THE OKLAHOMA BAR
Journal
Volume 90 — No. 18 — 9/28/2019

Court Issue

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Federal Law Clerk Vacancy (Part-time)

United States District Court
Western District of Oklahoma

Applications are being accepted for a part-time death penalty law clerk (20 hours per week) for the U.S. District Court in Oklahoma City. The position is available immediately. This part-time death penalty law clerk position is funded through December 31, 2021. Recertification is required each year thereafter to continue the position.

Applicants must be a law school graduate and possess excellent research, writing, proofreading, and communication skills. Qualified candidates are invited to submit applications by the closing date of October 9, 2019. Go to www.okwd.uscourts.gov to see full notice and application instructions.

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NOTICE OF HEARING ON THE PETITION FOR REINSTATEMENT OF JANET BICKEL PHILLIPS (HUTSON), SCBD #6672 TO MEMBERSHIP IN THE OKLAHOMA BAR ASSOCIATION

Notice is hereby given pursuant to Rule 11.3(b), Rules Governing Disciplinary Proceedings, 5 O.S., Ch. 1, App. 1-A, that a hearing will be held to determine if Janet Bickel Phillips (Hutson) should be reinstated to active membership in the Oklahoma Bar Association.

Any person desiring to be heard in opposition to or in support of the petition may appear before the Professional Responsibility Tribunal at the Oklahoma Bar Center at 1901 North Lincoln Boulevard, Oklahoma City, Oklahoma, at 9:30 a.m. on **Tuesday, November 12, 2019**. Any person wishing to appear should contact Gina Hendryx, General Counsel, Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, Oklahoma 73152, telephone (405) 416-7007.

PROFESSIONAL RESPONSIBILITY TRIBUNAL

OKLAHOMA BAR ASSOCIATION

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See Rule 1.200, Rules — Okla. Sup. Ct. R., 12 O.S. Supp. 1996 (1997 T. 12 Special Supplement)

2019 OK 57

Re: CREATION OF THE OKLAHOMA BAR EXAMINATION ADVISORY COMMITTEE AND APPOINTMENT OF MEMBERS

SCAD-2019-66. September 16, 2019

ORDER

¶1 The Supreme Court of Oklahoma, pursuant to its general administrative authority, Okla. Const. Art. 7 §6, and pursuant to its sole authority to regulate the admission to the practice of law in the state of Oklahoma, hereby creates the Oklahoma Bar Examination Advisory Committee. This committee shall consist of nine (9) members as follows:

Chair

¶2 The Honorable Jequita H. Napoli, Special Judge in Cleveland County to act as Chair.

Voting members:

Three members of the Oklahoma Board of Bar Examiners to be designated by the Board

The Dean of the University of Oklahoma College of Law

The Dean of the University of Tulsa College of Law

The Dean of Oklahoma City University School of Law

Three members to be selected by the President of the Oklahoma Bar Association, with at least one member from the Young Lawyers Division

Non-voting members:

The Honorable James Winchester, Justice of the Supreme Court

Brant Elmore, attorney Supreme Court

Cullen Sweeney, attorney, Supreme Court

Cheryl Beatty, OBBE

¶3 **The purpose of the Committee shall be as follows:**

1. To consider modifications to the Oklahoma Bar Examination.
2. This study shall also include whether Oklahoma should adopt the Uniform Bar Examination and if so, under what circumstances.
3. Would the adoption of the UBE in Oklahoma negatively impact the pass rate of people of color?
4. Can the UBE be offered as a voluntary option or in addition to the current Oklahoma Bar Exam?
5. If Oklahoma adopts the UBE, should there also be an Oklahoma component? If so, what subject or subjects should be included? How would that component be administered?
6. If the UBE is adopted, how would the transition best be handled and when would the test first be given? Include in the study a recommendation for an appropriate cut score for Oklahoma.

¶4 The Chair of the Oklahoma Bar Examination Advisory Committee shall convene the committee 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 committee will determine the meeting dates. The Advisory Committee shall prepare an i**nterim report to the Supreme Court no later than April 1, 2020, with a final report due not later than December 1, 2020.**

¶5 Upon completion of the final report and submission to the Oklahoma Supreme Court, the advisory members shall remain available to answer questions by this Court. The Oklahoma Bar Examination Advisory Committee shall dissolve upon completion of this Court's inquiry.

¶6 DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 16th day of SEPTEMBER, 2019.

/s/ Noma D. Gurich
Chief Justice

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

2019 OK 58

TALEN PAUL HOBSON Plaintiff/Appellant, v. CIMAREX ENERGY CO., a Delaware corporation, Defendant/Appellee.

No. 116,721. September 17, 2019

ON CERTIORARI TO THE COURT OF CIVIL APPEALS, DIVISION IV

¶0 Plaintiff/Appellant is the vested remainderman of his father's life estate in the surface rights of land in Canadian County, Oklahoma (the "Property"). Defendant is the lessee of the Property's mineral interests. Plaintiff filed suit alleging that he is entitled to compensation for the surface damages caused by the drilling of wells and entitled to be notified of negotiations to determine surface damages because he is a "surface owner" within the meaning of the Surface Damages Act (SDA), 52 O.S. §§ 318.2 *et seq.* The defendants moved to dismiss for failure to state a claim arguing Plaintiff is not an owner within the meaning of the SDA, and even if he were an owner, his proper remedy is to seek compensation from the life tenant. The trial court sustained the Defendant's Motion to Dismiss finding the Remainderman is not a "surface owner" under the SDA. The Plaintiff appealed. The Court of Civil Appeals, Division IV, reversed the trial court's ruling interpreting "surface owner" under the SDA to include vested remainder interests. This Court granted certiorari.

OPINION OF THE COURT OF CIVIL APPEALS VACATED; ORDER OF THE TRIAL COURT AFFIRMED

A. Gabriel Bass and Jana L. Knott, Bass Law, Oklahoma City, Oklahoma, for Plaintiff/Appellant.

Bradley W. Welsh and Ryan A. Pittman, Gable Gotwals, Tulsa, Oklahoma, for Defendant/Appellee.

COMBS, J.:

¶1 The issue presented is whether a vested remainderman is a surface owner under the Surface Damages Act (SDA). We hold he is not. For purposes of the SDA, surface owner means one who holds a current possessory interest.

FACTS AND PROCEDURAL HISTORY

¶2 Through a quitclaim deed, Timothy Hobson, father of Talen Hobson, holds a present life estate in the surface rights of property located in Canadian County, Oklahoma. Talen Hobson holds a vested remainder interest in the surface rights to his father's life estate. Cimarex Energy Co. (Cimarex) is a mineral lessee of the Property. Before drilling, Cimarex reached an agreement with the life tenant regarding surface damages under the SDA. After drilling, Cimarex paid the life tenant according to that agreement.

¶3 Talen Hobson (Hobson) then sued Cimarex claiming he is entitled to compensation under the SDA. Hobson further alleges that as a surface owner under the SDA, Cimarex should have negotiated with him for surface damages as well. Cimarex responded that a future interest owner does not qualify as a surface owner under the SDA. Alternatively, Cimarex argued that if a future interest owner does qualify as a surface owner his proper cause of action is against the life tenant. The trial court held that a vested remainderman does not qualify as a surface owner under the SDA and dismissed the action with prejudice. On appeal, the Court of Civil Appeals disagreed, reasoning that the SDA focuses on ownership rather than possession. The appeals court reversed and remanded the case for further proceedings.

¶4 Cimarex filed a Petition for Writ of Certiorari with this Court on July 9, 2018. We granted certiorari on November 5, 2018, and the matter was assigned to this office on April 23, 2019.

STANDARD OF REVIEW

¶5 This Court's review of a dismissal for failure to state a claim is conducted *de novo. Lockhart v. Loosen*, 1997 OK 103, ¶ 4, 943 P.2d 1074, *1077; Washington v. State ex rel. Dep't of Corr.*, 1996 OK 139, ¶ 7, 915 P.2d 359, 361. Questions of statutory interpretation are pure questions of law and are reviewed *de novo*. *Ward Petroleum Corp. v. Stewart*, 2003 OK 11, ¶4, 64 P.3d 1113, 1115.

¶6 "The fundamental rule of statutory construction is to ascertain and give effect to legislative intent, and that intent is first sought in the language of the statute." *YDF, Inc. v. Schlumar, Inc.*, 2006 OK 32, ¶6, 136 P.3d 656, 658. If there is an ambiguity, we apply the rules of statutory construction. *Id*. Ambiguity exists if

there is more than one reasonable interpretation. *Id*. "In construing ambiguous statutory language . . . we look to the various provisions of the relevant legislative scheme to ascertain and give effect to the legislative intent and the public policy underlying that intent." *Id*.

ANALYSIS

¶7 This case concerns the interpretation of "surface owner" under the SDA. The SDA provides that "[p]rior to entering the site with heavy equipment, the operator shall negotiate with the surface owner for the payment of any damages which may be caused by the drilling operation." 52 O.S. §318.5(A). The SDA defines "surface owner" as "the owner or owners of record of the surface of the property on which the drilling operation is to occur." 52 O.S. §318.2(2).

¶8 The SDA modifies the common law relationship between mineral owners and surface owners. *Ward Petroleum Corp*., 2003 OK 11, § 5, 64 P.3d at 1115. We therefore liberally construe the statute to give effect to legislative intent and promote justice. 12 O.S. §2.

I. The Ordinary Meaning

¶9 The SDA does not define surface owner in a manner that further explains owner, so we look to the ordinary meaning of that term. *Black's Law Dictionary* defines "owner" as "[s]omeone who has the right to possess, use, *and* convey something."[1] (emphasis added). *Merriam-Webster's* dictionary defines "own" as "to have or hold as property: possess."[2] Although the United States Supreme Court stated "ownership does not always mean absolute dominion," the statement indicates that at times ownership does mean absolute dominion. *Marsh v. State of Alabama*, 326 U.S. 501, 506 (1946). The context of that case further illustrates that the common understanding of ownership includes absolute dominion. In that case, the Supreme Court distinguished the dominion of an owner whose property is open to the public in general, like a company-owned town, versus an owner of property not set up for an essentially public function, like a farm. *Id*. at 506-07. The Court reasoned that in cases where the property is open to the public in general, the owner does not have absolute dominion. But where the property is not set up for an essentially public function, the owner retains more dominion.

¶10 A vested remainder becomes possessory only when the preceding estate, here the father's life estate, comes naturally to its end. Chester H. Smith & Ralph E. Boyer, *Survey of the Law of Property,* 23, West Publishing Co. (2d ed. 1971). A remainder cannot cut short a preceding estate. *Id.* The lessee of a mineral lease is statutorily required to negotiate with the person or persons holding a current possessory interest in the surface of the land. Here, Talen Hobson would not hold a possessory interest until his father's life estate came to a natural end.

¶11 This interpretation of surface owner does not violate this State's precedent regarding the SDA. In *McCrabb v. Chesapeake Energy Corp.*, the appellate court held that an operator is required to negotiate a surface damage agreement with all tenants in common. 2009 OK CIV APP 66, ¶16, 216 P.3d 312, 315. The court there focused on the SDA's use of the plural form of owner to reach its conclusion. *Id.* The unique aspect of tenants in common is that each tenant has unity of possession – an undivided equal interest in current possession. *De Mik v. Cargill*, 1971 OK 61, ¶8, 485 P.2d 229, 223. Interpreting surface owner to require current possession does not disturb precedent.

II. Promoting Justice

¶12 Interpreting surface owner as requiring current possessory interest gives effect to legislative intent and promotes justice. Defining surface owner under the SDA as requiring a possessory interest does not modify the rights of life tenants and vested remaindermen. A life estate entering a new minerals lease must still seek the remainderman's consent because removal of minerals will certainly affect the corpus of the property. *See Nutter v. Stockton*, 1981 OK 30, 626 P.2d 861. Additionally, if the life tenant's transactions with the mineral leaseholder constitute an unreasonable injury to the remainderman's estate, the remainderman may bring a waste claim. *McGinnity v. Kirk*, 2015 OK 73, ¶9, 362 P.3d 186, 190. A remainderman maintains recourse for the definite removal of corpus and potential waste from all other actions by the life tenant. This interpretation of surface owner does not thwart the SDA's purpose of promoting rapid payment of compensation to a party whose land is taken after the taking occurs. *Tower Oil & Gas Co., Inc. v. Paulk*, 1989 OK 105. ¶ 6, 776 P.2d 1279, 1281.

CONCLUSION

¶13 The SDA's definition of surface owner is ambiguous. This Court is persuaded by the common meaning, expressed legislative intent, and interests of justice that the SDA's use of surface owner applies only to those holding a current possessory interest. Under the SDA, a mineral lessee must negotiate surface damages with those who hold a current possessory interest in the property. A vested remainderman does not hold a current possessory interest until the life estate has come to its natural end. The opinion of the Court of Civil Appeals is vacated. The order of the trial court is affirmed.

OPINION OF THE COURT OF CIVIL APPEALS VACATED; ORDER OF THE TRIAL COURT AFFIRMED

¶14 Edmondson, Colbert, and Combs, JJ., and Swinton, S.J., concur.

¶15 Kauger, J., concurs specially (by separate writing).

¶16 Darby, V.C.J., (by separate writing), Hudson, S.J., Kuehn, S.J., and Goree, S.J., dissent.

¶17 Gurich, C.J., and Winchester, J., recused.

KAUGER, J., concurring specially:

I concur that under this statute, a surface owner is the one who has current possession of the property. Here, the life tenant father conveyed to his remainderman son without any restriction or exemption. I write specially to acknowledge that grantors can avoid this problem by ensuring that the document creating the life estate restricts the part of the remainderman. For example, the grantor may reserve all income from a successful drilling operation without incurring waste.[1] Or a grantor might create a life estate and endow the life tenant with the power to consume or dispose of the corpus of the estate, or grant the life tenant the explicit power to commit waste, or clearly alienate minerals, oil or gas interests for development.[2] The person conveying the life estate has great discretion in any conditions they wish to attach to the life estate, provided that the conditions are allowed by law.

Another more recent alternative to the life estate is the Transfer on Death Deed, which went into effect on November 1, 2008, through Oklahoma's "Nontestamentary Transfer of Property Act." This law allows a "record owner" to use a "Transfer-On-Death Deed" to name another person to receive real estate without going through probate.[3] This preserves total control of the property during the grantor's lifetime, but accomplishes the same legal effect as a life estate with a remainderman.[4]

DARBY, V.C.J., with whom Hudson, S.J., Kuehn, S.J. and Goree, S.J., join, DISSENTING:

¶1 I respectfully dissent. The aim of the Surface Damages Act (SDA), 52 O.S.2011, §§ 318.2–318.9, is "to balance the conflicting interests of the owners of two of our State's important natural resources: the mineral interest holder and the surface owner." *Ward Petroleum Corp. v. Stewart*, 2003 OK 11, ¶ 5, 64 P.3d 1113, 1115 (citing *Davis Oil Co. v. Cloud*, 1986 OK 73, 766 P.2d 1347). The critical question before us is therefore: Who is a surface owner? The SDA defines *surface owner* as "the owner or owners of record of the surface of the property on which the drilling operation is to occur." 52 O.S.2011, § 318.2(2). That definition simply and conclusively informs us that the surface owner is the *record* owner of the property. The majority, however, finds this definition ambiguous then construes it in a manner which excludes surface owners of record who have no current possessory interest in the property.

¶2 The legislature's definition is not ambiguous. In the absence of ambiguity or conflict with another enactment, we simply apply the statute according to the plain meaning. *Broadway Clinic v. Liberty Mut. Ins. Co.*, 2006 OK 29, ¶ 15, 139 P.3d 873, 877. The Court presumes "that the legislature expressed its intent in a statute and that it intended what is expressed."*Rath v. LaFon,* 1967 OK 52, ¶ 4, 431 P.2d 312, 314 (quoting *Hamrick v. George,* 1962 OK 247, ¶ 7, 378 P.2d 324, 326).We thus look to the ordinary meaning of the terms that the legislature chose. *Hall v. Galmor,* 2018 OK 59, ¶ 45, 427 P.3d 1052, 1070. To ascertain the ordinary meaning and achieve full force and effect of each provision, we look to the text of both the provision at issue as well as related provisions in the same statute or legislative act. *Id.* ¶ 45, 427 P.3d at 1070-71."A court may not ignore the plain words of a statute." *Sherbert v. City of Ada (In re Detachment of Mun. Terr.)*, 2015 OK 18, ¶ 10, 352 P.3d 1196, 1200.

¶3 The SDA was enacted in 1982. 1982 Okla. Sess. Laws 1062-66. Despite this fact, the majority now interprets the legislature's intent by relying on a definition of owner from the tenth

edition of *Black's Law Dictionary,* which did not exist until 2014. For this reason, I reference only the fifth edition of *Black's Law Dictionary*, as it was the most recent version available at the time of enactment.

¶4 This more appropriate version defines *owner* as:

> The person in whom is vested the ownership, dominion, or title of property . . . .
>
> The . . . meaning is to be gathered from the connection in which it is used, and from the subject-matter to which it is applied. The *primary meaning of the word as applied to land is one who owns the fee and who has the right to dispose of the property,* but the term also includes one having a possessory right to land . . . .
>
> The term "owner" is used to indicate a person in whom one or more interests are vested for his own benefit.

Black's Law Dictionary 996 (5th ed. 1979) (emphasis added). Additionally, the fifth edition defines record owner as "the owner of record, not the owner described in the tax roll; the owner of the title at time of notice." *Id.* at 997. The SDA lacks any limiting language to suggest that it should not encompass all surface *record owners.* In this case, Timothy is record owner of a life estate under Oklahoma law.[1] *See* 60 O.S.2011, § 22(2). And Talen is record owner of the fee simple remainder. *See id.* §§ 23, 30, 35. They are both within the SDA's definition of surface owner.

¶5 Even assuming, *arguendo*, that the SDA definition of surface owner is ambiguous and open to reasonable interpretation, the vested remainderman of record should not be excluded. The majority asserts that the common understanding of ownership includes absolute dominion. But definitions from both *Webster's New International Dictionary* and *Black's Law Dictionary* suggest otherwise. *Webster's* defines *owner* as "one who has legal or rightful title, whether the possessor or not." *Webster's New Int'l Dictionary* 1745 (2d ed. 1959). Likewise, *Black's* explains that

> [o]wnership of property is either absolute or qualified. The ownership of property is absolute when a single person has the absolute dominion over it, and may use it or dispose of it according to his pleasure, subject only to general laws. The ownership is qualified when it is shared with one or more persons, when the time of enjoyment is deferred or limited, or when the use is restricted.

Ownership, Black's Law Dictionary 997 (5th ed. 1979) (citation omitted).

¶6 The majority focuses on the fact that the remainderman's ownership is qualified – meaning his possessory interest in the property is deferred – and ignores that the essence of the relationship between a life tenant and remainderman is that neither has absolute dominion over the estate. *See Welborn v. Tidewater Associated Oil Co.*, 217 F.2d 509, 510-11 (10th Cir. 1954).[2] While the remainderman has no current possessory interest, the life tenant has no ability to alienate title beyond his or her life and is restricted from using the property in any way that permanently diminishes its value. *See Lawley v. Richardson*, 1924 OK 144, ¶ 6, 223 P. 156, 157-58.3 Both are record owners with qualified ownership.

¶7 The legislature made no effort to omit vested remaindermen or owners with deferred possessory interest from the definition of surface owner, and it is improper for this Court to do so in its place today. Indeed, "[t]his Court does not read exceptions into a statute nor may we impose requirements not mandated by the [l]egislature." *Cox v. State ex rel. Okla. Dep't of Hum. Servs.*, 2004 OK 17, ¶ 26, 87 P.3d 607, 617. Adding a current possessory interest requirement does not give effect to the legislature's intent. *See* 12 O.S.2011, § 2.

¶8 The SDA was established to promptly compensate surface owners for damages which may result from oil and gas exploration. *YDF, Inc. v. Schlumar, Inc.*, 2006 OK 32, ¶ 10, 136 P.3d 656, 659. It follows, therefore, that the SDA aims to compensate *all owners* with an interest in the surface estate – specifically to provide compensation when a drilling operation directly threatens to deplete a surface owner's interest. A vested remainderman fits this criteria as he has a damageable and alienable interest in the surface, which has market value. *See* 60 O.S.2011, § 30; *see also Bonebrake v. McNeill*, 1971 OK 146, ¶ 11, 491 P.2d 269, 272.

¶9 The fact that the SDA's provisions do not discriminate amongst types of damages a surface owner may recover is also an indication that a remainderman can recover for potential damages so long as the corpus may suffer an injury. The SDA mandates "payment of *any*

damages which may be caused by the drilling operation." 52 O.S.2011, § 318.5(A) (emphasis added); *see also id.* § 318.5(C). This Court has found that the proper measure of all damages under the SDA is the diminution of the fair market value of the surface estate resulting from the drilling operation. *Ward*, 2003 OK 11, ¶ 6, 64 P.3d at 1115 (recognizing these damages as appropriate in condemnation-type actions).

¶10 Recoverable temporary damages include the cost of restoring the land to its former condition as well as compensation for use, but only if that amount is less than the diminution in fair market value of the land. *Houck v. Hold Oil Corp.*, 1993 OK 166, ¶ 33, 867 P.2d 451, 460. Permanent damages include such things as the use of excess land for the well site, construction of excess roads, or irreparable damage caused by pollution. *See id.* ¶¶ 35, 37, 867 P.2d at 461 (citation omitted). These descriptions show that such damages may affect the corpus and not just the income.[4]

¶11 There is no question that a vested remainderman possesses a right to compensation for the diminution in value of the corpus of the estate. 41 O.S.2011, § 22; 60 O.S.2011, § 63.[5] Even as the majority acknowledges that life tenants must seek the remainderman's consent in order to enter a mineral lease (because it affects the corpus), see *Nutter v. Stockton*, 1981 OK 30, ¶ 1, 626 P.2d 861, 862, it nonetheless ignores that any diminution in fair market value of the property likewise affects the corpus and therefore the remainderman. A vested remainderman is exactly who the legislature intended to compensate under the SDA – a surface owner whose vested interest in the corpus has or likely will be damaged by an operator's drilling.

¶12 Only "in the rare case when literal construction produces a result demonstrably at odds with legislative intent" do we diverge from the plain meaning of a statute. *Samman v. Multiple Inj. Tr. Fund*, 2001 OK 71, ¶ 13, 33 P.3d 302, 307. This is not one of those rare cases. The legislature has not manifested an intention to exclude vested remaindermen from the SDA definition of surface owner, and neither should we. This Court should apply the ordinary meaning of surface owner gathered from the statutory definition, the connection in which it is used in the SDA, and the subject-matter to which it is applied.

¶13 While the majority opinion upholds the SDA's purpose of promoting prompt compensation to the life tenant, it prevents that purpose for the vested remainderman. Today's result could have been avoided by simply allowing this remainderman his statutorily granted seat at the negotiation table. For all of the above reasons, I respectfully dissent.

COMBS, J.:

1. *Black's Law Dictionary* (10th ed. 2010). The dissent, citing the fifth edition of Black's Law Dictionary, moves to the second paragraph of the definition after omitting portions of the first paragraph. Specifically that owner is "[t]he person in whom is vested the ownership, dominion, or title of property...*which he has a right to enjoy and do with as he pleases...*" *Black's Law Dictionary* 996 (5th ed. 1979) (emphasis added). Similarly, the dissent's definition of ownership omits the first portion stating it is a "[c]ollection of rights to use and enjoy property, including right to transmit it to others." *Black's Law Dictionary* 997 (5th ed. 1979). A vested remainderman has no right to use and enjoy the property until the life tenancy terminates.

2. *Merriam-Webster's Dictionary*, own, *available at* https://www.merriam-webster.com/dictionary/own#h2.

KAUGER, J., concurring specially:

1. Nuttter v. Stockton, 1981 OK 30, ¶__, 626 P.2d 861 [**Absent declarations to the contrary**, cases generally accept that by granting a life estate on producing land (or on land he had leased for production), the grantor often intends for the life tenant to have the profits.] 5A Vernon's Okla. Forms 2d, Real Estate §4.65 provides:

> In order to reserve a life estate the language in the habendum clause of a Warranty Deed is as follows:
>
> And Grantor expressly reserves to the Grantor and Grantor's assigns a life estate in the property for Grantor's own life [**OPTIONAL:, without liability for waste**]. (Emphasis supplied.).

See also, Board of County Commissioners, Etc. v. Seber, 318 U.S 705, 63 S.Ct. 920, 87 L.Ed. 1094, affirming 130 F. 2d 663 (10th Cir. 1943) [Grantor by express language in conveyance retained to herself a life estate, together with the improvements and the rents and profits from the land,.] .

2. See generally, Anthony J. Ford, *The Life Estate and the Power to Commit Waste; Using a Power Analysis to Resolve Oil & Gas Title Issues Created by Future Interests*, Vo. 2, Oil and Gas, Natural Resources, and Energy Journal 1 (2016).

3. The current version of Title 58 O.S. Supp. 2015 §§1251-1258 provides: in pertinent parts:

> Sections 1 through 8 of this act shall be known and may be cited as the "Nontestamentary Transfer of Property Act".
>
> A. An interest in real estate may be titled in transfer-on-death form by recording a deed, signed by the record owner of the interest, designating a grantee beneficiary or beneficiaries of the interest. The deed shall transfer ownership of the interest upon the death of the owner. A transfer-on-death deed need not be supported by consideration. For purposes of the Nontestamentary Transfer of Property Act, an "interest in real estate" means any estate or interest in, over or under land, including surface, minerals, structures and fixtures.
>
> B. The signature, consent or agreement of or notice to a grantee beneficiary or beneficiaries of a transfer-on-death deed shall not be required for any purpose during the lifetime of the record owner.
>
> C. To accept real estate pursuant to a transfer-on-death deed, a designated grantee beneficiary shall execute an affidavit affirming:
>
> 1. Verification of the record owner's death;
>
> 2. Whether the record owner and the designated beneficiary were married at the time of the record owner's death; and
>
> 3. A legal description of the real estate.
>
> D. The grantee shall attach a copy of the record owner's death certificate to the beneficiary affidavit. For a record owner's death occurring on or after November 1, 2011, the beneficiary shall record the affidavit and related documents with the office of the county clerk where the real estate is located within nine (9) months of the grantor's death, otherwise the interest in the property reverts to the deceased grantor's estate; provided, however, for a record owner's death occurring before November 1, 2011, such recording of the affidavit and related documents by the beneficiary shall not be subject to the nine-month time limitation. Notwithstanding the provisions of Section 26 of Title 16 of the

Oklahoma Statutes, an affidavit properly sworn to before a notary shall be received for record and recorded by the county clerk without having been acknowledged and, when recorded, shall be effective as if it had been acknowledged.

4. Title 85 O.S. Supp. 2015 §1257-58 provides:

A record owner who executes a transfer-on-death deed remains the legal and equitable owner until the death of the owner and during the lifetime of the owner is considered an absolute owner as regards creditors and purchasers.

A deed in transfer-on-death form, executed in conformity with the Nontestamentary Transfer of Property Act, shall not be considered a testamentary disposition and shall not be invalidated due to nonconformity with other provisions in Title 58 or Title 84 of the Oklahoma Statutes.

DARBY, V.C.J., with whom Hudson, S.J., Kuehn, S.J. and Goree, S.J., join, DISSENTING:

1. Both the life tenant and remainderman received their interests in this property via the same quit claim deed from a third party.

2. Regarding the rights of life tenant and remainderman mineral owners:

It is well settled that a remainderman may not make an oil and gas lease to permit immediate exploration and production without the consent of the life tenant. Likewise, a life tenant cannot drill new oil or gas wells, or lease the land to others for that purpose. *A life tenant and the remainderman may lease the land by a joint lease* and they may agree as to the division of the rents and royalties. In the absence of such agreement, the life tenant is not entitled to any part of the royalties, but is entitled only to the income from such royalties.

Welborn, 217 F.2d at 510-11 (emphasis added) (footnotes omitted).

3. A life tenant is entitled to the full use and benefit of the property, but he is restricted in this use, so that those who are to follow him in possession shall not take the property permanently diminished in value, by his failure to do that which an ordinarily prudent man would do in the preservation of his own property . . . and which have the effect of diminishing permanently the value of the future estate.

Lawley, 1924 OK 144, ¶ 6, 223 P. at 157-58.

4. The remainderman owns the corpus subject to a deferred right of possession. *See Barnes v. Keys*, 1912 OK 485, ¶ 2, 127 P. 261, 263.

5. "A person seized of an estate in remainder or reversion may maintain an action for waste or trespass, for injury to the inheritance, notwithstanding an intervening estate for life or years." 41 O.S.2011, § 22. "A person having an estate in fee, in remainder, or reversion, may maintain an action for any injury done to the inheritance, notwithstanding an intervening estate for life or years . . . ." 60 O.S.2011, § 63.

2019 OK 59

I.T.K., a minor individual, by and through his parents and natural guardians IAN KNIGHT and CAROLYN LEFFEW, Plaintiff/Appellant, vs. MOUNDS PUBLIC SCHOOLS, and WILLIAM RICHARD KNOX, an individual, Defendants/Appellees.

No. 115,069. September 24, 2019

ON CERTIORARI TO THE OKLAHOMA COURT OF CIVIL APPEALS, DIV. III

¶0 Plaintiff, a child, by and through his parents, brought a Governmental Tort Claims Act action in the District Court of Okmulgee County. The Honorable Ken Adair, District Judge, determined plaintiff's action was untimely and granted defendants' motion to dismiss, and plaintiff appealed. The Oklahoma Court of Civil Appeals, Div. III, affirmed the District Court's order, and plaintiff sought certiorari. We hold: (1) A Governmental Tort Claims Act (GTCA) notice of claim sent to the correct school superintendent by certified mail satisfied the mandatory requirement in 51 O.S. § 156(D) for filing the notice with the office of the clerk of the school's board of education; (2) An insurance adjuster's request for additional information did not toll either (a) the 51 O.S. § 157(A) 90-day time limit for approval, denial, or deemed denial of the claim, or (b) the 51 O.S. § 157(B) 180-day period to commence suit, when the request stated it would not extend or waive time limits; and (3) A plaintiff's letter unilaterally seeking settlement negotiations is not, as a matter of law, sufficient by itself to show an agreement pursuant to 51 O.S. § 157 to toll the GTCA time limits.

CERTIORARI PREVIOUSLY GRANTED; OPINION OF THE COURT OF CIVIL APPEALS VACATED; AND ORDER OF THE DISTRICT COURT AFFIRMED

Guy A. Thiessen, GT Law Firm, Tulsa, Oklahoma, for Plaintiff/Appellant.

Ammar S. Wasfi, *pro hac vice*, The Killino Firm, P.C., Philadelphia, PA, for Plaintiff/Appellant.

Matthew P. Cyran, Rosenstein, Fist & Ringold, Tulsa, Oklahoma, for Defendants/Appellees Independent School District No. 5, Creek County, Oklahoma a/k/a Mounds Public Schools, and William Richard Knox.

EDMONDSON, J.

¶1 The three basic questions raised on certiorari are: (1) Is an Oklahoma Governmental Tort Claims notice sent by certified mail to a superintendent of a public school statutorily sufficient; (2) Does an insurance adjuster's request for more information toll the GTCA time limits if the request also states an intent for tolling to not occur; and (3) Does a unilateral request by plaintiff for settlement negotiations toll the GTCA time limits? We hold plaintiff's Governmental Tort Claims Act (GTCA) notice of claim sent to the correct school superintendent by certified mail satisfied the requirement in 51 O.S. § 156(D) for filing the GTCA notice with the office of the clerk of the school's board of education, although the superintendent did not transmit the notice to the proper clerk for

filing. We hold the insurance adjuster's request for additional information did not toll the 90-day time limit for approval, denial, or deemed denial of the GTCA claim when the request expressly stated it would not extend or waive the GTCA time limits. We hold a plaintiff's letter unilaterally seeking settlement negotiations is not an agreement pursuant to 51 O.S. § 157 to toll the GTCA time limits.

I. The Case and Issues Raised by Parties

¶2 Plaintiff, a six-year-old child, by and through his parents, filed a Governmental Tort Claims Act (GTCA)[1] action in the District Court, and alleged that on January 10, 2012, William Knox, a bus driver for the Mounds Public Schools, negligently operated the bus causing the child to be injured. The record provided by plaintiff shows the child was taken to a hospital emergency room, given several diagnostic tests, and treated with 4 staples for one laceration and Dermabond for another. When he filed his District Court action more than one year later he alleged he had medical-related expenses in the amount of $6,209.30, and potential unknown medical expenses as a result of being hit by the bus. Further, he alleged pain and suffering and sought a sum in excess of $10,000.

¶3 Two weeks after the injury and on January 26, 2012, plaintiff's counsel sent a letter to both the school superintendent and school insurance adjuster. The letter states counsel's representation of plaintiff, plaintiff sustained an injury on Jan. 10, 2012, while exiting a Mounds School District bus. The letter states plaintiff received serious injuries. Counsel requested the superintendent to send all liability insurance information to the lawyer, have the school's insurance carrier contact him immediately, and preserve evidence relating to the event. The school superintendent forwarded his January 26th letter to the school district's insurance adjuster. The superintendent did not forward the original or a copy to a clerk for the board of education.

¶4 The insurance adjuster responded by a letter dated January 30, 2012. The letter acknowledged counsel's representation of the injured child, identity of the child, the insured school district, date of loss, and insurance claim number. The adjuster's letter requested information concerning the injuries claimed, names and addresses of plaintiff's doctors, witnesses, and medical authorization signed by plaintiff's guardian for release of medical information. The letter stated an investigation had been initiated into the matter. The letter also included the following separate paragraph at the end of the letter.

> My communications with you and my investigation of this matter are not intended to waive any statutory exemptions from liability or time limitations imposed by the Oklahoma Tort Claims Act. Further, any settlement negotiations or discussions do not extend the date of denial of your client's claim.

The adjuster's letter contains his name, the entity he represents, mailing address in Tulsa, Oklahoma, telephone number, and email address.

¶5 One year later, on January 30, 2013, counsel for plaintiff sent a demand letter to the insurance adjuster stating it was the "first and only pre-suit formal demand in order to settle this matter without litigation." Unlike the letter of January 26, 2012, the letter of January 30, 2013, stated a demand for a specified sum of money.[2] Defense counsel responded by letter and stated the claim was time-barred. Plaintiff responded by letter and stated the time limits had been tolled. Attached to plaintiff's letter was copy of a letter plaintiff's counsel asserted he had mailed September 5, 2012, and this September letter was part of an ongoing investigation and a response to the adjuster's request for more information. Defense counsel responded and stated the September letter had never been received by defendants.

¶6 After these letters, plaintiff filed a GTCA action in the District Court on May 31, 2013, against both the school district and the bus driver. The school district and bus driver filed a combined motion to dismiss stating the GTCA notice of claim was improper, the GTCA claim was time-barred, and the bus driver was not liable to suit on a GTCA claim because he had been acting within the scope of his employment when the child was injured.

¶7 The District Court held a hearing and determined: (1) The bus driver was acting within the scope of his employment and should be dismissed as a party; (2) The letter received by the insurance adjuster and superintendent in January 2012 was a notice of a GTCA claim provided to the school district; (3) The letter of the insurance adjuster did not toll the GTCA time limits; (4) The claim was deemed denied

90 days after this date; (5) The trial judge had doubts whether the letter of September 2012 had been mailed as asserted by counsel; (6) The content of the September 2012 letter was insufficient to create an agreement to toll or extend the GTCA time limits; and (7) Plaintiff "failed to comply with both the 180 day rule and one-year rule." The trial judge granted the defendants' motion to dismiss with prejudice.

¶8 Plaintiff appealed and raised the following assignments of error in his petition in error.

> 1. The trial court stated plaintiff was in substantial compliance with the notice requirements in 51 O.S. § 156, but the Journal Entry of Judgment does not state such;
>
> 2. Trial court erred in applying 51 O.S. § 157 because the adjuster's letter of January 30, 2012, tolled the time limits in § 157;
>
> 3. The September 5, 2012 letter from plaintiff's counsel "started anew the 90-day period for an action on the claim under 51 O.S.Supp.1992 § 157;"
>
> 4.The trial court erred because the September 5, 2012, letter was "providing additional information and confirming time to evaluate the claim and upon which to negotiate a settlement, was confirming in writing of additional time to negotiate a settlement starting anew the 90-day period for an action on a claim under 51 O.S. Supp.1992 § 157;"
>
> 5. The trial court erred by determining that even if defendants never received the September 5th letter plaintiff's "January 30, 2013 demand packet provided additional information to evaluate the claim and upon which to negotiate a settlement in response to Defendant/Appellee's request, thereby starting anew the 90-day period for action on the claim under 51 O.S.Supp.1992 § 157, making Appellant's May 31, 2013 filing of the action timely;" and
>
> 6. The trial court erred in basing its dismissal "on a 'one year rule' applied to the May 13, 2013 filing of the action in accordance with 51 O.S.Supp.1992 § 157."

The GTCA generally precludes naming of individual state employees for tort claims arising in the scope of their employment,[3] and plaintiff's assignments of error do not challenge the trial court's dismissal granted to the bus driver.

¶9 The Oklahoma Court of Civil Appeals, Div. III, affirmed the District Court's order dismissing plaintiff's action with prejudice. The appellate court concluded no written notice had been filed with the clerk of the school board by plaintiff's counsel and such was required by 51 O.S. § 156(D). The reasoning relied, in part, on this Court's explanation in *Minie v. Hudson*,[4] where we construed statutory language in § 156(D) as mandatory for a notice of a GTCA claim to be in writing. The Court of Civil Appeals correctly noted the distinction between a requirement considered mandatory and a requirement satisfied by substantial compliance.[5] Plaintiff sought certiorari from this Court, and both plaintiff and school district rely on our opinion in *Minie v. Hudson, supra*, in support of their arguments on appeal and certiorari. We previously granted the petition for certiorari.

II. Analysis

II (A). Standard of Review and Form of the Journal Entry

¶10 The combined motion to dismiss argued the District Court lacked jurisdiction because plaintiff failed to meet time deadlines jurisdictional and mandatory in nature. While some of our opinions have made summary statements explaining a jurisdictional issue reviewed on appeal presents an issue of law and is reviewed *de novo*,[6] this Court has often explained in more detail the nature of a decision adjudicating jurisdiction involves both law and fact issues.

¶11 For example, in *Chandler v. Denton*[7] we quoted from our opinion in Abraham v. Homer,[8] and we explained "each element of jurisdiction is dependent upon both law and fact."[9] When a decision by a District Court, a court of general jurisdiction, adjudicates a jurisdictional issue involving law such as statutory interpretation applied to an uncontroverted fact, then a *de novo* review occurs on direct appellate review.[10] To the extent we are asked to review a finding of fact made by a District Court on a motion challenging jurisdiction in an action at law, the finding and its effect on the court's order are reviewed using a clearly erroneous standard and the presence of competent evidence in the record to support the judgment;[11] and when judicial discretion is utilized for a finding or ruling a clear-abuse-of-discretion standard is used.[12] An obvious example is a decision on the admission of evidence.[13] An erroneous finding of fact by the District Court is insufficient to require a reversal on appeal[14] when the actual

adjudication by the District Court includes those facts necessary to provide a sufficient evidentiary basis to support the judgment or order made by the District Court.[15] A trial court's determination or finding on credibility will not be reviewed on appeal as a ground to reverse the judgment when evidence in the record is sufficient to support the judgment rendered.[16] A District Court's finding there is an absence of sufficient facts necessary to prove a legal element turns the issue into one of law and is reviewed *de novo*; *i.e.*, the evidence submitted fails as a matter of law in showing a necessary legal element.[17] These types of review are nothing new and have a result *similar* to federal appellate review of a jurisdictional fact and issue of law[18] in the context of a federal Rule 12(b)(1) motion to dismiss based on the absence of jurisdiction.[19]

¶12 What this means for application here is simply this: (1) A question of law is presented, and reviewed *de novo*, whether the judge correctly ruled plaintiff's letter of January 2012 was legally sufficient to comply with § 156(D); (2) A question of law is presented, and reviewed *de novo*, whether the trial judge correctly ruled that the content of the adjuster's January 2012 letter was *legally insufficient* to toll GTCA deadlines; (3) An issue of fact involving credibility is presented by the trial court's finding plaintiff's counsel had failed to mail the letter of September 2012, and this finding is insufficient to reverse the order due to facts in the record supporting the trial court's order; (4) A question of law is presented, and reviewed *de novo*, whether the judge correctly ruled the September 2012 letter was *legally insufficient* to extend plaintiff's time to commence a district court action; (5) A question of law is presented, and reviewed *de novo*, whether the judge correctly ruled the January 2013 letter was *legally insufficient* to extend the time to bring a District Court action; and (6) A question of law is presented, and reviewed *de novo*, whether the judge correctly ruled plaintiff's District Court action was untimely by application of statutes to uncontested facts of record.

¶13 Plaintiff challenges the form of the journal entry because it does not include the trial court's finding and conclusion that plaintiff's January 2012 letter was a proper notice of a GTCA claim. Nothing in the appellate record shows any objection to the journal entry made in the district court for the purpose of preserving error, and error asserted on appeal must be preserved in the trial court with cited authority or the error is deemed waived.[20] The issues surrounding the original notice of claim necessarily involve other GTCA time deadlines reviewed by the trial court and which are raised on appeal and on certiorari; and while a journal entry of judgment controls an inconsistent minute entry, the transcript of the hearing on the motion to dismiss, the court's minute, and the journal entry are sufficient to harmonize the minute and journal entry for the purpose of reviewing the preserved assignments of error as they relate to the issues raised on certiorari.[21]

II (B). Notice in Writing Filed with the Clerk of the Governing Body

¶14 A plaintiff filing a GTCA action in a District Court against a political subdivision must have previously given notice of the claim to the political subdivision.[22] The claim must have been denied, either actual or deemed denied, in whole or in part, by the political subdivision prior to commencing the GTCA action in District Court.[23] Plaintiff's petition named "Mounds Public Schools" as a defendant and alleged it is a political subdivision of the State of Oklahoma. A public school district is a "political subdivision" for the purpose of the GTCA,[24] and plaintiff was required to give notice of the claim to Independent School District No. 5, of Creek County, (Mounds Public Schools).

¶15 The GTCA provides the method for giving notice to a school district as a political subdivision. Title 51 O.S. § 156(D) states as follows.

> A claim against a political subdivision shall be in writing and filed with the office of the clerk of the governing body.

A notice of claim given to the State or political subdivision is a mandatory or jurisdictional prerequisite to filing a claim for tort damages in a District Court.[25] School district's first jurisdictional challenge was that the January 26th letter did not conform to § 156 (D).

¶16 The trial judge agreed with plaintiff that the letter dated January 26, 2012, sent by certified mail to both the school superintendent and insurance adjuster substantially complied with §156(D). School district argued substantial compliance was not the proper standard, and plaintiff was required to file his notice with the Clerk of the Board of Education for Independent School District No. 5 of Creek County, Oklahoma, known as the Mounds Public Schools or Mounds School District. De-

fendant relied upon our 1997 opinion in *Minie v. Hudson*.[26]

¶17 In *Minie v. Hudson* we addressed whether an oral notice of a GTCA claim to a municipality satisfied § 156(D). We held the phrase "shall be in writing" expressed a legislative command, and the notice *must* be in writing.[27] In support of this conclusion, we observed: (1) The language "shall be in writing" was an amendment to the relevant statute; (2) The statutory amendment came after this Court had approved an oral notice to a political subdivision in *Duesterhaus v. City of Edmond*[28] which utilized a substantial compliance test for fulfillment of the statutory notice requirement; and (3) When the Legislature amends a statute whose meaning has been settled by case law, it usually has expressed an intent to alter the law.[29]

¶18 Unlike the phrase "shall be in writing" which was added by statutory amendment after *Duesterhaus*, the phrase "filed with the office of the clerk of the governing body" appeared in the statutory version construed in *Duesterhaus*.[30] *Prior to the statutory amendment we discussed in Minie v. Hudson*, "filed with the office of the clerk of the governing body" was a statutory requirement deemed to be fulfilled by a plaintiff's substantial compliance. In *Conway v. Ohio Cas. Ins. Co.*,[31] a case involving a school bus striking a six-year-old child, the child's lawyer sent a letter to the school district's insurer giving notice of the claim, and failed to send a similar letter to the clerk of the school district as then required by statute. In *Conway,* like the case before us today, defendant sought summary judgment with an attached affidavit from the clerk of the school district stating no notice had been received.[32] Further, we held notice to the school district's insurer was analogous to the oral notice in *Duesterhaus* and although "the notice given did not conform to the authorized procedures under the [Political Division Tort Claims] Act, it was sufficient to establish substantial compliance."[33]

¶19 The parties before us draw different conclusions from *Minie, Duesterhaus*, and *Conway.* School district's argument is that a plaintiff's notice of claim must be physically put into the hands of "the clerk" of the school board by the plaintiff and not given to a superintendent.[34] Plaintiff states *Minie* only applies to the notice being in writing, and he may give notice to anyone so long as the school district obtains knowledge of the claim. Generally, a party's fulfillment of a statutory mandatory (or jurisdictional) requirement is sometimes expressed as a "strict compliance" duty,[35] but fulfillment of a non-jurisdictional or directory statutory requirement is often expressed as a "substantial compliance" duty.[36] We recognize some obligations created by statutes do not neatly fit into a universally applicable dichotomy of mandatory (jurisdictional) versus directory (non-jurisdictional) nature, and a statute may be mandatory for some purposes and directory for others.[37] We disagree with the conclusions made by both parties.

¶20 When examining a provision of the GTCA the Court has looked at: (1) the "plain language" of a statute which requires no further construction,[38] (2) if the Legislature used a term indicating a mandatory requirement, such as the term "shall,"[39] (3) the purposes of the provision at issue,[40] (4) construing language consistently within an individual provision as well as part of the GTCA as a whole,[41] (5) the legislative history of the language at issue noting the Court's previous constructions,[42] and (6) legislative acquiescence to a judicial construction indicating a legislative intent agreeing with the construction.[43]

¶21 We begin by looking at the plain language of the statute at issue in this controversy and note the grammar used by the Legislature.[44] In *Minie v. Hudson*[45] we looked at this "A claim . . . shall be" and explained it clearly expressed a legislative intent and will commanding a GTCA claim to be in writing. In *Minie* the Court construed the language consistent with elementary English grammar and concluded a mandatory requirement for notice was the attribute that it "be in writing."

¶22 Plaintiff asks us to separate "shall be in writing" from "filed with the office of the clerk" so that while the former is mandatory pursuant to *Minie v. Hudson*, the latter is directory[46] and may be satisfied by a substantial compliance test.[47] Plaintiff's argument may be reduced to a simple assertion that a legislative mandatory intent *must* be expressed by using one type of a compound verb with a conjunction; *i.e.*, the Legislature should have used "shall be written and filed" in the sentence if it wanted to create two mandatory requirements. Further, it is inferred, the absence of this grammatical expression results in two different standards for statutory compliance in the plain language.[48] We disagree. The term "filed" may not be separated from the phrase "shall be"

without destroying both the grammar and plain meaning of the sentence.

¶23 We hold the plain language in 51 O.S. § 156(D) makes filing the GTCA notice with "the office of the clerk" of the governing body a mandatory duty. Of course and as we now explain, because the *manner of filing with the clerk's office is not statutorily specified as mandatory*, when a school district is the governing body one issue which arises is the identity of potential clerks who may receive the notice for filing, and whether a superintendent is a proper recipient for notice when the superintendent's managerial duties require both representing the board and transmitting to a clerk for filing any financial claims against the school district which the superintendent has received.

¶24 In *Grisham* we declined to make attributes of notice to be mandatory when the Legislature had not done so and the intent of the Legislature could be effected with a plain reading or construction of the GTCA statutes showing nonmandatory obligations. For example, we explained the GTCA notice requirements were designed to further legitimate state interests: (1) prompt investigation with fresh evidence, (2) opportunity to correct dangerous conditions, (3) quick and amicable resolution of claims, and (4) fiscal planning to meet possible liability. The GTCA notice in *Grisham* provided names, addresses, the date and time of damage, the name of the city's supervisor who investigated damage, insurance information, and sought monetary relief for their property damage; and the notice satisfied the public interests of the political subdivision.[49] Filing the notice with the office of the clerk of the governing body is mandatory pursuant to 51 O.S. § 156 (D), but the statutory language does not specify a mandatory procedure for such filing, and we decline to create a mandatory GTCA obligation in the absence of an expressed legislative intent to create such an obligation. *Grisham, supra.*

¶25 A school district is "a body corporate" and possesses the usual powers of a corporation for public purposes; it may sue and be sued, and is capable of contracting as well as holding real and personal property.[50] Generally, a corporation exercises its powers by and through a board of directors when engaged in external dealing with third persons.[51] A board of directors for a school district is the district's board of education: School districts are "under the supervision and the administration of the respective boards of education,"[52] and the board of education is known as "the governing board" for the school district.[53]

¶26 The members of the board of education are private citizens who choose to be selected by a public election.[54] Members of the board are assigned particular titles with associated duties, *e.g.*, a president, vice president, and clerk.[55] A qualifying board of education may in certain circumstances use a board chair instead of a board president for the functions exercised by the latter.[56] The president and vice president are selected by the board, and the board "shall elect a clerk and, in its discretion, a deputy clerk, either of whom may be one of the members of the board."[57] A board of education "shall employ an encumbrance clerk and minute clerk, both functions of which may be performed by the same employee."[58] The encumbrance clerk keeps the books and documents of the school district and performs such other duties as the board of education or its committees may require.[59] The minute clerk is required to keep an accurate journal of the proceedings of the board of education and perform such other duties as the board of education or its committees may require.[60] *A board member selected as a clerk may not serve as the encumbrance clerk and minute clerk*.[61] If the board elects a board clerk who is not one of the members of the board, the board clerk may also be employed as the encumbrance clerk and minute clerk.[62]

¶27 An affidavit attached to defendants' motion to dismiss has an affiant who identifies himself as "the Clerk of the Board of Education" and states "[a]s Clerk of the Board of Education, one of my duties *is to maintain the files that contain all tort claim notices filed with the Mounds School District*." (Emphasis added). The affidavit does not specifically or expressly identify the type of clerk the affiant is asserting to be in support of the motion to dismiss. Defendants do not label, distinguish, or discuss a clerk who is a member of the board, or a clerk for the board who is not a member of the board, or an encumbrance clerk, or a minute clerk. Defendants do not indicate whether the board has more than one clerk, such as a deputy clerk or a clerk-employee. Though the affiant asserts status as "Clerk of the Board of Education" with duties keeping the books and documents of the school district, the question remains whether this individual is stating a status as an employee functioning as the encumbrance clerk and not a member of the School Board.[63]

Affiant further states no tort claim notice "has been submitted to the Mounds School District" by any on behalf of the plaintiff. The parties do not address which type of clerk should receive the GTCA notice to satisfy filing with "the office of the clerk for the governing body." The parties do not discuss *the office* of the clerk as it relates to either a member of a board of education who serves as a "clerk," or *the office* of an "encumbrance clerk" who keeps the books and documents of a school district and is a school district employee.

¶28 The official actions of a school district's board of education usually occur by actions taken by the board in a public meeting as the board of education.[64] A board of education is not in a perpetual meeting, and some person or persons must act for the board of education when the board is not meeting. Except as otherwise provided by statute, a superintendent of schools is appointed and employed by the board of education to be the executive officer of the board and perform duties as the board directs.[65]

¶29 The following is stated in an Oklahoma administrative regulation.

> *. . . the first and most important responsibility of the board of education is a complete and comprehensive set of written polices giving the framework of authority assigned to its executive officer, the superintendent of schools. It is proper practice for the board of education to grant authority to its executive officer to represent it during the interim between board meetings on routine business management problems which can be handled within established policies.*
>
> (c) A person serving on a board of education should remember that he/she is only another citizen in the school district except when the governing board of the school district is in a regular or special meeting for the purpose of transacting business for the school district. Again he/she should remember that as a member of the board of education while it is in a meeting transacting the district's business he/she participates in determining the board's judgment but when the board as such adjourns he/she reverts to his/her status as a citizen of the school district and all acts of the board should be referred to by him/her as "the board of education in its meeting made this decision" without reference to persons or individuals who happen to be members of such board.
>
> (d) *If a board of education has not prescribed and written down its policies for its executive officer, then a point of departure would be to require the superintendent to furnish the leadership and secure the necessary consultative service to perfect such policies as would be sound in nature and functional for the management and operation of the district's business.*

Oklahoma Administrative Code [O.A.C.] 210: 10-1-7 (2011 & 2016) (emphasis added).

A superintendent is a public day-to-day representative for the board of education. A superintendent has a duty to implement the written policies of the board of education. In the absence of a needed written policy for a circumstance, a superintendent implements a policy sound in nature and functional for the management and operation of the district's business.[66]

¶30 Sound operation and functional management by a superintendent includes receiving a GTCA notice on behalf of the board in the course of the superintendent's daily business, and transmitting the notice to the proper clerk for the board. An employee or agent must act in good faith and in the interest of the employer/principal.[67] A superintendent is an employee of the school board[68] and also acting on behalf of the board when dealing with the public and managing business affairs of the school district. A superintendent acting in an official capacity may perform an act which binds the board upon its deemed or actual ratification by the board.[69] Generally, a public official exercises power in a manner where neither public nor private rights will be injured or impaired, and employees acting on behalf of a public official have a similar duty. We have explained a public official should not ignore, or injure, or impair a citizen's rights when the official is exercising power involving a statute intended for the protection of a citizen's rights,[70] and a similar duty arises for an official's employee acting on behalf of the official.

¶31 A superintendent receives as a part of O.A.C-recognized "routine business management," monetary claims against the district in various forms such as purchase orders, bills, and invoices; and these are then transmitted by the superintendent, pursuant to the superintendent's duties as a business manager, to the appropriate school district clerk or treasurer for proper action by the board or otherwise. A

board of education is aware of monetary claims against the school district because the board has a legal obligation to pay its proper bills and a legal obligation to not pay improper bills.[71] No one disputes a school superintendent, as executive officer of the board, may have (1) a full or partial managerial and supervisory role, or (2) a mere business relationship role, relating to processing monetary claims by the encumbrance clerk for board.

¶32 The affidavit filed by the superintendent herein states: "I am also familiar with and access to all written notices of tort claims received by the School District." A superintendent is representing the board when transmitting documents temporarily in her or his custody to the proper clerk, and this duty is a ministerial duty where the superintendent is acting as a business manager and not as a clerk.[72] A superintendent receiving a GTCA notice on behalf of the board should, like other types of monetary claims against a school district the superintendent receives, transmit the notice to the proper clerk of the governing board for the appropriate action. Again, a business managerial aspect of representing the board and directing the filing of a monetary claim with the proper school district clerk is a routine managerial and ministerial duty *for the benefit of the board while simultaneously not impairing the private rights of citizens who have been granted a GTCA remedy by the Legislature.*

¶33 We recognize a superintendent is not a clerk for the board, and is prohibited from formally acting as the clerk.[73] However, many political subdivisions other than school districts maintain an office during normal business hours for public access to records of the entity; and the Legislature has provided for certain school district documents to be physically located in the superintendent's office for public inspection similar to the function provided by a clerk's office for other political subdivisions.[74] Our conclusion concerning a superintendent's business managerial duties as including a *temporary custody of financial documents seeking payment of money and proper directions for processing* by the school district, including a GTCA notice, does not run afoul of the Legislature's view a school district superintendent should be a *permanent* custodian of other statutorily specified records when for a public purpose and public inspection. We also note our conclusion is consistent with a *general principle used by the Legislature* for giving notice to a school district by service of process on an executive officer when not otherwise specifically stated by statute.[75]

¶34 We recognize plaintiff's January 2012 letter does not facially state "Notice of a Governmental Tort Claims Act claim," or request the superintendent to forward plaintiff's letter to the "clerk of the governing body." The plaintiff's letter identifies by name a six-year-old child who was struck by a Mounds school bus when exiting the bus on a specific date, and alleges the child suffered serious injuries, states the names of his parents, and discusses preservation of evidence and a cause of action against the school district.[76]

¶35 In the absence of evidence to the contrary, a court will generally presume that a public official will act in good faith to perform the official's duties and will faithfully discharge the duties the law imposes on the official.[77] Plaintiff's January 2012 letter gives sufficient information for the school district's public interests, *i.e.*, to commence investigation of the event and an opportunity to correct any situation deemed necessary by the board. In the absence of evidence to the contrary we presume officials, including a school board, when receiving a notice of a child being "struck and dragged by a school bus" would want to know as much as possible concerning the event, determine the proper response by the board, if any, and assess the seriousness of the event for fiscal planning.

¶36 We hold: when a superintendent of a school board receives a written GTCA notice, the superintendent has received the GTCA notice for the board and should transmit the notice to the proper clerk of the board for filing and other appropriate action. We agree with the District Court's conclusion the January 2012 letter received by the superintendent was a notice of claim for the purpose of the GTCA, but for the reasons stated herein.

¶37 If a school superintendent does not immediately upon receipt transmit the written GTCA notice to the clerk of the governing body for filing and no filing occurs, then we will deem the date filed to be the date of delivery of the notice to the superintendent. The certified mail return receipt shows January 30, 2012, as the delivery date for the Mounds School District superintendent.

II (C). Insurance Adjuster's Letter for More Information, Plaintiff's September 2012 Letter, and Claim Deemed Denied

¶38 Defendants cited 51 O.S.2011 § 157[78] and argued the claim was deemed denied 90 days after January 30, 2012 on Sunday April 29, 2012, and plaintiff then had 180 days from that date to file an action in the District Court. Plaintiff argued the combined effect of three letters *showed an agreement for a period of negotiation tolling the time to commence a GTCA action in a district court.* He first relied on two letters he sent, January and September 2012, and the January 2012 letter sent by the insurance adjuster. He later included his January 2013 letter in support of this argument. Plaintiff relied on 51 O.S. 2011 § 157 (B) which provided in part: "The claimant and the state or political subdivision may agree in writing to extend the time to commence an action for the purpose of continuing to attempt settlement of the claim except no such extension shall be for longer than two (2) years from the date of the loss."[79]

¶39 The trial judge stated he had doubts the September 2012 letter and packet were mailed in 2012. Plaintiff's assertion of mailing in September 2012 is supported by no evidence except for counsel for plaintiff's affidavit executed in August 2013 and stating he timely mailed the letter and packet in September 2012. The evidence from defendants was they did not receive the 2012 correspondence. Evidence in the record supports the trial court's assessment, and the assignment of error fails to point to evidence and legal argument sufficient to reverse this determination.[80]

¶40 The trial judge also concluded the September 2012 letter was legally insufficient to extend the GTCA time limits as a matter of law because no express agreement was made by the parties to extend the time limits. However, the fundamental nature or classification of legal obligations which could potentially arise from the adjuster's letter were not identified.[81]

¶41 Generally, legally enforceable agreements are often characterized based upon an express promise, a promise implied in law, or a promise implied in fact.[82] First, plaintiff points to no specific language in the letters showing an express stated intent or agreement to toll the GTCA time periods. The adjuster's letter states: "My communications with you and my investigation of this matter are not intended to waive any statutory exemptions from liability or time limitations imposed by the Oklahoma Tort Claims Act. Further, any settlement negotiations or discussions do not extend the date of denial of your client's claim." The letter provided no express agreement on tolling, but affirmatively stated no time limits were extended by the letter. No express promise was made to extend the time limits. This was discussed in the trial court. The parties make different assumptions concerning the nature of tolling by an adjuster's letter seeking additional information.

¶42 Intent or agreement of parties may be "legitimately inferred" when construing a contract implied in fact.[83] The existence of a contact implied in fact usually presents a mixed question of law and fact; with a determination whether facts exist, and a determination of law whether those facts determined to exist are legally sufficient to create an agreement or contract.[84] Defendants assume tolling the time limits by a request for more information from a plaintiff is an example of a promise or agreement implied in fact, and an express statement by an adjuster with language negating any tolling in a letter requesting information is sufficient to negate tolling because negation language shows no intent to toll the limits.

¶43 The intent of the parties is disregarded and an agreement of minds a "mere fiction" when an obligation is imposed as a matter of law. This promise implied in law requires legal authority to create and impress upon the parties the legal obligations to be enforced.[85] Plaintiff assumes a letter requesting more information creates a tolling of time limits which may not be negated by a party's statement of a contrary intent, *i.e.*, tolling is a mandatory requirement and not cancelable by a statement of the public entity's intent.

¶44 In *Bivins v. State ex rel. Oklahoma Memorial Hospital*,[86] we held a government's request for additional information from a plaintiff creates a legitimate expectation to assume the 90 days for approval or denial of the claim would commence anew upon a *timely* response by plaintiff.[87] We explained this "legitimate expectation" arose from a "*public-interest element which convinces us today that an agency's post-notice request for additional information must be regarded as impressed with serious legal effect.*"[88] We explained "[t]he request [for additional information] cannot be cavalierly dismissed as utterly without [legal] consequences upon the then-pending 90-day bar-of-suit interval."[89] We explained public policy favors an amendment

of a claim pursuant to additional requested information necessary to make a meaningful assessment of the claim by the public entity.[90] We treated a request for more information as an extension of the 90-day period mandatorily required by public policy and similar to an agreement implied in law, so an agreement to toll was legally impressed upon the conduct of requesting more information.

¶45 However, we also recognized this public policy was consistent with providing a public entity a means to protect itself from a plaintiff who fails to timely respond to a request for more information. We explained the public entity could "(a) direct that supplemental information must be received on or before a stated date and (b) make it clear that if neither submission nor satisfactory explanation is timely made, the deficient claim's notice will stand denied at the end of the initially triggered 90-day period or at some other date that follows the deadline for submission of supplemental data."[91] This procedure for protection against dilatory conduct occurs when a public entity affirmatively states no tolling will occur as it relates to a request for more information. Such a statement in a letter is an example of both the absence of a mutual agreement to toll as well as the absence of an agreement implied in fact to toll when no other circumstance is present to show tolling.

¶46 In *Bivins* we distinguished some of our opinions and we expressly did not deprive them of their continued precedential effect. One of these was *Sanchez v. City of Sand Springs*,[92] where we held a city's request for additional information about a GTCA claim did not toll the 90-day period for denial of the claim. We explained that in *Sanchez* the city's insurance carrier requested information about the amount of the claim three days after the claimant's notice, and plaintiff did not provide the information *until more than five months later*.[93] Nothing in the record before us indicates why it took slightly more than seven months for plaintiff to respond to the insurance adjuster's request in January 2012.

¶47 Further, 51 O.S.2011 § 157 (A) states the date a claim is denied will not be extended "unless agreed to in writing by the claimant and the state or political subdivision." This language is broad enough to include both express agreements and expressions of intent, but the statute requires the agreement be in the form "in writing," and an agreement by the claimant *and* the government entity. A plaintiff may not unilaterally toll the GTCA time limits by delay in responding to a request for more information or by offering to settle after a claim has been deemed denied.[94]

¶48 We agree with the school district that plaintiff's claim was deemed denied 90 days after January 30, 2012, and plaintiff had 180 days from that date to bring an action in the District Court. 51 O.S.2011 § 157. The request for more information by the insurance adjuster did not toll the time for the school district to evaluate the claim or the time to commence an action in the District Court. The content of plaintiff's letter dated Sept. 5, 2012, even if it was mailed as alleged in counsel's affidavit, was untimely to respond to the request for more information, and was not effective to toll the GTCA time limits.

II (D). Plaintiff's January 30, 2013, Demand Letter and Untimely District Court Action

¶49 Plaintiff sent a letter dated January 30, 2013, to defense counsel and stated it was a "first and only pre-suit formal demand in order to settle this matter without litigation." The injury occurred on January 10, 2012. Section 156 (B) of the GTCA states a claim against the state or political subdivision are to be presented within one (1) year of the date the loss occurs; and a claim against the state or a political subdivision shall be forever barred unless notice thereof is presented within one (1) year after the loss occurs.[95] This January 2013 letter may not, by itself, act as a timely first notice of a claim. Section 156 bars this letter acting as a notice of claim unless plaintiff pled and proved[96] tolling or an estoppel.[97] The correspondence plaintiff relies upon to show tolling is insufficient as a matter of law. Plaintiff's January 2012 notice was within one year of the date of loss, but the January 2013 letter may not function as the first notice of a claim for the purpose of plaintiff filing his District Court action in May 2013.

¶50 Plaintiff was required by 51 O.S. § 157 to bring his action within 180 days of the date his claim was deemed denied by the school district's 90 days of silence on his claim after receipt thereof on January 30, 2012.[98] We agree with the school district this period expired in October 2012. Again, plaintiff was required to plead and prove a tolling or an estoppel to escape from the effect of this statutory time limit. The correspondence plaintiff relies upon to show tolling is unilateral in nature and insuffi-

cient to show a mutual agreement for tolling as a matter of law. Plaintiff's action was filed May 2013 more than one year after the claim was deemed denied. The District Court action was untimely pursuant to 51 O.S.2011 §157.

III. Conclusion

¶51 We hold plaintiff's GTCA notice of claim sent to the correct school superintendent by certified mail satisfied the mandatory requirement in 51 O.S. § 156(D) for filing the GTCA notice with the office of the clerk of the school's board of education. We hold the insurance adjuster's request for additional information did not toll either (a) the 51 O.S. § 157(A) 90-day time limit for approval, denial, or deemed denial of the GTCA claim, or (b) the 51 O.S. § 157(B) 180-day period to commence suit, when the request stated it would not extend or waive time limits. *Bivins*, *supra.* We hold a plaintiff's letter unilaterally seeking settlement negotiations is not, as a matter of law, sufficient by itself to show an agreement pursuant to 51 O.S. § 157 to toll the GTCA time limits.

¶52 The opinion of the Court of Civil Appeals is vacated. The order of the District Court granting a motion to dismiss with prejudice is affirmed.

¶53 CONCUR: GURICH, C.J.; DARBY, V.C.J.; KAUGER, WINCHESTER, EDMONDSON, COLBERT, and COMBS, JJ.

¶54 PRESENT AND NOT PARTICIPATING: KANE, J.

EDMONDSON, J.

1. Governmental Tort Claims Act, 51 O.S.2011 §§ 151-172.

2. A written notice of a claim should reflect a demand for the sum of money sought. 51 O.S.Supp.2012 § 156 (E) ("The written notice of claim to the state or a political subdivision shall state the date, time, place and circumstances of the claim, the identity of the state agency or agencies involved, *the amount of compensation or other relief demanded*, ..."). A failure to specify the sum demanded does not by itself invalidate a written notice: "Failure to state either the date, time, place and circumstances and amount of compensation demanded, or any information requested to comply with the reporting claims to CMS under MMSEA shall not invalidate the notice unless the claimant declines or refuses to furnish such information after demand by the state or political subdivision." *Id.* § 156 (E).

3. *Harmon v. Cradduck*. 2012 OK 80, n. 20, 286 P.3d 643, 650, citing *Martin v. Johnson,* 1998 OK 127, ¶ 28, 975 P.2d 889, 895.

4. 1997 OK 26, 934 P.2d 1082.

5. *See* discussion at ¶¶ 19-24, *infra*.

6. *See, e.g., Young v. Station 27, Inc*., 2017 OK 68, ¶ 8, 404 P.3d 829, 834 (an order granting a motion to dismiss raising a jurisdictional issue is reviewed *de novo* and allegations of a petition are deemed as true); *Sheffer v. Buffalo Run Casino, PTE, Inc*., 2013 OK 77, 315 P3d 359 (determination of jurisdiction based upon the legal effect of a document recognized by all parties presented a question of law).

7. 1987 OK 109, 747 P.2d 938.

8. 1924 OK 393, 226 P. 45.

9. *Chandler,* 747 P.2d at 942, quoting *Abraham*, 226 P. at 47.

10. *Reeds v. Walker*, 2006 OK 43, ¶ 10, 157 P.3d 100, 107 ("when there are no contested jurisdictional facts, the question of subject matter jurisdiction is purely one of law which we review *de novo*"); *Christian v. Christian*, 2018 OK 91, ¶ 5, 434 P.3d 941, 942 ("when this Court is faced with a question of statutory interpretation, we apply a *de novo* standard of review").

11. *De novo*, clear-abuse-of-discretion, and clearly-erroneous have been viewed as different standards. *See, e.g., Ornelas v. United States,* 517 U.S. 690, 694 n. 3, 116 S.Ct. 1657, 134 L.Ed2d 911 (1996) (1996) (distinguishing application of abuse of discretion and stating clear error is a term of art derived from Federal Rules of Civil Procedure, Rule 52(a)). However, when there is no rational basis in evidence to support a judgment, that judgment will be clearly erroneous and it will be an abuse of discretion when the law is applied to the facts which are of record. *Nelson v. Enid Medical Associates, Inc.*, 2016 OK 69, ¶ 11, 376 P.3d 212, 217 (an abuse of discretion occurs when a court bases its decision on an erroneous conclusion of law or where there is no rational basis in evidence for the ruling).

12. *K & H Well Service, Inc. v. Tcina, Inc*., 2002 OK 62, ¶ 9, 51 P.3d 1219, 1223 (in the context of an action for a money judgment and to foreclose liens in an action tried without a jury, we explained: (1) If any competent evidence supports the trial court's findings of fact those findings will be affirmed by the appellate court; (2) Issues of law are reviewed *de novo*; and (3) Any decision made by the trial judge based upon the judge's discretion will be reviewed on appeal using an abuse-of-discretion standard). *Cf. State ex rel. Oklahoma Corp. Com'n v. McPherson*, 2010 OK 31, n. 11, 232 P.3d 458, 466 (noting federal court's standard of review for a finding of fact in the context of a motion to intervene where: (1) The trial court's order is reviewed *de novo* when a pure issue of law is presented; (2) Findings of fact are reviewed for clear error; and (3) An abuse-of-discretion review is used if the trial court's judicial discretion is involved).

13. *Robinson v. Borg-Warner Protective Services Corp*., 2001 OK 59, ¶ 16, 31 P.3d 1041, 1045 (decision on admission of evidence relevant to credibility is reviewed using an abuse-of-discretion standard).

14. *West v. Board of County Com'rs of Pawnee County*, 2011 OK 104, n. 26, 273 P.3d 31 (in the context of a District Court granting a new trial after a jury trial on the issue of damages in an action at law, the Court noted a trial court's ruling will not be reversed because of an erroneous finding of fact if the judgment is legally correct). *Cf. Utica Nat. Bank & Trust Co. v. Associated Producers Co*., 1980 OK 172, 622 P.2d 1061, 1065-1066 (trial court's judgment affirmed although the trial court's reasons were incorrect).

15. *Bivins v. State ex rel. Oklahoma Memorial Hospital,* 1996 OK 5, nn. 37 & 40, 917 P.2d 456, 464-465 (in the context of a GTCA claim the Court explained an appellate court will affirm a judgment on any applicable theory if the trial court record shows an actual trial court determination of those facts necessary to support the applicable theory on appeal).

16. *Central Plastics Co. v. Goodson*, 1975 OK 71, ¶ 29, 537 P.2d 330, 335 (fact questions in dispute are insufficient to reverse a judgment on appeal where the judgment is supported by the trial court record; because the credibility of witnesses and effect and weight to be given to conflicting or inconsistent testimony are questions of fact to be determined by trier of facts).

17. *Nelson v. Enid Medical Associates, Inc.*, 2016 OK 69, ¶ 11, 376 P.3d 212, 217. *Cf. Christian v. Gray,* 2003 OK 10, ¶ 44, 65 P.3d 591, 609 (A District Court's finding in a legal action that a fact exists is reviewed on appeal with a clear abuse of discretion standard, *i.e.*, whether there exists evidence in the record which supports the decision finding the fact exists; but that court's finding of insufficient facts, a finding of an absence of proof or absence of facts necessary for the proof legally required, is reviewed on appeal with a *de novo* standard.).

18. *High Desert Relief, Inc. v. United States*, 917 F.3d 1170, n. 4, 1179 (10th Cir. 2019) (a clearly erroneous standard is used to review a finding of fact made without a jury and a finding of fact which is clearly erroneous is an abuse of discretion), citing *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985) and *Zenith Radio Corp. v. Hazeltine Research, Inc*., 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969). *See also Holt v. U.S.*, 46 F.3d 1000, 1003 (10th Cir. 1995) (appellate review of a Rule 12(b)(1) motion to dismiss for lack of jurisdiction uses a *de novo* standard, and when the jurisdictional ruling is based upon a finding of fact the appellate court accepts the trial court's finding unless it is clearly erroneous); *Walters v. Wal-Mart Stores, Inc.*, 703 F.3d 1167, 1172 (10th Cir. 2013) ("An abuse of discretion occurs when the district court bases its ruling on an erroneous conclusion of law or relies on clearly erroneous fact findings.").

19. Although the abuse of discretion and clearly erroneous standards are not identical, one point of similarity in the present context is that *Anderson, supra*, explained the clearly erroneous appellate standard may not be used to weigh evidence differently than the trial court

or to choose between two permissible views of the evidence; and we also have explained the existence of conflicting or two permissible views of the evidence may not be used as justification for an order granting a new trial when a verdict was based on one of those two views of evidence existing in the record. *Compare, Anderson*, 470 U.S. at 573-574 with *Wright v. Central Oklahoma Milk Producers Ass'n*, 1973 OK 15, 509 P.2d 464, 469-470. *See also* the comparison of *K & H Well Service, Inc. v. Tcina, Inc., supra*, with *State ex rel. Oklahoma Corp. Com'n v. McPherson, supra*, in note 12, *supra*.

20. *Osage Nation v. Board of Commissioners of Osage County,* 2017 OK 34, ¶ 17, n. 18 & 20, 394 P.3d 1224, 1232-1233 (matters not first presented to the trial court for resolution are generally not considered on appeal, and propositions relating to trial court error are deemed waived when unsupported by authority on appeal).

21. *Powers v. District Court of Tulsa County*, 2009 OK 91, ¶ 9, 227 P.3d 1060, 1069 (a journal entry controls over an inconsistent minute entry; but the Court examines the record to determine what actually happened and if a true inconsistency exists between the minute and journal entry or whether they may be harmonized).

22. Section 152 of the GTCA in effect on the date of injury stated a "claim" "means any written demand presented by a claimant or the claimant's authorized representative in accordance with this act to recover money from the state or political subdivision as compensation for an act or omission of a political subdivision or the state or an employee." 51 O.S.2011 § 152(4).

23. 51 O.S.2011 § 157 states in part: "(A) A person may not initiate a suit against the state or a political subdivision unless the claim has been denied in whole or in part. A claim is deemed denied if the ... political subdivision fails to approve the claim in its entirety within ninety (90) days, unless the ... political subdivision has denied the claim or reached a settlement with the claimant before the expiration of that period ... (B). No action for any cause arising under this act, Section 151 et seq. of this title, shall be maintained unless valid notice has been given and the action is commenced within one hundred eighty (180) days after denial of the claim as set forth in this section...."

24. Title 51 O.S. 2011, §152 (11), stated a "'political subdivision' means . . . (b) a school district, including, but not limited to, a technology center school district established pursuant to Section 4410, 4411, 4420, or 4420.1 of Title 70 of the Oklahoma Statutes." Title 70 O.S. 2011 § 1-108 states: "A school district is defined as any area or territory comprising a legal entity, whose primary purpose is that of providing free school education, whose boundary lines are a matter of public record, and the area of which constitutes a complete tax unit." *See Martin v. Johnson,* 1998 OK 127, ¶ 28, 975 P.2d 889, 895 (a school district is a political subdivision for purposes of the GTCA).

25. *Hall v. The GEO Group, Inc.*, 2014 OK 22, ¶¶ 1, 13, 324 P.3d 399, 400, 404.

26. 1997 OK 26, 934 P.2d 1082.

27. 1997 OK 26, 934 P.2d at 1086.

28. 1981 OK 107, 634 P.2d 720.

29. *Minie*, 1997 OK 26, 934 P.2d at 1086.

30. *Duesterhaus*, 1981 OK 107, 634 P.2d at n.1, 721, construing 51 O.S.Supp.1978 § 156 (B) of the former Political Subdivision Tort Claims Act, which stated: "A claim against a political subdivision or employee shall be forever barred unless notice thereof is filed with the clerk of the governing body of the political subdivision within one hundred twenty (120) days after the loss occurs."

31. 1983 OK 83, 669 P.2d 766.

32. *Conway,*1983 OK 83, 669 P.2d at 767.

33. *Conway,* 1983 OK 83, 669 P.2d at 767.

34. The original version of the then new Oklahoma Governmental Tort Claims Act, 51 O.S.Supp.1985 § 156(D) stated the claim "shall be in writing and filed with *the office of* the clerk of the governing body." (Emphasis added). This language has remained unchanged in the current version. 51 O.S.Supp.2018 § 156(D).

35. *See, e.g., Walker v. Oak Cliff Volunteer Fire Protection Dist.,* 1990 OK 31, 897 P.2d 762, 766 (Court requires strict compliance with a statutory obligation when the Legislature makes that obligation a mandatory duty because a court requiring anything less than strict compliance "results in overt judicial legislation").

36. *See, e.g., Henderson v. Maley*, 1991 OK 8, 806 P.2d 626, 630 (statutory provisions for preservation of ballots after an election were directory rather than mandatory, and because they were the former the statutory duty was fulfilled by substantial compliance with the statute), explaining *Looney v. County Election Board of Seminole County,* 1930 OK 461, 293 P. 1056, 1059.

37. *See, e.g., Chandler v. Denton,* 1987 OK 109, 747 P.2d 938, 944 (a statute with a mandatory time period for a party to fulfill was nevertheless directory and involving a quasi-jurisdictional fact; and the District Court's reliance upon the party's untimely fulfillment did not render the District Court's decree void for lack of jurisdiction).

38. *Hathaway v. State ex rel. Medical Research & Technical Authority*, 2002 OK 53, n. 13, 49 P.3d 740, 743, citing *Duncan v. City of Nichols Hills*, 1996 OK 16, ¶ 15, 913 P.2d 1303, 1307.

39. *Grisham v. City of Oklahoma City*, 2017 OK 69, ¶ 8, 404 P.3d 843, (the term "shall" in the phrase "shall be in writing" is normally considered a mandatory requirement for notice and previous substantial compliance by oral notice was no longer authorized).

40. *Grisham v. City of Oklahoma City*, 2017 OK 69 at ¶ 11, 404 P.3d at 848-849 (notice provision of the GTCA has a purpose of furthering legitimate state interests) citing *Watkins v. Central State Griffin Memorial Hospital,* 2016 OK 71, ¶ 22, 377 P.3d 124, 130, citing *Reirdon v. Wilburton Bd. of Education*, 1980 OK 67 ¶ 4, 611 P.2d 239, 240.

41. *Grisham v. City of Oklahoma City*, 2017 OK 69 at ¶ 12, 404 P.3d at 849 (language in a notice provision must be construed consistently with itself and other provisions of the GTCA) citing B*roadway Clinic v. Liberty Mut. Ins. Co.*, 2006 OK 29, ¶ 6, 139 P.3d 873, 883 (part of an entire statute must be construed in light of the whole statute and its general purpose and objective) and *Pellegrino v. State ex rel. Cameron University ex rel. Board of Regents of State*, 2003 OK 2, 16, 63 P.3d 535, 540 ("an individual statute of the GTCA is viewed as one part of a whole statutory scheme with all individual statutes of the GTCA construed as consistent parts of the whole").

42. *McCathern v. City of Oklahoma City,* 2004 OK 61, 95 P.3d 1090 (Court examined application of 2001 statute when party argued 1984 statutory amendment defined scope of governmental immunity); *Childs v. State ex rel. Oklahoma State Univ.*, 1993 OK 18, 848 P.2d 571, 574 (issue presented by plaintiffs required an examination of a statutory amendment in light of legislative history and the Court's previous opinions construing earlier versions of the statute in the factual context of those cases); *Minie v. Hudson,* 1997 OK 26, 934 P.2d 1082, 1086 ("when the Legislature amends a statute whose meaning has been settled by case law, it has expressed its intent to alter the law"). *Cf. Berry v. Public Employees Retirement System,* 1989 OK 14, 768 P.2d 898, 899 (any doubt as to the meaning of a statute may be resolved by reference to its history).

43. *Cf. R. R. Tway v. Oklahoma Tax Com'n*, 1995 OK 129, 910 P.2d 972, 976 (legislative silence after judicial construction of a tax statute is legislative acquiescence to that construction); *Ethics Commission v. Keating,* 1998 OK 36, ¶ 19, 958 P.2d 1250, 1256 (legislative silence in one statute combined with an expression of the legislative voice in another may give rise to an implication of legislative intent).

44. *In re Guardianship of Stanfield*, 2012 OK 8, ¶ 11, 276 P.3d 989, 994 (when determining the meaning of an unambiguous statute, the ordinary rules of grammar must be applied unless they lead to an absurd result); *Gilbert Central Corporation v. State,* 1986 OK 6, 716 P.2d 654 (same); *Smith v. Broken Arrow Public Schools, Independent School Dist. No. 3,* 1983 OK CIV APP 19, 665 P.2d 858 (approved for publication by Supreme Court), (same).

45. 1997 OK 26, 934 P.2d 1082.

46. A distinction between mandatory and directory statutory language has been well-known in the common law since before its explanation in *Rex v. Loxdale,* 1 Burr. 445, 447 (1758), where Lord Mansfield stated: "there is a known distinction between the circumstances which are of the essence of a thing required to be done by an Act of Parliament, and clauses merely directory." *See also School Dist. No. 61, etc. v. Consolidated Dist. No. 2, etc.*, 1925 OK 518, 237 P. 1110, 1111 (quoting *Rex v. Loxdale, supra,* for a difference between mandatory and directory language). *Cf.* Theodore Sedgwick, *A Treatise on the Rules Which Govern the Interpretation and Construction of Statutory and Constitutional Law*, 318-319 (2d ed. 1874, Fred B. Rothman & Co. reprint 1980) (construction of mandatory versus directory statutory language was adopted from historically shared English jurisprudence).

47. *See, e.g., Looney v. Election Bd. of Seminole Cnty.*, 1930 OK 461, 293 P. 1056, 1061 (statutory provisions for preserving ballots were directory and not mandatory, and substantial compliance was sufficient).

48. An example of plaintiff's *sub silentio* but present argument is found in *Oden v. State, Regulation and Licensing Dept.*, 121 N.M. 670, 916 P.2d 1337. The sentence read: "The person assigned by the director shall make an immediate investigation, securing all pertinent facts and statements...." The court explained the term "shall" did not modify "securing all pertinent facts," because: "If the legislature had intended 'shall' to modify 'securing all pertinent facts,' it would have worded the statute 'shall make an immediate investigation *and secure* all pertinent facts.'" The court explained further: "Grammatically, 'shall' cannot form a compound verb with 'securing.'" *Id.* 916 P.2d at 1339. *See also* John E. Warriner & Francis Griffith, *English Grammar and Composition: A Complete Course,* 23 (Harcourt, Brace & World, 1963) ("a compound verb is a verb which consists of two or more connected verbs" and Warriner provides as an example: "The Council met at three and adjourned at four o'clock. [Compound verb: *met . . . adjourned*]").

49. *Grisham v. City of Oklahoma City*, 2017 OK 69, ¶¶ 11-12, 404 P.3d at 848-849.

50. 70 O.S.2011 § 5-105:

> Every school district shall be a body corporate and shall possess the usual powers of a corporation for public purposes by the name and style of "Independent (or Elementary, if it is an elementary school district) School District Number _____ (such number as may be designated by the State Board of Education) of _____ (the name of the county in which the district is located, or if lying in more than one county the name of the county where supervision is located) County, Oklahoma," and in that name may sue and be sued and be capable of contracting and being contracted with and holding such real and personal estate as it may come into possession of or by will or otherwise and as authorized by law.

See also 70 O.S.Supp.2018, § 5-117, as amended eff. Aug. 2, 2018, listing powers of a board of education.

51. *See* for example, 18 O.S.Supp. 2013 § 1027 (A), stating in part: "The business and affairs of every corporation organized in accordance with the provisions of the Oklahoma General Corporation Act shall be managed by or under the direction of a board of directors, except as may be otherwise provided for in this act or in the corporation's certificate of incorporation." *See also Henry Bldg. Co. v. Cowman*, 1961 OK 75, 363 P.2d 208, 212 (stating rule and citing 18 O.S.1951 § 1.34, repealed Laws 1986, c. 292 § 160, eff. Nov. 1, 1986).

52. 70 O.S.2011 § 5-101:

> All school districts in Oklahoma, now in existence or which may hereafter be created, shall be designated only as independent, elementary or technology center school districts. Independent school districts, elementary school districts and technology center school districts shall be under the supervision and the administration of the respective boards of education thereof.

53. 70 O.S.2011 § 5-106:

> A. The governing board of each school district in Oklahoma is hereby designated and shall hereafter be known as the board of education of such district. Except as otherwise provided in this section, the superintendent of schools appointed and employed by the board shall be the executive officer of the board and shall perform duties as the board directs.
>
> B. The board may contract with a superintendent for a term as mutually agreed upon but not to exceed three (3) years beyond the fiscal year in which the contract is approved by the board and accepted by the superintendent. The contract shall include all other terms and conditions as agreed upon in writing by the board and the superintendent.
>
> C. The boards of two or more school districts may contract with one superintendent to serve as superintendent of the school districts as provided in Section 4 of this act.
>
> D. No board of a school district having average daily membership (ADM) of fewer than five hundred (500) pupils shall be prohibited from allowing a superintendent to serve simultaneously as a principal.
>
> E. The chief executive officer of the board of education of a district in which a public developmental research school is established shall be the director of the school appointed as provided in Section 1210.577 of this title.

54. 70 O.S.2011 §§ 5-107A; 5-107B.

55. 70 O.S.2011 § 5-120: "It shall be the duty of the president to preside at meetings of the board of education, to appoint all committees whose appointment is not otherwise provided for, and to sign all warrants ordered by the board of education to be drawn upon the treasurer for school money."

70 O.S.2011 § 5-121: "It shall be the duty of the vice president to perform all of the duties of the president in case of his absence or disability."

70 O.S.2011 § 5-122: "It shall be the duty of the clerk to countersign all warrants for school monies drawn upon the treasurer by the board of education and perform such other duties as required by law or as the board of education or its committees may require. The clerk of the board of education of any school district is hereby authorized to destroy all claims, warrants, contracts, purchase orders and any other financial records, or documents, including those relating to school activity funds, on file or stored in the offices of the board of education of such district for a period of longer than five (5) years."

56. A board of education of a district with an average daily membership (ADM) of more than thirty thousand (30,000) students may be expanded to add a member who shall be elected at large for a term of four (4) years and who shall serve as chair of the board. 70 O.S.2011 § 5-107B. A chair of the board presides at meetings of the board and possesses all powers otherwise provided by law for a member of a board of education, all powers provided by law for the president of a board of education, and other lawful powers as may be conferred upon the chair by majority vote of the board. *Id.*

57. 70 O.S.2011 § 5-119 (A): "Except for districts that elect a chair of the board pursuant to Section 1 [70 O.S.2011 § 5-107B] of this act, the board of education of each school district shall elect from its membership at the first regular, special or emergency meeting following the annual school election and certification of election of new members, a president and vice president, each of whom shall serve for a term of one (1) year and until a successor is elected and qualified. The board shall also elect a clerk and, in its discretion, a deputy clerk, either of whom may be one of the members of the board, and each of whom shall hold office during the pleasure of the board and each of whom shall receive such compensation for services as the board may allow. If the board elects a board clerk who is not one of the members of the board, the board clerk may also be employed as the encumbrance clerk and minute clerk. Provided, no superintendent, principal, treasurer or assistant treasurer, instructor, or teacher employed by such board shall be elected or serve as clerk or deputy clerk of the board nor as encumbrance clerk or minute clerk except that a treasurer or assistant treasurer may serve as a minute clerk. No board member shall serve as encumbrance clerk or minute clerk. The deputy clerk may perform any of the duties and exercise any of the powers of the clerk with the same force and effect as if the same were done or performed by the clerk. Before entering upon the discharge of the duties of the deputy clerk, the deputy clerk shall give a bond in a sum of not less than One Thousand Dollars ($1,000.00) with good and sufficient sureties to be approved by the board conditioned for the faithful performance of the duties of the deputy clerk."

58. 70 O.S.2011 § 5-119 (B): "The board of education shall employ an encumbrance clerk and minute clerk, both functions of which may be performed by the same employee. The encumbrance clerk shall keep the books and documents of the school district and perform such other duties as the board of education or its committees may require. The minute clerk shall keep an accurate journal of the proceedings of the board of education and perform such other duties as the board of education or its committees may require. The board of education may designate a deputy minute clerk. The deputy minute clerk may perform any of the duties and exercise any of the powers of the minute clerk with the same force and effect as if the same were done or performed by the minute clerk. Before entering upon the discharge of the duties of the deputy minute clerk, the deputy minute clerk shall give a bond in a sum of not less than One Thousand Dollars ($1,000.00) with good and sufficient sureties to be approved by the board conditioned for the faithful performance of the duties of the deputy minute clerk. Before entering upon the discharge of their duties, the encumbrance clerk and minute clerk shall each give a bond in a sum of not less than One Thousand Dollars ($1,000.00) with good and sufficient sureties to be approved by the board conditioned for the faithful performance of their duties. If both functions are performed by the same person only one bond in a sum of not less than One Thousand Dollars ($1,000.00) shall be required."

59. 70 O.S.2011 § 5-119 (B), *supra*, note 58.

60. 70 O.S.2011 § 5-119 (B), *supra*, note 58.

61. 70 O.S.2011 § 5-119 (A) includes the language: "No board member shall serve as encumbrance clerk or minute clerk."

62. 70 O.S.2011 § 5-119 (A), *supra,* note 57.

63. 70 O.S.2011 § 5-119 (A) & (B), *supra,* notes 57-58.

64. *See, e.g., Oldham v. Drummond Bd. of Ed. of Independent School Dist. No. I-85*, 1975 OK 147, 542 P.2d 1309 (action by school board in violation of the then applicable 25 O.S.1971 § 201 of the former Open Meeting Act was invalid); *Andrews v. Independent School Dist. No. 29 of Cleveland County*, 1987 OK 40, 737 P.2d 929 (provisions of the 1981 version of the Open Meeting Act, 25 O.S. §§ 301-314, inclusive, applied to the school district's school board as the governing body; and Court concluded no violation of the Act had occurred).

65. 70 O.S.2011 § 5-106(A), note 53, *supra*.

66. *Walker v. Grp. Health Serv., Inc.,* 2001 OK 2, ¶ 27, 37 P.3d 749 ("Administrative rules are valid expressions of lawmaking powers having the force and effect of law.").

67. *Martin v. Johnson,* 1998 OK 127, ¶ 32, 975 P.2d 889, 896.

68. 70 O.S.2011 § 5-106, *supra,* note 53. *Cf. Board of Education of City of Bartlesville v. Schmidt*, 925 OK 655, 239 P. 580 (superintendent of an independent school district is an employee of the board of education and the agent of the said board to manage the general operation of the school, organization, and work, under the authority and direction of the board); *Farley v. Board of Education of City of Perry*, 1917 OK 83, 62 P. 797 (city superintendent of schools was not an officer but an employee of the board of education).

69. *C & C Tile Co., Inc. v. Independent School Dist. No. 7 of Tulsa County,* 1972 OK 137, 503 P.2d 554, 560 (when superintendent officially entered into a written contract the school district will be deemed to

have ratified it and be bound thereby if it receives and retains the full benefits).

70. *Security Bank & Trust Co. of Miami v. Barnett*, 1934 OK 429, 36 P.2d 874, 879 ("Requirements intended for the protection of the citizen and to prevent a sacrifice of his property, and by disregard of which his rights might be and generally will be injuriously affected, are not directory but mandatory."), *Bonaparte v. American Vinegar Mfg. Co.*, 1932 OK 725, 17 P.2d 441, 452, and its reliance on *French v. Edwards*, 13 Wall. (U.S.) 506-517, 20 L. Ed. 702 (1871).

71. We have not burdened our analysis with an unnecessary explanation of the various roles and duties a treasurer for a school district is statutorily charged with performing. But for one example of a treasurer's authority *see* 70 O.S.2011 § 5-114.

72. Temporary custody of claims for payment of money by a school district employee or official does not turn the employee or official into a clerk for the school district, and such presentation of claims is a ministerial duty. *American Asbestos Products Co. v. Independent School Dist. No. 14*, 1945 OK 358, 164 P.2d 619, 620 (school board members, as individuals, submitting purchase orders to the board for approval and then certification of approved amounts within an unencumbered balance of an appropriation for the purpose of the expense are both ministerial acts although the acts are made mandatory by statute).

73. 70 O.S.2011 § 5-119(A) includes the following: "no superintendent, principal, treasurer or assistant treasurer, instructor, or teacher employed by such board shall be elected or serve as clerk or deputy clerk of the board nor as encumbrance clerk or minute clerk except that a treasurer or assistant treasurer may serve as a minute clerk."

74. 70 O.S.Supp.2018, § 5-117 (F), (as amended eff. Aug. 2, 2018) ("The board of education of each school district shall adopt and maintain on file in the office of the superintendent of schools appropriate personnel policy and sick leave guide. The guide shall be made available to the public.").

75. *See* 12 O.S. 2011 § 2004 (C)(1)(c)(5) (and as amended in 2012, 2013, & 2017) (providing service on a governmental organization, including a school district, by delivering a copy of the summons and petition to the officer or individual designated by specific statute; "however, if there is no statute, then upon the chief executive officer or a clerk, secretary, or other official whose duty it is to maintain the official records of the organization"); Okla. Stat. Ann. tit. 12, § 2004 (West 2010), Oklahoma Pleading Code Committee Comment (stating language for service on governmental organization follows the federal rule "in allowing service on the chief executive officer of the governmental unit, but adds a provision for service on the clerk, secretary, or other official whose duty it is to maintain the official records of the of the organization"). C*f. McClellan v. Bd. of Cty. Comm'rs of Tulsa Cty.*, 261 F.R.D. 595, 604 (N.D. Okla. 2009) (FRCP Rule 4 (j)(2)(B) provides service on a state, local government, municipal corporation, or state-created governmental entity, and the court noted this rule authorized service "in the manner prescribed by that state's law," and Oklahoma law provides that unless otherwise designated by statute, service may be made upon "a state, county, school district, public trust or municipal corporation or other governmental organization thereof subject to suit, by delivering a copy of the summons and of the petition to the ... chief executive officer or a clerk, secretary, or other official whose duty it is to maintain the official records of the organization"); 12 O.S.2011 § 1193 (a statute originally enacted in 1925 and last amended prior to the enactment of both the 1984 Oklahoma Pleading Code and 1985 Governmental Tort Claims Act, states "where school boards or board of education are garnished, service herein shall be made by summons, as in other cases, upon the clerk of such boards").

76. *See* 51 O.S.Supp.2012 § 156 (E), supra, note 2.

77. *In re Initiative Petition No. 397, State Question No. 767*, 2014 OK 23, ¶ 18, 326 P.3d 496, 504.

78. 51 O.S.2011 § 157, *supra*, note 23.

79. 51 O.S.2011 § 157, *supra*, note 23.

80. *Central Plastics Co. v. Goodson, supra* at note 16.

81. We also note the September 2012 letter states as addressee the insurance adjuster and does not include the school superintendent, or office of the clerk of the board of education, or some other clerk for the board. We need not address whether the September letter has the necessary characteristics in proper circumstances to be a *first* notice of a claim and satisfy the mandatory obligation of filing with the office of the clerk. We have determined the January 2012 letter to the superintendent was the notice of a claim to be filed with the office of the clerk which commenced a 90-day approval/denial period unless tolled by agreement.

82. *Uptegraft v. Home Ins. Co.*, 1983 OK 41, 662 P.2d 681, 684 ("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.").

83. *Jones v. Univ. of Central Oklahoma*, 1995 OK 138, n. 1, 910 P.2d 987, 989 explaining *Conkling's Estate v. Champlin*, 1943 OK 282, 141 P.2d 569, 570.

84. *See, e.g., Russell v. Bd. of County Com'rs, Carter County,* 1997 OK 80, ¶ 24, 952 P.2d 492 (the factual and legal efficacy of an employer's act disclaiming an intent to make a personnel manual part of the employment contract presents a mixed question of law and fact); *Hayes v. Eateries, Inc.*, 1995 OK 108, 905 P.2d 778, 783 ("Although normally the issue of whether an implied contract exists is factual, if the alleged promises are nothing more than vague assurances, as they are here, the issue can be decided as a matter of law.").

85. *Jones v. Univ. of Central Oklahoma*, 1995 OK 138, n. 1, 910 P.2d 987, 989 explaining *Conkling's Estate v. Champlin,* 1943 OK 282, 141 P.2d 569, 570.

86. 1996 OK 5, 917 P.2d 456.

87. *Bivins*, 1996 OK 5, 917 P.2d at 461-463.

88. *Bivins*, 1996 OK 5, 917 P.2d at 463, emphasis in original.

89. *Bivins*, 1996 OK 5, 917 P.2d at 463, explanatory material added.

90. *Bivins,* 1996 OK 5, 917 P.2d at 462-463.

91. *Bivins,* 1996 OK 5, 917 P.2d at 464.

92. 1990 OK 26, 789 P.2d 240.

93. *Bivins,* 1996 OK 5, 917 P.2d at n. 31, 463.

94. 51 O.S. 2011 § 157 (A). *Cf. Sanchez v. City of Sand Springs*, (5 month delay did not toll GTCA); *Shanbour v. Hollingsworth*, 1996 OK 67, 918 P.2d 73 (excusable neglect by plaintiff will not toll the GTCA time limits).

95. On the date of injury, January 10, 2012, 51 O.S.2011 § 156 was in effect, and the amendment made by Laws 2012, c. 304, § 206, replaced "Department of Central Services" with the "Office of Management and Enterprise Services" in § 156 (C) involving claims against the State. The current version, 51 O.S.Supp.2012 § 156 (B) with language the same as on the date of plaintiff's injury states as follows.

> "B. Except as provided in subsection H of this section, and not withstanding any other provision of law, claims against the state or a political subdivision are to be presented within one (1) year of the date the loss occurs. A claim against the state or a political subdivision shall be forever barred unless notice thereof is presented within one (1) year after the loss occurs."

96. *See, e.g., Sullivan v. Buckhorn Ranch Partnership*, 2005 OK 41, ¶ 30, 119 P.3d 192, 201-202 (equitable estoppel is an affirmative plea which must be proved by the party asserting the estoppel); *Colton v. Huntleigh USA Corp.*, 2005 OK 46, ¶ 10, 121 P.3d 1070, 1073 (burden of proof as to any particular fact rests upon the party asserting such fact); *Oxley v. General Atlantic Resources, Inc.*, 1997 OK 46, 936 P.2d 943, 946 (question of estoppel based upon other party's conduct is a mixed question of fact and law).

97. *See, e.g., Hall v. GEO Group, Inc.*, 2014 OK 22, ¶ 16, 324 P.3d 399, 405 (GTCA gave plaintiff "at most, one year to file his lawsuit. [90 days for the prison to deny a claim, 180 days to bring an action after a claim is denied, and 90 days tolled for incapacity due to injury]."); *Watkins v. Central State Griffin Memorial Hospital*, 2016 OK 71, ¶¶ 24-31, 377 P.3d 124, 131-132 (an estoppel may be created when plaintiff alleges government entity actively concealed or engaged in fraudulent or misleading conduct inducing plaintiff to refrain from bringing action).

98. *Grisham v. City of Oklahoma City,* 2017 OK 69, n. 28, 404 P.3d 843, 850, citing *Harmon v. Cradduck*, 2012 OK 80, ¶ 28, 286 P.3d 643 and *Brown v. Creek County ex rel. Creek County Bd. of County Com'rs,* 2007 OK 56, ¶ 8, 164 P.3d 1073, 1076.


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2019 OK CR 21

KENNETH MERLE HAMMICK, II, Appellant, v. THE STATE OF OKLAHOMA, Appellee.

Case No. F-2018-221. September 12, 2019

OPINION

ROWLAND, JUDGE:

¶1 Appellant Kenneth Merle Hammick, II appeals his Judgment and Sentence from the District Court of Rogers County, Case No. CF-2015-327, for Robbery with a Dangerous Weapon (Count 1), in violation of 21 O.S.2011, § 801; Burglary in the First Degree (Count 2), in violation of 21 O.S.2011, § 1431; and Larceny of an Automobile (Count 3), in violation of 21 O.S.2011, § 1720, each after former conviction of two or more felonies. The Honorable J. Dwayne Steidley, District Judge, presided over Hammick's jury trial and sentenced him, in accordance with the jury's verdict, to thirty-eight years imprisonment on Count 1, twenty years imprisonment on Count 2, and nine years imprisonment on Count 3.[1] Judge Steidley awarded credit for time served and further ordered the sentences to run concurrently. Hammick appeals raising the following issues:

(1) whether the district court erred when it refused to suppress his inculpatory statements to law enforcement;

(2) whether his conviction was based upon an impermissibly suggestive identification procedure; and

(3) whether the district court erred in admitting other crimes evidence under the res gestae exception.

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

Facts

¶3 The evidence showed Hammick broke into a Claremore, Oklahoma home on May 10, 2015, and robbed its three occupants at gunpoint. He fled the scene by stealing the car of one of the victims. Two of the three victims identified Hammick as the perpetrator from a six-person photographic lineup within days after the crime. Knowing police would be on the lookout for the stolen car, Hammick abandoned it soon after the robbery. He attempted, without success, to steal another car, but nevertheless took a nine millimeter pistol from that car's console. The next day, a Claremore police officer responded to a trespassing call involving a suspicious man hiding in some bushes; he discovered Hammick there. After his arrest, Hammick denied any involvement in the home invasion robbery during his initial interview. He later expressed a desire for counsel. When investigators subsequently executed a search warrant for a DNA sample, it was Hammick who initiated conversation with them and ultimately made several incriminating statements. A month after that interview, he asked to speak to investigators again and this time made a full confession. He directed investigators to the gun he had pilfered and attempted, without success, to direct them to the clothing he was wearing during the robbery.

1. Admission of Inculpatory Statements

¶4 Hammick contends the district court's refusal to suppress his inculpatory statements from his latter two police interrogations was error because he had invoked his right to counsel.[2] He contends his inculpatory statements to police "were not given after a knowing and voluntary waiver of his right to an attorney." He preserved this claim for review. We review district court rulings on motions to suppress for an abuse of discretion. *Terry v. State*, 2014 OK CR 14, ¶ 6, 334 P.3d 953, 955. "We review the district court's legal conclusions *de novo*, and its factual findings for clear error, viewing the evidence in the light most favorable to the State." *Id.*

¶5 The district court held a *Jackson v. Denno*[3] hearing to consider the admissibility of Hammick's confessions. Under *Jackson-Denno*, the district court must decide: 1) whether relinquishment of Fifth Amendment rights was voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception; and 2) whether the waiver was made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. *Runnels v. State*, 2018 OK CR

27, ¶ 42, 426 P.3d 614, 624. Once a suspect invokes his Fifth Amendment rights, he "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Taylor v. State*, 2018 OK CR 6, ¶ 10, 419 P.3d 265, 269 (quoting *Edwards v. Arizona*, 451 U.S. 477, 484-85, 101 S.Ct. 1880, 1885, 68 L.Ed.2d 378 (1981). *See also Underwood v. State*, 2011 OK CR 12, ¶ 33, 252 P.3d 221, 238-39: (holding defendant's statements were voluntary, despite prior request for counsel, because he initiated conversation with law enforcement).

¶6 The district court found Hammick's inculpatory statements were not obtained in violation of his right to counsel because he initiated the conversations with investigators on both occasions and knowingly waived his right to counsel each time. A suspect may make a clear invocation of the right to counsel when interrogation is initiated or he may waive the right provided he does so voluntarily, knowingly, and intelligently. *See Montejo v. Louisiana*, 556 U.S. 778, 786, 129 S.Ct. 2079, 2085, 173 L.Ed.2d 955 (2009). When a suspect, after invoking his right to counsel, chooses to speak with police without counsel present, the burden is on the State to show the suspect's change of mind was "voluntary and intelligent." *Underwood*, 2011 OK CR 12, ¶ 31, 252 P.3d at 238. Whether a suspect's statements to police were voluntary depends on an evaluation of all surrounding circumstances, including the characteristics of the accused and the details of the interrogation. *Id.* at ¶ 33, 252 P.3d at 238.

¶7 Hammick asserts his confession was induced by his understanding that cooperation would result in less jail time. Hammick's allegation of coercion is without merit. Both investigators testified they made no threats and offered no specific inducements to get Hammick to talk. Hammick was oriented in time and place and appeared capable of understanding his circumstances and rights. The investigators honored Hammick's request not to be interrogated in the absence of counsel until he reinitiated conversation with them. All three interviews were recorded and there was no evidence of coercion or specific inducements made by investigators in this case. Based on this record, we find no error in the admission of Hammick's inculpatory statements. This claim is denied.

2. Identification Procedure

¶8 Hammick presumes for purposes of this claim that we will agree his confessions were erroneously admitted. He then argues that the photo lineup procedure was impermissibly suggestive and violated his right to due process. Without the identification evidence and his confessions, he maintains the evidence was insufficient to support his convictions. According to Hammick, the fact that he was the only suspect with a neck tattoo, that his photo was placed in the first position, and that his photo was the only one taken outdoors increased the likelihood of misidentification and affected the overall reliability of the victims' identification. Because he did not challenge the suggestiveness of the photo lineup below, review is for plain error only. *Harmon v. State*, 2011 OK CR 6, ¶ 42, 248 P.3d 918, 935. Hammick has the burden in plain error review to demonstrate that an error, plain or obvious under current law, adversely affected his substantial rights. *Murphy v. State*, 2012 OK CR 8, ¶ 18, 281 P.3d 1283, 1290 (citing *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923). Only if he does so will this Court entertain correcting the error provided the error seriously affected the fairness, integrity or public reputation of the judicial proceedings or represented a miscarriage of justice. *Id.*

¶9 Hammick's claim – that the lineup was impermissibly suggestive because he was the only suspect with a neck tattoo – requires no relief. In *Leigh v. State*, 1985 OK CR 41, ¶ 6, 698 P.2d 936, 938, this Court held that the challenged lineup procedure was impermissibly suggestive because the accused was the only man included without facial hair. Although the lineup fell short of established requirements, we held the identification was nevertheless admissible because the witnesses' identification testimony was independently reliable. *Id.* at ¶¶ 7-10, 698 P.2d at 938 (finding testimony identifying the defendant as the gunman properly received, despite corrupting influence of suggestive photo array). Factors to consider in deciding whether an in-court identification is independently reliable and not the result of a suggestive pretrial identification are: 1) the opportunity to view the suspect at the time of the crime; 2) the witness' degree of attention; 3) accuracy of the witness' prior description; 4) level of certainty demonstrated by the witness; and 5) the length of time between crime and confrontation. *Neil v. Biggers*, 409 U.S. 188, 199–200, 93 S.Ct. 375, 382, 34 L.Ed.2d 401 (1972).

¶10 The victims' testimony in this case was independently reliable as in *Leigh*. Both victims testified they got a good look at the robber. One paid particularly close attention to the robber's face in an effort to recall where he had previously seen Hammick. He also described Hammick's clothing. His description was corroborated by the other victim who gave the same general description. Her description was even more detailed because she identified the brand of Hammick's athletic shoes, which the investigator said matched the tread pattern of the muddy footprints on the seat and driver-side door of the car stolen by the robber. Both victims were certain in their identifications days after the crime and the record shows neither victim identified Hammick based solely on his neck tattoo. The fact that only two of the three victims identified Hammick in the lineup likewise weakens his claim that the lineup was unfairly suggestive. His photo did not obviously stand out or point to him as the culprit. Having reviewed the factors enumerated above, we find the factors weigh in favor of finding the victims' in-court identifications were independently reliable and admissible.

¶11 Next, Hammick contends because his photo was placed in the first position that the lineup was impermissibly suggestive. The record does not establish the order the photographs were displayed and shows only that the investigator placed Hammick's photo "among" five others. None of the victims mentioned the order in which the photos were displayed during the lineup. Even if Hammick's photo was in the first position, he cites no authority holding that a suspect's photo cannot be in the first position out of concerns of suggestiveness. This contention is without merit.

¶12 Finally, Hammick contends that because his photo was the only one taken outdoors that the lineup was impermissibly suggestive. The record belies his claim. Although the subjects in the lineups shown to the victims were not identical, two photos included in each lineup were also taken outdoors. (State's Exhibits 13–14). Accordingly, the background of Hammick's photo did not make it unfairly stand out.

¶13 This Court requires only that suspects in lineups possess the same general physical characteristics as the accused and that substantial compliance with physical similarity guidelines suffices to protect due process. *Peters v. State,* 1986 OK CR 138, ¶ 11, 725 P.2d 1276, 1278. Every photo in the lineup was of a thin, white male with dark hair wearing similar clothing. The challenged lineup was not so unfairly suggestive because of Hammick's visible neck tattoo that it gave rise to a likelihood of irreparable misidentification. The identifications by the two victims were independently reliable. Both had an opportunity to see Hammick during the commission of his crimes, paid close attention to his appearance and features, and were certain in their identifications of him when shown the lineup and in the courtroom. Hammick has failed to establish the commission of any error, plain or otherwise, that affected the outcome of his trial. This claim is denied. *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

3. Other Crimes Evidence

¶14 Hammick contends he was denied a fair trial from the admission of other crimes evidence. He contends the district court erred in admitting, under the res gestae exception, evidence of a pistol theft he committed the day after the charged crimes. He argues that exception does not apply because the charged acts and pistol theft were separated by time and location and were unconnected, i.e. he did not use the stolen pistol to perpetrate the charged acts. He also argues that the stolen pistol evidence was more prejudicial than probative.

¶15 The district court admitted the stolen pistol and photos of it, over objection, finding Hammick's theft of the pistol was part of a continuing series of related events. Witness testimony and argument concerning Hammick's theft of the pistol was admitted without objection. We review evidentiary rulings preserved by objection for an abuse of discretion. *Spruill v. State*, 2018 OK CR 25, ¶ 10, 425 P.3d 753, 756. "An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue." *State v. Delso*, 2013 OK CR 5, ¶ 5, 298 P.3d 1192, 1194. We review admission of evidence and argument not met with an objection for plain error only under the test cited above.

¶16 This Court has held that evidence is admissible under the res gestae exception when "a) it is so closely connected to the charged offense as to form part of the entire transaction; b) it is necessary to give the jury a complete understanding of the crime; or c) when it is central to the chain of events." *Eizem-*

ber v. State, 2007 OK CR 29, ¶ 77, 164 P.3d 208, 230. *See also Neill v. State*, 1994 OK CR 69, ¶ 36, 896 P.2d 537, 550–551 (stating evidence of other crimes is admissible as res gestae where the evidence forms part of "an entire transaction" or where there is a "logical connection" with charged offenses).

¶17 The State introduced evidence related to the pistol theft because of its proximity to the robbery. Admission of the pistol evidence gave the jury a more complete understanding of the crime and the chain of events. Evidence of the pistol theft and recovery of the pistol corroborated Hammick's June 9th confession and tended to prove he committed the charged crimes. He directed investigators to the buried pistol's location which coincidentally was in the same place he had been arrested for public intoxication the day after the charged robbery.

¶18 Hammick's contention that the pistol evidence was more prejudicial than probative is also unpersuasive. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *Harmon,* 2011 OK CR 6, ¶ 48, 248 P.3d at 936–37; 12 O.S.2011, § 2403. The Court gives proposed evidence its maximum reasonable probative force and its minimum reasonable prejudicial value. *Harmon,* 2011 OK CR 6, ¶ 48, 248 P.3d at 937. As noted above the stolen pistol evidence corroborated Hammick's June 9th confession and we find its probative value was not substantially outweighed by the danger of unfair prejudice. 12 O.S.2011, § 2403.

¶19 Moreover, Hammick cannot show any prejudice from admission of images or testimony about the stolen pistol because of the overwhelming evidence of his guilt, namely his confession and the victims' testimony. The district court instructed the jury not to consider the pistol evidence in deciding guilt, but only in reference to Hammick's motive, intent, preparation, common scheme or plan. We presume the jury followed that instruction. *See Sanders v. State*, 2015 OK CR 11, ¶ 15, 358 P.3d 280, 285. Nor is there any evidence the jury inflated Hammick's sentence because of the pistol evidence. It recommended the minimum sentence on Counts 2 and 3 and a sentence well within the range of punishment on Count 1.[4] Hammick has not shown any error, plain or otherwise. Accordingly, this claim is denied.

DECISION

¶20 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 ROGERS COUNTY THE HONORABLE J. DWAYNE STEIDLEY, DISTRICT JUDGE

APPEARANCES AT TRIAL

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

1. Under 21 O.S.Supp.2015, § 13.1, Hammick must serve 85% of his sentence of imprisonment on Counts 1 and 2 before he is eligible for parole consideration.

2. Hammick does not challenge the first interview because he made no incriminating statements during it.

3. 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964)(establishing a defendant's right to a hearing on the voluntariness of his confession).

4. The proper range of punishment for a person with five prior felony convictions on Count 1 is twenty years to life, on Count 2 is twenty years to life, and on Count 3 is nine years to life. 21 O.S.2011, §§ 51.1(B), (C), 801, 1431, 1720.

RESOLUTION NO. ONE: Proposed amendment to Rules of the Supreme Court of Oklahoma for Mandatory Continuing Legal Education.

Whereas the Continuing Legal Education Task Force of the Oklahoma Bar Association (OBA) was charged with studying and evaluating the quality and delivery of education programs to OBA members;

Whereas the Continuing Legal Education Task Force and the OBA Mandatory Continuing Legal Education Commission met in joint session on June 20, 2019, to discuss the potential amendment of Mandatory Continuing Legal Education Rules relating to the number of ethics credits that should be required;

Whereas the enhancement of Continuing Legal Education programs for OBA members on issues related to the fitness to practice law and recognizing and assisting clients and others in the profession with substance use disorders and mental health challenges is significant to providing quality legal services to the public;

Whereas OBA members currently are required to obtain one (1) legal ethics credit each year.

Whereas expanding the definition of legal ethics under the existing Mandatory Continuing Legal Education Rules and requiring an additional legal ethics credit each year will give OBA members greater opportunity for educational programs that address serious issues that impact the legal profession and the public.

Whereas the suggested change to the Mandatory Continuing Legal Education Rules **will not increase the total number of credits** from the currently required twelve (12) total credits per year but will only require that an additional legal ethics credit be obtained each year by OBA members who are required to annually report their Mandatory Continuing Legal Education hours.

BE IT RESOLVED by the House of Delegates of the Oklahoma Bar Association that the Association amend Rule 7, Regulations 3.6 and 4.1.3 of the Rules of the Supreme Court of Oklahoma for Mandatory Continuing Legal Education, as published in The Oklahoma Bar Journal and posted on the OBA website at **www.okbar.org**. *(Requires sixty percent (60%) affirmative vote for passage. OBA Bylaws Art. VIII Sec. 5.) (Submitted by OBA Continuing Legal Education Task Force and Mandatory Continuing Legal Education Commission.)* **Adoption recommended by the OBA Board of Governors.**

PROPOSED CHANGES TO THE RULES OF THE SUPREME COURT OF OKLAHOMA FOR MANDATORY CONTINUING LEGAL EDUCATION

RULE 7. REGULATIONS

The following Regulations for Mandatory Continuing Legal Education are hereby adopted and shall remain in effect until revised or amended by the Mandatory Continuing Legal Education Commission with approval of the Board of Governors and the Oklahoma Supreme Court.

~~3.6 The number of hours required means that the attorney must actually attend twelve (12) instructional hours of CLE per year with no credit given for introductory remarks, meal breaks, or business meetings. Of the twelve (12) CLE hours required the attorney must attend and receive one~~

~~(1) instructional hour of CLE per year covering the area of professional responsibility or legal ethics or legal malpractice prevention. An instructional hour will in all events contain at least fifty (50) minutes.~~

3.6 Instructional Hour. Each attorney must complete 12 instructional hours of CLE per year, with no credit for meal breaks or business meetings. An instructional hour must contain at least 50 minutes of instruction.

Legal Ethics and Professionalism CLE. Effective January 1, 2021, of the 12 required instructional hours of CLE each year, at least two hours must be for programming on Legal Ethics and Professionalism, legal malpractice prevention and/or mental health and substance use disorders.

PROGRAM GUIDELINES FOR LEGAL ETHICS AND PROFESSIONALISM CLE

Legal Ethics and Professionalism CLE programs will address the Code of Professional Conduct and tenets of the legal profession by which a lawyer demonstrates civility, honesty, integrity, fairness, competence, ethical conduct, public service, and respect for the Rule of Law, the courts, clients, other lawyers, witnesses and unrepresented parties. Legal Ethics and Professionalism CLE may also address legal malpractice prevention and mental health and substance use disorders.

Legal Malpractice Prevention programs provide training and education designed to prevent attorney malpractice. These programs focus on developing systems, processes and habits that reduce or eliminate attorney errors. The programs may cover issues like ensuring timely filings within statutory limits, meeting court deadlines, properly protecting digital client information, appropriate client communications, avoiding and resolving conflicts of interest, proper handling of client trust accounts and proper ways to terminate or withdraw from client representation.

Mental Health and Substance Use Disorders programs will address issues such as attorney wellness and the prevention, detection and/or treatment of mental health disorders and/or substance use disorders which can affect a lawyer's ability to provide competent and ethical legal services.

Programs addressing the ethical tenets of other disciplines and not specifically pertaining to legal ethics are not eligible for Legal Ethics and Professionalism CLE credit but may meet the requirements for general CLE credit.

Regulation 4.1.3

The program must deal primarily with matters related to the practice of law, professional responsibility, ~~or ethical obligations of attorneys~~ legal ethics, professionalism, mental health or substance use disorders related to attorneys. Programs that address law practice management and technology, as well as programs that cross academic lines, may be considered for approval.

2020 OBA Board of Governors Vacancies

Nominating Petition deadline was 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: **Michael C. Mordy, Ardmore**

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

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: **Michael J. Davis, Durant**

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: **Joshua A. Edwards, Ada**

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: **Amber Peckio Garrett, Tulsa**

NOTICE

Pursuant to Rule 3 Section 3 of the OBA Bylaws, the nominees for uncontested positions have been deemed elected due to no other person filing for the position.

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

Oklahoma Bar Association Nominating Petitions

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

OFFICERS
President-Elect
Michael C. Mordy, Ardmore

Nominating Petitions have been filed nominating Michael C. Mordy for President-Elect of the Oklahoma Bar Association Board of Governors for a one-year term beginning January 1, 2020.

A total of 389 signatures appear on the petitions.

Vice President
Brandi N. Nowakowski, Shawnee

Nominating Petitions have been filed nominating Brandi N. Nowakowski for Vice President of the Oklahoma Bar Association Board of Governors for a one-year term beginning January 1, 2020.

A total of 59 signatures appear on the petitions.

BOARD OF GOVERNORS
Supreme Court Judicial District No. 2
Michael J. Davis, Durant

A Nominating Resolution from Bryan County has been filed nominating Michael J. Davis for election of Supreme Court Judicial District No. 2 of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2020.

Supreme Court Judicial District No. 8
Joshua A. Edwards, Ada

Nominating Petitions have been filed nominating Joshua A. Edwards for election of Supreme Court Judicial District No. 8 of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2020.

A total of 36 signatures appear on the petitions.

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.

A total of 27 signatures appear on the petitions.

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

Member at Large
Amber Peckio Garrett, Tulsa

Nominating Petitions have been filed nominating Amber Peckio Garrett for election of Member at Large of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2020.

A total of 53 signatures appear on the petitions.

Licensed Legal Internship Committee Proposed Rule and Regulation Changes

By H. Terrell Monks

The Legal Internship Committee proposes the following rule changes for academic participants. Academic licenses allow practice in an Oklahoma law school clinic under the supervision of a faculty member licensed to practice law in Oklahoma, possibly with a special temporary permit. The proposed changes are intended to remove one of the barriers that may prevent some out-of-state law students from participation in law school clinics.

Under the proposed changes, academic applicants must provide a fingerprint-based background report from the Oklahoma State Bureau of Investigation but are no longer required to provide such a report from all prior states of residence. Some law students were prevented from participating in clinical programs due to the obstacles encountered in obtaining background reports from other states. (Changes Rule 2.1A(1), Regulation 7)

Other proposed changes are that academic applicants will be exempt from the testing requirement and may be sworn in by district judges. These changes are intended to streamline the licensing process and allow the academic applicants to use their license at the beginning of the term. (Changes Rule 2.1A(1), New Rule 2.1A (3) NOTE: This section has been renumbered. Rule 2.1A(3) regarding expiration of license has been changed to Rule 2.1(4).)

Rule 2.1A(1)

(f) ~~Successfully pass the examination required by Rule 5.2;~~

(g) Be registered with the Oklahoma Board of Bar Examiners or provide a criminal background report from the State of Oklahoma ~~and the student's prior state(s) of residence, if different~~; and

Add Rule 2.1A(3)

(3) The Academic Intern may be sworn in by any member of the Oklahoma Judiciary, including a judge of the district court.

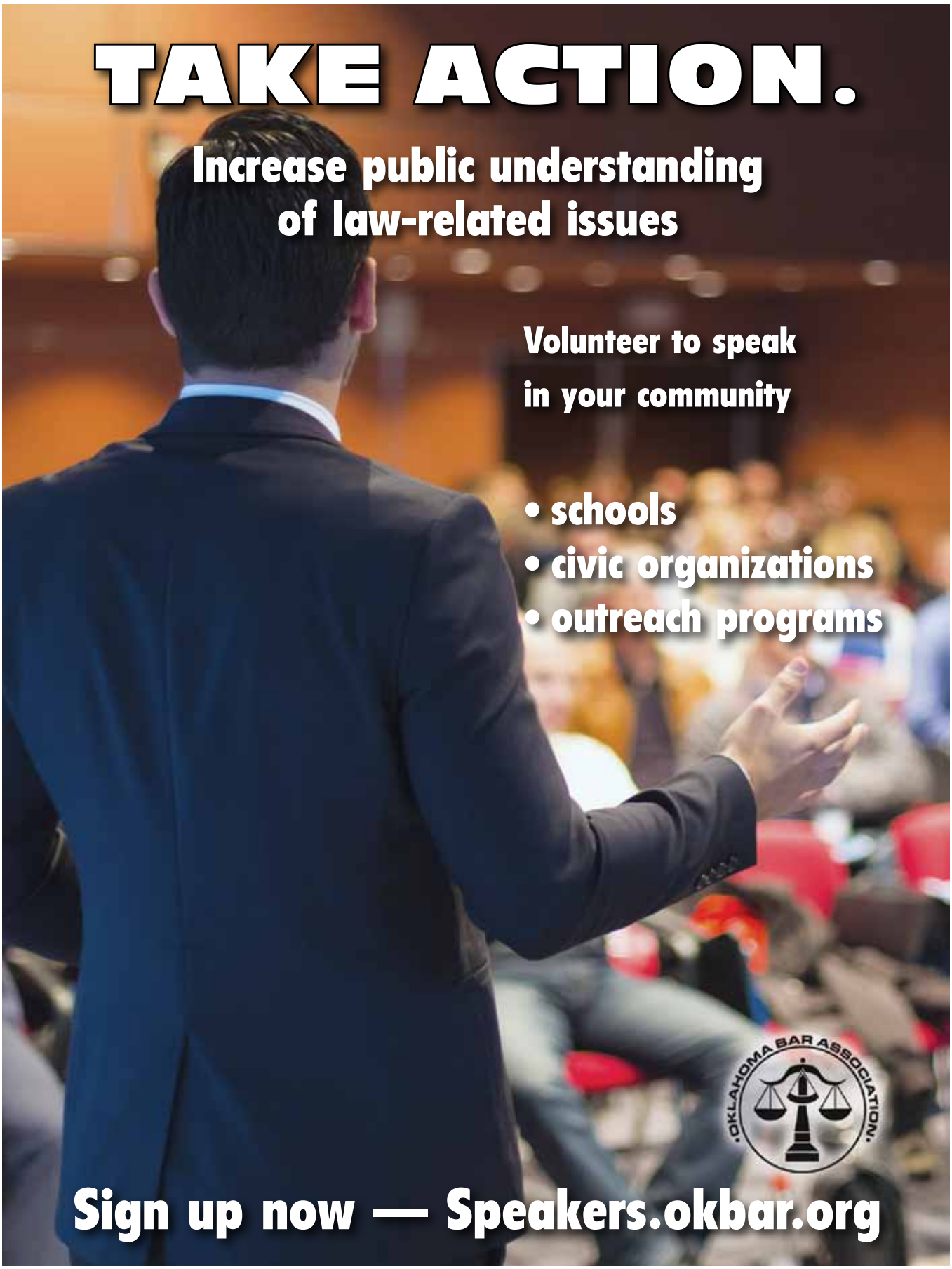
Regulation 7 modifications

(A) Under Rule 2.1A (1)(g) fingerprint-based and name-based criminal history, sex offender, and violent offender searches are required from the Oklahoma State Bureau of Investigation. ~~criminal investigative bureaus of each state in which the student has resided for a period of one month or longer. Information shall be provided for the last ten years or since age 18, whichever period of time is shorter.~~

(B) The student shall assume full responsibility for all the necessary procedures and fees associated with requesting complete criminal background reports. ~~from each applicable jurisdiction. Reports must be sent directly from the investigative bureaus to the Executive Director of the Oklahoma Bar Association for initial review. In the event that an out-of-state bureau cannot submit its report directly to the Oklahoma Bar Association, the student shall contact the Legal Internship Program representative at his or her law school for further instruction.~~

On June 14, 2019, the Legal Intern Committee unanimously voted in favor of proposed amendments to Rule 2.1A(1) f, g; new rule 2.1A(3); and changes to Regulation 7 contingent on Oklahoma Supreme Court approval of proposed rule changes. On August 23, 2019, the OBA Board of Governors approved the proposed changes for submission to the Oklahoma Supreme Court after publication for comment.

You may email comments or questions to Legal Internship Committee Chair Terrell Monks at LLIComments@okbar.org. The deadline for summitting comments is Oct. 28, 2019.


TAKE ACTION.
Increase public understanding of law-related issues
Volunteer to speak in your community
• schools
• civic organizations
• outreach programs
OKLAHOMA BAR ASSOCIATION
Sign up now — Speakers.okbar.org

Calendar of Events

October

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

3 **OBA Lawyers Helping Lawyers Discussion Group;** 6 p.m.; Office of Tom Cummings, 701 NW 13th St., Oklahoma City, OK 73012; RSVP to Jeanie Jones 405-840-0231

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

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

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

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

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

18 **OBA Board of Governors meeting;** 10 a.m.; Cleveland County; Contact John Morris Williams 405-416-7000

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

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

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

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

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

November

1 **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

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

6-8 **OBA Annual Meeting;** Renaissance Oklahoma City Convention Center Hotel, Oklahoma City

7 **OBA Lawyers Helping Lawyers Discussion Group;** 6 p.m.; Office of Tom Cummings, 701 NW 13th St., Oklahoma City, OK 73012; RSVP to Jeanie Jones 405-840-0231

11 **OBA Closed** – Veterans Day

12 **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

2019 OK CIV APP 48

TERRI JEAN FITZWILSON, Petitioner, vs. AT&T CORP., OLD REPUBLIC INSURANCE CO., and THE WORKERS' COMPENSATION COMMISSION, Respondents.

Case No. 117,280. July 12, 2019

PROCEEDING TO REVIEW AN ORDER OF THE WORKERS' COMPENSATION COMMISSION

HONORABLE P. BLAIR McMILLIN, ADMINISTRATIVE LAW JUDGE

VACATED AND REMANDED FOR FURTHER PROCEEDINGS

Darrel R. Paul, QUANDT LAW FIRM, Tulsa, Oklahoma, for Petitioner

Nichole S. Bryant, Matthew R. DeFehr, McANANY, VAN CLEAVE & PHILLIPS, P.A., Tulsa, Oklahoma, for Respondents

JANE P. WISEMAN, VICE-CHIEF JUDGE:

¶1 Claimant Terri Fitzwilson seeks review of an order of the Workers' Compensation Commission affirming the decision of an administrative law judge denying Claimant's claim as not compensable. After review, we vacate the order of the WCC and remand for further proceedings consistent with this Opinion.

FACTS AND PROCEDURAL BACKGROUND

¶2 Claimant filed a CC-Form 3 on December 8, 2016, for injuries to her back and right leg, which she alleged occurred on November 22, 2016, while she "was rolling forward in chair when it toppled over." Claimant's employer, AT&T Corp. (Employer), denied Claimant suffered an injury arising out of and in the course of her employment.

¶3 At trial held on February 6, 2018, Claimant described the accident this way: "We have roller chairs and we sit in groups so that we can ask each other questions during phone calls. I had rolled back to ask a question, when I went to roll forward, my chair fell over and I fell out of my chair." Claimant said she believes her right hip and buttocks struck the ground. Claimant testified she had four surgeries prior to this event. She had an L4-5 and L5-S1 fusion, she had hardware removed, she had another surgery in the same area, and she had hardware removed again. The surgeon she saw for her back was Dr. Hendricks in 2011. None of her surgeries involved the L3-4 disk. She has been seeing Dr. Martucci for pain management every three months. She experienced new symptoms after this fall – her pain levels were higher and she had pain radiating down her right leg. According to Claimant, her prior issues were in her left leg.

¶4 The ALJ denied compensability in an order filed February 27, 2018. The ALJ noted Claimant requested a hearing and "a finding of compensability to the lumbar spine in the form of an aggravation of a preexisting condition." Employer admits the incident occurred on November 22, 2016, but denies Claimant's claim is compensable and "asserts that her injury is degenerative and preexisting in nature and excepted from the definition of compensable injury pursuant to Title 85A O.S. §2(9)(b)(5) and (6)." Employer also "denies that the major cause of her degenerative condition is her employment."

¶5 The ALJ found Claimant has worked as a customer service representative for Employer for eight years. She testified she fell out of her chair after she rolled forward and was talking to another employee and she landed on her buttocks and right hip when she fell. Claimant "reported to her treating physicians thereafter that her chair had broken and caused her to fall to the floor." The ALJ noted: "Prior to the incident at work, Claimant received a significant amount of medical treatment for her lumbar spine to include numerous surgeries, injections, medications, and implantation of two spinal column [stimulators] as evidenced by the voluminous amount of records submitted by [Employer]." The ALJ explained that Claimant injured her lumbar spine in a work-related injury in 2001, resulting in her undergoing the following surgeries: (1) an L5-S1 diskectomy (Dr. Greg Wilson); (2) an L5-S1 fusion (Dr. Mark Hayes and Dr. Allen Fielding); (3) L4-5 fusion in 2003 (Dr. Randall Hendricks); (4) L4-5 and L5-S1 hardware removal in 2004 (Dr. Hendricks); (5) L4-5 and L5-S1 fusion in 2006 (Dr. Hendricks); and (6) L4-5 hardware removal

with revision decompression in 2008 (Dr. Hendricks). Dr. Hendricks released Claimant from his care for the 2001 injury on November 5, 2008, and she settled her workers' compensation "claim on Joint Petition for 30% permanent partial impairment to the lumbar spine on August 30, 2014."[1]

¶6 Claimant returned to Dr. Hendricks on December 22, 2010, after "she fell and twisted her low back going up stairs." The ALJ stated, "Claimant complained of mild hypesthesia on the dorsum of her right foot. Dr. Hendricks read her MRI of the lumbar spine on January 14, 2011, as normal and stated that she might be developing stenosis at L3-4, but was unable to truly confirm that finding []." Dr. Hendricks found Claimant was not a candidate for surgery and referred her to pain management.

¶7 The ALJ said:

> Claimant began a pain management regimen at Pain Consultants on April 11, 2011 and reported low back pain radiating to her right side down to her large toe. She reported a burning sensation down her right leg and that her right leg twitched on her intake sheet. She was given Lortab and referred for a L5-S1 epidural steroid injection, which she had on April 13, 2011. She had an EMG study of her right lower extremity on April 19, 2011, and the physician opined that her likely diagnosis was radiculopathy, but noted a possibility of plexopathy or peripheral neuropathy. She had additional injections at that level on May 11, 2011, July 20, 2011, and February 22, 2012. Up until 2016, Claimant tried various medications for nerve pain such as Lyrica and was switched to Norco 10 mg on November 17, 2012,[2] which she was still taking at the time of her work-related incident.

(Citation to the record omitted.)

¶8 The ALJ noted that Claimant had a spinal column stimulator implanted on December 6, 2011, and January 7, 2014, but they were removed on September 16, 2014. The ALJ stated, "Although Claimant testified at hearing that she had no further injections after 2011 until her work-related incident, she discussed resuming injection therapy with her pain management physician on October 15, 2013, October 14, 2014, May 11, 2015, [and] August 17, 2015." Four months before she fell from her chair, she "reported a 10 out of 10 pain on a VAS scale without medication," and 2 months before the incident Claimant "reported a 8-9 out of 10 pain on a VAS scale without medication" and she also reported she was having back pain which radiated down her right leg.

¶9 Claimant contacted her primary care physician Dr. Patrick Vanschoyck "on December 1, 2016 and reported that she fell out of a chair at work and requested an increase in her medication and an injection." She saw Dr. Vanschoyck the next day "report[ing] pain in her low back radiating to her right foot and received an injection and medication." On December 6, 2016, she returned to Pain Consultants for a L5-S1 epidural steroid injection for her back pain and right leg pain. On January 31, 2017, she had another injection on the L3-4 level.

¶10 On December 28, 2016, Claimant underwent an MRI of her lumbar spine. Dr. Hendricks found that Claimant had "L3-4 stenosis, worse on the right, with impingement and scar tissue at L4-5." On February 27, 2017, Dr. Hendricks "noted some quadriceps and dorsiflexor weakness of the ankle of the right side, sensory deficit mixed at L4 and L5, and a positive sciatic stretch maneuver on his examination." On March 21, 2017, Dr. Hendricks performed a laminectomy of L3, a revision laminectomy of L4-5 and L5-S1, and neurolysis.

¶11 The ALJ stated that in his report, Dr. Hendricks found "Claimant sustained a significant and identifiable aggravation of her preexisting injury." The ALJ further stated that in his deposition, when asked about the cause of her most recent lumbar surgery, Dr. Hendricks said "that it may have been due to some adjacent-level disease and her fall from the chair." He recognized "that adjacent-level disease can result from the passage of time and ongoing deterioration or that a single-event incident may aggravate it substantially." He noted there was no stenosis at the L3-4 level on her January 2011 MRI and "found that her fall had aggravated her severe canal stenosis."

¶12 Employer submitted the report of Dr. Gillock, who "found no objective medical evidence of a work-related injury." He concluded, "Claimant has a preexisting degenerative condition and that she did not sustain[] a significant and identifiable aggravation of that condition as a result of her employment."

¶13 The ALJ stated:

> Claimant testified that she was able to work and perform activities of daily living

with her pain medication from 2011 until incident of November 22, 2016. However, medical records indicate she had two trials of a spinal column stimulator in that time period and also inquired as to resuming injection therapy in 2013, 2014, and 2015. Those records also report that Claimant did not undergo further injections due to money concerns or being able to take off work (during that time period she also underwent surgery to her foot/ankle and left arm). Claimant also testified that prior to November of 2016 her radicular pain was only to her left leg, which is entirely inaccurate based on the history contained in the medical records that documented right leg radiculopathy particularly after her 2010 fall. Furthermore 2 months prior to her work-related incident, Claimant reported a 8-9 out of 10 pain in her back radiating to her right leg without medication.

The ALJ found that, in light of Claimant's medical records, her testimony was less than credible. The ALJ further found "that Dr. [Hendricks'] opinion is based on inaccurate history as her right leg radiculopathy was clearly present prior to November 22, 2016." The ALJ determined, "age-related degenerative conditions, including stenosis, are specifically excepted from the definition of compensable injury pursuant to Title 85A O.S. §2(9)(b)(5)." The ALJ ascertained, "Dr. Hendricks clearly noted on his operative report of March 21, 2017 that Claimant did not have a disc herniation at L3-4 only stenosis."

¶14 The ALJ was "not persuaded that [Claimant's] employment was the sole or major cause of her resulting lumbar spine deterioration or degeneration that ultimately necessitated surgery." The ALJ finished, "After assigning weight and credibility to all evidence submitted, I find Claimant has failed to prove by a preponderance of the evidence she sustained a compensable injury to her lumber spine on November 22, 2016." Consequently, Claimant's claim for compensation was denied.

¶15 Claimant appealed to the WCC arguing the ALJ's order was against the clear weight of the evidence and contrary to law because Employer "stipulated to an 'incident' occurring at work on 11/22/2016," and the ALJ's "finding of no injury is against the clear weight of the evidence."

¶16 The WCC affirmed the ALJ's decision. Claimant now seeks review of the WCC's decision.

STANDARD OF REVIEW

¶17 "The Supreme Court may modify, reverse, remand for rehearing, or set aside the judgment or award" of the WCC on a finding that the judgment or award was:

1. In violation of constitutional provisions;

2. In excess of the statutory authority or jurisdiction of the Commission;

3. Made on unlawful procedure;

4. Affected by other error of law;

5. Clearly erroneous in view of the reliable, material, probative and substantial competent evidence;

6. Arbitrary or capricious;

7. Procured by fraud; or

8. Missing findings of fact on issues essential to the decision.

85A O.S. Supp. 2018 § 78(C). "[W]ith respect to issues of fact, the [WCC's] order will be affirmed if the record contains substantial evidence in support of the facts upon which it is based and is otherwise free of error." *Mullendore v. Mercy Hosp. Ardmore,* 2019 OK 11, ¶ 13, 438 P.3d 358.

ANALYSIS

¶18 Claimant first asserts the WCC erred because it based its denial of compensability on 85A O.S. § 2(9)(b)(5) and did not apply 85A O.S. § 2(9)(b)(6) which addresses aggravation. Title 85A O.S. Supp. 2013 § 2(9)(b)(5), the law in effect when Claimant fell from the chair, provided "compensable injury" does not include a "strain, degeneration, damage or harm to, or disease or condition of, the eye or musculoskeletal structure or other body part resulting from the natural results of aging, osteoarthritis, arthritis, or degenerative process including, but not limited to, degenerative joint disease, degenerative disc disease, degenerative spondylosis/spondylolisthesis and spinal stenosis, or . . . ." 85A O.S. Supp. 2013 § 2(9)(b)(5) (emphasis added). The ALJ relied on this provision in denying compensability.

¶19 Claimant directs our attention to § 2(9)(b)(6), which provides "compensable injury" does not include "any preexisting condition

except when the treating physician clearly confirms an identifiable and significant aggravation incurred in the course and scope of employment." Claimant asserts:

> In the order under review, the absence of any discussion of § 2(9)(b)(6) creates an error of law in and of itself. This is of course because, while it appears that § 2(9)(b)(5) intends that the workers[‘] compensation system not be responsible for taking care of the slow, eventual [e]ffects of aging, § 2(9)(b)(6) recognizes that an on-the-job injury can activate or accelerate even a preexisting condition to the point that it can only fairly be deemed work-related in its ultimate physical disturbance. As such, it is appropriate that the system does provide benefits for those significant and identifiable aggravation injuries leaving an injured worker in a different and potentially far worse physical position than before the on-the-job injury.

Claimant goes on to argue "§ 2(9)(b)(6) does not preclude or exempt from compensable aggravation injuries even those § 2(9)(b)(5) conditions that may have previously been the 'natural results of aging.'"

¶20 Support for Claimant's reasoning can be found in the recent cases of *Ayisi v. Sequel Youth & Family Services, LLC*, 2019 OK CIV APP 21, ¶ 5, 437 P.3d 216. Before discussing this case, we must look at the first appeal in that case, *Sequel Youth & Family Services LLC v. Ayisi*, 2018 OK CIV APP 7, 412 P.3d 107 (*Ayisi 1)*, in which the Court took the opportunity to expatiate about § 2(9)(b)(5), § 2(9)(b)(6), and "major cause." In *Ayisi 1*, the Court was confronted with whether an ALJ properly found a claim compensable after claimant fell and struck both knees. *Id.* ¶¶ 1-2. The "[c]laimant testified she was not having any problems with her knees prior to the accident, though she testified she had knee surgery performed on her right knee – a 'right knee arthroscopic procedure' – in the year 2000." *Id.* ¶ 3. She testified she had no restrictions on her right knee, had been working for 16 years before she fell, and had never received any treatment on her left knee. *Id.* The claimant's employer denied that the injury "'was solely caused by her accident'" and argued the injury was specifically excluded by 85A O.S. § 2(9)(b)(5) "because '[t]he only diagnosis in any medical record is osteoarthritis.'" *Id.* ¶ 5.

¶21 The *Ayisi 1* Court noted that a compensable injury as defined by 85A O.S. Supp. 2014 § 2(9)(a) "'means damage or harm to the physical structure of the body . . . caused solely as the result of either an accident, cumulative trauma or occupational disease arising out of the course and scope of employment.'" *Id.* ¶ 12. It noted that the Legislature specifically excluded:

> "(5) any strain, degeneration, damage or harm to, or disease or condition of, the eye or musculoskeletal structure or other body part resulting from the natural results of aging, osteoarthritis, arthritis, or degenerative process including, but not limited to, degenerative joint disease, degenerative disc disease, degenerative spondylosis/spondylolisthesis and spinal stenosis, or
>
> (6) any preexisting condition except when the treating physician clearly confirms an identifiable and significant aggravation incurred in the course and scope of employment."

Id. (quoting 85A O.S. Supp. 2014 § 2(9)(b)(5-6)). The Court cited *Estenson Logistics v. Hopson*, 2015 OK CIV APP 71, 357 P.3d 486, a case also cited in this case by Claimant:

> a separate division of this Court stated that a claimant's "degenerative joint disease in his left hip" was compensable if the claimant "show[ed] that there was physical damage or harm caused by an on-the-job accident and that his treating physician confirmed an identifiable and significant aggravation." *Id.* ¶ 10. Thus, the *Hopson* Court, in effect, read subsections 2(9)(b)(5) and (6) together such that the claimant's degenerative joint disease constituted a "preexisting condition" subject to the exception set forth in § 2(9)(b)(6).

Ayisi, 2018 OK CIV APP 7, ¶ 13. The *Ayisi 1* Court noted that pursuant to the Administrative Workers' Compensation Act (AWCA), "the term 'preexisting condition' has a limited definition" and "'means any illness, injury, disease, or other physical or mental condition, whether or not work-related, for which medical advice, diagnosis, care or treatment was recommended or received preceding the date of injury[.]'" *Id.* ¶ 15 (quoting 85A O.S. Supp. 2014 § 2(36)). The *Ayisi 1* Court noted that the version of § 2 in effect when the claimant was injured did not "contain[] any mention of the 'major cause' test used, in past cases, to differentiate those degenerative conditions which are not compensable

because they are the natural result of aging from those which are compensable because they are the result of the employment." *Id.* ¶ 20.3 The *Ayisi 1* Court concluded:

> If possible, an interpretation of the "caused solely" language found in § 2(9)(a) which, among other things, gives effect to this major cause provision and harmonizes it with other provisions in the act, which avoids rendering § 2(9)(b)(5) a vain and useless provision, and which avoids serious constitutional pitfalls, will be adopted. In the context of the present case involving osteoarthritis, we conclude it is the legislative intent that osteoarthritis resulting from the natural results of aging is not compensable unless the employment is the major cause of the deterioration or degeneration and such a finding is supported by objective medical evidence.

Id. ¶ 23 (footnote omitted). The Court vacated the WCC's order and remanded the "case to the ALJ for further proceedings." *Id.* ¶ 24.

¶22 In *Ayisi v. Sequel Youth & Family Services, LLC,* 2019 OK CIV APP 21, 437 P.3d 216 (*Ayisi 2*), this Court reviewed the WCC's decision after the case had been remanded. This Court noted that the claimant's "medical evidence generated after the accident revealed that the primary injury or condition in [c]laimant's knees is osteoarthritis." *Id.* ¶ 1. The WCC's decision affirmed the ALJ's decision denying the claim for compensation because her "employment was not the major cause of her osteoarthritis in her knees." *Id.* ¶ 4. "The issue arose whether [c]laimant should at least be found to have sustained a compensable injury to her right knee as a result of an aggravation of a preexisting condition under § 2(9)(b)(6)." *Id.* The WCC concluded that this Court in *Ayisi 1* "'expressly held that [c]laimant's osteoarthritis is compensable only if her employment is the major cause of the degeneration in her knees.'" *Id.* The *Ayisi 2* Court instructed:

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

Id. ¶ 5 (footnote omitted). The Court continued:

> With regard to Claimant's left knee, however, we explained in the prior appeal that the ALJ concluded there was no "preexisting condition as defined in the AWCA[.]" *Ayisi*, [2018 OK CIV APP 7], ¶ 15. Thus, we concluded, at least impliedly, that the lower court erred in awarding compensation for the left knee under § 2(9)(b)(6). We further concluded that Claimant could still receive compensation for her left knee under § 2(9)(b)(5) if the major cause of her osteoarthritic condition in her left knee was her employment. Because the trial court's determination on remand that the major cause of Claimant's osteoarthritis is not work-related is supported by substantial evidence, we conclude compensation for Claimant's left knee was appropriately denied on remand. *See Gillispie v. Estes Exp. Lines, Inc*., 2015 OK CIV APP 93, ¶ 15, 361 P.3d 543 (On fact questions, this Court will review the record to determine if there is substantial evidence to support the decision.).

Id. ¶ 6 (footnote omitted). The *Ayisi 2* Court did not reach the same conclusion regarding the right knee. The Court noted that, on remand, the ALJ determined "that the major cause of [c]laimant's condition in her right knee is not work-related," and the Court concluded the ALJ's determination on this issue was "also supported by substantial evidence." *Id.* ¶ 7. The Court noted, however, the ALJ had previously found the claimant sustained an aggravation of preexisting condition "based on the fact that [c]laimant had an arthroscopic procedure performed on her right knee approximately sixteen years before the accident." *Id.* The Court concluded, "Regardless of the distance in time between the accident and this procedure, however, the findings that Claimant had a 'preexisting condition' in her right knee at the time of the accident, and that this is the condition for which treatment was provided, are supported by substantial evidence." *Id.* The Court noted that it was "undisputed the treating physician confirmed an identifiable and significant aggravation occurred to that condition in the course and scope of [c]laimant's employment." *Id.* This Court held the ALJ appropriately found the claimant sustained a compensable injury pursuant to § 2(9)(b)(6). *Id.*

¶23 We find the reasoning of *Ayisi 2* persuasive and applicable to this case. Even if Claim-

ant'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 § 2(9)(b)(5), the WCC was required to determine if her injury was compensable pursuant to § 2(9)(b)(6) because Claimant's treating physician, Dr. Hendricks, "found that Claimant sustained a significant and identifiable aggravation of her preexisting injury."

¶24 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 Dr. Hendricks' 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 AWCA.

CONCLUSION

¶25 The decision of the WCC is vacated and the case is remanded to the ALJ for further proceedings consistent with this Opinion.

¶26 **VACATED AND REMANDED FOR FURTHER PROCEEDINGS**.

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

August 23, 2019

ORDER

Petitioner's Motion for Publication of Opinion, which was filed of record on July 12, 2019, is hereby granted pursuant to Okla.Sup.Ct.R. 1.200(c)(2).

SO ORDERED THIS 21st day of August, 2019. ALL JUDGES CONCUR.

/s/ DEBORAH B. BARNES
Presiding Judge, Division IV

JANE P. WISEMAN, VICE-CHIEF JUDGE:

1. The file stamp date of the Joint Petition order in the record is August 30, 2004.

2. Employer's exhibit indicates the date for the switch was November 7, 2012.

3. Title 85A O.S. § 2(9)(a) was amended by Laws 2019, HB 2367, c. 476, § 1, effective May 28, 2019, to provide: "'Compensable injury' means damage or harm to the physical structure of the body, or damage or harm to prosthetic appliances, including eyeglasses, contact lenses, or hearing aids, of which the major cause is either an accident, cumulative trauma or occupational disease arising out of the course and scope of employment." (Emphasis added.)

Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS
Thursday, September 12, 2019

F-2017-67 — Cedric Dwayne Poore, Appellant, was tried by jury in Case No. CF-2013-865, in the District Court of Tulsa County, of four counts of Murder in the First Degree (Counts 1-4) and two counts of Robbery with a Firearm, After Former Conviction of Two Felonies (Counts 5-6). The jury acquitted Appellant of Possession of a Firearm, After Former Conviction of a Felony (Count 7). The jury returned a verdict of guilty and recommended as punishment sentences of life imprisonment without the possibility of parole on each of Counts 1-4; and life imprisonment plus a $10,000.00 fine on both Counts 5 and 6. The Honorable Kurt G. Glassco, District Judge, sentenced Appellant in accordance with the jury's verdicts on Counts 1-4 and found that Appellant's Counts 5-6 convictions merged with the four felony murder counts. From this judgment and sentence, Cedric Dwayne Poore has perfected his appeal. AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Recuses; Lumpkin, J., Concurs; Rowland, J., Concurs.

F-2018-586 — Appellant, Traevon Dontyce Harbert, was tried by jury and convicted of Count 1, First Degree Murder, Count 2, Felon in Possession of a Firearm, and Count 3, Conspiracy to Commit Murder, after former conviction of two or more felonies, in the District Court of Oklahoma County Case Number CF-2016-2482. The jury recommended punishment as follows: Count 1, imprisonment for life; Count 2, two years imprisonment; and Count 3, four years imprisonment. The trial court sentenced Appellant accordingly and ran the sentences consecutively. It is from this judgment and sentence that Appellant appeals. The Judgment and Sentence is AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur; Hudson, J., Concur; Rowland, J., Recuse.

F-2018-313 — Appellant, Juan Jose Nava-Guerra, was tried by jury and convicted of Count 1, Aggravated Trafficking in Illegal Drugs, and Count 2, Conspiracy to Commit Aggravated Trafficking in Illegal Drugs, in the District Court of Canadian County Case Number CF-2014-587. The jury recommended as punishment 105 years imprisonment on each count. The trial court sentenced Appellant accordingly and ordered the sentences to run concurrently to one another. It is from this judgment and sentence that Appellant appeals. The Judgment and Sentence are AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur in Results; Hudson, J., Concur; Rowland, J., Concur.

F-2018-194 — William Harold Pittman, II, Appellant, was tried by jury for the crimes of Count 1: Sexual Abuse - Child Under Twelve and Count 2: Child Sexual Abuse, in Case No. CF-2015-285, in the District Court of Caddo County. The jury returned a verdict of guilty and recommended as punishment thirty years imprisonment on each count. The Honorable Wyatt Hill, Associate District Judge, sentenced accordingly, ordering both sentences to run consecutively and imposed various costs and fees. From this judgment and sentence William Harold Pittman, II has perfected his appeal. AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs; Rowland, J., Concurs.

F-2018-309 — Adrian Escajeda, Appellant, was tried by jury for the crime of Murder in the First Degree, in Case No. CF-2017-226, in the District Court of Oklahoma County. The jury returned a verdict of guilty and recommended as punishment life imprisonment. The Honorable Michele D. McElwee, District Judge, sentenced accordingly and imposed various costs and fees and ordered credit for time served. From this judgment and sentence, Adrian Escajeda has perfected his appeal. AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs; Rowland, J., Recuses.

F-2018-358 — Sean Daniel Simmons, Appellant, was tried by jury for the crime of domestic abuse by strangulation (Counts 1-3) in Case No. CF-2017-1371 in the District Court of Oklahoma County. The jury returned a verdict of guilty and set punishment at five years imprisonment on each count. The trial court sen-

tenced accordingly and ordered the sentences served consecutively. From this judgment and sentence Sean Daniel Simmons has perfected his appeal. The Judgment and Sentence is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs in result; Hudson, J., concurs in result; Rowland, J., concurs in result.

F-2018-565 — Kimberly Ann Smith-Gentile, Appellant, was tried by jury on ten counts of Possessing Child Pornography in Case No. CF-2017-342 in the District Court of Pottawatomie County. The jury returned a verdict of guilty and recommended as punishment ten years imprisonment on Count 1-8 and 10, and 20 years on Count 9. The trial court sentenced accordingly and ordered the sentences to run concurrently. From this judgment and sentence Kimberly Ann Smith-Gentile has perfected her appeal. AFFIRMED. Opinion by: Kuehn, V.P.J.; Lewis, P.J., concur; Lumpkin, J., concur; Hudson, J., concur; Rowland, J., concur.

RE-2018-868 — On August 22, 2017, Appellant Misty Dawn Barrett entered a plea of guilty in Case Nos. CF-2016-439 and CF-2017-127 and no contest in Case Nos. CF-2017-126 and CF-2017-129. Appellant was convicted and sentenced to the following terms of imprisonment: ten years for Count 1, one year for Count 2, and thirty days for Count 3 in Case No. CF-2016-439; ten years in Case No. CF-2017-126; ten years for Count 1, five years for Count 2, and one year each for Counts 3-5 in Case No. CF-2017-127; and one year for Count 1 and five years for Count 2 in Case No. CF-2017-129. The sentences were suspended and ordered to be served concurrently. On July 25, 2018, the State filed a second Application to Revoke Suspended Sentence seeking to revoke Appellant's remaining suspended sentences. Following a revocation hearing, the trial court revoked Appellant's remaining suspended sentences. Misty Dawn Barrett has perfected the appeal of the revocation of her suspended sentences. AFFIRMED. Opinion by: Kuehn, V.P.J. Lewis, P.J.: concur;; Lumpkin, J.: concur;; Hudson, J.: concur;; Rowland, J.: concur.

RE-2018-1039 — Appellant Frank Revilla Paiz plead guilty to multiple offenses in Woodward County Case No. CF-2016-114, and was sentenced to eight years and one year respectively for Counts 2 and 4. The sentences were ordered to be served concurrently and were suspended in full, subject to terms and conditions of probation. Paiz also pled guilty to Possession of Controlled Dangerous Substance – Methamphetamine (Count 1) and Unlawful Possession of Drug Paraphernalia (Count 2) in Woodward County Case No. CF-2016-117. He was sentenced to eight years imprisonment for Count 1 and one year imprisonment for Count 2, all suspended, subject to terms and conditions of probation. The sentences were ordered to be served concurrently with each other and with the sentences assessed in Case No. CF-2016-114. Paiz subsequently pled guilty to Possession of Controlled Dangerous Substance – Methamphetamine in Woodward County Case No. CF-2017-142. He was sentenced to ten years imprisonment, to run concurrently with the sentences in Case Nos. CF-2016-114 and CF-2016-117. The sentences in all three cases were suspended pending completion of a Department of Corrections approved drug treatment program. On September 10, 2018, the State filed its second amended application to revoke Paiz's suspended sentences in all three cases, alleging multiple probation violations. Paiz stipulated to the allegations in the application to revoke and the Honorable Don A. Work, Associate District Judge, revoked 2,495 days of Paiz's suspended sentences in each case. Paiz appeals. The revocation of Paiz's suspended sentences is AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs.

Thursday, September 19, 2019

F-2017-1019 — Leslie Kevin Johnson, Appellant, was tried by jury for the crime of Child Sexual Abuse, in Case No. CF-2016-312, in the District Court of LeFlore County. The jury returned a verdict of guilty and recommended as punishment twenty-five years imprisonment and a $5,000.00 fine. The Honorable Marion Fry, Associate District Judge, sentenced accordingly. Judge Fry also imposed a three year term of post-imprisonment supervision and various costs and fees. From this judgment and sentence, Leslie Kevin Johnson has perfected his appeal. AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur; Lumpkin, J., Concur; Rowland, J., Concur.

F-2018-0812 — Appellant, Cesar Jurado, entered pleas of guilty in the District Court of Oklahoma County on December 2, 2015, in the following cases: Case No. CF-2014-8607: Count 1 – Possession of a Controlled Dangerous Substance With Intent to Distribute, a felony; Count 2 – Driving While Privilege Suspended, a misdemeanor; and Count 3 – Failure to Carry

Valid Security Verification, a misdemeanor. Case No. CF-2015-5536: Count 1 – Possession of a Controlled Dangerous Substance With Intent to Distribute, a felony; and Count 3 – Possession of an Offensive Weapon While Committing a Felony, a felony. [Count 2 – Possession of a Controlled Dangerous Substance, and Count 4 – Possession of an Offensive Weapon While Committing a Felony were dismissed.] And, Case No. CF-2015-6471: Possession of a Controlled Dangerous Substance With Intent to Distribute, a felony. Sentencing was delayed until September 11, 2016, while Appellant was committed to the Delayed Sentencing Program for Youthful Offenders. After successfully completing the Delayed Sentencing Program, Appellant's sentences in all three cases were deferred until June 14, 2026. The State filed an application to accelerate Appellant's deferred sentences on January 18, 2018. Following a hearing on July 26, 2018, before the Honorable Bill Graves, District Judge, the State's motion was granted. Appellant was sentenced in Case No. CF-2014-8607 to life imprisonment on Count 1, one year on Count 2 and thirty days on Count 3. In Case No. CF-2015-5536 Appellant was sentenced to life imprisonment on Count 1 and ten years on Count 3. Appellant was also given life imprisonment in Case No. CF-2015-6471. The sentences in these three cases were ordered to run concurrently. Appellant appeals from the acceleration of his deferred sentences. The acceleration of Appellant's deferred sentences is AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J.: concur; Kuehn, V.P.J.: concur; Lumpkin, J.: concur; Rowland, J.: recuse.

COURT OF CIVIL APPEALS
(Division No. 2)
Tuesday, September 10, 2019

117,440 — Donnie Sullivan and Brittany Sullivan, Plaintiffs/Appellees, vs. Get Right Auto, LLC, Defendant/Appellant. Appeal from an Order of the District Court of Tulsa County, Hon. Jefferson D. Sellers, Trial Judge. This is an interlocutory appeal by Defendant from the district court's order denying Defendant's motion to compel arbitration and motion to reconsider denial of the motion to compel. It is undisputed that Plaintiff Donnie Sullivan and Defendant entered into a contract for the purchase of a vehicle in a transaction that occurred on September 29, 2017. The court, after hearing evidence on Defendant's motion, discredited the testimony of Defendant's key witnesses, finding one not credible and the other was "mistaken" when he testified that Donnie Sullivan was present in person and signed the arbitration agreement on the day in question. Looking to the facts as resolved by the trial court, reasonable evidence supports its decision that no agreement to arbitrate was formed as part of the contract to purchase the vehicle in question. We agree with the trial court's decision to deny Defendant's motion to compel arbitration and its denial of reconsideration was not an abuse of discretion. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Thornbrugh, J.; Fischer, P.J., and Reif, S.J. (sitting by designation), concur.

Thursday, September 12, 2019

117,579 — In the Matter of J.V.B., II, Child under 18 years of age: Elissa Foster, Appellant, vs. State of Oklahoma ex rel., Department of Human Services, Appellee. Appeal from an Order of the District Court of Tulsa County, Hon. Wilma Palmer, Trial Judge. Appellant, the biological Aunt of J.V.B., II (Child), seeks review of a trial court order dismissing her petition to adopt Child and rejecting her challenge to Child's placement in a non-kinship home by the Department of Human Services (DHS). Aunt erroneously contends that DHS failed to comply with Oklahoma statutes concerning kinship placement. The facts are undisputed that DHS initially considered and approved Aunt as Child's kinship foster placement, but due to behavioral and other issues presented by Aunt, DHS eventually removed Child from her care and custody. DHS thus complied with the statutory requirements, and was not required to reconsider Aunt as a potential foster placement after she became disqualified. The circumstances before and after Child's removal from Aunt's care were discussed at length in testimony before the trial court, and DHS witnesses testified that Child is thriving in his current non-kinship placement. Aunt has failed to present a record demonstrating abuse of discretion by the trial court in the orders from which appeal is taken, and we find the orders are not clearly against the weight of the evidence. Accordingly, the trial court's orders are affirmed. AFFIRMED. Opinion from the Court of Civil Appeals, Division II by Thornbrugh, J.; Fischer, P.J., and Reif, S.J. (sitting by designation), concur.

(Division No. 3)
Friday, September 6, 2019

116,103 — Lynn Puffinbarger, Plaintiff/Appellee, vs. Clinton Michael Green, Defendant/Ap-pellant. Appeal from the District Court of Alfalfa County, Oklahoma. Honorable Loren Angle, Trial Judge. Defendant/Appellant Mike Green (Green) appeals from an order determining that Plaintiff/Appellee Lynn Puffinbarger (Puffinbarger) is the fee simple owner of certain real estate located in Alfalfa County (the Disputed Property) and issuing a permanent injunction restricting Green from interfering with Puffinbarger's use and enjoyment of the property. The Disputed Property is a 22-foot strip of land on Green's northern boundary. Green asserted he believed the Disputed Property belonged to him, and that he maintained and improved it. Puffinbarger instituted an action to quiet title in the Disputed Property. Based upon our review of the record and applicable law, we conclude that the trial court did not err in determining that Green failed to establish the elements of adverse possession. Similarly, we find that the trial court's determination that Green did not establish title to the property by acquiescence was not against the clear weight of the evidence. The order of the trial court is AFFIRMED. Opinion by Swinton, J.; Mitchell, P.J., and Bell, J., concur.

116,684 — In Re the Marriage of Franklin: Stuart Franklin, Petitioner/Appellant, vs. Shannon Franklin, Respondent/Appellee. Appeal from the District Court of Rogers County, Oklahoma. Honorable David Smith, Judge. In this dissolution of marriage proceeding, Petitioner/Appellant, Stuart Franklin (Husband), appeals from the trial court's decree characterizing a portion of the home occupied by the parties during the marriage as marital property. Husband asserts the home should have been awarded to him as separate property because he purchased the home prior to marriage and the home did not increase in value as a result of the parties' joint efforts during marriage. Husband also claims the trial court's division of marital property was inequitable and should be reversed. After reviewing the record, we find the trial court abused its discretion and held contrary to the evidence when it failed to characterize the marital home as separate property. That portion of the decree is reversed and remanded to the trial court. To effectuate a fair and equitable division of the marital estate, Wife, on remand, shall be afforded the opportunity to present proof of any enhanced value of such separate property attributable to the joint efforts of the parties. Furthermore, the trial court did not evaluate the rental properties with disputed values. Consequently, this Court cannot ascertain whether the property division of such rental properties is equitable. The trial court's division and award of the rental properties is reversed and remanded. On remand, the trial court is instructed to evaluate the rental properties and equitably divide the same in a manner consistent with this opinion. In all other respects, the trial court's valuation and division of property is affirmed. AFFIRMED IN PART, REVERSED IN PART AND REMANDED. Opinion by Bell, J.; Mitchell, P.J., and Swinton, J., concur.

117,396 — Earl Wheeler, an individual and as President of Timberlane Unit Ownership Association, Inc., Plaintiff/Appellant, v. Lewis Hoort, an individual; William Bowing, an individual; and Ken Meredith, an individual, Defendants/Appellees, and Arvest Bank, Intervenor, and Timerlane Unit Ownership Association, Inc., Interested Party. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Linda G. Morrissey, Judge. Plaintiff/Appellant Earl Wheeler (Wheeler) appeals from an order of the trial court denying his motion for an emergency temporary injunction to prevent Defendants/Appellees Lewis Hoort, William Bowling, and Ken Meredith from turning off the electricity to condominium units owned by Wheeler. On appeal, Wheeler contends the court erred by denying the injunction because (1) he satisfied the criteria required for an emergency injunction; (2) Defendants are barred by issue preclusion from arguing Wheeler was delinquent on his association dues; and (3) the Oklahoma Unit Ownership Estate Act provides the exclusive remedy for failure to pay association dues. Wheeler also claims the court erred by refusing to admit an affidavit. We find the court did not abuse its discretion and AFFIRM. Opinion by Mitchell, P.J.; Bell, J., and Swinton, J., concur.

117,461 — Loren Simunek, Plaintiff/Appellant, vs. Oklahoma Farm Bureau Mutual Insurance Company and Ag Security Insurance Company, Defendants/Appellees. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Patricia G. Parrish, Judge. Plaintiff/Appellant, Loren Simunek, appeals from the trial court's grant of

summary judgment in favor of Defendants/Appellees, Oklahoma Farm Bureau Mutual Insurance Company (OFB) and Ag Security Insurance Company (AgSecurity), in Plaintiff's action alleging he is entitled to uninsured/under insured motorist (UM) coverage under a policy issued by AgSecurity. On April 6, 2015, Plaintiff was injured while driving a farm pick-up truck, owned by his father, and received the UM coverage and liability limits of the farm truck policy issued by OFB. Plaintiff then sought UM benefits under the AgSecurity policy issued for his father's semi-tractor truck that was not involved in the accident. Among other things, Plaintiff claimed his status as a "listed driver" in his father's insurance application qualified him for UM coverage. The trial court granted summary judgment to the insurers and Plaintiff appealed. We hold the insurance application is not part of the Policy at issue and the Policy is not ambiguous. Because the Policy is not ambiguous, the doctrine of reasonable expectations does not apply. Title 36 O.S. Supp. 2014 §3636 does not mandate UM coverage because Plaintiff does not fall within the Policy's definition of an insured. AFFIRMED. Opinion by Bell, J.; Mitchell, P.J., and Swinton, J., concur.

Friday, September 13, 2019

116,696 — Larry Edgar, Plaintiff/Appellant, vs. The Charles Machine Works, Inc., Defendant/Appellee. Appeal from the District Court of Noble County, Oklahoma. Honorable Phillip A. Ross, Trial Judge. Larry Edgar (Plaintiff) appeals a trial court order sustaining a motion to dismiss filed by The Charles Machine Works, Inc., d/b/a Ditch Witch (Defendant). The trial court dismissed Plaintiff's amended petition alleging wrongful discharge for failure to state a claim for which relief may be granted. Taking both petitions allegations as true, including all reasonable inferences, we cannot say it is impossible for Plaintiff to prove a set of facts which would entitle him to relief. Although Plaintiff's petition alleging wrongful discharge was properly dismissed because it is time-barred, the trial court erred when it dismissed the Amended Petition for failure to state a claim as to the allegation of an implied contract. AFFIRMED IN PART AND REVERSED IN PART. Opinion by Swinton, J.; Mitchell, P.J., and Bell, J., concur.

(Division No. 4)
Thursday, September 5, 2019

117,147 (Companion with Case No. 116,912) — American Farmers & Ranchers Mutual Insurance Company, Plaintiff/Appellant, vs. Oklahoma City University, Defendant/Third Party Plaintiff/Appellee. Appeal from an order of the District Court of Oklahoma County, Hon. Lisa Davis, Trial Judge, granting Oklahoma City University's motion for attorney fees. In the underlying breach of contract action, the trial court granted partial summary judgment in favor of OCU. American Farmers dismissed without prejudice its remaining claims against OCU and appealed the trial court's grant of summary judgment (Case No. 116,912). After American Farmers filed its petition in error in Case No. 116,912, the trial court granted OCU's motion for attorney fees. This Court issued its Opinion reversing the trial court's grant of summary judgment in favor of OCU and remanded the case for further proceedings. Mandate has been issued. American Farmers filed this appeal asserting the attorney fees award should be reversed. OCU filed a motion to dismiss this appeal asserting that it is now moot. The trial court awarded OCU attorney fees as the prevailing party on American Farmers' breach of contract claim. OCU is no longer the prevailing party and is therefore no longer eligible for a prevailing party attorney fee award. This appeal is dismissed. DISMISSED. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, V.C.J.; Rapp, J., and Thornbrugh, J. (sitting by designation), concur.

117,668 — Mid America Mortgage, Inc., an Ohio Corporation, Plaintiff/Appellee, vs. Kristopher W. Thompson, Defendant/Appellant. Appeal from an order of the District Court of Comanche County, Hon. Emmit Tayloe, Trial Judge, granting summary judgment in favor of Mid America Mortgage, Inc., entering a decree of foreclosure, and granting judgment in favor of Mid America on Thompson's counterclaims. Although Mid America may be the entity entitled to enforce the note, from the documents it attached to its petition and its statement of material facts in its motion for summary judgment, there is a break in the chain of indorsements making the transfer to Mid America improper. This created a question of fact that remains in dispute and should have precluded the entry of summary judgment. Because issues of material fact remain in dispute, we reverse the summary judgment

in favor of Mid America and remand this matter for further proceedings. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, V.C.J.; Barnes, P.J., and Rapp, J., concur.

Friday, September 6, 2019

117,883 — Russell D. Anderson, Petitioner, v. Multiple Injury Trust Fund and the Workers' Compensation Court of Existing Claims, Respondents. Proceeding to review an order of a three-judge panel of the Workers' Compensation Court of Existing Claims, Hon. L. Brad Taylor, Trial Judge. Petitioner seeks review of the panel's order denying his claim against the Multiple Injury Trust Fund for permanent total disability benefits. Because the issue is whether there is a material increase in disability that is the result of the combination of disabilities, we reject Petitioner's argument that, upon finding him to be a physically impaired person at the time of his most recent work-related injury, the panel was required to find him to be entitled to at least some amount of compensation from the Fund. We also reject Petitioner's argument that the panel's order is not responsive to the issues presented. Consequently, we sustain the panel's order denying Petitioner's claim against the Fund. SUSTAINED. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Wiseman, V.C.J., concurs, and Rapp, J., dissents.

Friday, September 13, 2019

117,596 — In the Matter of G.S. and D.S., Deprived Children, Florisela Silva, Natural Mother, Appellant, v. State of Oklahoma, Appellee. Appeal from the District Court of Tulsa County, Hon. Doris Fransein, Trial Judge. In this termination of parental rights case, Florisela Silva (Mother) appeals from the trial court's order sustaining the State of Oklahoma's (State) petitions to terminate Mother's parental rights to G.S. and D.S., who are siblings, because she failed to protect G.S. from heinous and shocking abuse. Mother argues State failed to establish by clear and convincing evidence that she did not take reasonable action to remedy or prevent the child abuse inflicted upon G.S. by Mother's live-in boyfriend because the "'reasonableness' of her actions must be viewed in light of the trauma and torture she suffered at the hands of [her boyfriend]." Even if the reasonableness of a parent's actions or inaction under 10A O.S. Supp. 2018 § 1-1-105(26) includes consideration of his or her fear of the perpetrator of the child's abuse, Mother's argument on appeal assumes her version of the facts is the most credible and only version in the record or reasonably inferred from the evidence presented. Although Mother lived in a domestic violence situation with her boyfriend for several months, State presented clear and convincing evidence that Mother could have sought medical help for her infant daughter earlier than eight days after the child's leg was broken by the boyfriend, and could have sought protection from her boyfriend, if she feared him, and failed to do so when presented with the opportunity to seek protection from the boyfriend, and Mother gave implausible accounts of how G.S.'s leg was broken. Based on our review of the record, we conclude State met its burden of proof by clear and convincing evidence and thus the trial court did not err in ordering the termination of Mother's parental rights to G.S. and D.S. Accordingly, we affirm. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Wiseman, V.C.J., and Rapp, J., concur.

ORDERS DENYING REHEARING
(Division No. 1)
Tuesday, September 10, 2019

117,955 — Mandee James-Vansandt, Plaintiff/Appellant, vs. Sarah Passmore, Defendant/Appellee. Appellant's Petition for Rehearing, filed September 3, 2019, is *DENIED*.

(Division No. 4)
Wednesday, September 11, 2019

116,927 — Sharon Morrison, Plaintiff/Appellant, vs. David A. Carpenter, d/b/a Carpenter Law Office, Defendant/Appellee. Appellant's Petition for Rehearing is hereby *DENIED*.

Friday, September 13, 2019

117,114 — Mehlburger Brawley, Inc., an Oklahoma corporation, Plaintiff/Appellee, vs. Derryberry Naifeh, L.L.P., an Oklahoma limited liability partnership; Douglas A. Rice, individually and Pete G. Serrata, III, individually, Defendants/Appellees, and Craig Shew, Appellant. Appellant's Petition for Rehearing is hereby *DENIED*.

Classified Ads

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HANDWRITING IDENTIFICATION
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.

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OFFICE SPACE

LUXURY OFFICE SPACE AVAILABLE - One fully furnished office available for $955/month and one smaller (unfurnished) office available for $670/month lease in the Esperanza Office Park near NW 150th and May Avenue. The Renegar Building offers a 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. Gregg Renegar 405-488-4543.

SOUTH TULSA LAW FIRM with three attorneys (fourth attorney leaving at end of January 2020 or sooner) seeking attorney with some existing clients to join office and share expenses. Some referrals would be available. If interested in joining a congenial group, contact us at "Box EE," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

OFFICE SPACE FOR LEASE: 4501 North Western Ave. Move-in ready. Recently remodeled. Prime location, reception area, conference room, kitchen and five private offices. Ample parking front/back. Interested parties call 405-672-7211.

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.

SHARE LAW OFFICE SPACE. 1800 East Memorial Road. Remodeled, internet, copy room, receptionist, conference rooms, on-site free parking. No lease required. 478-5655.

POSITIONS AVAILABLE

ESTABLISHED, AV-RATED MIDTOWN TULSA LAW FIRM SEEKING ASSOCIATES with 0 to 5 years of experience to assist with insurance defense practice. Great growth potential. Excellent benefits. Send resume to "Box CC," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

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.

DURBIN LARIMORE & BIALICK PC has an excellent opportunity for attorneys with 5-7 years of litigation experience. Those candidates with employment, oil and gas and/or environmental law experience a plus, but not required. Generous benefits package and competitive salary. Please send cover letter, resume and references to radams@dlb.net.

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.

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.

THE SAC AND FOX NATION IS NOW ACCEPTING APPLICATIONS/RESUMES for the position of tribal attorney. The tribal attorney shall represent the nation on all legal matters excluding the prosecution of criminal and juvenile matters. Applications with resumes must be mailed to the Tribal Secretary, 920883 South Highway 99, Building A, Stroud, OK 74079. Deadline for receiving applications is Nov. 6, 2019, by 4 p.m.

THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT IS SEEKING QUALIFIED APPLICANTS for the position of branch librarian located in Oklahoma City, Oklahoma. For the full announcement and application instructions, please visit: https://www.ca10.uscourts.gov/hr/jobs.

POSITIONS AVAILABLE

DURBIN LARIMORE & BIALICK PC has an excellent opportunity for attorneys with 5-7 years' experience in corporate, real estate, business and commercial law. Those candidates with commercial litigation, probate and estate administration experience are a plus. Generous benefits package and competitive salary. Please send cover letter, resume and references to radams@dlb.net.

JENNINGS TEAGUE, AN AV RATED DOWNTOWN OKC LITIGATION FIRM whose primary areas of practice are insurance defense, products liability and transportation defense, seeks an associate attorney with 5-10 years of experience. The position will encompass all phases of litigation, including pleadings and motion practice, discovery, depositions, investigation, research and trial. Compensation commensurate with experience. Please submit cover letter, resume, writing sample and references to kbambick@jenningsteague.com.

TULSA LAW FIRM LOOKING FOR ATTORNEYS WHO WANT TO BUILD THEIR PRACTICE without the hassle of daily administration. We take care of the administration and help you market you. The Tulsa founding attorneys have practiced many years and recently were affiliated with a large international law firm headquartered in D.C. We realized there is something missing in Tulsa that is starting to take place in other major cities - law firms that are designed to help lawyers do what they do best - practice law. This is not an office sharing arrangement or a virtual office. This is a law firm working as one unit with the firm taking care of administration headaches while the attorneys work together to help each other grow their business and become more profitable. We are looking for talented attorneys or groups of attorneys with a proven book of business who want to be a part of a law firm that is the future of law firms. Most sole practitioners and many law firms are not up to date in how they operate, are inefficient and do not work together to build up each member. We are very interested in attorneys who practice the following types of law, but if your practice is not listed, do not let that stop you from contacting us: corporate law, oil and gas, aviation, government contracts, intellectual property, banking law, labor (defense side), employee benefits and executive compensation and real estate. We take care of the overhead - bar dues, legal liability insurance, office rental, phones, computers and software, billing, internet, etc. We provide benefits. We market you individually and the group as a team to maximize growth in clientele and income. Contact tsullivent@sflegalgroup.co.

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 405-416-7086 or heroes@okbar.org.

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INSURANCE LAW:

New Developments and Trends from Regulation to Litigation

FRIDAY,
OCTOBER 18, 2019
9 A.M. - 2:50 P.M.

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

MCLE 6/1

PROGRAM PLANNER/ MODERATOR:
Kevin D. Gordon,
Crowe & Dunlevy

Learn about new initiatives from the Oklahoma Insurance Department and about trending issues in property and casualty insurance, health insurance, life and disability insurance, and bad faith litigation.

TOPICS INCLUDE:

- **The Year in Review**
- **Bad Faith Litigation Forum**
- **Emerging Health Insurance Issues**
- **Trending Issues in Property and Casualty Insurance**
- **Update from the Regulators**
- **And more!**

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TUITION: Early-bird registration by October 3, 2019 is $150. Registrations received after October 3, 2019 is $175 and walk-ins are $200. Registration includes continental breakfast and lunch. For a $10 discount, enter coupon code FALL2019 at checkout when registering online for the in-person program. Registration for the live webcast is $200. Members licensed 2 years or less may register for $75 for the in-person program (late fees apply) and $100 for the webcast. All programs may be audited (no materials or CLE credit) for $50 by emailing ReneeM@okbar.org to register.

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THURSDAY, OCTOBER 10, 2019
9 A.M. - 2:50 P.M.

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

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PROGRAM PLANNERS:

Immigration Law Group Executive Board

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STEP-UP YOUR IMMIGRATION LAW PRACTICE

Cosponsored by the OBA Immigration Law Section

TOPICS INCLUDE:

- **Immigration Hurdles in Intercountry Adoption**
- **Ethical obligations when immigration implications may be involved**
- **How a criminal conviction, probation, or deferred sentence can impact your client's immigration status.**
- **What practitioners should know when representing non-citizens in litigation cases**

PRESENTERS:

- **Sean Dooley,** *Senior U.S. Probation Officer Sentencing Guidelines Specialist*
- **Marianne Blair,** *Professor Emeritus, Tulsa University College of Law*
- **Melissa Lujan,** *Melissa Lujan Law*
- **Lambert Dunn,** *Lambert Dunn and Associates*

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