O.S.2011 & Supp. 2018 §§ 1-1-101 through 1-9-122.
5. Though the "Definitions" section of the Oklahoma Children's Code has been amended several times, this definition of "substantiated" has remained unchanged since June 2012, and the requirement that a "substantiated" finding be based on "some credible evidence" has been in the statute since July of 2009. When child abuse or neglect is substantiated, the Department may recommend: "(a) court intervention if the Department finds the health, safety, or welfare of the child is threatened, or (b) child abuse and neglect prevention- and intervention-related services for the child, parents or persons responsible for the care of the child if court intervention is not determined to be necessary[.]" Title 10A O.S. Supp. 2018 § 1-1-105(39)(b)(1).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Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS
Thursday, July 11, 2019

S-2018-438 — Leslye Soto was charged with aggravated trafficking in illegal drugs in Case No. CF-2015-532 in the District Court of Oklahoma County. The Honorable Ray C. Elliott suppressed evidence obtained by law enforcement prior to the trial. The State appeals the trial court's order. The ruling of the trial court suppressing the evidence in this case is REVERSED. This case is REMANDED to the district court for further proceedings not inconsistent with this Opinion Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs; Rowland, J., concurs.

RE-2018-0457 — Appellant, Tommy Lee Tucker, entered a plea of guilty August 7, 2015, in the District Court of Logan County, Case No. CF-2015-56, to Domestic Assault and Battery, After Prior Conviction, a Felony, and in Logan County Case No. CF-2015-131 to Count 1 – Domestic Assault and Battery by Strangulation, AFCF, a felony, and Count 2 – Kidnapping, AFCF, a felony. He was given a twenty year suspended sentence and fined $1,500.00 in Case No. CF-2015-56. He was also given a twenty year suspended sentence and fined $1,500.00 for each count in Case No. CF-2015-131. The sentences were all ordered to run concurrently. On March 23, 2016, the State filed a motion to revoke Appellant's suspended sentences. Following a revocation hearing for both cases on April 25, 2018, before the Honorable Louis A. Duel, Associate District Judge, the State's motions to revoke were sustained. Appellant's suspended sentences, twenty years on each count in each case, were revoked in full, with credit for time served, and the sentences were ordered to run concurrently. Judge Duel also ordered post-imprisonment supervision upon revoking Appellant's suspended sentences. Appellant appeals the revocation of his suspended sentences. The revocation of Appellant's suspended sentences in Logan County District Court Case Nos. CF-2015-56 and CF-2015-131 is AFFIRMED, but the matter is REMANDED to the District Court for further proceedings consistent with this Opinion. Opinion by: Hudson, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Rowland, J., concurs.

F-2018-361 — John Brandon Upchurch, Appellant, was tried by jury for the crime of Sexual Exploitation of a Child Under Twelve, after former conviction of a felony in Case No. CF-2016-261 in the District Court of Muskogee County. The jury returned a verdict of guilty and recommended as punishment 100 years imprisonment. The trial court sentenced accordingly. From this judgment and sentence John Brandon Upchurch has perfected his appeal. AFFIRMED. Opinion by: Kuehn, V.P.J.; Lewis, P.J., concur; Lumpkin, J., concur; in part/dissent in part; Hudson, J., concur; Rowland, J., concur in results.

Thursday, July 18, 2019

C-2018-698 — Joe Saucedo Guerrero, Petitioner, entered blind pleas of guilty, in Case No. CF-2017-6354, in the District Court of Tulsa County, before the Honorable Sharon K. Holmes, District Judge, to six counts of Lewd or Indecent Proposal to a Child, (Counts 1, 3-7); one count of Soliciting a Minor for Indecent Exposure/Photos, (Count 2); and one count of Possession of Child Pornography, (Count 8). Judge Holmes accepted Petitioner's guilty pleas and sentenced Petitioner to twenty years imprisonment each on Counts 1-7 and to five years imprisonment on Count 8. Judge Holmes ordered the sentences on all eight counts to run consecutively and ordered credit for time served. Petitioner filed a motion to withdraw his guilty pleas and after a hearing, Judge Holmes denied the motion. Petitioner now seeks a writ of certiorari. The Petition for Writ of Certiorari is DENIED. The Judgment and Sentence of the District Court is AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concurs in Results; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs; Rowland, J., Concurs.

F-2018-248 — Mosi Abasi Dennis, Appellant, was tried by jury for the crimes of Count 1, first degree (felony) murder, and Count 2, conspiracy to commit robbery with a dangerous weapon in Case No. CF-2015-6232 in the District Court of Oklahoma County. The jury returned a verdict of guilty and set punishment at life

imprisonment without the possibility of parole on Count 1 and ten years imprisonment on Count 2. The trial court sentenced accordingly and ordered the sentences served consecutively. From this judgment and sentence Mosi Abasi Dennis has perfected his appeal. The Judgment and Sentence of the District Court is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs in results; Hudson, J., concurs; Rowland, J., recuses.

F-2017-1149 — Justin David Moore, Appellant, was tried by jury for the crime of Permitting Invitees Under 21 to Possess or Consume Alcohol (Count 1), Child Neglect (Count 2), and Transporting Loaded Forearm in Motor Vehicle (Count 3), a misdemeanor, in Case No. CF-2015-504 in the District Court of Cleveland County. The jury returned verdicts of guilty and set punishment at five years imprisonment on Count 1, three years imprisonment on Count 2, and a $500.00 fine on Count 3. The trial court sentenced accordingly. From these judgments and sentences Justin David Moore has perfected his appeal. Moore does not contest his misdemeanor conviction on appeal. AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs in results; Hudson, J., concurs.

F-2018-512 — Robert Neal Owens, Appellant, was tried by jury for the crime of Sexual Battery, After Former Conviction of Six Felonies (Count 1) and Child Abuse by Injury, After Former Conviction of Six Felonies (Count 2) in Case No. CF-2017-122 in the District Court of Lincoln County. The jury returned verdicts of guilty and set punishment at ten years imprisonment on Count 1 and forty-five years imprisonment on Count 2. The trial court sentenced accordingly. From these judgments and sentences Robert Neal Owens has perfected his appeal. AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs.

F-2018-350 — Appellant Jonathan Brent Buccino was convicted in a non-jury trial before the Honorable Brian Henderson, Associate District Judge, of three (3) counts of Embezzlement (21 O.S.Supp.2004, § 1451), in the District Court of LeFlore County, Case No. CF-2013-405. Appellant was sentenced to imprisonment for five (5) years in each count, said sentences ordered to run consecutively, and all sentences were suspended. It is from this judgment and sentence that Appellant appeals. The judgment and sentence is AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur; Hudson, J., Concur; Rowland, J., Concur.

RE-2018-769 — On September 9, 2015, Appellant Robert Kenneth Kramer entered a plea of *nolo contendere* in Okfuskee County District Court Case No. CF-2015-100. Appellant was convicted and sentenced to ten years imprisonment, with the final eight years suspended. On March 28, 2018, the State filed a motion to revoke suspended sentence. Following a July 11, 2018, hearing on the motion, Judge Parish revoked the eight-year suspended sentence in full. The revocation is AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs in results; Hudson, J., concurs.

F-2017-1232 — Appellant, Adrian Luis Walker, was tried by jury and convicted of Count 1, Second Degree Murder, Counts 2-8, Robbery By Two or More Persons, and Count 11, conspiracy to Commit a Felony in the District Court of Oklahoma County Case Number CF-2015-6994. The jury recommended as punishment imprisonment for life in Count 1 and twenty-five years imprisonment on each of the remaining counts. The trial court sentenced Appellant accordingly and ordered the sentences to run as follows: Counts 1 and 2 to run concurrently to one another, Counts 3-5 to run concurrently to one another, Counts 6-8 to run concurrently to one another, with each group of sentences to run consecutively to each other and to Count 11. It is from this judgment and sentence that Appellant appeals. The Judgment and Sentence of the District Court is hereby AFFRIMED. Opinion by: Lumpkin, J.; Lewis, P.J., Concur in Results; Kuehn, V.P.J., Concur; Hudson, J., Concur; Rowland, J., Recuse.

F-2017-1127 — Howard Leonard Jones, II, Appellant, was tried by jury and found guilty of Count 1, robbery with a dangerous weapon; Count 2, kidnaping; and Count 3, possession of a firearm after former conviction of a felony in Case No. CF-2016-6385 in the District Court of Tulsa County. The jury found Appellant guilty in Counts 1 and 2 after former conviction of a felony and set punishment at forty years imprisonment on Count 1, thirty years imprisonment on Count 2, and ten years imprisonment on Count 3. The trial court sentenced accordingly and ordered the sentences served concurrently. From this judgment and sentence Howard Leonard Jones, II has perfected his appeal. The Judgment and Sentence is AF-

FIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs in results; Hudson, J., concurs; Rowland, J., concurs.

RE-2018-674 — On April 30, 2015, Appellant Leon Deshawn Wright entered a plea of guilty in Oklahoma County District Court Case No. CF-2014-1676. Appellant was convicted and sentenced to five years imprisonment, with all five years suspended. On May 9, 2016, the State filed a motion to revoke suspended sentence. Following a June 25, 2018, hearing on the motion, Judge Graves revoked the five-year suspended sentence in full. The revocation is AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs in part/dissents in part; Lumpkin, J., concurs; Rowland, J., concurs.

C-2018-1024 — Larado James Smith, Petitioner, entered a negotiated plea of guilty in Case No. CF-2018-2550, in the District Court of Tulsa County, before the Honorable Deborah Ludi Leitch, Special Judge, to six counts of Second Degree Rape (Counts 1, 4, 5, 6, 7 and 8); and three counts of Forcible Sodomy (Counts 13-15). In accordance with the plea agreement, Judge Leitch sentenced Petitioner to fifteen years imprisonment and a $300.00 fine on each count, with all sentences to run concurrently and credit for time served. Petitioner, through plea counsel, filed a timely motion to withdraw his guilty plea. After a hearing, Judge Leitch denied Petitioner's motion to withdraw his plea. Petitioner now seeks a writ of certiorari. The Petition for Writ of Certiorari is DENIED. The Judgment and Sentence of the District Court is AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs; Rowland, J., Concurs.

Thursday, July 25, 2019

F-2018-43 — Anthony Paul Ornder, Appellant, was tried by jury in Case No. CF-2016-346 in the District Court of Washington County, of two counts of Possession of a Firearm, After Former Felony Conviction, After Two or More Previous Convictions (Counts 1-2); and one count of Falsely Personate Another to Create Liability, After Two or More Previous Convictions (Count 3). The jury returned a verdict of guilty and recommended as punishment forty years imprisonment each on Counts 1 and 2 and forty-five years imprisonment on Count 3. The Honorable Russell C. Vaclaw, Associate District Judge, sentenced accordingly ordering all three sentences to run concurrently and ordered credit for time served. From this judgment and sentence Anthony Paul Ornder has perfected his appeal. AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs; Rowland, J., Concurs.

COURT OF CIVIL APPEALS
(Division No. 2)
Friday, July 19, 2019

116,335 — Brown & Gould, PLLC, an Oklahoma professional limited liability company, Plaintiff/Appellant, vs. Samuel J. Tucker, an individual, Defendant/Appellee. Appeal from Order of the District Court of Oklahoma County, Hon. Aletia Haynes Timmons, Trial Judge. Plaintiff Brown & Gould appeals the trial court's order granting Defendant Samuel J. Tucker's request for "clarification" of a judgment for damages entered against him and in favor of Brown & Gould. After granting Tucker's request, the trial court modified the judgment and specifically prohibited Brown & Gould from pursuing any post-judgment collection remedy to satisfy its judgment "unless and until" Tucker defaulted on a judgment satisfaction plan imposed sua sponte by the trial court. Brown & Gould argues that the trial court lacked authority to limit its statutorily authorized collection efforts. Brown & Gould asserts that the trial court improperly enjoined it from pursuing not only the collection remedies specifically preserved in the final judgment, but also collection remedies afforded to all Oklahoma judgment creditors. Brown and Gould further asserts that the trial court violated the separation of powers doctrine and Brown & Gould's state and federal constitutional rights to due process and equal protection. Although there is merit to Brown & Gould's arguments, this Court finds another issue dispositive, and it is the apparent jurisdictional defect. It is the appellate court's duty to inquire not only into its own jurisdiction but also into that of the trial court. *Stites v. Duit Constr. Co.*, 1995 OK 69, n.10, 903 P.2d 293. The final and unappealed terms of the judgment could not be modified, more than one year after entry, under the guise of a "clarification." The language of the trial court's "final judgment" provides, in clear and unambiguous terms that "[n]othing in this judgment shall be construed to limit [Brown & Gould's] valid liens, creditor's rights, or any post-judgment statutory remedy allowed by law." There is no Oklahoma statutory or decisional authority

applicable to this case which would permit the trial court's exercise of discretion, as stated in its order, to engage in a post-judgment modification of those terms. VACATED. Opinion from Court of Civil Appeals, Division II by Fischer, P.J.; Goodman, J., and Thornbrugh, J., concur.

(Division No. 3)
Friday, July 12, 2019

115,972 — The Application of Brochton Kaveny, Agent for Moore Estates, LLC, Plaintiff/Appellee, vs. Mobile Home, Defendant, vs. Brenda Mayo, Appellant. Appeal from the District Court of Cleveland County, Oklahoma. Honorable Tracy Schumacher, Trial Judge. Appellant Brenda Mayo (Mayo) appeals from orders denying her attempt to vacate an order entered in an action by Petitioner/Appellee Brochton Kaveny as agent for Petitioner/Appellee Moore Estates, LLC (Moore Estates). Moore Estates obtained an order directing the Oklahoma Tax Commission to issue a motor vehicle title in its name on a mobile home. In 2016, Mayo filed a motion to withdraw the 2010 order directing the issuance of title. Mayo argues on appeal that Moore Estates did not have standing to maintain the original action, and that she was denied due process and the opportunity to be heard at a hearing before the court on her application. Because the judgment does not appear to be facially void, we AFFIRM the trial court's order. Opinion by Swinton, J.; Mitchell, P.J., and Bell, J., concur.

116,712 — Jeremiah Asay, an individual and James E. Fulmer, an individual, Plaintiffs/Appellants, vs. SBM Corporation d/b/a Jiffy Lube, Defendant/Appellee. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Daman H. Cantrell, Judge. This action was brought by Plaintiffs/Appellants, Jeremiah Asay and James Fulmer, to recover unpaid wages under the Federal Fair Labor Standards Act, 29 U.S.C. §201 *et seq.*; and the Department of Labor Rules, 29 CFR §500 *et seq.*, from Defendant/Appellee, SBM Corporation d/b/a Jiffy Lube. Plaintiffs alleged they were entitled to unpaid wages because they were required to arrive at work pre-shift and remain post-shift without pay. Plaintiffs also alleged they were required to remain on employer's premises, but clock-out, when there was no vehicle to service. After a bench trial, the trial court adopted Defendant's findings of fact and conclusions of law and entered judgment for Defendant. After reviewing the record, we cannot find the trial court's judgment was contrary to the evidence and AFFIRM. Opinion by Bell, J.; Mitchell, P.J. and Swinton, J., concur.

116,826 — Luke Taylor, Plaintiff/Appellant, vs. Ahmer Hussain, M.D., Defendant/Appellee. Appeal from the District Court of LeFlore County, Oklahoma. Honorable Jonathan Sullivan, Judge. Plaintiff/Appellant, Luke Taylor, appeals from the trial court's denial of his motion for new trial in his action against Defendant/Appellee, Ahmer Hussain, M.D., for medical malpractice. Specifically, Taylor contends the trial court abused its discretion by refusing to grant Taylor's motion to rescind a settlement agreement. Taylor maintained he did not have the capacity to enter into the agreement. We hold enforcement of the settlement agreement is contrary to law. "A party to an action who is represented by counsel of record may not act independently as his own attorney in the case." *Watson v. Gibson Capital, L.L.C.*, 2008 OK 56, ¶13, 187 P.3d 735. Because Taylor had an attorney of record in his lawsuit against Dr. Hussain, he did not have the authority to settle the suit on his own. Accordingly, the judgment of the trial court is REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion by Bell, J.; Mitchell, P.J., and Swinton, J., concur.

117,261 — In Re the Marriage of McConkey: Kevin Anthony McConkey, Petitioner/Appellant, vs. Angela Marie McConkey, Respondent/ Appellee. Appeal from the District Court of Comanche County, Oklahoma. Honorable Gerald F. Neuwirth, Judge. Petitioner/Appellant Kevin Anthony McConkey appeals the trial court's order vacating the Decree of Dissolution of Marriage. We find the trial court did not abuse its discretion by vacating the Decree. We AFFIRM AND REMAND FOR FURTHER PROCEEDINGS. Opinion by Mitchell, P.J.; Bell, J., and Swinton, J., concur.

117,570 — Peggy J. Hambrick, John Hambrick, and Barbara Hambrick, Plaintiffs/Appellants, vs. Farrell-Cooper Mining Company, Inc. and Brazil Creek Minerals, Inc., Defendants/Appellees. Appeal from the District Court of LeFlore County, Oklahoma. Honorable Jonathan Sullivan, Judge. Plaintiffs/Appellants Peggy J. Hambrick, John Hambrick, and Barbara Hambrick (collectively, Landowners) appeal from an order of the trial court granting summary judgment to Defendants/Appellees Farrell-Cooper Mining Company, Inc. and Brazil Creek Minerals, Inc. (collec-

tively, Mining Companies). The trial court found that Landowners' claims for fraud against Mining Companies were barred by the two-year statute of limitations for fraud claims because Landowners should have known Mining Companies had no intention of restoring Landowners' property to its pre-mining condition in 2009 and because Landowners admitted they actually knew Mining Companies were not going to restore the land in 2014. On appeal, Landowners claim their fraud claims did not accrue until January 28, 2016 – when Mining Companies affirmatively admitted they would not fill in the mine pits. After *de novo* review, we agree with the trial court: the statute of limitations was not tolled simply because Mining Companies could have conceivably performed at a later date. The undisputed facts show that Landowners should have been or were actually aware that Mining Companies did not intend to meet their contractual obligation more than two years before filing the petition in this case. 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 Mitchell, P.J.; Bell, J., and Swinton, J., concur.

Tuesday, July 16, 2019

116,415 — Leah Krautter, and All Other Parties Similarly Situated, Plaintiffs/Appellants, vs. City of Tulsa, ex rel. Tulsa Metropolitan Area Planning Counsel, ex rel. Tulsa County Board of Adjustment, ex rel. INCOG, Defendant/Appellee. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Mary Fitzgerald, Trial Judge. Plaintiff Leah Krautter appeals an order granting Defendant City of Tulsa's motion to dismiss her petition filed in Tulsa County District Court seeking judicial review of a Tulsa City Board of Adjustment decision. City argued the trial court lacked jurisdiction because Plaintiff failed to give it the statutorily required ten-day notice. Plaintiff's failure to include all necessary parties and to timely file a notice of appeal deprived the district court of jurisdiction. The order is AFFIRMED. Opinion by Swinton, J.; Mitchell, P.J., and Bell, J., concur.

(Division No. 4)
Wednesday, July 10, 2019

116,748 — Andrew Sabatino, Plaintiff/Appellee, vs. Farmers Insurance Exchange and Paul Harrington, Defendants/Appellants, Bret Duffy, Mindy Duffy, and Advantage Tree and Landscape Company, LLC, Defendants/Appellees. Appeal from an order of the District Court of Cleveland County, Hon. Lori M. Walkley, Trial Judge. Paul Harrington and Farmers Insurance Exchange appeal the trial court's judgment entered in favor of Plaintiff Andrew Sabatino for $750,000 against Defendants Advantage Tree & Landscape Company, LLC, Bret Duffy, and Mindy Duffy. We first address the argument by Plaintiff, Advantage, and Bret and Mindy Duffy that Farmers and Harrington lack standing to appeal and the appeal should be dismissed. Standing is determining whether appellants are "the proper party to seek adjudication of the asserted issue." *Cities Serv. Co. v. Gulf Oil Corp.*, 1999 OK 16, ¶ 5, 976 P.2d 545. Our examination of the record and pertinent case law persuades us that Farmers and Harrington "are not indemnitors or insurers of Plaintiff's case who have sustained direct injury as a result of a court adjudication." *Anderson v. Access Med. Ctrs.*, 2011 OK CIV APP 106, 263 P.3d 328. And as advanced by Plaintiff, Advantage and Bret and Mindy Duffy, Farmers has represented throughout the case that it is not an insurer of Advantage and owes no duty of indemnification to Advantage for Plaintiff's workers' compensation claim – a position which formed the very basis for Plaintiff abandoning his workers' compensation claim and pursuing his remedies in district court. Farmers and Harrington have failed to establish they are insurers or indemnitors who have sustained "concrete and actual or imminent injuries." Because Farmers and Harrington lack standing to pursue this appeal, this Court cannot entertain this appeal on its merits. Plaintiff's motion to dismiss the appeal is granted for lack of standing. APPEAL DISMISSED. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, V.C.J.; Barnes, P.J., and Rapp, J., concur.

Thursday, July 11, 2019

117,645 — In the Matter of the Estate of Marie Lenfestey, Deceased, Appellee, v. Jerry Jones, Appellant. Appeal from an Order of the District Court of Oklahoma County, Hon. Richard Kirby, Trial Judge. Attorney Jerry Jones (Jones)

appeals an Order entered in the probate of the Estate of Marie Gurine Lenfestey, deceased, where the probate court denied Jones' requested attorney fee and awarded a lower fee. In this case, Jones, attorney for the Personal Representative of the Lenfestey Estate, seeks to have the probate court approve having the Estate reimburse the PR for his attorney fee. The fee agreement with the PR is that the fee will be the same as the PR's statutory fee. Although not known at the outset, the Estate proved to be substantial. The probate court appointed a Special Master, who investigated and recommended the necessary time for administration of the estate. Jones did not have time records and reconstructed his time and claimed more hours than recommended by the Special Master. An attorney for an estate personal representative may have the fee reimbursed to the personal representative by the estate if the time and services were necessary to the administration of the estate. There was no litigation. Jones needed to show records existed showing: (1) his time and services; (2) the necessity of the time and services for the administration of the estate; and, (3) the value of the time and services. After review, this Court finds that the judgment of the probate court is not against the evidence or an abuse of discretion. Therefore, the trial court's judgment is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., concurs, and Wiseman, V.C.J., concurs in result.

117,772 — Renee Lynch and Michael William Lynch, Plaintiffs/Appellants, v. Jae Pregill, Defendant/Appellee. Appeal from an Order of the District Court of Blaine County, Hon. Paul K. Woodward, Trial Judge. The plaintiffs, Renee Lynch (Lynch), and her husband, Michael William Lynch, appeal the trial court's grant of summary judgment to the defendant, Jae Pregill (Pregill). Carol Pregill, a California resident, executed a Durable Power of Attorney. She named her daughter, Renee Lynch, as agent. The DPA contains a notice in bold face stating that the agent cannot transfer the principal's property to herself or accept a gift of the principal's property. Nevertheless, Lynch did convey to herself Oklahoma land owned by the principal. The transaction is challenged by Lynch's brother, Jae Pregill, who seeks to void the conveyance. Both sides moved for summary judgment. Jae Pregill relies on the specific language of the DPA and California law. Renee Lynch argued, but did not support with evidentiary materials, that she had permission from the principal. The absence of evidentiary materials precludes a grant of summary judgment or a defense to a motion for summary judgment. The trial court granted summary judgment to Jae Pregill and denied summary judgment to Renee Lynch. The trial court did not err and the judgment voiding the conveyance is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., and Wiseman, J., concur.

Friday, July 12, 2019

117,280 — Terri Jean Fitzwilson, Petitioner, vs. AT&T Corp., Old Republic Insurance Co., and The Workers' Compensation Commission, Respondents. Proceeding to review an order of the Workers' Compensation Commission, Hon. P. Blair McMillin, Administrative Law Judge, affirming the ALJ's decision denying Claimant's claim as not compensable. Even if Claimant's work-related incident, which Employer admitted occurred, was not "the sole or major cause of her resulting lumbar spine deterioration or degeneration that ultimately necessitated surgery" and is excluded from being compensable pursuant to 85A O.S. Supp. 2013 § 2(9)(b)(5), the Workers' Compensation Commission was required to determine if her injury was compensable pursuant to § 2(9)(b)(6) because Claimant's treating physician "found that Claimant sustained a significant and identifiable aggravation of her preexisting injury." We vacate the decision of the WCC and remand the case to the ALJ to determine if Claimant's injury is compensable pursuant to § 2(9)(b)(6) in light of Claimant's treating physician's finding regarding the preexisting condition and Claimant's prior reports of pain in her back and right leg. The ALJ noted that Claimant's testimony regarding lack of pain in her right leg was less than credible. However, Claimant's prior complaints of right leg and back pain as noted in the medical records are relevant to whether she had a preexisting condition as defined by the Administrative Workers' Compensation Act. The decision of the WCC is vacated and the case is remanded to the ALJ for further proceedings consistent with this Opinion. VACATED 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.

Monday, July 15, 2019

116,199 (Companion with Case No. 116,633) — In re the Marriage of: Annette C. Nashire, Petitioner/Appellee, v. Leisten M. Nashire, Respondent/Appellant. Appeal from an Order of the District Court of Oklahoma County, Hon. Lisa Hammond, Trial Judge. Trial court respondent, Leisten M. Nashire, appeals the trial court's Decree of Dissolution of Marriage. Respondent specifically appeals the trial court's finding of domestic abuse, the trial court's division of the equity in the marital home, and the trial court's award of the tax exemptions for the three minor children to Petitioner. This Court finds the trial court did not err and the trial court's Decree of Dissolution of Marriage is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., and Wiseman, V.C.J., concur.

116,633 (Companion with Case No. 116,199) — In re the Marriage of: Annette C. Nashire, Petitioner/Appellee, v. Leisten M. Nashire, Respondent/Appellant. Appeal from an Order of the District Court of Oklahoma County, Hon. Trevor Pemberton, Trial Judge. Trial court respondent, Leisten M. Nashire, (Father) appeals the trial court's Journal Entry (RE: Attorney Fees) awarding attorney's fees and costs to Petitioner, Annette C. Nashire, (Mother) pursuant to Title 43 O.S.2011, § 112.6 in this dissolution of marriage action. The trial court made a finding of domestic abuse in this case, which this Court affirmed in the companion case, Case No. 116,199. Under these facts, Title 43 O.S.2011, § 112.6 mandates an award of attorney's fees and costs to Mother, upon her application. Thus, the trial court's order awarding Mother attorney's fees and costs pursuant to Section 112.6 is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., and Wiseman, V.C.J., concur.

Wednesday, July 17, 2019

116,239 — Tammy Petro, Plaintiff/Appellant, vs. American Mercury Insurance Co., a Domestic for Profit Insurance Corporation, Defendant/Appellee. Appeal from an Order of the District Court of Rogers County, Hon. Sheila A. Condren, Trial Judge, sustaining American Mercury Insurance Company's (AMIC) motion for summary judgment and denying Insured's motion for partial summary judgment. Insured sued AMIC for bad faith refusal to provide coverage. AMIC alleged the coverage had lapsed due to non-payment of the premium and was not in force the day Insured's claim arose. We find the evidentiary record supports the conclusion AMIC did not retain a premium for the 24 hour period of lapsed coverage. Insured has failed to establish a valid contract of insurance was in effect at the moment of her claim. We conclude the trial court correctly granted AMIC's motion for summary judgment and correctly denied Insured's motion for partial summary judgment. AFFIRMED. Opinion on Rehearing from Court of Civil Appeals, Division IV, by Goodman, J.; Rapp, J., concurs, and Fischer, J. (sitting by designation), concurs in result.

Tuesday, July 23, 2019

117,506 — Federal National Mortgage Association, Plaintiff/Appellee, vs. Leslie J. Peake and Danny Alan Peake, Defendants/Appellants, and Bank of America, N.A., Defendant/Appellee. Appeal from orders of the District Court of Oklahoma County, Hon. Richard Ogden, Trial Judge, granting summary judgment in favor of Federal National Mortgage Association (Fannie Mae), foreclosing its mortgage and lien, and in favor of Bank of America, N.A., on the Peake's counterclaims. The primary issue on appeal is whether the trial court properly concluded Fannie Mae and Bank of America were entitled to judgment as a matter of law. We conclude that the Peakes did not show an equitable reason to refuse foreclosure on the mortgage. Although they claim Bank's payment of the taxes increased their mortgage payments and caused them to default, other than stating in their affidavits that they "could not afford the increased monthly mortgage payment and the loan went into default," nothing in the record supports this statement. We further conclude the trial court correctly decided that Bank acted reasonably and within the terms of the mortgage in paying the Treasurer in the face of the threat of foreclosure and in not giving notice to the Peakes. There being no dispute as to why Bank paid the taxes and no evidence linking the payment of the taxes to the default, we conclude no material issues of fact remain as to Fannie Mae's claims or the Peakes' counterclaims. We therefore affirm the decisions of the trial court. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, V.C.J.; Barnes, P.J., and Rapp, J., concur.

ORDERS DENYING REHEARING
(Division No. 1)
Tuesday, July 9, 2019

116,978 — James C. Payne, Plaintiff/Appellant, vs. Joel Kerns and Missy Eldridge, Defendants/Appellees. Appellant's Petition for Rehearing filed June 6th, 2019, is *DENIED*.

(Division No. 2)
Monday, July 22, 2019

117,162 — In Re the Matter of: Y.R., a Deprived Child, John Cato and Marlene Cato, Appellants, vs. State of Oklahoma, *ex rel.* Department of Human Services, Appellee. Appellants' Petition for Rehearing is hereby *DENIED*.

(Division No. 3)
Monday, July 22, 2019

115,617 — Wade Lavoy, Plaintiff/Appellant, vs. United Services Automobile Association and USAA General Indemnity Company, Defendants/Appellees. Plaintiff/Appellant's Combined Petition for Rehearing and Brief in Support Thereof, filed June 13, 2019, is *DENIED*.

(Division No. 4)
Friday, July 5, 2019

117,250 — Lancey Darnell Ray, Plaintiff/Appellant, and William Chestnut, Plaintiff, vs. Kevin Stitt, Defendant/Appellee. After review, this Court finds that the Petition for Rehearing should be denied. It is therefore ordered that Appellant's Petition for Rehearing is *DENIED*.

117,011 (Companion to Case No. 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*.

Monday, July 22, 2019

116,681 — Randy Harrison, Petitioner/Appellant, vs. The Oklahoma Police Pension and Retirement System and The Oklahoma Police Pension and Retirement Board, Respondents/Appellees. Appellant's Petition for Rehearing is hereby *DENIED*.

Notice of Judicial Vacancy

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

District Judge
Seventh Judicial District, Office 12 • Oklahoma County

This vacancy is due to the untimely passing of the Honorable Lisa Davis on April 14, 2019.

To be appointed to the office of District Judge, Office 12, Seventh Judicial District, one must be a registered voter of Oklahoma County Electoral Division Four at the time (s) he takes the oath of office and assumes the duties of office. Additionally, prior to appointment, such appointee shall have had a minimum of four years experience as a licensed practicing attorney, or as a judge of a court of record, or both, within the State of Oklahoma.

Application forms can be obtained on line at www.oscn.net, click on Programs, then Judicial Nominating Commission or by contacting Tammy Reaves at (405) 556-9300. Applications must be submitted to the Chairman of the Commission at the address below **no later than 5:00 p.m., Friday, September 20, 2019. If applications are mailed, they must be postmarked by midnight, September 20, 2019.**

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

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POLYGRAPH EXAMINATIONS

Board Certified	State & Federal Courts
Diplomate - ABFE	Former OSBI Agent
Fellow - ACFEI	FBI National Academy

Arthur Linville 405-736-1925

INTERESTED IN PURCHASING PRODUCING & NONPRODUCING MINERALS; ORRi. Please contact Greg Winneke, CSW Corporation, P.O. Box 23087, Oklahoma City, OK 73123; 210-860-5325; email gregwinne@aol.com.

WANT TO PURCHASE MINERALS AND OTHER OIL/GAS INTERESTS. Send details to: P.O. Box 13557, Denver, CO 80201.

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TWO MONTHS FREE RENT
with 3-year lease agreement
Perimeter Center Office Complex, located at NW 39th and Tulsa Avenue currently has available office suites for lease at $13.00 psf, ranging in size from 613 to 5,925 square feet.

EXECUTIVE SUITES
Single unfurnished offices. Prices range from $150 to $700 per month. Amenities include conference rooms, break room, fax, copy and answering service.
Please call (405) 943-3001 M-F from 8-5 for additional information or appointment to tour our facilities

OFFICE SPACE

LUXURY OFFICE SPACE AVAILABLE - One fully furnished office available for lease in the Esperanza Office Park near NW 150th and May Avenue. The Renegar Building offers a beautiful reception area, conference room, full kitchen, fax, high-speed internet, security, janitorial services, free parking and assistance of our receptionist to greet clients and answer telephone. No deposit required, $955/month. To view, please contact Gregg Renegar at 405-488-4543 or 405-285-8118.

PREMIUM OFFICE SPACE FOR LEASE IN EDMOND. Three offices available in law firm building. Lease includes parking, conference room use, Wi-Fi. Located in SE Edmond with great access to Kilpatrick Turnpike, Broadway Extension and I-35. Contact us at 405-285-8588 for more information.

POSITIONS AVAILABLE

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

ESTABLISHED, AV-RATED TULSA INSURANCE DEFENSE FIRM WHICH REGULARLY TAKES CASES TO TRIAL seeks motivated associate attorney to perform all aspects of litigation including motion practice, discovery and trial. Two to 5 years of experience preferred. Candidate will immediately begin taking depositions and serving as second chair at jury trials and can expect to handle cases as first chair after establishing ability to do so. Great opportunity to gain litigation experience in a firm that delivers consistent, positive results for clients. Submit CV and cover letter to "Box CC," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

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

SEEKING EXPERIENCED WORKERS' COMPENSATION CLAIMS ADJUSTER for large self-insured employer. Send resume to mclark@saintfrancis.com or complete application online at https://www.saintfrancis.com/careers/.

POSITIONS AVAILABLE

JUDGE ADVOCATE GENERAL'S (JAG) CORPS for Oklahoma Army National Guard is seeking qualified licensed attorneys to commission as judge advocates. Selected candidates will complete a six-week course at Fort Benning, Georgia, followed by a 10 ½ week military law course at the Judge Advocate General's Legal Center on the University of Virginia campus in Charlottesville, Virginia. Judge advocates in the Oklahoma National Guard will ordinarily drill one weekend a month and complete a two-week annual training each year. Benefits include low-cost health, dental and life insurance, PX and commissary privileges, 401(k) type savings plan, free CLE and more! For additional information contact 1LT Rebecca Rudisill, email Rebecca.l.rudisill2.mil@mail.mil.

THE OKLAHOMA INDIGENT DEFENSE SYSTEM (OIDS) HAS AN OPENING FOR DEFENSE COUNSEL in our Non-Capital Trial Division, Okmulgee office. This is an entry level position. For more details and how to apply, visit us at www.ok.gov/OIDS/. Deadline is Aug. 16, 2019.

CHILD SUPPORT SERVICES ATTORNEY IV - Announcement #19-N031U.2 and Recruitment ID#< >. Visit www.jobs.ok.gov to apply. Applications must be submitted online by Aug. 28, 2019. The DHS Child Support Services has an opening for a full-time attorney (CSS Attorney IV, $5,044.91 monthly) with experience in child support enforcement. This position will be located at 9901 SE 29th Street Midwest City, OK 73130. The position involves preparation and filing of pleadings and trial of cases in child support related hearings in district and administrative courts. This position may be filled at an alternate hiring level as a Child Support Services attorney III (beginning salary $4,405 monthly), Child Support Services attorney II (beginning salary $4,067.91 monthly), or as a Child Support Services attorney I (beginning salary $3,689.25 monthly), dependent on child support or family law experience and minimum qualifications as per state policy.

NORMAN BASED LAW FIRM IS SEEKING SHARP, MOTIVATED ATTORNEYS for fast-paced transactional work. Members of our growing firm enjoy a team atmosphere and an energetic environment. Attorneys will be part of a creative process in solving tax cases, handle an assigned caseload and will be assisted by an experienced support staff. Our firm offers health insurance benefits, paid vacation, paid personal days and a 401K matching program. No tax experience necessary. Position location can be for any of our Norman, OKC or Tulsa offices. Submit resumes to Ryan@polstontax.com.

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

POSITIONS AVAILABLE

CUDDY & MCCARTHY, LLP, A 23 ATTORNEY LAW FIRM with offices in Santa Fe and Albuquerque, New Mexico, seeks out qualified attorneys with the experience, character and judgment to provide the best service to our clients in our Santa Fe or Albuquerque offices. Portable business is preferred. We are looking to grow our team. C&M has a strong established infrastructure, an exceptional client-services team of professionals and strives to provide a comfortable professional work environment which is attractive to both our team and our clients. Candidates must be committed to serving the diverse needs of our clients. Your comprehensive CV will be viewed with care and discretion and may be submitted to ejaramillo@cuddymccarthy.com. All replies will be kept confidential.

OBA HEROES PROGRAM COORDINATOR. The Oklahoma Bar Association has an opening for coordinator of its Oklahoma Lawyers for America's Heroes program. Duties include working with veterans, enlisted service members, guard and reserve members to qualify them for free legal services and then match them with volunteer lawyers from across the state to assist them with their legal issues. The coordinator also provides administrative support for OklahomaFree LegalAnswers.org. Successful applicant must be proficient in Word and Excel and have familiarity working with databases. Strong organizational skills, good communication skills and the ability to work with minimal supervision are all important. This is a part-time position for approximately 20 hours/week at the bar center in Oklahoma City; working from home is not an option. Preference given to persons with legal training and experience. Send resume to Heroes Coordinator Search, P.O. Box 53036, Oklahoma City, OK 73152 or by email to nickied@okbar.org. Interviews begin in mid-August.

DURANT LAW OFFICE SEEKING LICENSED ATTORNEY. Jones Law PC in Durant is seeking a full-time licensed attorney, focusing in real estate law. Email your resume detailing your experience and a cover letter to tlw@joneslawpc.net.

METRO AREA LAW FIRM SEEKING FAMILY LAW ATTORNEY FOR ITS NORMAN OFFICE. Qualified candidates will have 1 to 5 years of experience in the family law sector. Health, vision, dental insurance and 401K benefits available. Pay commensurate with experience. Please send resume and writing sample to office@ballmorselowe.com.

ESTABLISHED, DOWNTOWN OKC, AV-RATED LAW FIRM with a heavy emphasis in plaintiff's insurance bad faith litigation seeks associate attorney with 2-5 years insurance defense litigation experience. Deposition and trial experience preferred. Competitive salary and benefits, with bonus opportunity. Send replies to "Box F," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

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

Oklahoma Bar Center
1901 N. Lincoln Blvd.
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A Workshop about law firm business development: The good, the bad, and the dangerous

This is a no-credit educational course.

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

FEATURED INSTRUCTOR:
Stuart I. Teicher

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

PROGRAM DESCRIPTION:

Every lawyer wants to hear new ideas for developing and growing their business. This unique, limited attendance program led by Stuart Teicher will not only give you the opportunity to hear new ideas on law firm business development.

IN THIS PROGRAM YOU WILL LEARN:

- **What it means to be a "thought leader" that attracts clients… and how to become one**
- **Ideas for how to become involved in your community in a way that creates business**
- **How to improve the number of referrals you get from your existing client base**
- **Learn how a good mission statement could lead to practical results in your practice**
- **An hour will be devoted to developing your on-line presence, including understanding how to create an integrated social media presence, creating YouTube videos that help you develop a following, and learning about the right type of content for your Facebook and Twitter posts.**

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

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TO REGISTER GO TO WWW.OKBAR.ORG/CLE


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