THE OKLAHOMA BAR
Journal
Volume 90 — No. 20 — 10/26/2019

Court Issue

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continuing legal education

FRIDAY, NOVEMBER 22, 2019

9 - 11:40 A.M. (MORNING PROGRAM)
12:30 - 3:10 P.M. (AFTERNOON PROGRAM)

Oklahoma Bar Center
1901 N. Lincoln Blvd.
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MCLE 3/1 (MORNING PROGRAM)
MCLE 3/3 (AFTERNOON PROGRAM)

FEATURED PRESENTER:
Sean Carter,
Chief Humor Officer, Mesa CLE

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Legal Ethics with...

LAW HUMORIST SEAN CARTER

MORNING PROGRAM:

THE 2019 ETHY AWARDS

Each year, Hollywood celebrates the best performances in motion pictures at the Oscars. Well, each year, we note the worst ethics violations in the legal profession at the Ethys. Humorist Sean Carter will host the festivities

AFTERNOON PROGRAM:

1. IF YOU CAN'T SAY SOMETHING NICE, SHUT UP!: THE ETHICAL IMPERATIVE FOR CIVILITY
2. MAY IT DISPLEASE THE COURT?: KEEPING YOUR HEAD (AND YOUR LAW LICENSE) IN COURT
3. TECHNICAL FOULS: EVEN MINOR ETHICS VIOLATIONS CAN HAVE MAJOR CONSEQUENCES

Whether in open court, a deposition, or contract negotiation, lawyers who choose to "go low," run a high risk of bar discipline. Increasingly, disciplinary authorities are treating the once aspirational goal of civility as a mandate.

TUITION: Early registration by November 17, 2019, is $120 for either the morning or afternoon program or $200 for both programs. Registration received after November 17, 2019 will $145 for either the morning or afternoon program or $225 for both programs. Walk-ins will be $170 for either the morning or afternoon program or $250 for both programs. Registration for the full-day includes continental breakfast and lunch. For a $10 discount, enter coupon code FALL2019 at checkout when registering online for the in-person program. No other discounts apply. Registration for the live webcast is $150 each or $250 for both.

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Journal

Volume 90 – No. 20 – 10/26/2019

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The Oklahoma Association for Justice (OAJ) presents the

2019 Insurance, Tort & Workers' Compensation Update

Please join The Oklahoma Association for Justice and 2019 OAJ President Fletcher Handley for a reception honoring all new attorneys admitted in 2019 after the CLE.

Oklahoma City: November 7, 2019 at the Cox Convention Center, during the Oklahoma Bar Association's Annual Meeting (Ballroom A, 1 Myriad Gardens, Oklahoma City, OK 73102); followed by a hosted reception for all participants at The Manhattan, OKC, from 4:30 pm to 5:30 pm (Oklahoma Tower, 210 Park Ave. Suite 150, Oklahoma City, OK 73102). Admission to the reception is by OAJ or OBA badge only.

Tulsa: December 5, 2019 at the Renaissance Tulsa Hotel and Convention Center (Seville Ballroom, 6808 S. 107th E. Ave., Tulsa, OK 74133); followed by a hosted reception for all participants.

Get MCLE credit and learn the latest updates in insurance law,workers' comp, torts, and bad faith.

Presentations include:

- ❏ Malpractice Avoidance in Tort and Insurance Cases, materials written by Rex Travis, presented by Margaret Travis
- ❏ Bad Faith Update by Clifton Naifeh
- ❏ Uninsured Motorist Update by Rex Travis
- ❏ Insurance Law Update by Rex Travis
- ❏ Workers' Compensation Update by Jack Zurawik
- ❏ Tort Cases You Need to Know About by Rex Travis

Registration opens at 8:30 am; first presentation begins at 9:00 am; presentations conclude at approximately 3:45 pm.

Participants will receive 6 hours of mandatory CLE credit, including 1 hour of Ethics.

Newly admitted attorneys with bar dates in 2019 attend free! If you took the Oklahoma Bar Exam in either February or July 2019 and have joined the Oklahoma Bar, OAJ invites you to get ½ of your MCLE for 2020 and enjoy a hosted reception where you can meet your peers at no charge. We look forward to meeting you.

Register online at https://okforjustice.org, Member Center, CLE & Events

Oklahoma Bar Association

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2019 OK 64

IN RE: AMENDMENT TO THE OKLAHOMA SUPREME COURT RULE 1.60, 12 O.S. ch. 15, app.1.

S.C.A.D. No. 2019-86. October 8, 2019

ORDER

On October 7, 2019, the Oklahoma Supreme Court in Conference approved the attached amendment to Oklahoma Supreme Court Rule 1.60, Okla. Stat. tit. 12, ch. 15, app. 1. The amendment shall be immediately effective upon the filing of this order, and shall apply to all pending cases before this Court and the Court of Civil Appeals.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THE 7th DAY OF OCTOBER, 2019.

/s/ Noma D. Gurich
CHIEF JUSTICE

Gurich, C.J., Darby, V.C.J., Kauger, Combs and Kane, JJ., concur;

Winchester, Edmondson and Colbert, JJ., dissent.

Exhibit "A"

RULE 1.60 - DEFINITION OF INTERLOCUTORY ORDERS APPEALABLE BY RIGHT

Orders of the district court that are interlocutory and may be appealed by right in compliance with the rules in this part are those that:

(a) Grant a new trial or vacate a judgment on any ground, including that of newly discovered evidence or the impossibility of making a record (12 O.S. § 655, 12 O.S. § 952(b)(2));

(b) Discharge, vacate or modify or refuse to discharge, vacate or modify an attachment (12 O.S. § 993(A)(1));

(c) Deny a temporary injunction, grant a temporary injunction except where granted at an ex parte hearing, or discharge, vacate or modify or refuse to discharge, vacate or modify a temporary injunction (12 O.S. § 952(b)(2) and 12 O.S. § 993(A)(2));

(d) Discharge, vacate or modify or refuse to discharge, vacate or modify a provisional remedy which affects the substantial rights of a party (12 O.S. § 952(b)(2) and 12 O.S. § 993(A)(3));

(e) Appoint a receiver except where the receiver was appointed at an ex parte hearing, refuse to appoint a receiver or vacate or refuse to vacate the appointment of a receiver (12 O.S. § 993(A)(4));

(f) Direct the payment of money pendente lite except where granted at an ex parte hearing, refuse to direct the payment of money pendente lite, or vacate or refuse to vacate an order directing the payment of money pendente lite (12 O.S. § 993(A)(5));

(g) Certify or refuse to certify an action to be maintained as a class action (12 O.S. § 993(A)(6));

(h) Are enumerated in 58 O.S. § 721 (interlocutory probate orders but not orders allowing a final account and granting a decree of distribution); or

(i) Are made under the provisions of 12 O.S. § 1879.; or

(j) Temporary orders of protection made in proceedings pursuant to the Protection From Domestic Abuse Act, 22 O.S. §§ 60 et seq.

2019 OK 65

EDWARD SHADID, Petitioner, v. CITY OF OKLAHOMA CITY, a municipal corporation, Respondent.

No. 118,271. October 14, 2019

APPLICATION FOR EXTRAORDINARY RELIEF

¶0 The Petitioner filed this original action seeking declaratory and injunctive relief determining a new ordinance proposed and set for a vote by the City of Oklahoma City was unconstitutional. The application to assume original jurisdiction is granted. The proposed ordinance does not violate the single subject rule found in the Oklahoma Constitution or the single subject rule found in state statute and City of Oklahoma City's charter. Relief denied.

APPLICATION TO ASSUME ORIGINAL JURISDICTION GRANTED; PETITION

FOR DECLARATORY AND INJUNCTIVE RELIEF DENIED

Jay W. Barnett, Barnett Legal, PLLC, Edmond, Oklahoma, for Petitioner.

Kenneth Jordan, Municipal Counselor, Amanda Carpenter, Deputy Municipal Counselor, and Laura McDevitt, Assistant Municipal Counselor, Oklahoma City, Oklahoma for Respondent.

COMBS, J.:

¶1 The Petitioner, Edward Shadid, filed an Application to Assume Original Jurisdiction and a Petition for Declaratory and Injunctive Relief with this Court on September 25, 2019. The Petitioner challenges Oklahoma City Ordinance No. 26,255 (Ordinance)[1] which was passed by the City Council of Oklahoma City and signed by the Mayor of Oklahoma City on September 24, 2019.[2] The Ordinance amends Article II of Chapter 52 of the Oklahoma City Municipal Code, 2010, by creating a new Section 52-23.7. This amendment creates a temporary term (8 year) excise tax of 1% to begin April 1, 2020, if approved by a majority vote of qualified, registered voters of Oklahoma City. A special election has been set for this purpose on December 10, 2019.[3]

¶2 The Ordinance requires the City Council of Oklahoma City to create a Citizens Sales Tax Advisory Board by a resolution. The duty of this Board is to make recommendations to the Council on Council-assigned projects proposed for funding with the tax levied by the Ordinance. This resolution, or one created at a later date, will determine which projects are to be considered by the Advisory Board. There is no requirement for the Advisory Board to recommend adoption of all or any of the later assigned projects. **No specific projects are listed or mandated in the Ordinance.** The title of the Ordinance adequately reflects the proposed amendments found in the Ordinance.

¶3 The Petitioner contends the Ordinance violates the single subject rule found in art. 5, §57, Okla. Const., which provides in pertinent part:

> Every act of the Legislature shall embrace but one subject, which shall be clearly expressed in its title, except general appropriation bills, general revenue bills, and bills adopting a code, digest, or revision of statutes . . . ;

He asserts this section is made applicable to municipalities by art. 18, §3, Okla. Const. which provides "[a]ny city containing a population of more than two thousand inhabitants may frame a charter for its own government, consistent with and subject to the Constitution and laws of this State. . . ." The Oklahoma City Charter and state statute also require a city ordinance to contain only one subject which is clearly expressed in the title of the ordinance.[4] In at least one opinion of this Court we have found art. 5, § 57, Okla. Const. to be applicable to municipal ordinances.[5]

¶4 Title 68 O.S. § 2701 (A) provides: "[a]ny incorporated city or town in this state is hereby authorized to assess, levy and collect taxes for general and special purposes of municipal government as the Legislature may levy and collect for purposes of state government." Subsection (B) of this law provides: "[a] sales tax authorized in subsection A of this section may be levied for limited purposes specified in the ordinance levying the tax." The Petitioner contends the strategy employed by the city is to present a series of special taxes cloaked as a single general revenue tax to avoid the single subject rule, rather than placing each germane special tax before the voters separately. He seeks a finding of this Court that the Ordinance does not fall under the "general revenue" exception in art. 5, § 57, Okla. Const. His argument is based upon the Resolution of Intent of the Mayor and City Council of Oklahoma City Setting Forth a New MAPS Program to be Known as MAPS 4.[6] The Resolution of Intent sets out many diverse projects that he alleges are not of the same subject, i.e., not germane to one another, nor does the Ordinance or its title clearly express any of these projects. This resolution was passed by the City Council and signed by the Mayor on August 27, 2019. On page 2 of the resolution it states:

> NOW THEREFORE, BE IT FURTHER RESOLVED that, subject to available revenues, the Council's **administrative intent** is for MAPS 4 to include the following capital projects and operating funds, supported by allocations of estimated revenues as listed. (emphasis added).

Thereafter, it lists the various capital projects which include the subjects of: Parks, Youth Centers, Senior Wellness Centers, Mental Health & Addiction, Family Justice Center, Transit, Sidewalks, Bike Lanes, Trails, and Streetlights, Homelessness, Chesapeake Energy Arena and

Related Facilities, Animal Shelter, Fairgrounds Coliseum, Diversion Hub, Innovation District, Freedom Center and Clara Luper Civil Rights Center, Beautification, and Multipurpose Stadium. This Resolution of Intent is an altogether separate document from the Ordinance and is not something put to a vote of the people.

¶5 First, the Respondent requests this Court not assume original jurisdiction. It argues the Petitioner has failed to meet his burden under Okla.Sup.Ct.R. 1.191 (b). This Rule provides:

> The application and petition may be combined in the same instrument and shall state concisely:
>
> (1) the reasons why such action or proceeding is brought in the Supreme Court instead of another court of competent jurisdiction and why original jurisdiction should be assumed,
>
> (2) the nature of the remedy or relief sought, and
>
> (3) the facts entitling the petitioner to the remedy or relief sought.

We disagree. The power of this Court to assume original jurisdiction is discretionary in cases such as this where this Court and the district court both have concurrent jurisdiction. *Fent v. Contingency Review Bd*., 2007 OK 27, ¶11, 163 P.3d 512. A petitioner must still fulfill specified burdens of procedure and persuasion. *State ex rel. Oklahoma Bar Ass'n v. Mothershed*, 2011 OK 84, ¶78, 264 P.3d 1197. The Petitioner filed his application and petition separately rather than combined. Reading the two documents together the Petitioner is asking this court to assume original jurisdiction due to the *publici juris* nature of the allegation and the urgency needed to address the issue prior to the December 10, 2019 special election. He asks this Court to declare the Ordinance unconstitutional as violating the single subject rule and grant an injunction to stop the election based upon the facts alleged. In *Keating v. Johnson,* we noted:

> A fairly consistent theme running through most of our cases where original jurisdiction has been assumed has been that the matter must be affected with the public interest and there must be some urgency or pressing need for an early determination of the matter.

1996 OK 61, ¶10, 918 P.2d 51.

Both elements are present here. The Petitioner and Respondent acknowledge the widespread impact a decision on this matter may have. The Petitioner argues in his petition that any municipality in Oklahoma will be able to follow this strategy adopted by the City Council and Mayor. The Respondent notes in its response our decision "could significantly affect municipal finance statewide." The urgency of the matter is without question. A special election is set for December 10, 2019, just a few months away from the filing of the Petitioner's application and petition. We, hereby, assume original jurisdiction.

¶6 The purpose behind the single subject mandate is to prevent "logrolling." Logrolling is the practice of assuring the passage of a law by creating one choice in which a legislator or voter is forced to assent to an unfavorable provision to secure passage of a favorable one, or conversely, forced to vote against a favorable provision to ensure that an unfavorable provision is not enacted. *Fent v. State ex rel. Oklahoma Capitol Improvement Authority,* 2009 OK 15, ¶14, 214 P.3d 799. We need not analyze the germaneness of the projects listed in the Resolution of Intent because the Ordinance itself, the actual proposed law which will be put to a vote, does not list any of these projects. The Respondent asserts the Resolution of Intent merely proposes a wish list of projects the City Council hopes to accomplish with the excise tax.[7] As mentioned, the Ordinance provides for the creation of a Citizens Sales Tax Advisory Board by a resolution. The duty of this Board is to make **recommendations** to the City Council concerning the projects assigned to it by the City Council. The Ordinance provides in paragraph (c):

> (c) The City Council shall by resolution establish a Citizens Sales Tax Advisory Board. The Advisory Board's duties shall be to review and make recommendations to the City Council on Council-assigned projects proposed for funding with the sales tax levied by this section. The City Council assignment of which projects will be considered by the Advisory Board will be set forth in either the City Council resolution establishing the Board or in a later resolution or resolutions.

The Ordinance does not specify what projects will be assigned by the City Council nor does it require the Advisory Board to make a recommendation to adopt any specific project. The authority for the City Council to make the

resolution(s) that will create the Advisory Board and assign projects for its review and recommendation will only come about upon the passage of the Ordinance at the special election. Such resolution(s) do not yet exist. The Petitioner's argument that the Ordinance violates the single subject rule relies upon the contents of the Resolution of Intent and not upon the contents of the Ordinance itself. The subject matter contained in the Ordinance is clearly germane to the 1% excise tax.

¶7 In considering a statute's constitutionality, a heavy burden is cast on the challenger and every presumption is to be indulged in favor of its constitutionality. *Fent v. Oklahoma Capitol Imp. Authority*, 1999 OK 64, ¶3, 984 P.2d 200. If there are two possible interpretations, one of which would hold the legislation unconstitutional, the construction must be applied which renders it constitutional, unless constitutional infirmity is shown beyond a reasonable doubt. *Id.* The Petitioner has failed to carry this heavy burden of proof necessary to find the Ordinance unconstitutional under the single subject rule found in art. 5, §57 Okla. Const. Nor has he proven the Ordinance violates the single subject rules found in 11 O.S. §14-104 and art. II, §25 of the Oklahoma City Charter. Due to the exigent circumstances of this case, the 20-day period, allowed by Okla.Sup.Ct.R. 1.13 for filing a petition for rehearing, is reduced. *See OCPA Impact v. Sheehan*, 2016 OK 84, ¶12, 377 P.3d 138. Any petition for rehearing must be filed by the close of business at 5:00 p.m. on October 18th, 2019.

APPLICATION TO ASSUME ORIGINAL JURISDICTION GRANTED; PETITION FOR DECLARATORY AND INJUNCTIVE RELIEF DENIED

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

COMBS, J.:

1. The content of Ordinance 26,255 is as follows:

ORDINANCE NO. 26,255

ORDINANCE RELATING TO TAXATION; AMENDING THE OKLAHOMA CITY SALES TAX CODE, CODIFIED AS ARTICLE II OF CHAPTER 52 OF THE OKLAHOMA CITY MUNICIPAL CODE, 2010; ENACTING SECTION 52-23.7 OF SAID ARTICLE II OF CHAPTER 52; LEVYING AN EXCISE TAX OF ONE PERCENT (1%) ON THE GROSS PROCEEDS OR GROSS RECEIPTS DERIVED FROM ALL SALES TAXABLE UNDER THE SALES TAX LAWS OF THE STATE OF OKLAHOMA; PROVIDING A LIMITED TERM OF EIGHT (8) YEARS FOR SUCH EXCISE TAX, WHICH WILL COMMENCE AT 12:00 A.M. ON APRIL 1, 2020, AND END AT 12:00 A.M. ON APRIL 1, 2028; PROVIDING FOR A CITIZENS SALES TAX ADVISORY BOARD; PROVIDING THAT THE EXCISE TAX LEVIED BY THIS SECTION 52-23. 7 SHALL BE CUMULATIVE TO ALL OTHER EXCISE TAXES LEVIED BY THIS CHAPTER; PROVIDING FOR CODIFICATION; AND PROVIDING AN EFFECTIVE DATE FOR SECTIONS 1 AND 2 OF THIS ORDINANCE, WITH APPROVAL OF THE ORDINANCE BY CITY VOTERS REQUIRED.

ORDINANCE

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF OKLAHOMA CITY:

SECTION 1. That Article II of Chapter 52 of the Oklahoma City Municipal Code, 2010,
is hereby amended by the enactment of a new Section 52-23.7 to read as follows:

Chapter 52. TAXATION

* * *

ARTICLE II. SALES TAX CODE

* * *

§ 52-23.7. **Additional excise tax on gross receipts.**

(a) An excise tax in the amount of one percent (1%) is hereby levied upon the gross proceeds or gross receipts derived from all sales taxable under the sales tax laws of this state, including but not limited to the specific taxable sales and service transactions enumerated in Paragraphs (1) through (11), inclusive, of Subsection (a) of Section 52-20 of this chapter.

(b) The excise tax levied pursuant to Subsection 52-23.7(a) above shall be for a limited term of eight (8) years, beginning at 12:00 a.m. on April 1, 2020, and ending at 12:00 a.m. on April l, 2028.

(c) The City Council shall by resolution establish a Citizens Sales Tax Advisory Board. The Advisory Board's duties shall be to review and make recommendations to the City Council on Council-assigned projects proposed for funding with the sales tax levied by this section. The City Council assignment of which projects will be considered by the Advisory Board will be set forth in either the City Council resolution establishing the Board or in a later resolution or resolutions.

(d) The limited-term excise tax levied pursuant to this Section 52-23.7 shall be cumulative to the excise tax of two percent (2%) levied by Section 52-20 of this chapter upon the gross proceeds or gross receipts derived from all sales taxable under the sales tax laws of this state, cumulative to the excise tax of three-fourths percent (3/4%) levied by Section 52-21 or this chapter upon the gross proceeds or gross receipts derived from all sales taxable under the sales tax laws of this state, cumulative to the excise tax of one-eighth percent (1/8%) levied by Section 52-22 of this chapter upon the gross proceeds or gross receipts derived from all sales taxable under the sales tax laws of this state, cumulative to the excise tax of one-fourth percent (1/4%) levied by Section 52-23.6 of this chapter upon the gross proceeds or gross receipts derived from all sales taxable under the sales tax laws of this state, and cumulative of any other such excise tax levied by this chapter.

SECTION 2. CODIFICATION. The provisions of Section l of this Ordinance shall be codified as Section 52-23.7 of Article II of Chapter 52 of the Oklahoma City Municipal Code, 2010.

SECTION 3. EFFECTIVE DATE OF SECTIONS l AND 2; APPROVAL BY CITY VOTERS REQUIRED. The provisions of Sections 1 and 2 of this Ordinance shall become effective from and after 12:00 a.m. on April 1, 2020, but only if this Ordinance is approved by a majority vote of the qualified, registered voters of The City of Oklahoma City voting at the special election called for that purpose by the City Council of the City, which election will be held within the City on December 10, 2019 and will be conducted by the Oklahoma County Election Board in the manner provided by law; provided, if this Ordinance is not so approved by City voters on December 10, 2019, then the provisions of Sections 1 and 2 hereof shall become null and void and of no force and effect whatever.

INTRODUCED and **CONSIDERED** in open meeting of the Council of The City of Oklahoma City on the 27th day of August 2019.

PASSED by the Council of The City of Oklahoma City on the 24th day of September 2019.

SIGNED by the Mayor of The City of Oklahoma City on the 24th day of September 2019.

2. Resp. Appdx. Tab 1.

3. Resp. Appdx. Tabs 2-4.

4. City of Oklahoma City Charter Art. II, §25; Title 11 O.S. § 14-104.

5. In *Chastain v. Oklahoma City*, 1953 OK 166, ¶5, 258 P.2d 635, we held a city ordinance "clearly met the constitutional requirement" found in art. 5, §57, Okla. Const.

6. Resp. Appdx. Tab 5.

7. Resp. Response at 11 "the City proposes to voters a general tax levy by ordinance [a single subject measure] while stating in a Resolution of Intent its administrative wishes for accomplishing the MAPS 4 Program."

2019 OK 66

ASHLEY ERLANDSON, Petitioner, v. THE HONORABLE WALLACE COPPEDGE, Respondent, and DENNIS RAY WAGONER, JR., Real Party in Interest.

No. 118,169. October 21, 2019

ORDER

Petitioner Ashley Erlandson's application to assume original jurisdiction is granted. Original jurisdiction is assumed. Okla. Const. art. VII, § 4. A writ of mandamus is issued to Marshall County District Court Judge Wallace Coppedge, or any other assigned district court judge, in *Ashley Erlandson v. Dennis Ray Wagoner, Jr.,* No. FD-2019-27 (Marshall Cnty.).

The Marshall County District Court interlocutory order of June 26, 2019, entitled Summary Order, is hereby vacated. Oklahoma recognizes two forms of marriage: ceremonial and common law. *State ex rel. Oklahoma Bar Ass'n v. Casey,* 2012 OK 93, ¶ 14, 295 P.3d 1096, 1100. The legislative amendments to 43 O.S., § 5 in 1999 did not abolish common law marriage, but only reformatted the statute to add subsections. 43 O.S. Supp. 1999, § 5. The Legislature added subpart (E) of § 5 in 1959. 43 O.S. Supp.1959, § 5. The Court has continually recognized common law marriage since that legislative change in 1959. *See Hill v. Shreve*, 1968 OK 182, ¶ 4, 448 P.2d 848, 850-51; *Rath v. Maness,* 1970 OK 111, 470 P.2d 1011, 1013; *Mueggenborg v. Walling*, 1992 OK 121, 836 P.2d 112, 113-14. For the Legislature to abolish common law marriage, it must be explicit. *See Fent v. Henry,* 2011 OK 10, ¶ 11, 257 P.3d 984, 991; *In re Love's Estate*, 1914 OK 332, ¶ 0, 142 P. 305, 305 (Syllabus by the Court No. 3).

The Marshall County District Court is directed to proceed with Petitioner Ashley Erlandson's petition filed on April 12, 2019.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 21st DAY OF OCTOBER, 2019.

/s/ Noma D. Gurich
CHIEF JUSTICE

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

2019 OK 67

IN RE: Amendment of Rule 1.27(a) of the Oklahoma Supreme Court Rules (Cross-Appeal or Counter-Appeal)

SCAD-2019-87. October 21, 2019

ORDER

¶1 Rule 1.27(a) of the Oklahoma Supreme Court Rules, Okla. Stat. tit. 12, ch. 15, app. 1, is hereby amended as shown on the attached Exhibit "A." Rule 1.27(a), with the amended language noted, is attached as Exhibit "B." The remainder of Rule 1.27 is unaffected by the amendment. The amended Rule will be effective on December 2, 2019.

¶2 DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 21st day of October, 2019.

/s/ Noma D. Gurich
CHIEF JUSTICE

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

EXHIBIT "A"

Oklahoma Statutes Citationized
Title 12. Civil Procedure
Appendix 1 - Oklahoma Supreme Court Rules
Article Part II. Appeals From Judgment Or Final Order Of The District Court
Section RULE 1.27 - MULTIPLE APPEALS

Cite as: O.S. §, __ __

(a) Cross-Appeal or Counter-Appeal.

If a petition in error has been timely filed to commence an appeal from an appealable decision, then a party aggrieved by the same decision may file a cross or counter petition in error within thirty (30) days from the date the petition in error is filed by the Appellant in the same case. Failure to file within the time allowed will result in the dismissal of the cross or counter appeal. Petitions in error which commence an appeal from the same appealable decision or from different appealable decisions in the same case shall so far as possible be filed under the same docket number, except when one of the appeals is brought pursuant to Rule 1.36. If more than one petition in error addressed to the same decision is filed the same day, the court shall determine which of these petitions

in error is to be regarded as bringing the principal appeal and which constitutes a counter-appeal, a cross-appeal or some other form of appeal.

Only one cost deposit prescribed by statute shall be required in this Court for multiple appeals from the same case filed under the same number. This cost deposit shall be paid by the party who first shall file a petition in error in this Court. See Rule 1.36(k) and (l) for multiple appeals involving one or more appeals governed by Rule 1.36. Appeals from different appealable decisions in the same district court case, filed in a pending appeal, are subject to leave of court which will be granted or withdrawn subsequent to filing. An appellate court may order a later appeal to be redocketed as a new cause upon payment of an accompanying cost deposit.

EXHIBIT "B"

Oklahoma Statutes Citationized
Title 12. Civil Procedure
Appendix 1 - Oklahoma Supreme Court Rules
Article Part II. Appeals From Judgment Or Final Order Of The District Court
Section RULE 1.27 - MULTIPLE APPEALS

Cite as: O.S. §, __ __

(a) Cross-Appeal or Counter-Appeal.

If a petition in error has been timely filed to commence an appeal from an appealable decision, then a party aggrieved by the same decision may file a cross or counter petition in error within ~~forty (40) days of the date the judgment was filed with the district court clerk.~~ thirty (30) days from the date the petition in error is filed by the Appellant in the same case. Failure to file within the time allowed will result in the dismissal of the cross or counter appeal. Petitions in error which commence an appeal from the same appealable decision or from different appealable decisions in the same case shall so far as possible be filed under the same docket number, except when one of the appeals is brought pursuant to Rule 1.36. If more than one petition in error addressed to the same decision is filed the same day, the court shall determine which of these petitions in error is to be regarded as bringing the principal appeal and which constitutes a counter-appeal, a cross-appeal or some other form of appeal.

Only one cost deposit prescribed by statute shall be required in this Court for multiple appeals from the same case filed under the same number. This cost deposit shall be paid by the party who first shall file a petition in error in this Court. See Rule 1.36(k) and (l) for multiple appeals involving one or more appeals governed by Rule 1.36. Appeals from different appealable decisions in the same district court case, filed in a pending appeal, are subject to leave of court which will be granted or withdrawn subsequent to filing. An appellate court may order a later appeal to be redocketed as a new cause upon payment of an accompanying cost deposit.

2019 OK 68

LISA GAYE LOVEN, Plaintiff/Appellant, v. CHURCH MUTUAL INSURANCE COMPANY and JEFFREY F. HANES, Defendants/Appellees.

No. 116,808; Comp w/116,954
October 22, 2019

CERTIORARI TO THE COURT OF CIVIL APPEALS, DIVISION III

Thomas E. Prince, Trial Judge

¶0 The plaintiff/appellant, Lisa Loven, is a general contractor who applied for a public adjuster license with the Oklahoma Department of Insurance (the Department). After she disclosed that a former client sued her for acting as an unlicensed adjuster, the Department opened an investigation regarding her application. Subsequently, the Department denied her application, and Loven appealed. During the appeal hearing Church Mutual Insurance and its adjuster Jeffrey Hanes provided information regarding their dealings with Loven as a general contractor when she contracted for storm repair work for two churches they insured. The appellate hearing officer affirmed the denial of her application as a public adjuster because she had illegally acted as an unlicensed public adjuster. Loven sued Church Mutual and Hanes for intentional interference with a prospective economic business advantage. The trial court granted summary judgment to Church Mutual and Hanes because 36 O.S. Supp. 2012 §363 provides civil tort immunity to insurers who provide any information of fraudulent conduct to the Department. Loven appealed and the Court of

Civil Appeals affirmed. We granted certiorari to address the statutory immunity provisions and to determine the first impression question of whether the tort of intentional interference with a prospective economic business advantage requires an element of bad faith. We hold that: 1) 36 O.S. Supp. 2012 §363 provides immunity for those who report or provide information regarding suspected insurance fraud as long as they, themselves, do not act fraudulently, in bad faith, in reckless disregard for the truth, or with actual malice in providing the information; and 2) the alleged tort of intentional interference with a prospective economic business advantage requires a showing of bad faith. However, because no proffered evidence in this cause tends to show bad faith, the immunity provisions of 36 O.S. Supp. 2012 §363 apply, and summary judgment was proper.

COURT OF CIVIL APPEALS OPINION VACATED; TRIAL COURT AFFIRMED.

Stanley M. Ward, Barrett T. Bowers, Norman, Oklahoma, for Plaintiff/Appellant.

Kenyatta R. Bethea, Oklahoma City, Oklahoma, for Defendants/Appellees.

KAUGER, J.:

¶1 We granted certiorari to address the first impression question of whether a claim of the tort of intentional interference with a prospective economic business advantage requires a showing of bad faith, and whether the immunity protections provided by 36 O.S. Supp. 2012 §363 were forfeited under the alleged facts.[1] We hold that: 1) 36 O.S. Supp. 2012 §363 provides immunity for those who report or provide information regarding suspected insurance fraud as long as they, themselves, do not act fraudulently, in bad faith, in reckless disregard for the truth, or with actual malice in providing the information; and 2) the alleged tort of intentional interference with a prospective economic business advantage requires a showing of bad faith.[2] However, because no proffered evidence in this cause tends to show bad faith, the immunity provisions of 36 O.S. Supp. 2012 §363 apply, and summary judgment was proper.

FACTS AND PROCEDURAL HISTORY

¶2 The plaintiff/appellant, Lisa Gaye Loven (Loven) worked as a general contractor in the construction business. In May of 2012, the Edmond Christian Church (ECC) contacted Loven to repair damage to several church buildings caused by storms. According to Loven, after she contracted with the ECC to make the repairs, she contacted their insurer, the defendant/appellee, Church Mutual Insurance (insurer/Church Mutual) to discuss the differences in her estimated repair costs and Church Mutual's estimated costs. Ultimately as a result of Loven's intervention, Church Mutual paid ECC over $221,000.00 more than the insurer's initial estimate of loss. Loven then performed the repairs, and ECC paid her for her work.

¶3 Also in May of 2012, Loven submitted estimates to Chisolm Creek Baptist Church (CCBC) for property damage to its buildings as well. CCBC also used Church Mutual, whose adjuster Jeff Hanes valued the damage to CCBC's buildings at $4,000.00. Again, Loven intervened on behalf of her client. Through discussions back and forth, engineer inspections, delays in payment, etc, Church Mutual again ended up paying $221,000.00 more on the claim than they initially offered.

¶4 On July 21, 2015, Loven sumbmitted an online application with the Oklahoma Insurance Department (the Department) to become a licensed resident public adjuster. She disclosed, as required by her application, that she was currently being sued by a former client, Loc Nguyen,[3] who alleged that Loven acted as a public adjuster without a license which is prohibited by the Oklahoma Insurance Adjusters Licensing Act, 36 O.S. 2011 §§6201 et seq.[4] Due to this disclosure, the Anti-Fraud Unit of the Department opened an investigation. As part of the investigation, the Anti-Fraud Unit interviewed Church Mutual employees regarding their dealings with Loven during 2012.

¶5 The Department denied Loven's application on October 30, 2015. An administrative appeal hearing was held on January 20, 2016, and continued on February 4, 2016. Church Mutual employees and Hanes testified at the administrative appeal hearing. The hearing examiner denied the application on the grounds that Loven negotiated client's claim settlements and acted as an unlicensed adjuster and that she received inflated compensation through ownership of a construction business due to the claims she negotiated. The hearing examiner also determined that Loven had submitted a bogus invoice in the amount of $14,923.00 and added $2,984.59 for her overhead and profit on the bogus charge. The bogus charges related to the

use of a crane when "lifts" were actually used instead of a crane on the CCBC repairs.

¶6 On March 30, 2016, the State of Oklahoma charged Loven and her subcontractor with felonies of filing a false claim for insurance[5] and conspiracy to commit a felony,[6] stemming from the crane invoice submitted to CCBC. The charges were eventually dismissed on June 9, 2016. On October 13, 2016, Loven filed a lawsuit against Church Mutual and its adjuster Hanes in the District Court of Oklahoma County. She alleged that Church Mutual and Hanes intentionally interfered with her prospective business opportunity/economic advantage. She specifically asserted that they intentionally interfered with her attempts to get licensed as a public adjuster in retaliation for her actions which caused them to pay more in hail damage roof claims than they had offered to pay to ECC and CCBC.

¶7 On November 7 and November 10, 2016, Hanes and Church Mutual filed motions to dismiss, arguing that: they were obligated to follow the Oklahoma Insurance Code; they were subpoenaed by the Oklahoma Insurance Department as part of Loven's investigation; and any information they gave was protected by immunity from Loven's lawsuit pursuant to 36 O.S. Supp. 2012 §363.[7]

¶8 Loven objected to the motions to dismiss, arguing that immunity was inapplicable to this cause because the alleged intentional interference occurred regarding her application to be a public adjuster, and not as a result of a "report" by Church Mutual or Hanes. On January 9, 2017, the trial court granted the motions to dismiss, but allowed Loven thirty days to amend her petition to try and plead her way around the immunity provisions of the statute. She filed an amended petition on January 17, 2017, making essentially the same allegations. Church Mutual and Hanes filed motions to dismiss the amended petition, but the trial court denied the motions on May 12, 2017.

¶9 On August 18, 2017, Church Mutual and Hanes filed motions for summary judgment, again arguing that they were immune from liability. On January 31, 2018, the trial court entered an order granting the defendants' motion for summary judgment. It determined that the uncontroverted facts show that the Oklahoma Insurance Code, 36 O.S. Supp. 2012 §363 provided the defendants immunity from tort liability. On March 2, 2018, the plaintiff appealed, and on April 27, 2018, the Court made this cause a companion case to Case No. 116,954, involving the same parties, so that both cases would be assigned to the same Court of Civil Appeals division for disposition.

¶10 Case No. 116,954 remains pending in the Court of Civil Appeals, but on October 29, 2018, the Court of Civil Appeals, in this cause, No. 116,808, affirmed the trial court. On November 16, 2018, Loven filed a Petition for Writ of Certiorari in this Court, arguing that Church Mutual and Hanes were not entitled to the immunity protections provided by 36 O.S. Supp. 2012 §363. We granted certiorari on April 22, 2019, to address the statutory immunity provisions, whether the tort of intentional interference with a prospective economic business advantage requires a showing of bad faith, and whether summary judgment was proper.

I.

TITLE 36 O.S. 2012 §363 PROVIDES IMMUNITY FOR THOSE WHO REPORT OR FURNISH INFORMATION CONCERNING FRAUDULENT ACTS AS LONG AS THEY, THEMSELVES, DO NOT ACT FRAUDULENTLY, IN BAD FAITH, IN RECKLESS DISREGARD FOR THE TRUTH OR WITH ACTUAL MALICE IN PROVIDING THE INFORMATION.

¶11 Loven argues that the statutory immunity provided by 36 O.S. 2012 §363[8] only applies when an insurer reports suspected fraudulent activity and because Church Mutual or Hanes did not initiate a suspected fraud report against her with the Department, the statutory immunity is inapplicable to them. Church Mutual and Hanes counter that Loven's argument is contrary to the plain language of the statute. We agree.

¶12 The statute is plain and unambiguous. When a statute is plain and unambiguous, there is no need to resort to statutory construction[9] nor does any justification exist for the use of interpretive devices to fabricate a different meaning.[10] Title 36 O.S. Supp. 2012 subsection A of §363 requires insurers such as Church Mutual to report suspected fraud. It provides:

> A. Any insurer, employee or agent of any insurer who has reason to believe that a person or entity has engaged in or is engaging in an act or practice that violates any statute or administrative rule of this state related to insurance fraud shall imme-

diately notify the Anti-Fraud Unit of the Insurance Department and, in the case of an allegation of claimant fraud, the Workers' Compensation and Insurance Fraud Unit of the Office of the Attorney General.

¶13 Subsection B precludes civil or criminal liability against an insurer, in absence of fraud, bad faith, or reckless disregard for the truth, for providing such information. It provides:

> B. No insurer, employee or agent of an insurer, or any other person acting in the absence of fraud, bad faith, reckless disregard for the truth, or actual malice shall be subject to civil liability for libel, slander or any other relevant tort or subject to criminal prosecution by virtue of filing of reports or furnishing other information either orally or in writing, concerning suspected, anticipated or completed fraudulent insurance acts to the Anti-Fraud Division of the Insurance Department or the Workers' Compensation and Insurance Fraud Unit of the Office of the Attorney General pursuant to subsection A of this section or to any other agency involved in the investigation or prosecution of suspected insurance fraud.

¶14 Subsection C provides civil or criminal immunity for the filing of reports or furnishing other information, either orally or in writing, concerning suspected, anticipated or completed fraudulent insurance acts to the Anti-Fraud Division of the Insurance Department. Title 36 O.S. Supp. 2012 §363 (C) provides:

> C. No civil or criminal cause of action of any nature shall exist against the person or entity by virtue of filing of reports or furnishing other information, either orally or in writing, concerning suspected, anticipated or completed fraudulent insurance acts to the Anti-Fraud Division of the Insurance Department pursuant to subsection A of this section or to any other agency involved in the investigation or prosecution of suspected insurance fraud. The immunity provided in this subsection shall extend to the act of providing or receiving information or reports to or from:
>
> 1. Law enforcement officials, their agents and employees;
>
> 2. The National Association of Insurance Commissioners, any state department of insurance, any federal or state agency or bureau established to detect and prevent fraudulent insurance activities, as well as any other organization established for the same purpose, their agents, employees or designees; and
>
> 3. Any organization or person involved in the prevention and detection of fraudulent insurance activities or that organization or person's employees, agents, or representatives.
>
> The immunity provided in this subsection shall not extend to any person, insurer, or agent of an insurer for communications or publications about suspected insurance fraud to any other person or entity.

¶15 The immunity provisions of §363 expressly apply to either reports made under subsection A, or when an insurer furnishes information, either orally or in writing for an investigation or prosecution of suspected insurance fraud.[11] The terms of the statute, insofar as to when immunity applies, are clear and unambiguous. If Church Mutual, or any other insurer, furnished information for an investigation or prosecution, as they did in this cause, they are protected from civil action for libel, slander or any other relevant tort or any criminal action.

¶16 The only exception for such immunity is if the insurer provides such information fraudulently, in bad faith, in reckless disregard for the truth, or with actual malice. Consequently, the next questions we must answer are whether Loven's alleged tort of intentional interference with a prospective economic business advantage requires a showing of bad faith/wrongfulness and if it does, do the alleged facts survive a motion for summary judgment?

II.

INTENTIONAL INTERFERENCE WITH A PROSPECTIVE ECONOMIC ADVANTAGE REQUIRES A SHOWING OF BAD FAITH, BUT BECAUSE NO OFFERED EVIDENCE TENDS TO SHOW BAD FAITH, THE IMMUNITY PROVISIONS OF 36 O.S. SUPP. 2012 §363 APPLY, AND SUMMARY JUDGMENT WAS PROPER.

¶17 Church Mutual and Hanes argue that it is important to note that Loven has not provided any evidence that they allegedly acted with fraud, bad faith or reckless disregard for the truth, or actual malice, and that the Department on two separate occasions found Loven's

conduct to be in violation of Oklahoma's adjuster licensing requirements. Loven insists that Church Mutual and Hanes did provide false information to the Department fraudulently and in bad faith and that her license would not have been denied were it not for their participation in the proceedings.

¶18 This Court has not examined the details of the particular elements of the tort of intentional interference with a **prospective** economic business advantage,[12] but we have discussed the elements of the tort of intentional interference with a current or "present" business relationship. Insofar as the former is concerned, this is a case of first impression. In Tuffy's Inc. v. City of Oklahoma City, 2009 OK 4, ¶14, 212 P.3d 1158 we noted that one has a right to prosecute a lawful business without unlawful molestation or unjustified interference from any person, and any malicious interference with that business is an unlawful act and an actionable wrong. We laid out the elements of a claim for malicious interference as follows:

1.) interference with a business or contractual right;
2.) malice or wrongful interference that is neither justified, privileged, nor excusable; and
3.) damage proximately sustained as a result of the interference.[13]

¶19 We stated that the element of malice, for malicious interference, is defined as an unreasonable and wrongful act done intentionally, without just cause or excuse and that it clearly requires a showing of bad faith. We also stated that the terms "malicious interference," "intentional interference," and "tortious interference" with contract and business relations have been used interchangeably[14] and constitute the same tort in Oklahoma jurisprudence.

¶20 Tuffy's, supra, concerned an action brought under the Oklahoma Governmental Torts Claims Act, (GTCA) 51 O.S. §§155 et seq. Because the element of malicious and wrongful interference necessarily involves some degree of bad faith, we held that a political subdivision is not liable for malicious interference with a business relationship committed by its employees because bad faith actions are specifically excluded from the GTCA's definition of the scope of employment.

¶21 Other courts, including the Oklahoma Court of Civil Appeals, have detailed the essential elements of a claim for intentional interference with a prospective economic advantage as follows:

1.) the existence of a valid business relation or expectancy;
2.) knowledge of the relationship or expectance on the part of the interferer;
3.) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; and
4.) resultant damage to the party whose relationship has been disrupted.[15]

Although the tort as it relates to current/present business relations and prospective business relations are extremely similar, they are recognized as distinct torts.[16] Courts define interference as: inducing a third person not to enter into the prospective relation or preventing the other party from acquiring the prospective relation;[17] encompassing an unfair or unlawful act or by lawful means without justification;[18] or intentionally acting with the purpose to interfere with the relationship or expectancy.[19] In other words, like the tort of current or present business interference in Tuffy's, supra, the element of intentional interference clearly requires a showing of bad faith.[20] The interference must be the purpose of the tortfeasor's act, and their motive must include a desire to interfere and disrupt the others' prospective economic business advantage.[21]

¶22 In the evidentiary materials submitted in this cause, the offered evidence may infer that Church Mutual's and Hanes' responses to the Department's investigation of Loven have interfered or inhibited with her ability to become a licensed public adjuster. However, no evidence tends to show that either Church Mutual or Hanes acted with the intentional purpose to interfere or in bad faith in responding to the Department's questions concerning their experiences in dealing with Loven. Nor is there any evidence that any interference was done with an improper, wrongful, or malicous motive.

¶23 The purpose of their interference was in response to the Department's investigation, which was in response to Loven's online application to be a public adjuster. Accordingly, Church Mutual and Hanes are entitled to immunity pursuant to 36 O.S. Supp. 2012 §363.[22] Because no genuine issue of material facts exists, Church Mutual and Hanes are entitled to a judgment as a matter of law.[23] The judgment of the trial court is affirmed.

CONCLUSION

¶24 Consistent with our opinion in Tuffy's, supra, wrongful/intentional interference of any form implies some degree of bad faith. Because the tort of intentional interference with a prospective economic business advantage requires a showing of wrongfulness, it also implies a showing of bad faith. Therefore, the tort falls under the language of "other relevant torts" of 36 O.S. Supp. 2012 §363.[24] Section 363 provides immunity for those who report or provide information regarding suspected insurance fraud as long as they, themselves, do not act fraudulently, in bad faith, in reckless disregard for the truth, or with actual malice in providing the information.

¶25 The alleged tort of intentional interference with a prospective economic business advantage does require a showing of bad faith. However, because no offered evidence in this cause tends to show bad faith, the immunity provisions of 36 O.S. Supp. 2012 §363 apply to this cause. Summary judgment was proper.

COURT OF CIVIL APPEALS OPINION VACATED; TRIAL COURT AFFIRMED.

GURICH, C.J., DARBY, V.C.J., KAUGER, WINCHESTER, EDMONDSON, COMBS, KANE, JJ., concur.

COLBERT, J - not participating.

KAUGER, J.:

1. Title 36 O.S. Supp. 2012 §363 of the Oklahoma Insurance Code provides:

A. Any insurer, employee or agent of any insurer who has reason to believe that a person or entity has engaged in or is engaging in an act or practice that violates any statute or administrative rule of this state related to insurance fraud shall immediately notify the Anti-Fraud Unit of the Insurance Department and, in the case of an allegation of claimant fraud, the Workers' Compensation and Insurance Fraud Unit of the Office of the Attorney General.

B. No insurer, employee or agent of an insurer, or any other person acting in the absence of fraud, bad faith, reckless disregard for the truth, or actual malice shall be subject to civil liability for libel, slander or any other relevant tort or subject to criminal prosecution by virtue of filing of reports or furnishing other information either orally or in writing, concerning suspected, anticipated or completed fraudulent insurance acts to the Anti-Fraud Division of the Insurance Department or the Workers' Compensation and Insurance Fraud Unit of the Office of the Attorney General pursuant to subsection A of this section or to any other agency involved in the investigation or prosecution of suspected insurance fraud.

C. No civil or criminal cause of action of any nature shall exist against the person or entity by virtue of filing of reports or furnishing other information, either orally or in writing, concerning suspected, anticipated or completed fraudulent insurance acts to the Anti-Fraud Division of the Insurance Department pursuant to subsection A of this section or to any other agency involved in the investigation or prosecution of suspected insurance fraud. The immunity provided in this subsection shall extend to the act of providing or receiving information or reports to or from:

1. Law enforcement officials, their agents and employees;

2. The National Association of Insurance Commissioners, any state department of insurance, any federal or state agency or bureau established to detect and prevent fraudulent insurance activities, as well as any other organization established for the same purpose, their agents, employees or designees; and

3. Any organization or person involved in the prevention and detection of fraudulent insurance activities or that organization or person's employees, agents, or representatives.

The immunity provided in this subsection shall not extend to any person, insurer, or agent of an insurer for communications or publications about suspected insurance fraud to any other person or entity.

2. Title 36 O.S. 2012 §363, *see* note 1, supra.

3. That cause was Oklahoma County Case No. CJ-2015-185 and it was filed on June 12, 2015, by Loc Nguyen. He alleged Loven acted as an adjuster without a license, and committed breach of contract. He sought replevin of $17,688.51. The jury returned a verdict for $10,693.17 on May 25, 2017.

4. Title 36 O.S. Supp. 2011 §§6201 et seq. Section 6302 provides in pertinent part:

. . .2. "Adjuster" means either an insurance adjuster or a public adjuster;

3. "Insurance adjuster" means any person, firm, association, company, or legal entity that acts in this state for an insurer, and that investigates claims, adjusts losses, negotiates claim settlements, or performs incidental duties arising pursuant to the provisions of insurance contracts on behalf of an insurer and includes:

a. "independent adjusters", meaning any insurance adjuster that suggests or presents to the insurance industry and public that said adjuster acts as an adjuster for a fee or other compensation, and

b. "company or staff adjusters", meaning adjusters who engage in the investigation, adjustment, and negotiation of claims as salaried employees of an insurer;

4. "Public adjuster" means any person, firm, association, company, or corporation that suggests or presents to members of the public that said public adjuster represents the interests of an insured or third party for a fee or compensation. Public adjusters may investigate claims and negotiate losses to property only; . . .

5. Title 21 O.S. Supp. 2012 §1162 provides:

Any person who presents or causes to be presented any false or fraudulent claim, or any proof in support of any such claim, upon any contract of insurance, for the payment of any loss, or who prepares, makes or subscribes any account, certificate, survey affidavit, proof of loss, or other book, paper or writing, with intent to present or use the same, or to allow it to be presented or used in support of any such claim, shall be guilty of a felony punishable by imprisonment in the State Penitentiary not exceeding three (3) years, or by a fine not exceeding twice the amount of the aggregated loss sum, or both.

6. Title 21 O.S. 2011 §421 provides:

A. If two or more persons conspire, either:

1. To commit any crime; or

2. Falsely and maliciously to indict another for any crime, or to procure another to be charged or arrested for any crime; or

3. Falsely to move or maintain any suit, action or proceeding; or

4. To cheat and defraud any person of any property by any means which are in themselves criminal, or by any means which, if executed, would amount to a cheat or to obtaining money or property by false pretenses; or,

5. To commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice or the due administration of the laws, they are guilty of a conspiracy.

B. Except in cases where a different punishment is prescribed by law the punishment for conspiracy shall be a misdemeanor unless the conspiracy is to commit a felony.

C. Conspiracy to commit a felony shall be a felony and is punishable by payment of a fine not exceeding Five Thousand Dollars ($5,000.00), or by imprisonment in the State Penitentiary for a period not exceeding ten (10) years, or by both such fine and imprisonment.

7. Title 36 O.S. Supp. 2012 §363, *see* note 1, supra.

8. Title 36 O.S. 2012 §363, *see* note 1, supra

9. Rouse v. Oklahoma Merit Protection Commission, 2015 OK 7, ¶17, 345 P.3d 368, Twin Hills Golf & Country Club, Inc. v. Town of Forest Park, 2005 OK 71, ¶6, 123 P.3d 5.

10. Rouse v. Oklahoma Merit Protection Commission, *see* note 9, supra; Strong v. State of Oklahoma, ex rel., The Oklahoma Police Pension and Retirement Board, 2005 OK 45, ¶8, 115 P.3d 889; Keating v.

Edmondson, 2001 OK 110, ¶15, 37 P.3d 882; Neer v. State ex rel. Oklahoma Tax Comm'n, 1999 OK 41, ¶16, 982 P.2d 1071.

11. Title 36 O.S. Supp. 2012 §363, *see* note 1, supra.

12. In both Gaylord Entertainment Co. v. Thompson, 1998 OK 30, ¶¶49-50, 958 P.2d 128, and Brock v. Thompson, 1997 OK 127, ¶¶32-33, 948 P.2d 279, we expressly neglected to detail the particular elements of a cause of action for what we referred to as the common-law claim for "tortious interference with advantageous business relations," but we did determine that plaintiffs' complaint fails to disclose allegations of "unlawful" means used to interfere with the plaintiffs' "prospective or present" business relationships. We noted in Brock, supra in footnotes 58 and 59 that:

> Oklahoma jurisprudence teaches that one has the right to prosecute a lawful business without unlawful molestation or unjustified interference from any person, and any malicious interference with that business is an unlawful act and an actionable wrong. Crystal Gas Co. v. Oklahoma Natural Gas. Co., Okl., 529 P.2d 987, 989 (1974); Nat'l Life & Accident Ins. Co. v. Wallace, 162 Okl. 174, 21 P.2d 492, 494 (1933); Stebbins v. Edwards, 101 Okl. 188, 224 P. 714, 715-16 (1924); Schonwald v. Ragains, 32 Okl. 223, 122 P. 203, 208 (1912). For a discussion of the difference between interference with a prospective economic advantage and with contractual or business relations, *see* Overbeck v. Quaker Life Ins. Co., 1984 OK CIV APP 44, 757 P.2d 846, 847-48. *See* in this connection Lakeshore Community Hosp., Inc. v. Perry, 538 N.W. 2d 24, 27 (Mich.App. 1995); Weitting v. McFeeters, 304 N.W.2d 525, 529 (Mich.App.1981); Wilkerson v. Carlo, 300 N.W.2d 658, 659 (Mich. App. 1981), for the elements of tortious interference with advantageous business relationships or prospective economic relations. The Restatement (Second) of Torts § 766B states that "[o]ne who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or (b) preventing the other from acquiring or continuing the prospective relation." There is no actionable claim if the interference is lawful or does not encompass any unfair or unlawful act. *See*, e.g., Mandelblatt v. Devon Stores, Inc., 132 A.D.2d 162, 168, 521 N.Y.S.2d 672, 676 (1987) (intentional interference with a precontractual business relationship is actionable if effected by unlawful means or, under the theory of prima facie tort, by lawful means without justification); Quail Ridge Assocs. v. Chemical Bank, 162 A.D.2d 917, 919-20, 558 N.Y.S.2d 655, 658, appeal dismissed, 76 N.Y.2d 936, 563 N.Y.S.2d 64, 564 N.E.2d 674 (N.Y.App.1990); accord BPS Clinical Laboratories v. Blue Cross and Blue Shield of Michigan, 552 N.W.2d 919, 925 (Mich.App.1996) (Michigan law) (requiring unlawful means); *see also* Bonelli v. Volkswagen of Am., 421 N.W.2d 213, 219-220 (Mich.App.1988)(requiring unlawful means).

However, in Wilspec Techs, Inc. v. Dunan Holding Group Co., 2009 OK 12, ¶6, 204 P.3d 69, a case in which we answered the Federal Question of whether Oklahoma adopts the Restatement (Second) of Torts §766A which allows a claim against one who prevents the other from performing the contract or causing performance to be more expensive or burdensome. We recognized that the tort could be applied to existing and prospective business relations when we noted intentional interference with business relations may be interference with a third party existing contract; with plaintiff's own performance; or with prosepective contractual relations not yet reduced to contract. We also noted in Wilspec, supra, that:

> ¶15 Presently, Oklahoma recognizes a tortious interference claim with a contractual or business relationship if the plaintiff can prove (1) the interference was with an existing contractual or business right; (2) such interference was malicious and wrongful; (3) the interference was neither justified, privileged nor excusable; and (4) the interference proximately caused damage. Mac Adjustment, Inc., 1979 OK 41, ¶ 5, 595 P.2d 427, 428. Additionally, the claim is viable only if the interferor is not a party to the contract or business relationship. Voiles v. Santa Fe Minerals, Inc., 1996 OK 13, ¶ 18, 911 P.2d 1205, 1209.
>
> ¶16 Although Defendants provide adverse authority from other jurisdictions, we believe that where the law provides a remedy against a tortfeasor who induces or causes a third party not to perform the contract, the protection against such tortious acts extends to a party who is unable to perform his/her contract or where such performance becomes more costly or unduly burdensome. To hold otherwise would unjustly enrich a tortfeasor and leave a plaintiff less than whole.

13. Tuffy's Inc. v. City of Oklahoma City, 2009 Ok 4, ¶14, 212 P.3d 1158; Daniels v. Union Baptist Ass'n, 2001 OK 63, ¶13, 55 P.3d 1012; Green Bay Packaging, Inc. v. Preferred Packaging, Inc., 1996 OK 121, ¶21, 932 P.2d 1091; Voiles v. Santa Fe Minerals Inc., 1996 OK 13, ¶18 fn. 6, 911 P.2d 1205; Morrow Dev. Corp. v. American Bank & Trust Co., 1994 OK 26, ¶10, 875 P.2d 411; James Energy Co. v. HCG Energy Corp., 1992 OK 117, ¶29, 847 P.2d 333; Waggoner v. Town & Country Mobile Homes, Inc., 1990 OK 139, ¶27, 808 P.2d 649; Mac Adjustment, Inc. v. Property Loss Research Bureau, 1979 OK 41, ¶5, 595 P.2d 427.

14. Tuffy's Inc. v. City of Oklahoma City, 2009 Ok 4, ¶15, fn. 34, 212 P.3d 1158 provides that "[T]he note to Oklahoma Uniform Jury Instruction-Civil, OUJI-Civil 24.1 provides that the term "business relationship" may be substituted for the word "contract" throughout to adapt for a claim of interference with a business relationship. OUJI-Civil 24.1. . . ."

15. *See*, Robert's Hawaii School Bus, Inc. v Laupahoehoe, 91 Hawai'i 224, 258, 982 P.2d 853, 888 (1999); Gonzalez v. Sessom, 2006 OK CIV APP 61, ¶16, 137 P.3d 1245; Boyle Services, Inc. v. Dewberry Design Group, Inc., 2001 OK CIV APP 63, ¶6, 24 P.3d 878; Lakeshore Community Hosp. v. Perry, 212 Mich. App. 396, 401, 538 N.W. 2d 24, 26 (1995); These elements have apparently evolved at least in part, from the Restatement (Second) of Torts §766B at 20 (1979) which defines the tort of "Intentional Interference with Prospective Contractual Relations" as follows:

> One who intentionally and improperly interferes with another's prospective contractual relation (except to marry) is subject to liability to the other for pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of
> (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or
> (b) preventing the other from acquiring or continuing the prospective relation.

See also, Note, Leigh Furniture and Carpet Co. v. Isom: Utah's New Tort for Interference with Prospective Economic Relations, 10 J. Contemp. L. 227 (1984) (Discussing the views of the Restatement (First) of Torts, Restatement (Second) of Torts, and the Oregon View which requires improper motives or means plus an improper intent to interfere.).

16. This distinction apparently attempts to preserve the ability of individuals to freely compete in the marketplace. For example, The Supreme Court of California, in Della Penna v. Toyota Motor Sales, U.S.A., 11 Cal. 4th 376, 392, 902 P.2d 740 (1995), summarized the reasoning;

> We are guided by . . . the need to draw and enforce a sharpened distinction between claims for tortious disruption of an existing contract and claims that a prospective contractual or economic relationship has been interfered with by the defendant . . . Economic relationships short of contractual, however, should stand on a different legal footing as far as the potential for tort liability is reckoned. Because ours is a culture firmly wedded to the social rewards of commercial contests, the law usually takes care to draw lines of legal liability in a way that maximizes areas of competition free of legal penalties.

The Supreme Court of Tennessee, citing to Della Penna, supra, also reiterated the importance of the distinction;

> Because the tort (of intentional interference with a prospective economic advantage) extends beyond situations in which there exists a valid contractual relationship, it could potentially infringe upon the principle of free competition by holding liable those individuals engaged in legitimate business practices.

Trau-Med of Am., Inc. v. Allstate Ins. Co., 71 S.W.3d 691, 699, (2002).

17. Brock v. Thompson, *see* note 12, supra.

18. Gaylord Entertainment Co. v. Thompson, *see* note 12, supra.

19. Robert's Hawaii School Bus, Inc. v Laupahoehoe, *see* note 15, supra.

20. Courts include some requirement of interference to be wrongful or improper or illegal by some measure beyond the fact of the interference itself. The Supreme Court of Oregon stated the following in Top Service Body Shop, Inc. v. Allstate Ins. Co., 283 Ore. 201, 209, 582 P.2d 1365 (1978);

> . . . [S]uch a claim is made out when interference resulting in injury to another is wrongful by some measure beyond the fact of the interference itself. Defendant's liability may arise from improper motives or from the use of improper means. They may be wrongful by reason of a statute or other regulation, or a recognized rule of common law, or perhaps an established standard of a trade or profession.

Connecticut requires "plaintiff to plead and to prove at least some improper motive or improper means" and quoting Top Service, supra, that the interference be "wrongful by some measure beyond the fact of the interference itself." Blake v. Levy, 191 Conn. 257, 262, 464 A.2d 52 (1983). Idaho requires that the interference be "improper" or "wrongful". That the plaintiff must show . . . the interference was wrongful by some measure beyond the fact of the interference itself. Syringa Net-

works, LLC v. Idaho Dep't of Admin., 155 Idaho 55, 64, 305 P.3d 499 (2013). Illinois requires that there be intentional and unjustified interference by the defendant that induced or caused a breach or termination of the expectancy. Voyles v. Sandia Mortg. Corp., 196 Ill. 2d 288, 300, 751 N.E.2d 1126 (2001).

The Restatement (Second) of Tort §767, at 25-26 discusses determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not considering the following factors:

(a) the nature of the actor's conduct,
(b) the actor's motive,
(c) the interests of the other with which the actor's conduct interferes,
(d) the interests to be advanced by the actor,
(e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
(f) the proximity or remoteness of the actor's conduct to the interference and
(g) the relations between the parties.

21. Top Service Body Shop v. Allstate, *see* note 19 supra.

22. Title 36 O.S. Supp. 2012 §363, note 1, supra.

23. A motion for summary judgment should be sustained only when the pleadings, affidavits, depositions, admissions, or other evidentiary materials establish that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Green Tree Servicing, LLC., v. Dalke, 2017 OK 74, ¶19, 405 P.3d 676; K & K Food Services, Inc. v. S & H, Inc., 2000 OK 31, ¶16, 3 P.3d 705; Skinner v. Braum's Ice Cream Store, 1995 OK 11, ¶9, 890 P.2d 922; Buck's Sporting Goods, Inc., of Tulsa v. First Nat. Bank & Trust Co. of Tulsa, 1994 OK 14, ¶11, 868 P.2d 693. All conclusions drawn from the evidentiary materials submitted to the trial court are viewed in the light most favorable to the party opposing the motion. Green Tree Servicing, LLC., v. Dalke, supra; K & K Food Services, Inc. v. S & H, Inc., supra; Phelps v. Hotel Management, Inc., 1996 OK 114, ¶7, 925 P.2d 891; State ex rel. Hettel v. Security National Bank & Trust Co. in Duncan, 1996 OK 53, ¶24, 922 P.2d 600. Even when basic facts are undisputed, motions for summary judgment should be denied, if under the evidence, reasonable persons might reach different conclusions from the undisputed facts. Green Tree Servicing, LLC., v. Dalke, supra; Prichard v. City of Oklahoma City, 1999 OK 5, ¶19, 975 P.2d 914.

24. Title 36 O.S. Supp. 2012 §363, *see* note 1, supra.

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NOTICE OF MEETINGS

CREDENTIALS COMMITTEE

The Credentials Committee of the Oklahoma Bar Association will meet Thursday, Nov. 7, 2019, from 9 - 9:30 a.m. in Room 6 (street level) of the Cox Convention Center, 1 Myriad Gardens, Oklahoma City, Oklahoma, in conjunction with the 115th Annual Meeting. The Committee members are: Chairperson Luke Gaither, Henryetta; Kimberly K. Moore, Tulsa; Emma Payne, Tulsa; and Jeffery D. Trevillion, Oklahoma City.

RULES & BYLAWS COMMITTEE

The Rules & Bylaws Committee of the Oklahoma Bar Association will meet Thursday, Nov. 7, 2019, from 10 - 10:30 a.m. in Room 6 (street level) of the Cox Convention Center, 1 Myriad Gardens, Oklahoma City, Oklahoma, in conjunction with the 115th Annual Meeting. The Committee members are: Chairperson Judge Richard A. Woolery, Sapulpa; Roy D. Tucker, Muskogee; Billy Coyle IV, Oklahoma City; Nathan Richter, Mustang; and Ron Gore, Tulsa.

RESOLUTIONS COMMITTEE

The Resolutions Committee of the Oklahoma Bar Association will meet Thursday, Nov. 7, 2019, from 10:45 - 11:45 a.m. in Room 6 (street level) of the Cox Convention Center, 1 Myriad Gardens, Oklahoma City, Oklahoma, in conjunction with the 115th Annual Meeting. The Committee members are: Chairperson Molly A. Aspan, Tulsa; Kendall A. Sykes, Oklahoma City; Peggy Stockwell, Norman; Clayton Baker, Jay; M. Courtney Briggs, Oklahoma City; and Mark E. Fields, McAlester.

Opinions of Court of Criminal Appeals

2019 OK CR 26

THE STATE OF OKLAHOMA, Appellant, v. JOHN GLENN MORGAN, Appellee

Case No. S-2018-952. October 17, 2019

OPINION

ROWLAND, JUDGE:

¶1 The State of Oklahoma charged Appellee John Glenn Morgan by Misdemeanor Information in the District Court of Tulsa County, Case No. CM-2017-4166, with Possession of Controlled Drug (Count 1), in violation of 63 O.S. Supp.2017, § 2-402(A)(1), Unlawful Possession of Drug Paraphernalia (Count 2), in violation of 63 O.S.2011, § 2-405, and Unsafe Lane Change (Count 3), in violation of 47 O.S.Supp. 2017, § 11-309. Morgan filed a motion to suppress all evidence seized from the warrantless search of his vehicle by the arresting officers during the traffic stop. After a hearing, the Honorable April Seibert, Special Judge, sustained Morgan's motion and dismissed Counts 1 and 2. The State announced its intent to appeal and timely filed the instant appeal of the district court's order, seeking review of four issues:

(1) whether the trial court failed to properly evaluate the durational requirements of the traffic stop;

(2) whether the trial court erred in failing to conclude that Morgan's consent to a search of his trailer altered the durational requirements of the stop;

(3) whether the trial court failed to recognize that the police were justified in holding Morgan beyond the initial traffic stop; and

(4) whether the trial court failed to recognize an independent source to hold Morgan.

¶2 We affirm the district court's order for the reasons discussed below.

BACKGROUND

¶3 On September 5, 2018, Owasso Police Officer Josua Goins was on patrol duty when he responded to a dispatch that a reckless driver of a semi-truck was northbound on Highway 169. Officer Goins located the semi-truck and observed it crossing the lane lines. Goins stopped the vehicle which was driven by John Glenn Morgan. During the course of the stop an officer from the canine unit walked a drug dog around the semi-truck. The dog alerted on the cab and a subsequent search revealed an eyeglass case in a bed rack that contained a substance that field tested positive for methamphetamine. A pipe was also found. Morgan was arrested.

¶4 Following a motion to suppress during which the trial judge heard evidence and watched video evidence of the entire encounter, the Court sustained the motion. Specifically, the Court held that once Goins had investigated the truck's swerving by speaking with the driver, administering field sobriety tests, and inspecting the inside of the trailer, further detention for the purpose of screening the vehicle with a drug dog was not supported by reasonable suspicion and therefore violated the Fourth Amendment.

DISCUSSION

¶5 The State challenges the district court's order granting Morgan's motion to suppress.[1] We exercise jurisdiction under 22 O.S.2011, § 1053(5)[2] because the State's ability to prosecute Morgan on the charges of unlawful possession of a controlled drug and unlawful possession of drug paraphernalia is substantially impaired absent the suppressed evidence, making review appropriate. *See State v. Strawn*, 2018 OK CR 2, ¶ 18, 419 P.3d 249, 253. In reviewing a district court's ruling on a motion to suppress evidence based on an allegation the search or seizure was illegal, we credit the district court's findings of fact unless they are clearly erroneous. *State v. Alba*, 2015 OK CR 2, ¶ 4, 341 P.3d 91, 92. "However, we review *de novo* the magistrate's legal conclusions drawn from those facts." *State v. Nelson*, 2015 OK CR 10, ¶ 11, 356 P.3d 1113, 1117.

PROPOSITION 1: THE TRIAL COURT FAILED TO PROPERLY EVALUATE THE DURATIONAL REQUIREMENT OF THE STOP.

¶6 Morgan had a right under both the United States and Oklahoma Constitutions to be free from unreasonable searches and seizures. U.S.

Const. Amend. IV; Okla. Const. Article II, Section 30. It is well-established that a traffic stop is a seizure under the Fourth Amendment. Strawn, 2018 OK CR 2, ¶ 21, 419 P.3d at 253 (citing *McGaughey v. State*, 2001 OK CR 33, ¶ 24, 37 P.3d 130, 136). The scope and duration of a traffic stop must be related to the stop and must last no longer than is necessary to effectuate the purpose of the stop (i.e., investigate the potential traffic infraction). *Seabolt v. State*, 2006 OK CR 50, ¶ 6, 152 P.3d 235, 237 (citing *Florida v. Royer*, 460 U.S. 491, 500, 103 S.Ct. 1319, 1325, 75 L.Ed.2d 229 (1983); *Terry v. Ohio*, 392 U.S. 1, 20, 88 S.Ct. 1868, 1879, 20 L.Ed.2d 889 (1968)). "If the length of the investigative detention goes beyond the time necessary to reasonably effectuate the reason for the stop, the Fourth Amendment requires reasonable suspicion that the person stopped has committed, is committing or is about to commit a crime." *Seabolt,* 2006 OK CR 50, ¶ 6, 152 P.3d at 237-38.

¶7 The United States Supreme Court has held that "the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission' - to address the traffic violation that warranted the stop and attend to related safety concerns." *Rodriguez v. United States*, 575 U.S. ___, 135 S.Ct. 1609, 1614, 191 L.Ed.2d 492 (2015) (internal citation omitted). "Authority for the seizure thus ends when tasks tied to the traffic infraction are – or reasonably should have been – completed." *Id.* Given the many variable circumstances associated with traffic stops, this Court has been unwilling to impose rigid time limitations on the duration of traffic stops. *See Seabolt*, 2006 OK CR 50, ¶ 9, 152 P.3d at 238.

¶8 In determining whether the scope and duration of the traffic stop was related to the violation and lasted no longer than was necessary to investigate the traffic violation, the trial court considered both Officer Goins' testimony at the hearing and the lapel camera video recording of the stop. The video recording showed that Officer Goins stopped the semi-truck and made contact with Morgan at 6:21 p.m. He asked for, and received, Morgan's driver's license and proof of insurance. Officer Goins asked Morgan to step outside the vehicle and wait for him on the side of the road. By 6:23 p.m., Officer Goins was back in his patrol car. He requested a drug dog as well as a trooper to deal with the log book and size and weights because Morgan had admitted his log book was not properly filled out. When Officer Goins was finished with the computer check he waited in his patrol car for the backup officer to arrive. A backup officer arrived at 6:27 p.m. and he went with Officer Goins to the front of the semi-truck where Officer Goins administered sobriety tests on Morgan from 6:30 p.m. to 6:32 p.m. After this Officer Goins asked Morgan if he would open the back of the trailer and Morgan indicated he would do so. At 6:33 p.m., while they were walking to the back of the trailer, the backup officer told Goins that no troopers were available to come check the log book and Goins is heard to reply, "Hah, it's his lucky day." Morgan opened the trailer at 6:33 p.m. and Goins looked at the load. After the officers had examined the load and the back doors were closed, the canine unit officer, who had arrived earlier with the drug dog, brought it to the semi-truck and walked it around the vehicle. The dog alerted on the cab of the semi-truck at 6:38 p.m. This was seventeen minutes after the initial stop. Officer Goins had still not written a citation at this point.

¶9 Upon considering Officer Goins' testimony and especially the video of the lapel camera,[3] the trial court found that after Goins administered the sobriety tests and checked the load in the back of the trailer he should have expeditiously issued a citation or a warning and allowed Morgan to leave. Instead, Officer Goins told Morgan that he was being detained longer because of the issue with his log book. This clearly was not the case. Officer Goins was, as the trial court noted, offering an excuse to detain Morgan longer so a drug dog could be walked around the truck.[4] This case illustrates why simply using a stopwatch to time the length of detention in these cases is not dispositive. The seventeen minute detention prior to the dog alert may be reasonable in other cases, but here, at the point in time the dog handler commenced his work, there simply was not reasonable suspicion of drug activity to justify that continued detention. The district court found the situation similar to that in *Seabolt* where no circumstances existed to justify the extended detention. That ruling sustaining the motion to suppress is supported by the record and was not an abuse of discretion.

PROPOSITION 2: THE TRIAL COURT ERRED IN FAILING TO CONCLUDE THAT MORGAN'S CONSENT TO A SEARCH OF HIS TRAILER ALTERED THE DURATIONAL REQUIREMENTS OF THE STOP.

¶10 The record reflects that Officer Goins asked Morgan for consent to search the back of the trailer and that Morgan opened the trailer for the officers to inspect the load. The State complains that consent to search during a traffic stop gives the police more to investigate but with less time to do so. It asks this Court to expand the length of time the police have to conduct traffic stops where consent to search is given. The State also argues that the trial court erred in failing to account for the time necessary to conduct the search when assessing the duration of the traffic stop.

¶11 Again, given the many variable circumstances associated with traffic stops, we decline to impose rigid time limitations on the duration of traffic stops. *See Seabolt*, 2006 OK CR 50, ¶ 9, 152 P.3d at 238. In the present case, the time the officers spent inspecting the load did not count against the time deemed reasonable to effectuate the purpose of the stop; it was reasonable, under the circumstances of this case, for the officers to inspect the load to determine whether it may have contributed to the erratic driving. Rather, the trial court's ruling made clear that the unlawful detention is the time interval commencing after the sobriety tests had been administered and after the trailer had been inspected, in order to allow the drug dog to screen the vehicle. This proposition is without merit.

PROPOSITION 3: THE TRIAL COURT FAILED TO RECOGNIZE THAT OWASSO POLICE WERE JUSTIFIED IN HOLDING MORGAN BEYOND THE INITIAL TRAFFIC STOP.

¶12 If a traffic stop extends beyond the time necessary to effectuate the purpose of the stop, no Fourth Amendment violation will be found where the officer extended the stop because he or she had reasonable suspicion to believe that the person stopped committed, was committing, or was about to commit a crime. *Seabolt*, 2006 OK CR 50, ¶ 6, 152 P.3d at 237-38. It is the government's burden to prove the reasonableness of an officer's suspicion. *United States v. Lopez,* 849 F.3d 921, 925 (10th Cir. 2017) (citing *United States v. Pettit*, 785 F.3d 1374, 1379 (10th Cir. 2015). "[R]easonable suspicion is not, and is not meant to be, an onerous standard." *Pettit*, 785 F.3d at 1379 (10th Cir. 2015) (quoting *United States v. Kitchell*, 653 F.3d 1206, 1219 (10th Cir. 2011)). Individual acts that are susceptible to an innocent explanation can collectively amount to reasonable suspicion. *See United States v. Arvizu*, 534 U.S. 266, 274, 122 S.Ct. 744, 751, 151 L.Ed.2d 740 (2002). However, continued detention must be based on observed facts, not conclusions. *United States v. Fernandez,* 18 F.3d 874, 878, (10th Cir. 1994) ("continued detention . . . can only be justified if specific and articulable facts and rational inferences drawn from those facts [give] rise to a reasonable suspicion of criminal activity") (internal citation and quotation marks omitted). Furthermore, "inchoate and unparticularized suspicion or 'hunch' is insufficient to give rise to reasonable suspicion." *Id. See also United States v. Simpson*, 609 F.3d 1140, 1147-53 (10th Cir. 2010) (finding reasonable suspicion is determined by the totality of the circumstances).

¶13 The State argues that in the present case Morgan's behavior and the relevant circumstances exceed the quantum of specific and articulable facts necessary to justify extending the detention beyond the scope of the traffic stop. It specifically claims that Morgan's erratic driving and inability to maintain safe lane use, his failure to fill out his driving logs, and his nervousness provide specific and articulable facts necessary for further investigation beyond the scope of the traffic stop. We disagree.

¶14 Morgan's erratic driving and inability to maintain safe lane use were adequately investigated during the traffic stop by the officer's questioning, field sobriety tests, and the inspection of the load in the trailer. The tests did not indicate that Morgan was intoxicated and Morgan explained that irregular driving was caused by the light load he was hauling which was confirmed by visual inspection of the inside of the trailer. Thus, this information did not provide the requisite reasonable suspicion to extend the traffic stop past the time necessary to effectuate the purpose of the stop, specifically, the time required for the drug detector dog to screen the vehicle.

¶15 Nor did Morgan's failure to fill out his driving logs provide reasonable suspicion necessary to extend the stop in this case. While Officer Goins requested a trooper to investigate this violation, one was not available and Goins acknowledged that he was not detaining Morgan because of issues with the driver's log. At 6:29 p.m., Officer Goins can be heard outlining his plan of action to his backup officer, and in referring to his attempts to get a trooper to investigate the log book violations he says, "Oh well, if a trooper shows up a trooper shows up." Four minutes later upon being informed by his

backup officer that no trooper is available, Officer Goins remarks "Hah, its his lucky day." Although an officer's subjective intent ordinarily plays no role in Fourth Amendment analysis, *Dufries v. State*, 2006 OK CR 13, ¶ 9, 133 P.3d 887, 889, allowing the in-vestigation of the logbook to serve as the basis for continued detention here would authorize an indefinite detention because the officers knew no trooper would be coming.

¶16 Finally, while an officer may consider nervousness along with other circumstances in forming reasonable suspicion, it is not, generally, given significant weight in the reasonable suspicion analysis. *See Seabolt*, 2006 OK CR 50, ¶ 10, 152 P.3d at 238; *Fernandez*, 18 F.3d at 879 ("nervousness is of limited significance in determining reasonable suspicion"). *See also United States v. Moore*, 795 F.3d 1224, 1230 (10th Cir. 2015)("nervousness is not entitled to significant weight when determining whether reasonable suspicion exists") (quoting *Courtney v. Okla. ex rel. Dep't of Public Safety*, 722 F.3d 1216, 1224 (10th Cir. 2013)). "It is certainly not uncommon for most citizens – whether innocent or guilty – to exhibit signs of nervousness when confronted by a law enforcement officer." *United States v. Wood*, 106 F.3d 942, 948 (10th Cir. 1997). However, more weight is given to "extreme and persistent nervousness." *Simpson*, 609 F.3d at 1148; *Paul v. State*, 2003 OK CR 1, ¶ 3 n. 4, 62 P.3d 389, 390 n. 4.

¶17 Here, Officer Goins testified at the suppression hearing that when he made contact with Morgan he was "a little erratic." Goins testified that Morgan's body movements were "kind of all over the place" and he spoke with "sort of an excited nervousness." The lapel video of the stop, however, did not show Morgan to display extreme nervousness at all. Rather, he appeared quite calm during the video-taped portions of the stop. Morgan's slight nervousness does not provide significant weight in the reasonable suspicion analysis to justify detention exceeding the scope of the initial traffic stop.

¶18 The trial court did not abuse its discretion in failing to recognize that the officers were justified in holding Morgan beyond the initial traffic stop as the record did not support such a finding.

PROPOSITION 4: THE TRIAL COURT FAILED TO RECOGNIZE AN INDEPENDENT SOURCE TO HOLD MORGAN.

¶19 The State argues that even if the officers illegally extended the stop beyond the duration necessary to effectuate the purpose of the traffic stop, the evidence was admissible under the independent source doctrine because Morgan's failure to maintain his log book provided an independent reason to extend the stop. "[T]he independent source doctrine allows trial courts to admit evidence obtained in an unlawful search if officers independently acquired it from a separate, independent source." *Utah v. Strieff*, 579 U.S. __, 136 S.Ct. 2056, 2061, 195 L. Ed.2d 400 (2016) (citing *Murray v. United States*, 487 U.S. 533, 537, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988)). The State's argument is not well taken. The record makes clear that no troopers were available to come to the scene and that Officer Goins was not going to pursue the problems with the log book. The State has not shown that the contraband was or would inevitably have been acquired from a separate, independent source. In fact, the record indicates that the investigation of logbook violations was in all likelihood a moot issue twelve minutes into the detention, which was prior to the consensual search of the trailer and the drug dog sniff of the vehicle's exterior. We cannot find that the trial court abused its discretion in declining to find that the stop was lawfully extended and the drugs and paraphernalia admissible under the independent source doctrine.

DECISION

¶20 The ruling of the district court sustaining Morgan's Motion to Suppress is **AFFIRMED.** Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2019), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY THE HONORABLE APRIL SEIBERT, SPECIAL JUDGE

APPEARANCES IN DISTRICT COURT

Randall Young, Asst. District Attorney, Tulsa County, 500 S. Denver, Ste. 900, Tulsa, OK 74103, Attorney for State

Matthew Hall, Attorney at Law, 2727 E. 21st St., Ste. 600, Tulsa, OK 74114, Attorney for Defendant

APPEARANCES ON APPEAL

Randall Young, Asst. District Attorney, Tulsa County, 500 S. Denver, Ste. 900, Tulsa, OK 74103, Attorney for State

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

1. Morgan did not file a brief responding to the State's claims.

2. Under Section 1053(5), the State may appeal "[u]pon a pretrial order, decision, or judgment suppressing or excluding evidence where appellate review of the issue would be in the best interests of justice[.]"

3. The trial court indicated its initial opinion about the legality of the detention had been changed by watching the video of the encounter.

4. The trial court incorrectly noted that Officer Goins was waiting for the canine unit to arrive. The lapel camera showed that the canine unit had arrived while Goins was administering the sobriety tests. However, the canine officer did not begin his work until after the field sobriety tests had been administered, and the search of the trailer had failed to disclose evidence or a reason for the truck's erratic driving. Thus, Officer Goins extended the detention waiting for the canine officer to get the dog out of his car and bring it to the semi-truck after the other tasks had been completed.

NOTICE OF NOMINEES for FOUNDATION

The Oklahoma Bar Foundation announces the following nominees for new Trustee positions for 3 year terms commencing on January 1, 2020:

Cesar Armenta, Oklahoma City
Bob Burke, Oklahoma City
Ryan Ray, Tulsa

Nominees for their second 3 year terms commencing on January 1, 2020 include:

Courtney Briggs, Oklahoma City
Andrew Shank, Tulsa
Tom Vincent, Tulsa

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Rules Creating And Controlling the Oklahoma Bar Association

(Okla. Statutes Title 5, Chapter 1, Appendix 1)

Notice is hereby given that the following proposed amendments to the Rules Creating & Controlling the Oklahoma Bar Association and the Oklahoma Rules of Professional Conduct have been approved by the Board of Governors for submission to the Supreme Court for approval. The purpose of these amendments is to ensure those seeking licensure also be directed to the Rules Governing Admission to the Practice of Law in the State of Oklahoma.

Section 5. OUT-OF-STATE ATTORNEYS AND ATTORNEYS GRANTED A SPECIAL TEMPORARY PERMIT TO PRACTICE.

A. Definitions - The following definitions govern this Article:

1. Out-of-State Attorney: A person who is not admitted to practice law in the State of Oklahoma, but who is admitted in another state or territory of the United States, the District of Columbia, or a foreign country.

2. Oklahoma Attorney: A person who is (a) licensed to practice law in Oklahoma, as an active or senior member as those categories are defined in Section 2 of this Article; and (b) a member in good standing of the Oklahoma Bar Association.

3. Oklahoma Courts or Tribunals: All trial and appellate courts of the State of Oklahoma, as well as any boards, departments, commissions, administrative tribunals, or other decision-making or recommending bodies created by the State of Oklahoma and functioning under its authority. This term shall include court-annexed mediations and arbitrations. It shall not, however, include federal courts or other federal decision-making or recommending bodies which conduct proceedings in Oklahoma.

4. Proceeding: Any action, case, hearing, or other matter pending before an Oklahoma court or tribunal, including an "individual proceeding" within the meaning of Oklahoma's Administrative Procedures Act (75 O.S. § 250.3).

5. **Attorney Granted Special Temporary Permit to Practice:** An attorney who is granted a special temporary permit pursuant to Rule Two Sections 5 and 6 of the Rules Governing Admission to the Practice of Law in the State of Oklahoma.

B. An out-of-state attorney may be permitted to practice before Oklahoma courts or tribunals solely for the purpose of participating in a proceeding in which he or she has been employed upon the following express conditions:

1. The out-of-state attorney shall make application with the Oklahoma Bar Association, in such form and according to the procedure approved by the Board of Governors of the Oklahoma Bar Association. Said application shall include an affidavit (or unsworn statement under penalty of perjury pursuant to 12 O.S. § 426) which: (a) lists each state or territory of the United States, the District of Columbia, or foreign country in which the out-of-state attorney is admitted; and (b) states that the out-of-state attorney is currently in good standing in such jurisdictions. If an out-of-state

attorney commits actual fraud in representing any material fact in the affidavit or unsworn statement under penalty of perjury provided herein, that attorney shall be permanently ineligible for admission to an Oklahoma court or tribunal pursuant to this Rule, or for admission to the Oklahoma Bar Association. The out-of-state attorney shall file a separate application with respect to each proceeding in which he or she seeks to practice.

2. An Oklahoma court or tribunal may temporarily admit an out-of-state attorney on a showing of good cause for noncompliance with the other provisions of this Rule. Temporary admission under this Rule may be granted for a period not exceeding 10 days; however, such period may be extended as necessary on clear and convincing proof that the circumstances warranting the extension are beyond the control of the out-of-state attorney.

3. Unless a waiver is granted pursuant to Subsection 4, the out-of-state attorney shall pay the sum of Three Hundred Fifty Dollars ($350.00) as a non-refundable application fee to the Oklahoma Bar Association. If the proceeding is pending on the anniversary of the application, an annual renewal fee of Three Hundred Fifty Dollars ($350.00) shall be paid to the Oklahoma Bar Association and such fee shall continue to be paid on each anniversary date until the proceeding is concluded or the out-of-state attorney is permitted to withdraw from the proceeding by the applicable Oklahoma court or tribunal. In the event the annual renewal fee is not timely paid, the Oklahoma Bar Association shall mail a renewal notice to the out-of-state attorney at the address set forth in the attorney's application filed with the Oklahoma Bar Association under this Rule (or at an updated address subsequently furnished by the out-of-state attorney to the Oklahoma Bar Association), apprising the attorney of the failure to timely pay the annual renewal fee of Three Hundred Fifty Dollars ($350) with an additional late fee of one hundred dollars ($100). If the out-of-state attorney fails to timely comply with this renewal notice, the Oklahoma Bar Association shall mail notice of default to the out-of-state attorney, the Oklahoma associated attorney (if applicable), and the Oklahoma court or tribunal conducting the proceeding. The Oklahoma court or tribunal shall file the notice of default in the proceeding and shall remove the out-of-state attorney as counsel of record unless such attorney shows that the Oklahoma Bar Association's renewal notice was not received or shows excusable neglect for failure to timely pay the annual renewal fee and late fee. In the event of such a showing, the tribunal shall memorialize its findings in an order, and the out-of-state attorney shall within 10 calendar days submit the order to the Oklahoma Bar Association, promptly pay the annual renewal fee and late fee, and file a receipt from the Oklahoma Bar Association showing such payments with the Oklahoma court or tribunal.

4. Out-of-state attorneys appearing pro bono to represent indigent criminal defendants, or on behalf of persons who otherwise would qualify for representation under the guidelines of the Legal Services Corporation due to their incomes and the kinds of legal matters that would be covered by the representation, may request a waiver of the application fee from the Oklahoma Bar Association. Waiver of the application fee shall be within the sole discretion of the Oklahoma Bar Association and its decision shall be nonappealable.

5. The out-of-state attorney shall associate with an Oklahoma attorney. The associated Oklahoma attorney shall enter an appearance in the proceeding and service may be had upon the associ-

ated Oklahoma attorney in all matters connected with said proceeding with the same effect as if personally made on the out-of-state attorney. The associated Oklahoma attorney shall sign all pleadings, briefs, and other documents, and be present at all hearings or other events in which personal presence of counsel is required, unless the Oklahoma court or tribunal waives these requirements.

6. An out-of-state attorney shall by written motion request permission to enter an appearance in any proceeding he or she wishes to participate in as legal counsel and shall present to the applicable Oklahoma court or tribunal a copy of the application submitted to the Oklahoma Bar Association pursuant to Subsection B(1) of this Rule and a Certificate of Compliance issued by the Oklahoma Bar Association.

C. Admission of an out-of-state attorney to appear in any proceeding is discretionary for the judge, hearing officer or other decision-making or recommending official presiding over the proceeding.

D. Upon being admitted to practice before an Oklahoma court or tribunal, an out-of-state attorney is subject to the authority of that court or tribunal, and the Oklahoma Supreme Court, with respect to his or her conduct in connection with the proceeding in which the out-of-state attorney has been admitted to practice law. More specifically, the out-of-state attorney is bound by any rules of the Oklahoma court or tribunal granting him or her admission to practice and also rules of more general application, including the Oklahoma Rules of Professional Conduct and the Rules Governing Disciplinary Proceedings. Out-of-state attorneys are subject to discipline under the same conditions and terms as control the discipline of Oklahoma attorneys. Notwithstanding any other provisions of this Article or Subsection, however, out-of-state attorneys shall not be subject to the rules of this Court relating to mandatory continuing legal education.

E. The requirements set forth below shall apply to all attorneys granted a special temporary permit to practice pursuant to the Rules Governing Admission to the Practice of Law in the State of Oklahoma (5 O.S Chapter 1, App. 5):

1. In addition to compliance with the applicable Rules Governing Admission to the Practice of Law in the State of Oklahoma, ~~A~~ an attorney granted a special temporary permit to practice shall pay an administrative fee to the Oklahoma Bar Association of $350.00 regardless of the duration of the permit. An annual fee in the amount of $350.00 shall be collected on or before the anniversary of the permit. A late fee of $100.00 shall be collected in the event the fee is paid within 30 days of the due date. In the event that the fee is not paid within 30 days of the due date, the special temporary permit shall be deemed cancelled and can only be renewed upon making application to the Board of Bar Examiners and the payment of a new application fee. The annual permit shall only be renewed upon affirmation that the conditions for which the special temporary permit was issued still exist. An attorney granted a special temporary permit to practice shall not appear on the roll of attorneys and shall not be considered a member of the Oklahoma Bar Association. However, an attorney granted a special temporary permit shall be subject to the jurisdiction of the Oklahoma Supreme Court for purposes of attorney discipline and other orders revoking, suspending or modifying the special permit to practice law.

Oklahoma Rules of Professional Conduct

(Okla. Statutes Title 5, Chapter 1, Appendix 3-A)

Notice is hereby given that the following proposed amendments to the Rules Creating & Controlling the Oklahoma Bar Association and the Oklahoma Rules of Professional Conduct have been approved by the Board of Governors for submission to the Supreme Court for approval. The purpose of these amendments is to ensure those seeking licensure also be directed to the Rules Governing Admission to the Practice of Law in the State of Oklahoma.

Rule 5.5. Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) Subject to the provisions of 5.5(a), a lawyer admitted in a United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in a jurisdiction where not admitted to practice that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction that has reciprocity with the State of Oklahoma, and not disbarred or suspended from practice in any jurisdiction, and is in compliance with Rule 2, Section 5 of the Rules Governing Admission to the Practice of Law in the State of Oklahoma, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates in connection with the employer's matters, provided the employer does not render legal services to third persons and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

2019 RESOLUTION

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 **<u>will not increase the total number of credits</u>** 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.

Calendar of Events

October

30 **OBA Legal Internship Committee;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact H. Terrell Monks 405-733-8686

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

15 **OBA Lawyers Helping Lawyers Assistance Program Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Jeanne Snider 405-366-5466

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

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

OBA Member Services Committee meeting; 1:30 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Peggy Stockwell 405-321-9414

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

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

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

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

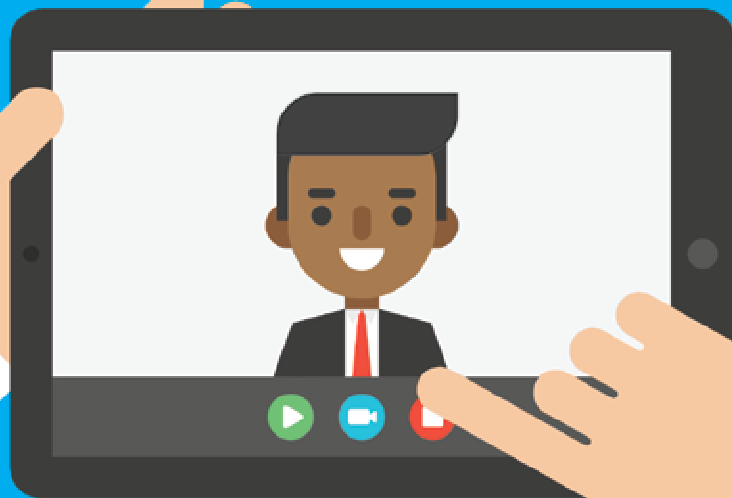
26 **OBA Access to Justice Committee meeting;** 11:30 a.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Rod Ring 405-325-3702

28-29 **OBA Closed** – Thanksgiving

December

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

Don't let distance keep you from getting involved



Attend section and committee meetings remotely via BlueJeans. Use a mobile device, phone or computer. Visit www.okbar.org/bluejeans.

Opinions of Court of Civil Appeals

2019 OK CIV APP 52

KACY AKINS, INDIVIDUALLY, AND VELVA AKINS, INDIVIDUALLY AND AS NEXT FRIEND OF D.N., A MINOR, Plaintiffs/Appellants, vs. BEN MILAM HEAT, AIR & ELECTRIC, INC., Defendant/ Appellee.

Case No. 114,935. January 11, 2019

APPEAL FROM THE DISTRICT COURT OF GRADY COUNTY, OKLAHOMA

HONORABLE W. MIKE WARREN, TRIAL JUDGE

REVERSED AND REMANDED

A. Laurie Koller, CARR & CARR, Tulsa, Oklahoma, and

Tye H. Smith, CARR & CARR, Oklahoma City, Oklahoma, for Plaintiffs/Appellants,

Nathan E. Clark, Rachel M. Rogers, RHODES, HIERONYMUS, JONES, TUCKER & GABLE, P.L.L.C., Tulsa, Oklahoma, for Defendant/ Appellee.

Barbara G. Swinton, Presiding Judge:

¶1 Plaintiffs Kacy Akins, his former wife, Velva Akins now Phillips, and her son, D.N. (collectively, Plaintiffs), appeal a judgment based on a jury verdict in favor of Defendant Milam Heat, Air & Electric Inc. (Milam). Plaintiffs' cause of action for negligence sought damages for carbon monoxide (CO) poisoning allegedly caused by Milam's failure to properly and safely maintain, inspect, and/or warn of a hidden dangerous condition existing in the gas furnace in their home. We conclude the trial court abused its discretion by determining Plaintiffs breached their duty to preserve evidence by removing their gas furnace and its ventpipe or "flue" and lastly by sanctioning them in giving an adverse inference instruction to the jury. This record shows a complete absence of evidence of pre-litigation conduct which was in bad faith, willful or intentional. The admission of irrelevant evidence concerning the spoliation circumstances improperly made that issue the focus of the trial instead of the merits, and prejudiced Plaintiffs' right to a fair trial. The judgment in favor of Milam is reversed, and a new trial is granted.

UNDISPUTED FACTS

¶2 Milam is a business in Chickasha, Oklahoma, in Grady County. On October 26, 2007, Milam's heat and air technician, Andy Adkins, went to Plaintiffs' home in Chickasha for a "no heat" service call. Adkins cleaned rust from the gas furnace's burners and replaced burned wires. After cycling the furnace several times, he told Mrs. Akins the furnace was operating okay and gave her a repair invoice.

¶3 Just before midnight November 6, 2007, Mr. Akins was awakened before midnight by a loud noise. He got up and found Mrs. Akins on the bathroom floor, passed out with a bloody face. Mr. Akins screamed for his stepson, D.N., who did not respond. Mr. Akins called an ambulance, Mrs. Akins was transported to the local emergency room, and Mr. Akins drove himself there. While waiting in the lobby, Mr. Akins passed out, was evaluated, and admitted to the hospital.

¶4 During treatment Mrs. Akins inquired about D.N., then 17 years of age. Soon after, her relatives found D.N. in his bedroom and were dragging him outside when Chickasha Police Officer T. Breath, who had been dispatched to the scene, arrived to help. D.N. was transported by ambulance to the hospital.

¶5 Additionally, on November 6, 2007, the local firemen at the scene ran a CO test inside the house with a meter that starts to alert at "35." According to Officer Breath, the CO meter read "1100 (Incident Level)." The firemen told Officer Breath not to go back into the residence, turned off Plaintiffs' gas furnace, and opened the windows to clear the air. Officer Breath called the police dispatcher, who then called the home of Ivan Reed, a local heat and air technician for Milam, woke him up, asked for his help and then gave him the address. Mr. Reed arrived between 1-2 a.m. using his flashlight in the dark house to locate the gas fueled furnace in a laundry room closet.

¶6 Mr. Reed checked the furnace burner, cleaned off some rust, inspected the heat exchanger for cracks "as best he could," but did not see any. He also looked up the furnace vent or "flue" and did not see any black soot. He then got his ladder, climbed up on the roof, and

used his flashlight to see if the flue was obstructed "with a bird nest or something else" that would prevent CO and other gases from properly venting outside.

¶7 Mr. Reed then asked the firemen to run another test for CO, and they observed the levels in the house begin to rise after he started the furnace. Officer Breath testified Mr. Reed stated, "I don't know what's going on, but I disabled the unit so it won't – you can't turn it back on." Mr. Reed then asked the police officer to tell the homeowners to call Milam "first thing in the morning so that they could discuss the way they are going to fix this."

¶8 Testing revealed each family member had elevated carboxyhemoglobin levels in their blood confirming carbon monoxide (CO) poisoning. They all were treated with supplemental oxygen, Mrs. Akins and D.N. were released after their oxygen levels normalized, and Mr. Akins was kept for observation. The following timeline demonstrates the events after his release from the hospital:

Nov. 8, 2007 - Mr. Akins arrived home from the hospital and called two local HVAC companies. Meli H&A looked at the furnace and submitted a quote for new gas furnace.

Nov. 9, 2007 - Mr. Akins met with Albright H&A about need for replacing furnace.

Nov. 12, 2007 - Mr. Akins received Meli H&A's proposal for new electric furnace.

On or before Nov. 13, 2007 - Mr. Akins retained Carr & Carr (Law Firm)

Nov. 13, 2007 - Law Firm wrote letter to Milam, advising they were retained by the Akins family "concerning the CO poisoning they sustained after the work Milam had performed on their heating unit".

Nov. 19, 2007 - Mr. Akins accepted Albright H&A's proposal to replace gas furnace with new electric heat pump; order was placed.

Nov. 26, 2007 - Milam's Insurer, Hanover Ins. Grp, responded to Law Firm; requested: 1) the family's authorization for medical records, 2) clarification of date of loss; 3) "records pertaining to the care and maintenance of the furnace, names of manufacturer, initial installer and any other companies who may have done work on the *furnace*"; 4) "to inspect *this furnace* at your earliest convenience"; and also 5) "if repairs have been done we will need the name and contact information of the company doing such repairs." Insurer finally asked to take the Akins family's statements, advising of its willingness to get statements "after the holidays" but asking for "the inspection of the *furnace* to take place as soon as practicable, to avoid any spoliation issues."

Dec. 3, 2007 - New electric heat pump installed approximately two weeks after Mr. Akins accepted bid (see November 19, 2007); the installers carried the furnace to his waterproof backyard shed where it was covered and stored; flue/vent pipe to furnace apparently discarded.

On or about Jan. 7, 2008 - Mr. Akins testified he and his brother-in-law removed the original gas water heater about two months after CO incident, replaced with an electric one, and carried the gas water heater to the curb for pickup. The furnace and water heater were housed in the same utility closet.

Jan. 22, 2008 - Milam and Insurer's expert went to the Akins' home to inspect the furnace.

Jan. 24, 2008 - Insurer's letter to Law Firm, insisting on completing the inspection of the Akins' furnace alleged to be leaking CO. Noted "upon arrival at your client's home on [1-22-2008], our expert and insured found the original furnace which is the subject of this action had been removed from the utility closet."

Dec. 17, 2008 - Furnace removed from the Akins' shed for testing requested by Insurer; Milam chose location at DeHart Heat & Air; Plaintiffs' truck was too small to transport furnace in an upright position and requested Milam transport to DeHart; test attended by Dr. Block and Insurer's expert was to determine if the furnace produced excessive CO under optimal conditions; CO test result 2000 parts per million (ppm) (testing level). Later inquiry to DeHart revealed the furnace was lost.[1]

Litigation History

¶9 On April 19, 2009, Plaintiffs filed their petition against Milam, alleging negligent failure to properly and safely maintain, inspect,

and/or warn of a hidden dangerous condition of the furnace in their home. They further alleged Milam "held itself out to be a professional in the field of residential heating installation and maintenance."

¶10 Milam filed its answer on May 28, 2009, admitting "it was in the business of providing heating installation and maintenance" but specifically denied Plaintiffs' allegations of negligence. As affirmative defenses, Milam asserted contributory negligence, actions by third parties over which it had no control, and any defect that existed was open and obvious. It denied the existence of an unreasonably hazardous condition and that it had notice of a defect.

¶11 Over the next 3-1/2 years, the trial court approved the parties' nine joint applications to extend the pretrial schedule. In January 2013, Milam moved for "Judicial Determination Of Its Entitlement To An Adverse Inference Jury Instruction Based On Plaintiffs' Willful Destruction Of Evidence." Noting Plaintiffs' alleged theories for the furnace's production of toxic CO, "inadequate combustion air supply in the closet and cracked furnace heat exchanger," Milam argued it had been substantially prejudiced because it was unable to fully defend against their case because Plaintiffs had "willfully" removed the furnace from the utility closet, without notice to Milam.

¶12 Plaintiffs responded, denying any destruction of evidence and arguing the factors for spoliation sanctions were not present. They also argued Milam's authority for "spoliation" of the furnace from the closet in which it operated was distinguishable. Milam replied, arguing *Barnett v. Simmons*, 2008 OK 100, 197 P.3d 12, controlled the issue of spoliation. The trial court denied Milam's sanction motion, holding the issues would be "ruled on ... after the evidence is heard at trial."

¶13 Two years later, on April 2, 2015, the original trial judge recused himself from the case for reasons not disclosed by the record. Eighteen days later, a second judge was assigned to the case.

¶14 In June of 2015, Plaintiffs moved to transfer the trial to another county pursuant to 12 O.S. 140,[2] arguing the marital relationship between the Milam's owner, Royce Hannah, and the Court Clerk for Grady County, Lisa Hannah, and also her position as secretary/treasurer of Milam, raised concerns with Plaintiffs' ability to get a fair and impartial jury trial. Milam opposed Plaintiffs' motion to transfer, which the trial court subsequently denied.

¶15 On November 24, 2015, Milam moved for reconsideration of its sanction motion for an adverse inference jury instruction for Plaintiffs' spoliation of evidence. Plaintiffs objected that there was no new evidence or arguments and incorporated by reference their response to Milam's first sanction motion. They specifically requested a spoliation instruction against Milam, attaching evidentiary support for its possession and control of the furnace when it was permanently lost.

¶16 A hearing was held December 16, 2015, on the parties' numerous motions in limine and counter-motions for sanctions.[3] Concerning the latter, the order filed January 25, 2016, states the trial court reviewed "all of the related pleadings,"[4] heard "all arguments," and reserved its ruling "until ... determination during the trial process."

Summary of the Jury Trial

¶17 During the five-day jury trial, January 25-29, 2016, the jury heard nine witnesses in Plaintiffs' case in chief premised on Milam's failure to properly service their gas furnace, specifically: 1) failure to perform a CO test, and 2) failure to warn Plaintiffs of the potential danger obvious to Milam at the October 26, 2007 service call.[5] To support their first theory of liability, expert testimony revealed several national associations/groups recommend testing for CO, but there are no Oklahoma or federal statutes or agency regulations requiring it. All experts agree the National Field Code sets a 400 ppm limit on the quantity of CO to safely exit the furnace's flue, and that value cannot be safely exceeded.[6] Plaintiffs' expert, Dr. Block, testified there were clear indications for the CO testing in this case: 1) the burned wires caused by flame-roll out; and 2) the installation in a closet without venting to provide an adequate combustion air supply did not meet current code requirements for safety from CO poisoning. Dr. Block testified a CO test takes less than 10-20 minutes and it alone would have determined the presence of excessive CO regardless of which two gas appliances in the closet was the source.

¶18 During Plaintiffs' case in chief, Milam's technician, Mr. Adkins, testified Milam had no set policy for CO testing, but as a technician he did, so if he had any concerns or the customers

mentioned any symptoms of CO poisoning, he would drive to the shop to pick up a CO detector and return to test for CO. He testified Plaintiffs had an old "gravity-style" furnace,[7] that he cleaned the rust from the burner and heat exchanger and fixed the burned wires caused by "flame roll-out."[8] After turning on the furnace, he cycled through its settings and verified it was working properly by checking to make sure the burner flame had a steady, blue flame. He admitted "flame roll-out" may indicate the furnace is producing excessive CO caused by one of three problems: 1) an obstructed furnace vent (a/k/a "flue"), 2) inadequate combustion air supply, or 3) a cracked heat exchanger.

¶19 Plaintiffs' experts testified a heat exchanger in a furnace must be removed to properly check for holes or cracks from which CO and other combustion products would leak. Both experts testified that the heat exchanger in the GE brand and model furnace in the Akins' home always cracked in the back. Both experts agreed it was better to test the furnace in original condition. However, they opined such condition was less significant in this case because the furnace 1) had been tested in its original condition by the fireman and Mr. Reed the night of the CO poisoning when it produced the toxic CO level of 1100 ppm (incident level), then was tagged out of service, obstruction of the flue was eliminated the same night and 2) had been stored and subsequent tests with optimal supply of combustion air revealed the furnace still produced toxic CO levels. Both experts opined a cracked heat exchanger was the source of the furnace's excessive production of CO.

¶20 For Plaintiffs' failure to warn theory, there was witness testimony and an exhibit of the invoices from Milam for its two prior service calls for burned wires caused by flame roll-out. Mr. Adkins testified he was not told about Milam's prior service calls at the Akins' home. The 11-01-06 invoice notes the "Unit should have combustion air installed" which, according to Plaintiffs' exhibit of Dr. Blocks' summary of findings, documents Milam's knowledge that the furnace presented the danger of CO poisoning more than a year before the incident that did poison them. It is undisputed that the significance of the 11-01-06 recommendation to install combustion air was not explained to Mrs. Akins on that date. Mr. Adkins admitted he noticed the furnace had been improperly installed in a closet with no outside source of combustion air, that its blower safety switch had been bypassed, and that he did not mention either problem to Plaintiffs.

¶21 Mr. Adkins testified he checked the flame condition to make sure it was blue and steady with the doors wide open because it was physically impossible for him to be inside with the door shut. According to Plaintiffs' experts, Mr. Adkins failed to properly evaluate the furnace's burner flame by checking its condition with the utility closet doors open, which failed to test for a possible cause of the flame roll-out, *i.e.*, inadequate combustion air supply due to the furnace's installation in the unvented closet.

¶22 The trial court denied Milam's motion for directed verdicts as to negligence and res ipsa loquitor, but directed a verdict on Plaintiffs' claim for punitive damages. Milam proceeded with its defense that Plaintiffs could not prove a specific cause for the CO production because Plaintiffs destroyed the furnace in its original condition including the gas hot water heater. Their case in chief included three expert witnesses, two for damages and one HVAC expert, L. Wilhelm.

¶23 Wilhelm opined that neither he nor anyone else with experience could determine the specific source for the CO at the Plaintiffs' home "without seeing the scene as it was when this happened." He testified that if a H&A technician sees a mainly blue flame and no fluttering, there is no reason to check for carbon monoxide or to inspect for a cracked heat exchanger.

¶24 Wilhelm further opined it was important to check the original condition of the flue "because if something has happened... for example, if birds built a nest in it or something." Wilhelm also testified it did not surprise him "Dr. Block was unable to reach a specific determination as to what was causing the furnace to function the way it was" because "the scene was destroyed."

¶25 The parties' exhibits, some pre-admitted by stipulation and the rest admitted throughout the trial, were voluminous. The jury instructions included Defendant's requested adverse inference instruction.[9] The jury returned a unanimous verdict on all issues in favor of Milam on March 29, 2016. Plaintiffs appeal the Journal Entry of Judgment filed March 30, 2016, in which the trial court entered

judgment in favor of Milam and against the Plaintiffs.

GENERAL ERRORS AND STANDARD OF REVIEW

¶26 Plaintiffs allege the trial court erred in refusing and giving certain jury instructions, admitting and excluding evidence, and denying their pre-trial motion to transfer the case to a different venue. In reviewing assigned error in jury instructions, "this court must consider the instructions as a whole, to determine whether [they] reflect the Oklahoma law on the relevant issue." *Nealis v. Baird,* 1999 OK 98, ¶ 15, 996 P.2d 438, 444-445. A judgment will not be disturbed on appeal unless it appears reasonably evident that the jury was misled by the allegedly erroneous instruction. *Id.* By statute, an appellate court may not disturb a judgment for misdirection of the jury in the absence of a miscarriage of justice or a substantial violation of the complaining party's constitutional or statutory rights. *Id.* "The test upon review of an instruction urged as improperly given or refused is whether there is a probability that the jury was misled into reaching a result different from that which would have been reached but for the error." *Id.* With these principles in mind, we begin with Plaintiffs' jury instruction arguments.

ANALYSIS

Jury Instructions

Adverse Inference

¶27 Plaintiffs challenge the court's decision that they failed to preserve material evidence and the sanction of giving the jury an adverse inference instruction. They specifically argue: 1) there was no evidence that Plaintiffs destroyed anything willfully or intentionally; 2) they had a reasonable explanation for removing the furnace; 3) the furnace was stored in a shed, made available to Milam's expert for testing, and lost during Milam's possession and control; and 4) the trial court's stated reason for not giving the same sanction against Milam is contrary to the record. In separate propositions but related to the same issue, Plaintiffs also challenge the trial court's refusal to give an adverse inference against Milam for its spoliation of the evidence, arguing it is contrary to the evidence presented to the jury.[10]

¶28 Milam argues the trial court correctly found Plaintiffs' failure to preserve "the furnace *in the condition it was operating* the night of the incident" rose to the level of spoliation as defined by Oklahoma law. Milam claims the adverse inference instruction given to the jury is the "least intrusive and most appropriate" sanction because Plaintiffs' *willful* removal of the furnace without notice prejudiced Milam by making it unable to fully defend against Plaintiffs' theories of liability. Admitting they transported the furnace to be inspected at Plaintiffs' request because they had only a small pickup, Milam argues that Plaintiffs did not present any evidence of what happened to the furnace after the inspection.

¶29 Both parties' authority on appeal for spoliation of evidence is *Barnett v. Simmons*, 2008 OK 100, 197 P.3d 12, in which the Court reviewed a denial of sanctions against the plaintiff for failing to comply with a court order requiring him to produce his computer's hard drive. *Barnett* did not involve a verdict-based judgment in a negligence action or a trial court's rulings on the parties' counter-motions for adverse inference jury instruction as a sanction for *pre-litigation* spoliation of evidence. However, it is the controlling authority in Oklahoma on a trial judge's authority and the requirements to impose sanctions for such conduct.

¶30 Pursuant to *Barnett*, trial judges have authority under 12 O.S. 2011 § 3237 to sanction for discovery violations and also "*inherent authority*" to impose sanctions for "abuse of the discovery process" and "abusive litigation practices or for abuse of judicial process, even if an order compelling discovery has not been made." *Id.*, ¶ 14. "A litigant who is *on notice* that documents and information in its possession are relevant to litigation or *potential litigation* or are reasonably calculated to lead to the discovery of admissible evidence *has a duty to preserve such evidence." Id.*, ¶20. The "duty to preserve material evidence arises not only during litigation but also extends to that period *before the litigation* when a party reasonably should know that the evidence may be relevant to anticipated litigation." (Emphasis added.) *Id.*

¶31 As defined in *Barnett*, spoliation is "the *destruction or material alteration* of evidence or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." (Emphasis added.) *Id.*, ¶ 21. It "occurs when evidence relevant to prospective civil litigation is destroyed, adversely affecting the ability of a litigant to prove his or her claim." *Id.* Finally, "[s]poliation includes

intentional and *negligent* destruction or loss of tangible and relevant evidence which impairs a party's ability to prove or defend a claim." (Emphasis added.) *Id.*

¶32 Additionally, in *Barnett,* the Court held the trial court had applied an erroneous standard for sanctions under [Title 12 O.S.] § 3237." *Id.*, ¶ 27. Relevant to this appeal, the Court identified the factors the trial court should consider: 1) whether plaintiff failed to obey the court's order, 2) whether plaintiff violated his duty to preserve evidence; 3) the level of plaintiff's culpability; and 4) whether the defendant was unfairly prejudiced." *Id.* The order was reversed and remanded for reconsideration of the defendants' motion for sanctions.

Preliminary Issue Established by Barnett

¶33 The *Barnett* Court's first factor is not applicable to this case. Plaintiffs' alleged spoliation of evidence occurred two years before they filed their negligence action against Milam, so there was no discovery order to violate. As we interpret *Barnett,* a party's *prelitigation* spoliation of evidence may nevertheless be subject to sanctions under the trial court's inherent authority *if* certain threshold determinations are made.

¶34 The first determination is whether Plaintiffs (the alleged spoliating party) had a duty to preserve *material* evidence. Under *Barnett* and the facts of this case, said duty "arises ... before the litigation *when* a party *reasonably should know that the evidence may be relevant to anticipated litigation*." If the trial court finds Plaintiffs had a prelitigation duty to preserve evidence, it must then determine the remaining factors, *i.e.*, did the alleged spoliating party violate that duty, their level of culpability, and the prejudice, if any, to Milam.

¶35 Review of the appellate record establishes the trial court did not rule on the Plaintiffs' bad faith, willfulness, or intentional conduct at pretrial, during the jury trial, or in the judgment on appeal. The absence of such rulings are contrary to *Barnett.* In accordance with Barnett, we hold the trial court, prior to allowing an adverse inference instruction, should determine whether there was sufficient evidence of willful, intentional and bad faith conduct.[11]

¶36 Unlike *Barnett* or an appeal from an order sanctioning a party by dismissal of the action, granting default judgment, or ordering payment of the other party's attorney fees, the subject appeal is from the judgment entered on a jury's verdict in a negligence action that lacks *necessary evidentiary support* for the trial court's sanction. We are guided here by two state court cases addressing the same omission in different contexts and applying the same standard.

¶37 In *Yuanzong Fu v. Rhodes*, 2015 UT 59, 355 P.3d 995, the Utah Supreme Court held the court's failure to make the ruling regarding willfulness before imposing a sanction of default judgment for a discovery violation *did not require reversal*, and "the sanction may be affirmed if the record and the court's factual findings demonstrates a basis for them." In a negligence case tried to a jury, *Emerald Point, LLC v. Hawkins*, 808 S.E.2d 384, 392-393 (Va. 2014) the appellant (landlord) argued that a spoliation instruction is inappropriate "in the absence of an express finding the responsible party acted in bad faith." As noted in the opinion, the trial court had ruled that the instruction would be given and stated the landlord "did nothing in bad faith." 808 S.E.2d at 391. Persuaded by the standard and rationale of the Federal Rules of Civil Procedure R. 37(e)(2)(B) for spoliation of electronic evidence and when "adverse inference" instructions are appropriate, the Virginia Supreme Court concluded "the evidence must support a finding of *intentional* loss or destruction of evidence ... before the court may permit the spoliation inference." *Id.*, at 392-393. The Court reviewed the record and found no evidence that the landlord had intentionally destroyed the furnace. Considering that and other relevant facts,[12] the Court held the trial court erred by giving the spoliation instruction.

¶38 Based on these two cases, we find the absence of necessary rulings to support the sanction imposed during a jury trial under the trial court's inherent authority may be treated as harmless error and the sanction ruling affirmed "unless the ruling is contrary to the weight of evidence or to a governing principle of law." *Barnett,* ¶ 23. Consequently, we proceed with our analysis of whether the trial court abused its discretion in ruling on the parties' counter-motions for an adverse inference instruction.

Adverse Inferences in Oklahoma

¶39 The Oklahoma Uniform Jury Instructions-Civil (OUJI-Civil), Instruction 3.11, is titled "Inference from Failure to Produce Evidence or Witness" and states "NO INSTRUC-

TION SHOULD BE GIVEN." (Caps in original.) The "Notes on Use" explains "[i]n general, no instruction should be given for an inference from failure to produce evidence. However, in appropriate circumstances, an *adverse inference* instruction may be given as a *sanction for spoliation of evidence*." (Emphasis added.) *Barnett* is one of two authorities cited in the note to OUJI Instruction 3.11.[13]

¶40 *Barnett* discussed prior Oklahoma cases in which the Supreme Court had limited the severe sanctions of dismissal of the action and default judgments to willful or bad faith conduct, noting one exception in which they had affirmed a severe sanction for the parties' reasonably foreseeable destruction of evidence.

¶41 More recently, the Supreme Court addressed an adverse inference instruction in *American Honda Motor Co. v. Thygesen*, 2018 OK 14, 416 P.3d 1059. The Court reviewed a trial court order entered in a product liability case that sanctioned Honda for "destroying evidence," *i.e.*, a computer program used for new model design that Honda had deleted under its routine policy twelve years prior to the plaintiff's accident. As punishment for Honda's *inability to produce* the program, the trial court ordered an *adverse inference* jury instruction be given at trial, *which told* the jury that it could infer that the computer program would be adverse to Honda's defense. The trial court was reversed on appeal, as discussed in ¶44.

Duty to Preserve

¶42 Our review of the court's sanction ruling for an abuse of discretion begins with the threshold determination of whether the record evidence supports the trial court's implied finding that Plaintiffs had a duty to preserve evidence as defined in *Barnett.* Unlike most of the spoliation cases this Court has reviewed, the trial court in this case was presented with the parties' conflicting arguments on the scope of the evidence that was spoliated, if any, in this negligence action. "When a party's duty to preserve evidence is contested, as well as what evidence, if any, was spoliated, the latter issue must first be resolved." *Landry v. Charlotte Motor Cars, LLC,* 226 So.3d 1053, 1056-1057 (Fla. App.Dist.2 2017).

¶43 The critical time for determining a party's duty to preserve is not specifically addressed in *Barnett,* but the facts the Court considered suggests the requisite knowledge must exist at the time *relevant* evidence is destroyed.[14] The *Thygesen* Court clarified that question when it held "because Honda was under *no legal obligation to retain the computer program <u>at the time it was deleted</u>*, and its deletion was pursuant to the routine, good-faith operation of Honda's document-retention system, Honda falls within [§] 3237(G)'s safe harbor" and the sanctions order "was not au-thorized by law."[15] (Emphasis added.) 2018 OK 14, ¶ 4.

¶44 Several courts have expressly reached that same conclusion. "A party must have been under a duty to preserve evidence *at the time it was altered or destroyed*." *Nucor Corp. v. Bell,* 251 F.R.D. 191 (D.C. S.Carolina 2008) (citing *Silvestri v. General Motors Corp.*, 271 F.3d 583, 590 (4th Cir. (Md.) 2001).[16]

¶45 "The party alleging spoliation bears the burden of establishing that the nonproducing party had a duty to preserve the evidence." *Brookshire Bros., Ltd. v. Aldridge,* 438 S.W.3d 9, 20 (Tex. 2014). *See also Duluc v. AC & L Food Corp.,* 119 A.D.3d 450, 452, (N.Y.A.D. 2014).

¶46 Beginning in 2013 with Milam's first motion for sanctions, it maintained Plaintiffs *destroyed* the furnace *as it operated in the utility closet on the night of the CO poisoning*. At the jury instruction argument stage of the trial, Milam specifically identified "the furnace in its specific environment ... that utility closet." It claimed "the case was not about just the furnace, but how a furnace was operating within a very specific environment," further asserting:

> When the furnace was taken out of the closet without expert inspection and testing, it lost the opportunity to assess gas pressure, how the connection of the hose to the furnace to the gas line – the seals on the furnace, its interaction with the plenum, how the flue pipe was configured, what role the hot water tank – which was also gas powered in that same closet, played in this case.

¶47 Milam argued Plaintiffs had a duty to preserve evidence under *Barnett* at trial, relying on Mr. Akins getting two independent HVAC companies to "inspect" the furnace, calling and retaining the Law Firm, and then removing the furnace. Milam did not point to any testimony or evidence establishing how Plaintiffs reasonably should have known the furnace *as it operated the night of the CO poisoning* may be relevant to prospective litigation as required in *Barnett.* To establish the furnace's original operating condition was material and relevant to Plain-

tiffs' theories, Milam relied on *Langley by Langley v. Union Electric Co.*, 107 F.3d 510 (7th Cir. (Ill.) 1997).[17]

¶48 Plaintiffs argued the furnace was the sole focus of both the first responders and their assistant HVAC expert, Mr. Reed, who also investigated it and the flue, turned the furnace on again, and the re-testing confirmed rising CO levels. He tagged the furnace out of service, not the gas hot water heater installed next to it in the closet. Plaintiffs also argued Milam and its insurer had never asked for the hot water tank to be preserved.

¶49 The trial court's decision to grant Milam's request for the adverse inference jury instruction was based solely on the furnace and flue as a "unit,"[18] explaining a gas furnace is not going to be placed in a home without venting.[19] This comment implies the court determined that Plaintiffs should reasonably have known the furnace and flue *as a unit* was material and may be relevant to prospective litigation and therefore had a duty to preserve the unit.

¶50 There is no dispute that the furnace itself is *material* evidence in this case. The fact that Mr. Akins stored the furnace in his shed after its removal suggests that *he knew* the furnace was material and might be *relevant* to prospective litigation. Further, our review of the record confirms that within hours of the CO poisoning incident, the furnace was the sole focus of both the firemen and the HVAC expert, Mr. Reed. After his investigation of the flue and the furnace, he turned the furnace on again and the re-testing confirmed rising CO levels. Although the closet included a gas hot water heater, it is undisputed Mr. Reed never considered it a problem and tagged out-of-service only the furnace.

¶51 There is no evidence Officer Breath or anyone else told Plaintiffs that Mr. Reed "did not know what was causing" the toxic CO, which might have put Mr. Akins on notice that something more than the furnace was the problem. Officer Breath confirmed that his police report stated Mr. Reed told him to have the homeowners "to call [Milam] first thing in the morning so that they could discuss the way they were going to fix this problem." According to Officer Breath he relayed Mr. Reed's statement to Mr. Akins, stating "Ya'll got to call Ben Milam in the morning, you know, or whenever you get out ... to check... and see what's going on."

¶52 Neither version of Mr. Reed's statement remotely suggests the furnace *as it operated that night* may be material or relevant. This was the sole information upon which Mr. Akins was operating when he was released from the hospital and called two HVAC companies for replacement quotes, retained counsel, and almost two weeks later accepted a quote for a heat pump. We conclude Milam has not carried its burden of proof to establish Plaintiffs reasonably should have known *at the time the furnace was removed*, that the furnace, in the original operating condition on the night of the family's CO poisoning, was material or may be relevant to prospective litigation.

¶53 We further find Milam's authority is distinguishable. First, unlike this case, the CO deaths in *Langley* were "presumably caused by an unventilated furnace" and the plaintiffs' theory of liability was the gas company acted negligently by providing gas service to the victims' home when it had reason to know their home contained improper or nonexistent gas fixtures. Therefore, in *Langley,* the linchpin was "how the furnace was hooked up, both at the time of the installation and at the time of the deaths." As a result, the removal of the furnace from its original operating condition is significantly more relevant in *Langley* than in this case where Plaintiffs' theories are failure to test for CO and failure to warn of hazardous conditions.

¶54 Second, the police officers simply took pictures of the furnace in *Langley*, whereas in this case, the local fire department tested the furnace as the cause of the CO immediately after the incident and after Mr. Reed's evaluation of the furnace and flue. Third, the furnace in *Langley* was *never* produced for testing of any kind by the gas company's experts nor any time thereafter. In this case by contrast, the parties' sanction motions, responses, and attachments demonstrate that both parties' experts attended the "initial test."[20]

¶55 We also conclude Milam has not carried its burden of proof to establish Plaintiffs reasonably should have known *at the time the furnace was removed* that the furnace's flue was material and might be relevant to prospective litigation. We agree the evidence supports the trial court's determination that a vent pipe or "flue" is a material part for safely operating a gas furnace because it transports the combustible gases produced by the furnace, both acceptable or toxic levels, through the attic and roof to the outside. However, the flue is not

relevant to the key issues in this case, because the undisputed evidence establishes it transports CO, but does not produce it. More importantly, there is no evidence or testimony that Plaintiffs were aware of Mr. Reed's investigation of the flue and no testimony that Plaintiffs reasonably should have known the flue was material and relevant to prospective litigation.

¶56 Further, both parties' experts testified only that an *obstructed* flue or its cap would prevent the exhaust of CO outside, resulting in increased CO and decreased oxygen (O2) which could cause the burner's flame to rollout, looking for O2 to burn. However, Milam's expert never testified about what else, if anything, the flue would have shown had it been produced or made available for testing that would have been relevant to the specific cause of the CO production and/or how it would have helped their defense. Both parties' experts further acknowledged Mr. Reed's evaluation of the furnace included checking up the flue with his flashlight from inside the utility closet, about which he testified he found no soot indicating incomplete combustion. Mr. Reed also used his ladder to climb on the roof where he checked the flue and vent cap for obstructions like a bird nest again using his flashlight. Although Mr. Reed testified he did not check the flue in the attic, Milam elicited no testimony from Wilhelm about any possible defects in that part of the flue, that had it been available, would have shown or would have helped their defense in any way.

¶57 Additionally, the record is void of any evidence or testimony that Plaintiffs reasonably should have known the gas hot water heater was material and relevant to prospective litigation *when Plaintiffs removed it two months after the night of the CO poisoning.* Milam's defense that the gas hot water heater could have also produced the toxic CO fails to consider that gas appliance operated in the same closet for almost two months after the gas furnace was removed, without incident.[21] Not only did Milam's expert admit during cross examination that he was *not aware* of that fact, he also admitted the only way CO gets to people from a gas hot water heater is if there's a problem with the gas furnace. Milam's defense also fails to consider the furnace's initial testing yielded 2000 ppm of CO (testing levels), proving it alone was capable of producing the toxic levels on the night of the Plaintiffs' CO poisoning. Defendant's expert faulted the initial testing because only a 3-4 ft. flue was used, instead of a 10 ft. flue, which in his opinion a CO test in such a short flue would naturally get higher readings. However, he admitted the high CO result at the initial test was too high for any gas furnace to produce and was abnormally dangerous.

¶58 Assuming, arguendo, Plaintiffs had a "duty to preserve all of the evidence in the utility closet environment, the flue and/or hot water heater," Milam did not present any evidence that Plaintiffs' removal of the furnace and flue from the closet was done in bad faith, willfully, or intentionally. Instead the jury heard testimony of reasonable explanations for Mr. Akins' actions after he was released from the hospital: 1) he did not call Milam as requested because he had trusted them three prior times and no longer did, 2) he replaced the gas furnace because of concern for his family's safety, 3) he did not know what happened to the flue when the gas furnace was removed from the closet, and 4) 2 months after the CO poisoning incident a new electric hot water heater was installed and the gas-powered hot water heater was discarded.

¶59 A party is not automatically entitled to a sanction just because evidence is destroyed or altered. *Shimanovsky v. General Motors Corp.*, 692 N.E.2d 286 (Ill.1998). A court must consider the unique factual situation that each case presents, and apply the appropriate criteria to these facts in order to determine what particular sanction, if any, should be imposed. *Id. See also Landry, supra* ("A determination that evidence has been spoliated does not inevitably lead to the imposition of sanctions under the threefold inquiry").

¶60 An adverse inference jury instruction is considered a severe sanction in some federal courts. *See Rimkus Consulting Group, Inc. v. Cammarata*, 688 F.Supp.2d 598 (S.D. Texas 2010) (citing *Pension Committee of University of Montreal Pension Plan v. Bank of America Securities,* 685 F.Supp.2d 456, 467 (S.D.N.Y. 2010). The giving of such instruction in civil cases is a powerful sanction as it "brands one party as a bad actor" and "necessarily opens the door to a certain degree of speculation by the jury." *Henning v. Union Pacific R. Co.,* 530 F.3d 1206, 1219-1220 (10th Cir. (Okla.) 2008)(quoting *Morris v. Union Pac. R.R.,* 373 F.3d 896, 900-01 (8th Cir.(Ark.) 2004).

¶61 An adverse inference jury instruction is considered a "harsh remedy" for spoliation. *Brookshire Bros.* 438 S.W.3d at 14. *See also Carroll v. Kelsey,* 234 S.W.3d 559, 565-566 (Mo.App. 2007) (the instruction requires "evidence showing intentional destruction of the item ... [which]... must occur under circumstances which give rise to an inference of fraud and a desire to suppress the truth."). Evidence of intentional destruction or bad faith is required before a litigant is entitled to a spoliation instruction. *Henning,* at p. 1220. In Texas, a party must *intentionally* fail to preserve evidence in order for a spoliation instruction to constitute an appropriate remedy. B*rookshire Bros.,* 438 S.W. 3d at 24. *See also Emerald Point, LLC*, 808 S.E.2d at 391-392.

¶62 Plaintiffs had a duty to preserve the furnace. It is undisputed that Plaintiffs gave no notice to Milam of their plan to replace the furnace and no opportunity to inspect and/or test the original scene *before* the furnace's removal. The jury heard Milam's numerous questions to Mr. Akins during cross examination about "its rights" to have been contacted and to examine and/or test the furnace before its removal. Unlike the majority of spoliation/sanction cases in which the parties had no notice until a petition was filed, Milam received notice of Plaintiffs' potential claim through its insurer sufficient to protect its interest. Milam's claim that Plaintiffs violated their duty to preserve the original operating condition and their defense to Plaintiffs' claims were prejudiced thereby is unpersuasive considering the fact that Milam's insurer requested only to inspect "the furnace" when responding to Plaintiffs' notice one week before the furnace was removed.

¶63 In this case, the undisputed record evidence establishes Plaintiffs did not violate their duty with regard to the furnace, having instead sufficiently discharged it by preserving and then presenting the furnace to Milam in good working condition for testing. *See Landry,* 226 So.3d at 1057 ("Assuming that Ms. Landry had a duty to preserve the vehicle, [she] only had to preserve the vehicle so that the Dealership would have an opportunity to examine it."). Plaintiffs' level of culpability was, at best, negligent, and such conduct does not warrant an adverse inference jury instruction in this case.

¶64 Oklahoma has yet to recognize spoliation as an independent tort. *Patel v. OMH Medical Center, Inc.*, 1999 OK 33, ¶ 48, 987 P.2d 1185. In Texas and Oklahoma, "[s]poliation is an evidentiary concept, not a separate cause of action." *Brookshire Bros.*, 438 S.W.3d at 19-20; *Harrill v. Penn,* 1927 OK 492, ¶ 9, 273 P. 235 (describing spoliation as a "wholesome principle of the law of evidence."). "Evidentiary matters are resolved by the trial court." *Brookshire Bros.* The same applies in Oklahoma, especially with spoliation of evidence. *See Barnett.*

¶65 As a consequence of the trial court's failure to determine pre-trial the parties' countermotions for sanctions, especially the threshold question of the duty to preserve evidence as to each party, the trial court allowed the jury to hear testimony and evidence bearing on whether spoliation occurred in this case and the level of culpability for the same. Such evidence has no bearing on "any fact that is of consequence to the determination of the action," and was irrelevant and therefore inadmissible. 12 O.S. 2011 §§ 2401 and 2402. We concur with the detailed analysis of the Court in *Brookshire Bros.* and agree "[t]he tendency of such evidence to skew the focus of the trial from the merits to the conduct of the spoliating party raises a significant risk of both prejudice and confusion of the issues." 438 S.W.3d at 26.

¶66 The confusion of issues in this case was compounded by the trial court's submission of an adverse inference jury instruction for Plaintiffs' "failure to produce" that does not identify "the evidence" the trial court had impliedly determined they had violated their duty to preserve. Plaintiffs' spoliation of the evidence was indirectly raised during voir dire and opening statements, but it was the primary focus during closing arguments. The irrelevant evidence relating to the spoliation circumstances together with the adverse inference instruction unfairly branded Plaintiffs as bad actors and prejudiced their rights to a fair and just trial in this state.

CONCLUSION

¶67 We reverse the judgment based on the jury's verdict in favor of Milam, and remand the case to the trial court for a new trial in accordance with this opinion.

¶68 REVERSED AND REMANDED.

GOREE, V.C.J., and MITCHELL, J., concur.

Barbara G. Swinton, Presiding Judge:

1. Emails attached to Plaintiffs' response to Milam's motion to reconsider conclusively establishing the testing location was chosen by

Milam and that Milam had transported the furnace there at Plaintiffs' request because their truck was too small to keep the furnace in its original operating condition, *i.e.*, standing upright. Plaintiffs' responses to Milam's motions attached numerous depositions establishing Milam's expert, Mr. Hergenrether, also attended the initial test. He testified it was a "nondestructive test, so we weren't able to remove the burners or heat exchanger" and "someone working on behalf of the Plaintiffs had limited the test to being an operational test...not a destructive examination of the furnace." This confirms Dr. Block's deposition and trial testimony that the test was just to determine if under optimal conditions the furnace produced CO in excess of the normal limits, not to determine the specific cause.

2. Section 140 provides "[i]n all cases in which it is made to appear to the court that a fair and impartial trial cannot be had in the county where the suit is pending, the court may, on application of either party, change the place of trial to some county where such objections do not exist."

3. Despite the counter-sanction motions, neither party sought to exclude any evidence regarding the alleged spoliation of evidence.

4. It is clear from the record all of the supporting evidence and testimony necessary to decide the parties' counter-allegations of spoliation in 2007 had been presented to the second trial judge.

5. There is no pretrial conference order included in the appellate record. The jury instruction, "Issues in Case- No Counter-Claim" states Plaintiffs claim Milam was negligent "when it serviced" their furnace. However the evidence presented during Plaintiffs' case in chief supports both theories that counsel specified during opening statement.

6. Plaintiffs' expert, Mr. Prach, testified the furnace should be shut down if readings of 400 ppm or above are exhibited.

7. According to Adkins, gravity-style gas furnaces "just have burners," the heat from which creates a gravity draft and pulls like a chimney with a fireplace. Unlike the older models, he testified the new furnaces have a fan with an induction motor that creates a draft to get the combustion air in and get the flue gases out.

8. Mr. Adkins testified "flame rollout" is where the flame comes out of the compartment from where it's supposed to be, then burns the wires to the furnace blower. He agreed: 1) flame roll-out "could be" a sign of combustion gases leaking into the upper section of the furnace; 2) incomplete combustion can cause the furnace to produce more CO; and also 3) when CO is not being properly vented from a combustion chamber, the oxygen level goes down and the flame "rolls out" seeking oxygen to burn.

9. As given to the jury, Instruction No. 20, "Adverse Inference Stemming from Plaintiff's Spoliation of Evidence" reads:

> If Plaintiffs to this case have failed to offer evidence within their power to produce, you may infer that the evidence would be adverse to Plaintiffs if you believe each of the following elements:
>
> (1) The evidence was under the control of the party Plaintiffs and could have been produced by the exercise of reasonable diligence;
>
> (2) The evidence was not equally available to [Milam];
>
> (3) A reasonable prudent person under the same or similar circumstances as Plaintiffs would have offered the evidence to [Milam] if [Plaintiffs] believed the evidence would have been favorable to Plaintiffs; and
>
> (4) No reasonable excuse for the failure has been shown by Plaintiffs.

10. Plaintiffs also argue the adverse inference instruction, as given, is prejudicial because it improperly includes Mrs. Akins and D.N., who was a minor at the time of the CO poisoning, when referring to "Plaintiffs" when there is no evidence either had anything to do with the decision to remove the furnace or its removal.

11. "A trial court has the inherent authority to sanction a party or an attorney for bad faith litigation misconduct." *Garnett v. Government Employees Ins. Co.*, 2008 OK 43, ¶ 18, 186 P.3d 935. However, in *Walker v. Ferguson*, a finding of bad faith or oppressive behavior was required where the trial court has imposed sanctions on the basis of its inherent or equitable power. 2004 OK 81, ¶ 14, 102 P.3d 144. As authority for the required finding, *Walker* cites *Roadway Express Inc. v. Piper,* 100 S.Ct. 2455 (1980), in which the U.S. Supreme Court reversed an order awarding attorney fees and remanded the case, holding, in part, that "the trial court did not make a specific finding as to whether counsel's *conduct constituted ... bad faith*, *a finding that would have to precede any sanction under the court's inherent powers*." (Italics and underline added.) 100 S.Ct. at 2465.

12. The Court in *Emerald Point* explained "the evidence showed that the furnace was disposed of only after it sat for more than one year in a maintenance bay before being discarded," the landlord's action "resulted at worst from negligence," and the tenants did not demonstrate that it was motivated by any desire to deprive them of access to the furnace as material evidence in probable litigation." 808 S.E.2d at 393.

13. The second authority is *Harrill v. Penn*, 1927 OK 492, 273 P. 235.

14. The *Barnett* Court found the plaintiff: 1) was aware that his hard drive was subject to a discovery request, and 2) wiping software programs were downloaded on his computer when both parties' counsel were actively working to produce the hard drive. After the court order to produce the hard drive, the plaintiff also hired a computer expert to work on the computer without informing the expert about the order and also without informing the defendants' counsel of the work about to be done. *See id.*, ¶ 22.

15. The *Thygesen* Court held the trial court abused its discretion by failing to consider 12 O.S. 2011 § 3237(G), which prohibits sanctions for a party's "failure to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." The Court further found there was nothing in the record to indicate the program deletion was the result of something other than routine operation of Honda's retention system or that Honda was operating the system in bad faith when the program was deleted twelve years ago. *See* ¶¶ 2-3.

16. *See also Teal v. Jones*, 222 So.3d 1052 (Miss. App. 2017) (spoliation instruction not warranted in alienation of affection action; insufficient evidence to show ex-wife deliberately or negligently destroyed emails on her computer at a time when she knew or should have known that they might contain evidence relevant to the case).

17. Four family members perished from CO poisoning in early 1991 in their home "presumably from an unventilated furnace." The *Langley* Court affirmed the sanction, finding the personal representative who removed the furnace delayed inspections several times without informing UEC the furnace had been lost and was at fault for the furnace's loss (poor judgment in choosing the storage site) and for lack of candor on its loss.

18. The court stated, "And they're one unit ... it's like taking half of the car. And if you've got half of the car, and the other party is responsible for the whole car and they only produce half the car, then there's *cause for concern*, and **the instruction is proper**." The trial judge finally concluded, "So I'm going to grant the requested adverse inference instruction, because I think that - the testimony you have revealed that there was a 3- or 4-foot tall pipe that was used in testing, and that the pipe needed to be at least 10 feet tall, and what happened – during part of that 10 feet, I don't know, but I think it's important to know."

19. Based on personal experiences of his own furnace and vent pipe connections, the trial court explained his concern, *inter alia*, about what the testimony showed and what it did not, *i.e.*, whether the flue went straight through the attic and roof or was connected in the attic to the gas hot water heater's flue before exiting the house.

20. Milam's counsel consistently referred to this test as Dr. Block's test, as though he was the only expert present at the test and during which he did not determine a specific cause for the excessive production of CO by the furnace.

21. Wilhelm confirmed during the two week period after the CO incident the furnace was not being used and the gas hot water heater "was still being used." He was then asked, "so in that two week time frame, until the furnace is replaced, its pretty clear the hot water heater wasn't putting out CO, right?" Following his "um..." response, the question was rephrased "if it was putting out [CO], there would have been another poisoning, right?" He answered, "Not with the furnace not running, where it was pulling [CO] back through the return plenum." Q: So the only way that the hot water heater puts out [CO] that gets to people is if there's a problem with the furnace? A: Yes.

2019 OK CIV APP 53

IN THE MATTER OF THE GUARDIANSHIP OF HAROLD S. WOOD, A Partially Incapacitated Person. VIRGINIA L. WOOD, Plaintiff/Appellant, vs. MARK LYONS, Defendant/Appellee.

Case No. 116,078; Comp w/116,349

December 31, 2018

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

HONORABLE KURT G. GLASSCO,
TRIAL JUDGE

AFFIRMED

Thomas M. Ladner, Roger K. Eldredge, LADNER & ELDREDGE, PLLC, Tulsa, Oklahoma, for Plaintiff/Appellant

Joseph R. Farris, FRANDEN | FARRIS | QUILLIN GOODNIGHT + ROBERTS, Tulsa, Oklahoma, for Defendant/Appellee

JERRY L. GOODMAN, JUDGE:

¶1 Plaintiff Virginia L. Wood (Widow) appeals the trial court's May 2, 2017, order denying her request to impose a surcharge on Defendant Mark Lyons, (Guardian) who had served as a Limited Guardian of Harold S. Wood, a partially incapacitated person, now deceased (Ward). Widow contends that upon his appointment, Guardian was obligated by 30 O.S.2001, § 4-709(A), which defines the appropriate types of investments in which a guardian may invest a ward's money, to liquidate Ward's existing stock portfolio, which was not compliant with § 4-709(A), and use the resulting proceeds to re-invest in § 4-709(A)-approved investments. Widow contends Guardian's failure to do so constituted a breach of fiduciary duty, meriting a surcharge. The trial court found no breach of duty occurred and denied the request for a surcharge. On this first impression issue, based on our review of the facts and applicable law, we affirm the order under review.

BACKGROUND

¶2 Guardian was temporarily appointed Special Limited Guardian of Ward in an order filed July 11, 2007, and was later appointed Limited Guardian, with both the order and letters of limited guardianship being filed August 24, 2007.[1] At the time of Guardian's appointment, Ward was 84, in poor health, and required round-the-clock professional medical care. He lived with Widow and his medical staff, and owned substantial assets. Guardian had been Ward's attorney for at least 10 years prior to his appointment as Ward's guardian. Guardian managed Ward's and Widow's assets until Ward's death on January 7, 2012. After Guardian filed a final account of Ward's estate on October 12, 2012,[2] Widow objected to that accounting on October 29, 2012. She requested Guardian be made subject to a surcharge for allegedly breaching his fiduciary duties relating to the handling of Ward's assets, and for failure to timely file required reports.[3, 4] Widow claimed that Guardian caused a financial loss to Ward by failing to immediately liquidate Ward's existing, substantial stock portfolio which contained volatile, individual blue-chip stocks, and convert that portfolio into one consisting of the approved bond funds set out in 30 O.S.2001, § 4-709(A). Widow also sought an order discharging Guardian as Limited Guardian, and that he be denied a fee for his services.

¶3 Guardian filed a motion for summary judgment on April 25, 2014.[5] He argued § 4-709(A) did not require him to liquidate the stock portfolio, and objected to being discharged as Guardian. In a minute order filed August 6, 2014, the court, without comment, granted Guardian's summary judgment on the issue of § 4-709(A), but removed Guardian as Limited Guardian, at Widow's request.[6, 7] Guardian's letters of guardianship were re-voked, but Guardian was not discharged immediately, and instead ordered to submit a final accounting before September 11, 2014.[8] Substitute guardians for Widow were appointed, as well as a substitute personal representative for Ward's estate.

¶4 The surcharge and breach of fiduciary duty issues between the parties continued until an evidentiary hearing was held over several days in November, 2016. On May 2, 2017, the trial court filed an order containing extensive and detailed findings of fact and conclusions of law.[9] The trial court denied Widow's motion to surcharge Guardian, finding that he met the standard of care in his handling of Ward's assets and breached no fiduciary duties.[10] Widow appeals this order.

STANDARD OF REVIEW

¶5 *In re Estate of LaRose*, 2000 OK CIV APP 33, ¶ 5, 1 P.3d 1018, 1021, states:

> Where a final account of a guardian is presented and considered and surcharges made and disallowed, and thereafter an appeal is taken, the matter will be considered as an appeal from an equity judgment and the surcharges made or disallowed will be approved where such action is based on competent evidence and not clearly against the weight of the evidence. *In re Guardianship of Durnell*, 1967 OK 62, 434 P.2d 905. The judgment of the trial court in a settlement of a guardian's account will not be disturbed unless against the

weight of the evidence. *Pruitt v. Pilgreen*, 178 Okl. 608, 64 P.2d 263 (1936).

ANALYSIS

¶6 The central issue in this case is a dispute between Widow and Guardian over Guardian's management of Ward's substantial stock portfolio. Widow's brief-in-chief alleges the trial court committed errors of law and erred in its interpretation and application of certain undisputed facts to the law. With certain limited exceptions, Widow does not allege the trial court's findings of fact are erroneous; rather, she argues those facts support a different conclusion than that made by the trial court, resulting in trial court error. Therefore, after determining if they are supported by competent evidence, we will cite the applicable findings of fact in addressing each issue on appeal.

I. Was Guardian Required to Liquidate Ward's Stock Portfolio by Operation of 30 O.S.2001, § 4-709(A)?

¶7 Widow presents a first impression question of law. Questions of law mandate application of the *de novo* standard of review, which affords this Court with plenary, independent, and non-deferential authority to examine the issues presented. *Martin v. Aramark Servs., Inc.*, 2004 OK 38, ¶ 4, 92 P.3d 96, 97; *Kluver v. Weatherford Hosp. Auth.*, 1993 OK 85, ¶ 14, 859 P.2d 1081, 1084.

¶8 The resolution of this issue requires the interpretation of the statute in effect when Guardian was first appointed as a limited guardian, *i.e.*, 30 O.S.2001, § 4-709.[11]

> A. Except as may be otherwise provided by law, the ***money*** belonging to estates of minors and incapacitated or partially incapacitated persons, subject to the jurisdiction of the court, ***can only be invested*** in one or more of the following:
>
> 1. Real estate and first mortgages upon real property which do not exceed fifty percent (50%) of the actual value of the property;
>
> 2. United States bonds, or any other type of security certificate, or evidence of indebtedness which is guaranteed by the United States government, or any authorized agency thereof;
>
> 3. State bonds;
>
> 4. Bonds of municipal corporations;
>
> 5. Annuities covered by the Oklahoma Life and Health Insurance Guaranty Association, which do not exceed Three Hundred Thousand Dollars ($300,000.00), individually; or
>
> 6. Accounts in savings and loan associations and credit unions located in this state, and all types of interest-bearing time deposits and certificates of banks, savings and loan associations, and credit unions located in this state, not to exceed the amount insured by the United States government.

Section § 4-709(A) (emphasis added).[12]

¶9 At the time of Guardian's appointment as a limited guardian, the trial court found:

> 23. In August 2007, [Ward's] Smith Barney stock portfolio had a gross value of a little over $6 million with a margin debt of $2,170,000. The net value of the account as of August 31, 2007, was $3,924,939.74.
>
> 24. The account was made up of 100% equities/stocks. There were no fixed-income assets, no CDs, and no T-bills. The portfolio was weighted in energy stocks.
>
> 25. [Ward] had chosen the nature of his stock portfolio being weighted 37% to energy stocks over a period of 52 years.[13]

It is undisputed that Ward's portfolio did not consist of any of the six investment categories set out in § 4-709(A).

¶10 Widow contends that upon Guardian's appointment, he was obligated by § 4-709(A) to immediately liquidate the Smith Barney stock portfolio in order to rid it of non-§ 4-709(A)-sanctioned investments, and use the proceeds of that sale to purchase a portfolio that complied with § 4-709(A)'s list of approved investments. In support of this argument, Widow cited *Freeman v. Prudential Sec., Inc.*, 1993 OK CIV APP 65, 856 P.2d 592, for its proposition that "Guardians ... were limited in the investments they could make for their wards, pursuant to ... § 4 – 709." *Id.* at ¶ 10, at 594.[14] Widow argues that by not reconfiguring the volatile, stock-heavy portfolio into the statutorily-authorized, relatively stable, investments, Ward suffered unnecessary and preventable losses during the 2007-2008 stock market turmoil that soon followed.[15] Widow contends Guardian should bear responsibility for those losses and be surcharged.

¶11 Guardian contended he was under no obligation to liquidate an existing stock portfolio and reinvest the proceeds to conform to § 4-709's guides. Instead, he argued he was only obligated to follow § 4-709 if he possessed money belonging to Ward which he intended to use to purchase future investments on Ward's behalf. Guardian argued that to immediately liquidate the holdings would have subjected Ward's estate to further losses. Moreover, selling the "blue-chip" stocks during a time in which their values were already temporarily depressed would result in enormous capital gains taxes. This would have significantly depleted the amount of money available for Ward's future use and care.[16]

¶12 The trial court found that, under these facts, § 4-709(A) did not require liquidation. We agree.

A. Analysis of § 4-709(A)

¶13 Section 4-709(A) states:

> Except as may be otherwise provided by law, the *money* belonging to estates of ... incapacitated or partially incapacitated persons, subject to the jurisdiction of the court, *can only be invested* in one or more of the following [six categories of investments]... ." (Emphasis added).

¶14 The issue, as framed by the parties, turns on the definition of "money." Widow contends the term "money," as used in § 4-709(A), includes Ward's stock holdings. She contends this section applies whether "the Ward's approximately $4 million is initially held in cash under the Ward's bed, deposited in the Ward's checking account, or invested in the Ward's stock account."[17] Widow argues that the "term 'money' is not limited to just 'cash' or 'currency' but also includes 'gold and silver coin, treasury notes, bank notes and other forms of currency in common use'" which an owner could "withdraw in money on demand" citing *Mason v. State*, 1923 OK CR 62, ¶ 18, 212 P. 1028, 2030.[18] Thus, upon his appointment, Guardian was required to conform Ward's money, no matter the form, and whether cash or stock certificate notwithstanding, into a § 4-709(A)-acceptable investment.

¶15 Guardian contends "money" is not the same as "stock." Therefore, unless Guardian chose to use Ward's money to invest in new holdings, § 4-709(A) does not apply. Further, §4-709(A) does not compel liquidation of existing stock holdings. Finally, Guardian argues § 4-709(A) does not mandate investment of Ward's money, but merely permits its optional investment, though in a prescribed way.[19]

¶16 Our analysis must begin with established definitions of the terms used in the statute. Unless specially defined, we use the terms in their most common form.

> In the absence of a contrary definition of the common words used in the act, we must assume that the lawmaking authority intended for them to have the same meaning as that attributed to them in ordinary and usual parlance.

Riffe Petroleum Co. v. Great Nat. Corp., Inc., 1980 OK 112, ¶ 7, 614 P.2d 576, 579 (footnote omitted). Further,

> In *Applications of Oklahoma Turnpike Authority,* Okl., 277 P.2d 176, 182, we said:
>
> 'The general rule is that all legislative enactments must be interpreted in accordance with their plain ordinary meaning according to the import of the language used. See *Loeffler v. Federal Supply Company,* 187 Okl. 373, 102 P.2d 862.' See also *City of Duncan ex rel. Board of Trustees of Police Pension and Retirement System v. Barnes,* Okl., 293 P.2d 590.

W.S. Dickey Clay Mfg. Co. v. Ferguson Inv. Co., 1963 OK 298, ¶ 19, 388 P.2d 300, 304. Finally,

> To ascertain intent, the Court looks to the language of the pertinent statute(s) and presumes the legislative body intends what it expresses. Where a statute's language is plain and unambiguous, and the meaning clear and unmistakable, no justification exists for the use of interpretative devices to fabricate a different meaning. Terms in a statute are given their plain and ordinary meaning, except when a contrary intention plainly appears, and the words of a statute should generally be assumed to be used by the law-making body as having the same meaning as that attributed in ordinary and usual parlance. *Neer v. Oklahoma Tax Comm'n,* 1999 OK 41, ¶¶ 15 – 16, 982 P.2d 1071, 1078.

First United Bank & Tr. Co. v. Wiley, 2008 OK CIV APP 39, ¶ 13, 183 P.3d 1022, 1026-27.

¶17 Section 4-709(A) is part of the Oklahoma Guardianship and Conservatorship Act, 30 O.S.

2011 and Supp. 2017, §§ 1-101 through 6-102 (OGCA). We begin there for definitions.

¶18 Generally, the OGCA defines the terms "Manage financial resources" or "manage the estate" as "those actions necessary to obtain, administer, and dispose of real property, business property, benefits and income, and to otherwise manage personal financial or business affairs." *Id.* at § 1-111(A)(17).

¶19 The OGCA defines "intangible personal property" as "cash, stocks and bonds, mutual funds, money market accounts, certificates of deposit, insurance contracts, commodity accounts, and other assets of a similar nature." *Id.* at § 1-111(A)(14). Clearly, Ward's portfolio is within this definition.

¶20 However, though the OGCA includes the terms "cash, stocks and bonds" within the definition of "intangible personal property," the terms "Money" or "Investment" are not defined in the OGCA. We therefore look elsewhere for definitions.

¶21 "Money" is defined in Oklahoma's Uniform Commercial Code as:

> "Money" means a medium of exchange authorized or adopted by a domestic or foreign government. The term includes a monetary unit of account established by an intergovernmental organization or by agreement between two or more countries.

12A O.S.2011, § 1-201(b)(24).

¶22 *Black's Law Dictionary* defines "money" as:

> In usual and ordinary acceptation it means coins and paper currency used as circulating medium of exchange, and does not embrace notes, bonds, evidences of debt, or other personal or real estate. . . .

Black's Law Dictionary 906 (5th ed. 1979). *Black's* defines "investment" as:

> An expenditure to acquire property or other assets in order to produce revenue; the asset so acquired. The placing of capital or *laying out of money* in a way intended to secure income or profit from its employment. . . . *To purchase securities* of a more or less permanent nature, or to place money or property in business venture or real estate, or otherwise lay it out, so that it may produce a revenue or income.

Black's Law Dictionary 741 (5th ed. 1979) (emphasis added). Oklahoma case law provides further guidance:

> The word "invest" is defined by 33 C. J. p. 807, as follows:
>
> > Invest – to convert into some other form of wealth usually of more or less permanent nature; to employ for some profitable use; to place so that it will be safe and yield a profit; to surround with or place in.
>
> In the case of *La Belle Iron Works v. U.S.,* 256 U. S. 377, 41 S. Ct. 528, 65 L. Ed. 998, the court says:
>
> > * * * 'to invest' imports a *laying out of money,* or money's worth, either by an individual *in acquiring an interest* in the concern with a view to obtaining income or profit from the conduct of its business, or by the concern itself in acquiring something of permanent use in the business; in either case involving a conversion of wealth from one form into another suitable for employment in the making of the hoped-for gains.

Popp v. Munger, 1928 OK 277, ¶¶ 18, 19, 268 P. 1100, 1103.

¶23 It is clear from a reading of Oklahoma case law, Oklahoma statutes, and of general definitions, that the terms "money" and "investment" are neither synonymous nor interchangeable. Money is used to obtain an investment in an enterprise in the hope the investment will in time return money to the investment owner. Widow's argument that the two terms are the same is therefore rejected.[20]

¶24 We hold that § 4-709(A) regulates only the use of a ward's money held by a guardian that is intended to be invested on behalf of the ward. It does not directly address a ward's existing investment portfolio which may consist of stocks, bonds, or other investment vehicles that are not encompassed in § 4-709(A)'s approved investments. Nor does it require a guardian who is managing an existing portfolio that is non-compliant with § 4-709(A) to liquidate or otherwise convert that preexisting portfolio into a compliant investment.[21] Such language appears nowhere in the statute, and this Court will not add language to a statute that the Legislature itself has not chosen to use.

> When the language of the statute is plain, it will be followed without further inquiry. When further inquiry is needed, this court is "not free to rewrite the statute.... [T]he sole function of the courts – at least where the disposition [called for] by the text is not absurd – is to enforce it [the statute] according to its terms." Courts must "if possible, construe a statute to give every word some operative effect" and vigorously "resist reading words or elements into a statute that do not appear on its face". The legislature expresses its purpose by words. "It is for [this court] to ascertain [the meaning of these words] – neither to add nor to subtract, neither to delete nor to distort." This court is thus without authority to supplement by judicial interpretation the classification of persons subject to statutory authority "but must accord the language used by the Legislature, it being unambiguous, ... fair, reasonable, plain and ordinary import or meaning."

Oklahoma City Zoological Tr. v. State ex rel. Pub. Employees Relations Bd., 2007 OK 21, ¶ 6, 158 P.3d 461, 464 (footnotes omitted).

¶25 The trial court correctly decided this issue of law and its decision that Guardian was not required to liquidate the existing stock portfolio was correct and is affirmed.

B. Other Reasons Support our Analysis

¶26 Widow points to no Oklahoma case law, nor indeed to any precedential authority, in support of her argument. We reject both *Mason, infra,*[22] and *Freeman, infra*[23] as inapplicable to these facts. However, one of the cases Widow cites for authority is instructive.

¶27 Widow cites *In re Seamans' Estate*, 5 A.2d 208 (Penn. 1939), a Pennsylvania Supreme Court case written in the aftermath of the Great Depression, as authority for the proposition that: "a guardian must promptly dispose of the ward's investments that are outside the scope of the investments permitted by the guardianship statutes,"[24] and that the "safe, proper, and only recourse for appellant was thereupon to convert the estate into authorized investments." *Seamans' Estate, id.* at 212. Though having already found that under these facts, Oklahoma's guardianship statutes do not compel liquidation of a ward's existing investments, and therefore *Seamans' Estate's* holding is rejected, the case is, nevertheless, instructive to our analysis.

¶28 Mr. Seaman died in 1929 owning a number of common stocks of various local mining companies, national railroads, regional and national banks, and major companies such as General Electric and United States Steel Corporation. This portfolio was distributed to his four minor children and was managed by a guardian. When the oldest child came of age, he sued the guardian, alleging the guardian unnecessarily held onto the stocks instead of liquidating them during the so-called Great Depression. The former ward sought to surcharge the guardian for the lost value of those depreciated stocks.

¶29 Of interest to our analysis is the Pennsylvania court's discussion regarding the tension between selling a stock portfolio and retaining it intact during turbulent financial times:

> If a fiduciary receives nonlegal securities as part of the trust estate, *he is vested by law with a measure of discretion and allowed to some extent to exercise his own judgment as to the wisdom of selling the securities under prevailing market conditions.* However, *in the absence of exceptional circumstances,* he should convert them promptly. This does *not require that he sell them immediately, as 'under the whip of the law,'* but it means that he should not continue to hold them indefinitely merely because he believes that they will appreciate in value and would therefore retain them if they were his own securities.
>
> *Under certain circumstances a fiduciary is excused from the prompt sale of nonlegal securities* which is otherwise required. *Such circumstances cannot be completely catalogued; they must be considered in each case as they arise.* Among them may be ... instances ... *where a security is abnormally depressed in value because of a general economic and financial collapse, so that a sale can be effected only at a sacrifice, but there is a reasonable likelihood of an early return to stable conditions which will restore the normal value. A fiduciary is not compelled to jettison seasoned investments during a temporary panic. ...*

Id. at 211 – 12 (emphasis added). Although the Pennsylvania court upheld the imposition of a surcharge under the facts of that case, the dissent stated:

> I would make no surcharge. *We are here dealing with a situation which might well*

confound any man. The guardian received the securities when the *financial walls were falling. He did not make the investments himself.* He did what, it seems to me, was the most prudent thing he could do, sought the aid and advice of one of the principal financial institutions of the community in which he lived to help him solve the problem with which he was confronted, whether to sell the securities at what seemed terrible sacrifices or to hold them. ... *No prudent person, unless compelled to do so, would have sold these securities at the distress figures of 1931.*

> *I think the case should be viewed, not retrospectively, but from the position in which the guardian found himself in the upset financial world,* and so viewed, I cannot say he did not exercise 'normally good judgment' and common skill, common prudence and common caution.

Id. at 213 (emphasis added).

¶30 In our case, the trial court's findings of fact reflect a very similar dilemma faced by Guardian.

> 36. The stock in [Ward's] portfolio had been accumulated over approximately 50 years. ... [Guardian] took into account through discussions with various brokers, that an immediate sale of the stock prior to [Ward's] death would have resulted in a tax liability of approximately $2.7 to $3 million which would have significantly reduced the estate. [Ward] was 85 years old and in poor health. If [Guardian] had sold off the entire stock portfolio and paid down the margin loan immediately, there would have been a 30-35% tax on the sale of the entire stock. With roughly $20,000/month living expenses needed, the account would have been depleted to under $1 million in a year or two.
>
> 37. Based on these considerations, [Guardian] did not think it was prudent to liquidate the entire account just to pay off the margin loan.
>
> ...
>
> 39. In memos to his file from February 2008 and May 2009, [Guardian] analyzed the downturn in the market which affected the value of the account at the time. In 2009, [Guardian] was also still dealing with the tax penalty and interest issues incurred because the [Ward and Widow] had not filed three years of tax returns before [Guardian] was appointed Limited Guardian. [Guardian] did not know the full extent of that liability and he needed to retain stock to make those payments, if necessary. Given the blue chip status of the stocks, [Guardian] never believed that [Ward's] account would have been wiped out. The speculation by [Widow] that it could have been wiped out is not supported, because in fact the account made millions of dollars later.
>
> 40. [Guardian] did not sell when the stock market was down believing that it is the worst time to sell. He also did not sell in the Fall of 2007 because the market was climbing and continued to go up another couple of thousand points.

¶31 We find no error in the trial court's reasoning or its application of fact to the law.

¶32 Finally, Guardian's choice not to immediately liquidate the stock portfolio must be considered in light of his duty as a guardian to a ward, as set out in 30 O.S. 2011, § 1-121:

> A. A guardian of the property must keep safely the property of his ward. ...
>
> B. A guardian of the property, in relation to powers conferred pursuant to the provisions of the Oklahoma Guardianship and Conservatorship Act, shall act as a fiduciary and shall perform, diligently and in good faith, as a prudent person would in managing his own property, not with regard to speculation but with regard to conservation and growth, and the specific duties and powers assigned by the court.

¶33 Our Court has held:

> "The whole theory of guardianships is to protect the ward during his period of incapacity to protect himself." *Oyama v. California,* 332 U.S. 633, 643-44, 68 S.Ct. 269, 274, 92 L.Ed. 249 (1948). ... A guardian must keep his or her ward's property safe. 30 O.S.2011 1-121(A).

Tinker Fed. Credit Union v. Grant, 2017 OK CIV APP 9, ¶ 24, 391 P.3d 766, 771. Under these facts, Guardian was charged with the duty to prudently manage Ward's property, not to actively

speculate with his stock portfolio. Given the unforeseeable financial circumstances described above, we cannot say Guardian's handling of Ward's portfolio was a breach of his fiduciary duty or of law.

¶34 Finally, recent amendments to this statute support our analysis. Section 4-709 was amended, effective November 1, 2017. Though Guardian was not bound by these amendments, having been removed as guardian before their effective date, we are permitted to review subsequent legislative amendments in order to better understand the intent of the act.

> It is well settled that subsequent amendments to an act can be used to ascertain the meaning of the prior statute. *See Texas County Irrigation & Water Resources Ass'n v. Oklahoma Water Resources Bd.*, 803 P.2d 1119, 1122 (Okla. 1990). *See also Board of Educ. v. Morris*, 656 P.2d 258, 261 (Okla. 1982); *Magnolia Pipe Line Co. v. Oklahoma Tax Comm'n*, 196 Okla. 633, 167 P.2d 884, 888 (1946). Where the meaning of a prior statute is subject to serious doubt and has not been judicially determined, a presumption arises that a subsequent amendment was meant to clarify, as op-posed to change, the prior statute. *Texas County*, 803 P.2d at 1122; *Magnolia Pipe Line*, 167 P.2d at 888. A subsequent statute clarifying a prior statute can be used to determine the meaning of the prior statute even if the interpretation affects alleged vested rights. *See, e.g., Morris*, 656 P.2d at 261.

Quail Creek Golf v. Okl. Tax Comm., 1996 OK 35, ¶ 10, 913 P.2d 302, 304. The relevant amendments state:

> B. When an individual guardian is investing the money belonging to estates of minors or incapacitated or partially incapacitated persons, subsection A of this section shall not apply, provided that the guardian has contracted with a person who is a registered investment advisor representative pursuant to the Oklahoma Uniform Securities Act of 2004 and a certified Financial Planner credentialed by the Certified Financial Planner Board of Standards, and provided further that the court authorizes such investments.
>
> ...
>
> D. When an individual guardian enters into an agreement with a bank or trust company, or when the guardian is a bank or trust company qualified and acting under the supervision of the Banking Board, or of the Comptroller of the Currency of the United States of America, the guardian may, upon application to the court, invest funds coming into its hands as guardian in any property, real, personal or mixed, in which an individual may invest the individual's own funds pursuant to the provisions of the Oklahoma Uniform Prudent Investor Act, unless otherwise provided by law.

30 O.S.2011 and Supp. 2017, § 4-709.

¶35 These recent amendments recognize the need to provide other investment opportunities than those enumerated in § 4-709(A)'s original, rather limited choices. The amendment is an effort to require a guardian to obtain expert financial oversight, or a second set of eyes, on a ward's future portfolio. The amendment encourages a guardian to convert "funds coming into its hands as guardian" in "any" investment, as long as such investment would be sanctioned by the Prudent Investor Act. What the amendment does not do is require an existing portfolio be liquidated, taxed, and reinvested. It is limited to the "money" or "funds coming into [a guardian's] hands." *Id.* at § 4-709(D). The record shows that Guardian did indeed consult with various financial experts and planners before making his decision as to how best manage Ward's existing portfolio during very volatile financial times. Some of those experts advocated Widow's position: *i.e.*, selling the stock and paying off the margin loan immediately. In retrospect, Guardian's choices proved more sound than those of the experts he consulted. However, even were that not the case, Guardian's choices, based as they were on the information available to him at that time, were not in violation of either law or his fiduciary duties.

II. Excusing Admitted Breach of Reporting Deadlines

¶36 Widow next argues the trial court's order should be reversed because the trial court erred when it "excused" Guardian's admitted breaches of statutory duty to file timely guardianship reports. Guardian had a duty to file an inventory of the estate within two months of his appointment, unless extended by the court,[25] had a duty to file a guardianship report annually,[26] had a duty to file a report within two months

after the death of the ward,[27] and to file a report upon his removal as guardian.[28] Widow contends Guardian breached these statutory duties, thus constituting a breach of his fiduciary duties. When the trial court failed to assess a surcharge for those breaches, it erred, argues Widow.

¶37 In this regard, the trial court's undisputed findings of fact state:

> 51. [Guardian] admitted he was late in filing the annual reports in 2008 and 2009 and the final accounting. He nevertheless eventually filed those reports and accountings and such reports and accountings were accepted by the Court. The Court approved his 2010 and 2011 filings. No claim has been made that the filings did not accurately report and account for all income and expense in the [Ward's] Estate.
>
> 52. [Guardian] did not follow statutory or local court rules in submitting annual accounting or plans for the care and treatment of the property of the ward. He failed, refused or neglected to follow the formalities required by law or rule.
>
> 53. Although [Guardian] never filed a complete inventory of [Ward's] estate with the Court, he had a complete inventory available for review by [Widow's] attorneys or [Widow]. [Guardian] prepared a financial report and an inventory but neither were filed with the court in [Ward's] guardianship. He did file a partial inventory of oil and gas interests in [Ward's] Guardianship, which was accepted by Judge Dreiling, and he filed an inventory in [Widow's] Guardianship.
>
> 54. Although [Guardian] never filed a complete management plan approved by the court, he documented his thought processes by way of contemporaneous memos throughout the course of his Limited Guardianship to show his reasoning and to be as thorough as possible. He also filed the request to sell $1.8 million in stock to pay off the margin loan, which was the equivalent of a management plan. He discussed that plan with Judge Dreiling so the Judge would know what he was doing even though he believed he had authority to make those kinds of sales without a specific court order. He also sought court approval before dealing with oil and gas properties. ... In fact, he filed two motions to sell off stock for which he obtained court approval.

¶38 Widow contends the trial court erred when it:

> gave this Tulsa lawyer a pass refusing to enter a finding that [Guardian]'s clear statutory violations constituted a breach of fiduciary duty. Given the unequivocal command of the statutes, the district court's ruling is clearly erroneous and represents an abuse of discretion.[29]

¶39 Title 30 O.S.2011, § 4-901(A) states:

> Any guardian who willfully violates the duties or willfully misuses the powers assigned by the court and thereby causes injury to the ward or damages to the financial resources of the ward shall, in addition to any criminal penalties, be liable in a civil action for any actual damages suffered by the ward. Nothing in this subsection shall limit the authority of the court to surcharge a guardian as otherwise provided by law.

¶40 The record supports the trial court's finding that Guardian missed many mandatory filing deadlines, a fact which Guardian admits. The trial court also found that those late reports were accepted by a supervising court, which had the effect of either extending the deadline to file, or waiving the deadline, at the court's discretion. Significantly, however, the trial court found no harm to the Guardianship Estate resulted from the missed deadlines.

> 55. As of the date of trial, no one had identified any asset of either [Ward or Widow] that they claim was omitted from [Guardian]'s management of the estate. No one has accused [Guardian] of missing any deposit, payment, or any other omission of a material or financial nature during his tenure as Limited Guardian.[30]

¶41 Widow admits this, according to the trial court:

> 3. [Widow] stipulated she had no claims of malfeasance against [Guardian]. He was not accused of mishandling the Estate, taxes, debts, obligations, or personal well-being of the [Ward and Widow].[31]

¶42 Although Widow had established Guardian violated the statutory deadlines to file those reports, in order to subject Guardian to liability for violating the duty to timely file a

report, it must be shown that such breach "thereby causes injury to the ward or damages to the financial resources of the ward... ." § 4-901(A). The trial court found no such damages occurred. Widow admits this. Therefore, we find the trial court's findings in this regard were not erroneous.

III. Failure to Repay Margin Loan

¶43 Widow next contends Guardian breached his fiduciary duty to Ward to prudently manage Ward's assets when Guardian failed to immediately pay off the margin loan in the Smith Barney account. This issue was encompassed within the earlier, broader issue regarding whether Guardian was required to liquidate the account, which would necessarily require repaying the margin loan. Because we found no error in the trial court's resolution of that issue, we accordingly find no error here.

IV. Omissions in Findings of Fact

¶44 Widow correctly contends the trial court failed to include in its findings of fact certain unrebutted evidence regarding the amount of interest Ward paid on the unrepaid margin loan. She claims error. While Widow's claim that the trial court's findings of fact omit the specific items complained of is accurate, we find no reversible error occurred. Our Courts have addressed this issue.

¶45 In *Thomas v. Owens*, 1952 OK 64, 241 P.2d 1114, the Court held:

> A party is not entitled to a specific finding of fact, or conclusion of law, upon every point which he may request. *Kilgore v. Stephens*, 159 Okl. 119, 14 P.2d 690. A trial court is not required to make specific findings of fact and conclusions of law in the form as submitted and requested by a party, but is merely required to state its findings of the material and controlling facts, separately from the conclusions of law. *Bradford v. Mayes Mercantile Company*, 89 Okl. 31, 213 P. 743. If a court makes findings of fact and conclusions of law on the vital issues, sufficient to serve as a basis for the judgment rendered, a contention that the court refused to make findings of fact and conclusions of law, or a contention that the court refused to make adequate findings of fact and conclusions of law, is without merit. *Black, Sivalls & Bryson v. Farrell*, 131 Okl. 249, 268 P. 276.

Thomas v. Owens, 1952 OK 64, ¶ 9, 241 P.2d 1114, 1118. *See also, Littlefield v. Roberts*, 1968 OK 180, ¶ 10, 448 P.2d 851, 854.

¶46 Finally, even though Widow submitted unrebutted evidence in support of her theory of recovery, "the trial judge, who observes the demeanor of the witnesses ... is the sole arbiter of the credibility of the witnesses and the weight to be given to their testimony." *Peabody Galion Corp. v. Workman*, 1982 OK 42, ¶ 13, 643 P.2d 312, 315. "Thus, the fact finder may choose to believe some evidence and reject other evidence which in its opinion lacks veracity." *Moore v. Mustang Pub. Sch.*, 2006 OK CIV APP 67, ¶ 4, 136 P.3d 737, 738.

> Likewise, the credibility of witnesses and the effect and weight to be given to their testimony are questions of fact to be determined by the trier of fact ... and are not questions of law for the Supreme Court on appeal. *Hagen v. Independent School District No. I-004*, 2007 OK 19, ¶ 8, 157 P.3d 738, 740.

Manufacturers Guild, Inc. v. City of Enid, 2010 OK CIV APP 87, ¶ 6, 239 P.3d 986, 988 – 89.

¶47 Disregarding for the moment the trial court's finding that no breach of duty occurred and therefore no damages are owed, we find the omission of findings of damage in the trial court's findings of fact does not constitute reversible error. We find the trial court made "findings of fact and conclusions of law passing correctly upon vital issues sufficient to become the predicate of the judgment rendered, [therefore] a contention by the party making the request that the court refused to make such findings and conclusions is without merit." *Black, Sivalls & Bryson v. Farrell,* 1928 OK 269, ¶ 0(3), 268 P. 276, 276.

V. Measuring Damages – Wrong Date

¶48 Finally, Widow asserts the trial court erred when it used the wrong date to measure the damages she claimed were due. This argument assumes damages were awarded. As set out above, this Court has affirmed the trial court's decision that no breach of duty occurred, and therefore, no damages are warranted. It stands to reason, therefore, that an alleged error regarding the length of time over which non-existent damages should be measured is without merit.

CONCLUSION

¶49 Having examined the voluminous record and examined the applicable law, we find no reversible error occurred. The trial court's May 2, 2017, order is affirmed.

¶50 **AFFIRMED**.

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

JERRY L. GOODMAN, JUDGE:

1. Guardian was also appointed the Special Limited Guardian of Widow on July 10, 2007. *See*, Findings of Fact and Conclusions of Law (FFCL), R. 2807, ¶ 4.

2. R. 490.

3. R. 659.

4. The record strongly suggests Widow's dissatisfaction with Guardian was prompted by Widow's grandson. Prior to Guardian's appointment, Ward and Widow subsidized grandson's lifestyle, including paying for his tuition, apartment, utilities, cell phone, and other expenses while attending an out-of-state college (R. 487). After his appointment, Guardian began limiting those expenses, which displeased grandson (R. 483), to the point grandson filed a motion to compel Guardian to pay grandson's expenses from Ward's estate (R. 482). Grandson exerted great influence over Widow, initiated contact with attorneys in his effort to have Guardian removed, and later filed a bar complaint against Guardian because of Guardian's refusal to use Ward's and Widow's funds to buy a car wash business for grandson, pay for a ski trip, college funds, or country club dues. Grandson is likely a primary beneficiary of Ward's and Widow's estates.

5. R. 879.

6. *See*, n. 1.

7. *See*, n. 4.

8. R. 2135.

9. R. 2806-2825.

10. On May 22, 2017, the trial court granted Guardian a fee. In its remarks, the trial court stated the objection to Guardian's stewardship was "being driven by the grandson and not Mrs. Wood." (Transcript May 22, 2017, p. 2 ll 18-19); that Guardian "did a very good job representing the Woods" (*id.* l. 24), and that Guardian "went above and beyond what would be expected ... ." (*id.* p. 3, l.1-2).

11. This subsection was subsequently amended effective November 1, 2011. *See,* 30 O.S.2001 and Supp.2017, § 4-709. These amendments are discussed elsewhere in this opinion.

12. Though this issue was earlier decided in Guardian's favor after being raised in Guardian's April 2014, motion for summary judgment, the issue may again be properly raised at this hearing.

> Moreover, since any interlocutory summary adjudication is subject to alteration or modification by the trial court before entry of final judgment determining all the issues raised by a claim, it can have no binding res judicata effect. By issuing an order of this kind, the trial court does not relinquish, but rather retains, full power to make one complete adjudication of all facets of the action when the case comes to be concluded.

Reams v. Tulsa Cable Television, Inc., 1979 OK 171, ¶ 6, 604 P.2d 373, 376 (footnotes omitted).

13. R. 2809-2810.

14. We address *Freeman* elsewhere in this opinion.

15. This time of economic turmoil became variously known as the Financial Crisis of 2007-2008, or the Great Recession of 2008-2009, in which the U.S. stock market, as measured by the Dow Jones Industrial Average, lost more than 50 percent of its value, or $11 trillion, moving from over 14,100 in October 2007, down to 6,400 points by March 2009. The Dow did not return to its 2008 levels until March 2013.

16. Guardian argues that Ward's investment portfolio had a cost basis of $550,000.00 on a portfolio valued in excess of $6,000,000.00, which, if liquidated within a short time of his appointment, would subject Ward to a large tax liability of between $2-3,000,000.00. This would have left considerably less money available to re-invest in §4-709-approved investments.

17. Brief-in-Chief, p. 16.

18. We discuss *Mason's* application later in this opinion.

19. We interpret § 4-709(A)'s use of the phrase "can only be invested" as a permissive, not compulsory, use of a ward's money. In other words, Widow's position is that any money in a guardian's hands <u>must</u> be invested in a § 4-709(A) portfolio. We disagree, holding that any money in a guardian's hands, that guardian chooses to invest, "can only be invested" pursuant to § 4-709(A).

20. If Widow was correct, and "money" and "stocks" were one and the same, there would be no need to invest the money into stocks because, by that logic, they are the same. Likewise, there would be no need to compel Guardian to liquidate Ward's stocks into money, as again, they are the same. This reasoning leads to an absurdity. We cannot interpret a statute in such a way as to lead to an absurdity. ("Finally, statutory construction that would lead to an absurdity must be avoided and a rational construction should be given to a statute if the language fairly permits." *Ledbetter v. Oklahoma Alcoholic Beverage Laws Enf't Comm'n*, 1988 OK 117, ¶ 7, 764 P.2d 172, 179.)

21. Though a guardian, acting in the best interest of the Ward, may choose to do so.

22. Widow cites *Mason* for the proposition that the term "money" includes "gold and silver coin, treasury notes, bank notes and other forms of currency in common use," and by extension, Ward's stocks and bonds. Widow misapplies this case. The defendant in *Mason* fraudulently billed the City of Ardmore for services the City had already paid, causing it to issue him a city warrant, which he deposited into his personal account and made withdrawals. He was charged with fraudulently obtaining money. Mason claimed that falsely obtaining a warrant was not the same as falsely obtaining cash, and challenged his conviction. The Oklahoma Criminal Court of Appeals rejected this argument and held that for purposes of the fraud charge, "money" could "include coin, currency, drafts, warrants, and other things equivalent to money ..." *Mason v. State,* 1923 Okla. Crim. 111, ¶ ___, 212 P. 1028, 1031 (1923). *Mason* does not address stocks, bonds, investments, or securities. It limited its definition of "money" to those items which could be deposited or credited in a bank account for later withdrawal. Clearly, a stock certificate cannot be deposited in a bank account. We therefore reject Widow's application of *Mason* to this case.

23. *Freeman,* 1993 OK CIV APP 85, 856 P.2d 592, is inapplicable to the facts of this case. A conservator purchased certain Prudential securities on behalf of the ward that contractually compelled arbitration under New York law in the event of a dispute. A second guardian was appointed and filed suit in Oklahoma, contending the sale of the securities was procured by fraud and in violation of Oklahoma's Securities Act. When Prudential sought to compel arbitration in New York, the *Freeman* Court held the original conservator had no authority under the previous version of § 4 – 709 then in effect to enter into a contract for those unauthorized securities, and therefore the arbitration clause was unenforceable. *Id.* at ¶ 11, at 595. *Freeman* stands for the single proposition that a guardian is limited to purchasing only the investments specified in the statute. That proposition is not in dispute; however, it is not the issue in this case.

24. Brief-in-Chief, p. 14

25. Title 30 O.S.2011, § 4-301.

26. Title 30 O.S.2011, § 4-303.

27. Title 30 O.S.2011, § 4-803.

28. Title 30 O.S.2011, § 4-803.

29. Brief in Chief, December 6, 2017, p. 11.

30. R. 2815-2816.

31. R. 2807.

2019 OK CIV APP 55

DILLON S. ROSE, Petitioner, vs. BERRY PLASTICS CORP., SAFETY NATIONAL CASUALTY CORP., and THE WORKERS' COMPENSATION COMMISSION, Respondents.

Case No. 116,911. November 16, 2018

PROCEEDING TO REVIEW AN ORDER OF THE WORKERS' COMPENSATION COMMISSION

HONORABLE MICHAEL T. EGAN, ADMINISTRATIVE LAW JUDGE

<u>REVERSED WITH DIRECTIONS</u>

Kathryn Black, Tulsa, Oklahoma, for Petitioner

H. Lee Endicott, Donald A. Bullard, BULLARD & ASSOCIATES, P.C., Oklahoma City, Oklahoma, for Respondents

JERRY L. GOODMAN, JUDGE:

¶1 Claimant Dillon S. Rose seeks review of the March 19, 2018, Workers' Compensation

Commission (WCC) order denying him benefits because Claimant tested positive for marijuana following an accident. The WCC's order reversed the findings of the Administrative Law Judge (ALJ), which had awarded benefits in an order filed September 13, 2017.[1]

¶2 Based on our review of the facts and applicable law, we reverse the WCC's order and reinstate the ALJ's order.

FACTS

¶3 Claimant's CC Form 3 was filed April 11, 2017, and alleged that Claimant's left hand and wrist were crushed in a "guillotine" machine while working as a machine operator for Employer Berry Plastics on April 5, 2017.[2] Employer initially provided medical treatment, but denied the claim was compensable because Claimant tested positive for marijuana and therefore Employer raised the affirmative defense of intoxication.[3]

¶4 The matter was heard by an ALJ on August 30, 2017. Both parties stipulated as to jurisdiction, availability of coverage, timeliness of claim, and compensation rate.[4] The ALJ found the fact of the injury was not in dispute. Nor was there any dispute Claimant tested positive for marijuana shortly after the accident. The ALJ found that Claimant admitted to smoking marijuana at 11:00 p.m. the night before the accident, but denied its use was a factor in the accident.[5] His admission was later confirmed by the results of a post-accident drug test which showed Claimant "positive THC & Morphine."[6, 7] However, the test merely showed the presence of chemicals in the blood. There were no quantitative measurements reported in the test results.

¶5 Claimant's undisputed testimony was that he left home in the dark between 6:00 and 6:15 in the morning and drove 45 minutes to Employer's facility.[8] Following his arrival at work at 6:55 a.m., Claimant attended a safety meeting, met with his supervisor, and began his 7 a.m., shift at his machine.[9] Operating his machine, which ran 24 hours a day, requires concentration and precision when Claimant takes over operation of the machine from the worker on the previous shift.[10] After relieving the previous operator on the machine, Claimant operated it without incident until his relief and break at 9:15 a.m.[11] During his break, Claimant said he ate, smoked a cigarette, and talked to other co-workers and a supervisor.[12] None of his supervisors testified, and there is no evidence that any supervisors had remarked that Claimant was having any problems associated with intoxication, according to Claimant's testimony.[13] Claimant specifically denied being under the influence of any alcohol or drug that day.[14] Before returning to his machine following his break, Claimant went to help a co-worker at a different machine, known as a guillotine machine. The co-worker was having difficulty closing a latch on the machine because a piece of plastic, called a flare out, was stuck in the roller. A video of the incident, introduced into evidence, showed Claimant and two of his co-workers attempting to clear the jammed machine.[15] Finally, Claimant took off his gloves and inserted his hand in the machine to extract the plastic and clear the obstruction. At the same time, a co-worker pushed the button to operate the machine, causing the guillotine to operate and crush Claimant's left arm.[16] The injury took place approximately ten hours after Claimant had smoked marijuana.[17]

¶6 Claimant testified he knew it was against company policy to be impaired on Employee's premises and not wear his safety goggles and gloves.[18] He admitted removing his gloves and safety goggles while working to clear the machine, but denied being impaired when he did so. He acknowledged that putting his hand inside the machine was unsafe, but that he was clear-headed and knew what he was doing.[19] Claimant testified that operating the machine requires two buttons to be pushed simultaneously, insuring that a single operator cannot place his hand inside the machine and operate it at the same time.[20] The ALJ found that, had the co-worker not operated the machine while Claimant's hand was inside, the accident could not have occurred.[21] Under cross-examination, Claimant was asked:

> Q Your hand was still in the machine when he pushed the buttons, correct?
>
> A Yes, sir.
>
> Q And you knew that was not . . . good safety, correct?
>
> A Yes, sir.
>
> Q And so why did you do it, *were you not thinking clearly?*
>
> A *No, sir. That I could get the flare outs out of the way and lock the machine into place.* I honestly did not think the machine would

> engage with where the safety bar was.[22] (Emphasis added.)

¶7 At the conclusion of his cross-examination, Claimant was asked:

> Q All right. And just to summarize, you are standing in a place where you should not have been standing while he was starting the machine. You had your hand under a machine while the machine was trying to be started. You didn't have your safety glasses on. You didn't have your gloves on. Were you – Again, I'm asking you again, *were you thinking clearly that day*?
>
> A *Yes, sir*.[23] (Emphasis added.)

¶8 On redirect, Claimant again stated he was not under the influence of anything, his head was clear, and he knew what he was doing.[24]

¶9 The ALJ then heard testimony from Employer's production manager about the proper safety protocols that were breached by the Claimant. The manager did not witness the accident. The manager opined that Claimant's placement of his hands in the machine was "a bad decision."[25] The witness went on to state that he had not spoken with Claimant before the accident and denied any knowledge that Claimant was intoxicated.[26] The manager stated Claimant had never been written up for any safety violations prior to the accident.

¶10 The ALJ entered an order which concluded:

> The Commission believes that while the Claimant and his two co-workers exercised extremely poor judgment in the way they tried to fix the machine, *there is no evidence that the Claimant's use of marijuana the night before this accident caused the accident*. It is likely that if the Claimant were intoxicated it would have been noted at the safety meeting that morning. *The accident was caused because the Claimant had his hand where it should not have been and his co-worker pushed two buttons which should not have pushed [sic]* which caused the machine to slam down on the Claimant's hand.[27] (Emphasis added.)

The ALJ ordered Employer to continue to provide medical treatment and temporary benefits.

¶11 Employer sought review[28] before the WCC, which issued an order filed March 19, 2018, reversing the ALJ's order. The WCC's order will be discussed in detail below.

STANDARD OF REVIEW

> Any party feeling aggrieved by the judgment, decision, or award made by the administrative law judge may, within ten (10) days of issuance, appeal to the Workers' Compensation Commission. After hearing arguments, the Commission may reverse or modify the decision only if it determines that the decision was against the clear weight of the evidence or contrary to law. . . . Any judgment of the Commission which reverses a decision of the administrative law judge shall contain specific findings relating to the reversal.
>
> C. []The Supreme Court may modify, reverse, remand for rehearing, or set aside the judgment or award only if it 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. 2014, § 78(C).

> This standard of review is substantially the same as that provided for the judicial review of final agency decisions in individual proceedings under the Administrative Procedures Act (APA), 75 O.S.2011 § 322(1). Therefore, we are guided by case law under the APA in understanding our role in appeals from the Commission. On review of an administrative decision, we may only disturb the decision if one of the statutory grounds is shown. *Young v. State ex rel. Dep't of Human Servs.*, 2005 OK CIV APP 58, ¶ 12, 119 P.3d 1279, 1284. We are not entitled to substitute our judgment for that of the agency as to the weight of the evidence on fact questions. *Id.* On fact issues we will examine the record only to

> determine if the evidence supportive of the order possesses sufficient substance as to induce a conviction as to the material facts. *Union Texas Petroleum v. Corp. Com'n of State of Okl.*, 1981 OK 86, ¶ 31, 651 P.2d 652, 662.

Estenson Logistics v. Hopson, 2015 OK CIV APP 71, ¶ 8, 357 P.3d 486, 488.

ANALYSIS

¶12 When Claimant's post-accident blood test revealed the presence of marijuana in his system, the presumption set out 85A O.S.Supp. 2013, § 2(9)(b)(4) operated. That section states:

> "Compensable injury" does not include:
>
> . . .
>
> (4) injury where the accident was caused by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders. If, within twenty-four (24) hours of being injured or reporting an injury, an employee tests positive for intoxication, an illegal controlled substance, or a legal controlled substance used in contravention to a treating physician's orders, or refuses to undergo the drug and alcohol testing, *there shall be a rebuttable presumption that the injury was caused by* the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders. *This presumption may only be overcome if the employee proves by clear and convincing evidence that his or her state of intoxication had no causal relationship to the injury.* (Emphasis added.).

¶13 In this case, it became incumbent upon Claimant to overcome by clear and convincing evidence the "rebuttable presumption that the injury was caused by the use of . . . illegal drugs." § 2(9)(b)(4). Claimant's evidence consisted of his testimony of the events leading up to the accident. After Claimant was cross-examined and at the conclusion of the evidence, the ALJ found that Claimant and his two co-workers present at the time of the injury (one of whom actually operated the buttons to turn on the machine, crushing Claimant's arm) used:

> extremely poor judgment in the way they tried to fix the machine, there is *no evidence* that the Claimant's *use of marijuana the night before* this accident caused the accident. It is likely that if the Claimant were intoxicated it would have been noted at the safety meeting that morning. *The accident was caused because the Claimant had his hand where it should not have been and his co-worker pushed two buttons which should not have [sic] pushed*. . . . (Emphasis added.).[29]

¶14 Upon being presented with the ALJ's conclusion, the WCC's role was to "reverse or modify the decision *only* if it determines that the decision was against the clear weight of the evidence." § 78(C). Further, the WCC, acting in its appellate capacity, is not:

> entitled to substitute [its] judgment for that of the agency as to the weight of the evidence on fact questions. . . . On fact issues [it] will examine the record only to determine if the evidence supportive of the order possesses sufficient substance as to induce a conviction as to the material facts."

Estenson Logistics, id. at ¶ 8, at 488.

¶15 With these parameters in mind, we review the WCC's order. The WCC order correctly sets out its standard of review:

> []The sole question presented is whether there is clear and convincing evidence to support the ALJ's finding that intoxication had no causal relationship to the injury. On review, the Commission may reverse or modify the ALJ's decision only if it is against the clear weight of the evidence or contrary to law.[30] (Footnote omitted.)

See, 85A O.S.Supp. 2014, § 78(C). The WCC's order next goes on to state:

> Claimant testified that he was clear-headed at the time of the injury and no longer affected by the marijuana he smoked the night before. *This logic requires two great leaps by the Commission. First, we must believe Claimant's self-serving testimony. Second, we must conclude, without any supporting evidence, that Claimant's smoking the night before left him completely free of any intoxicating effect at the time of the accident.*

¶16 This statement demonstrates the WCC's first error. It is not the role of the WCC to make "leaps," to "believe claimant's self-serving testimony," or to "conclude" anything. As set out above, the role of the WCC is only to "determine if the evidence supportive of the order possesses sufficient substance as to induce a conviction as to the material facts." *Estenson Logistics v. Hopson,* 2015 OK CIV APP 71, ¶ 8, 357 P.3d 486, 488, citing *Union Texas Petroleum v. Corp. Com'n of State of Okl.*, 1981 OK 86, ¶ 31,

651 P.2d 652, 662. In this case, Claimant's statement as to his state of mind is uncontested. His unrefuted testimony was that he arose and left for work around 6 a.m., operated a motor vehicle for 45 minutes, participated in a safety meeting with his supervisor, and proceeded to operate his machine for two hours, all without incident. There was no evidence whatsoever that refuted Claimant's statements regarding what happened to cause the accident. It is Claimant's own words that comprise the evidence that must be examined, first by the ALJ, and then by the WCC, to determine if that unrefuted evidence supports the findings of fact by the ALJ. While additional corroborating evidence could buttress Claimant's case in chief, its lack of corroborating evidence, coupled with the lack of any contrary evidence, is sufficient to rebut the presumption imposed by § 2(9)(b)(4).

> The determination whether there is 'substantial evidence' to support an order made by [an administrative agency] does not require that the evidence be weighed, but only that the evidence tending to support the order be considered to determine whether it implies a quality of proof which induces the conviction that the order was proper or furnishes a substantial basis of facts from which the issue tendered could be reasonably resolved.

Chenoweth v. Pan Am. Petroleum Corp., 1963 OK 108, ¶ 8, 382 P.2d 743, 745, citing *Producers Dev. Co. v. Magna Oil Corp.*, 1962 OK 73, 371 P.2d 702. The WCC's order reversing the ALJ is not based on a determination of whether the evidence supports the ALJ's findings, but rather rests on the WCC's "leaps" of belief regarding that undisputed evidence. This was error.

¶17 Section 78(C) states: "[a]ny judgment of the Commission which reverses a decision of the administrative law judge shall contain specific findings relating to the reversal." In response to that requirement, the WCC's order contains the following statement:

> []According to Claimant's own testimony, he took a fifteen-minute break prior to the accident. *His activity and whereabouts during this break are absent from the record. In addition, Claimant's testimony regarding customary workplace practices was uncorroborated and disputed by his supervisor.* (Emphasis added).[31]

¶18 This finding is factually erroneous for two reasons. Regarding his activities during his break, Claimant testified:

> Q Okay. Now, during your break on this day, did you talk to other coworkers?
>
> A Yes, ma'am.
>
> Q Okay. Did you talk to any supervisors?
>
> A Yes, ma'am. . . .
>
> Q Okay. Now, on your break this day, you think you ate something and maybe had a smoke, and you talked to some other coworkers.
>
> A Yes, ma'am.
>
> Q Supervisors?
>
> A Yes, ma'am.
>
> Q Who was your supervisor on that day?
>
> A Frank Burka.[32]
>
> Q Okay. And you spoke to Frank Burka.
>
> A Yes, ma'am.[33]

Clearly, the WCC's statement that "his activity and whereabouts during this break are absent from the record" is demonstrably erroneous. Further, this statement demonstrates once again the WCC's lapse into that of a finder of fact, rather than confining its review to determine if the evidence supported the ALJ's conclusions. The only reason this Court can surmise for the WCC's injection into the order of a comment about evidence that it says does not appear in the record, when in fact it does exist, is for the purpose of attaching a negative connotation to Claimant's activities during this fifteen minute break. This spurious statement was then used as a basis for denial.

¶19 The WCC's order next states: "In addition, Claimant's testimony regarding customary workplace practices was uncorroborated and disputed by his supervisor." Again this statement is demonstrably inaccurate compared to the record.

¶20 Claimant had testified that, from time-to-time, he and others would remove their safety goggles when they fogged up, or would remove their safety gloves at times in order to complete a task. He testified other supervisors knew of this practice, and testified that sometimes safety violations occurred in order to get the job done.

¶21 Employer's witness stated that if he personally saw someone violating a safety rule he would have a discussion with them, and if they did so again, they would be subject to discipline.[34] However, the supervisor then stated:

> The glasses in particular, *Dillon made a comment* that sometimes they've got to put them on top of their head, that's accurate. Especially, like if they are over at their workstation trying to write down roll weights, things of that nature, because they do get foggy, sweaty . . . whatever the case may be. *So I do see that happening,* like if I walk by a line and somebody is at their desk, they've got their glasses up like this and they're trying to write down some information, *that's pretty commonplace*.[35] (Emphasis added).

The supervisor's testimony shows that not only was Claimant's testimony regarding the frequency of safety violations corroborated by Employer's witness, the witness stated such safety violations were "pretty commonplace." Thus, the WCC's finding that Claimant's testimony was both disputed and uncorroborated is belied by this record.

¶22 The WCC's error was compounded when the WCC went on to comment about the quality of Claimant's testimony as uncorroborated. To that point, the order contains a footnote stating, in part, "Claimant introduced into evidence a transcript . . . [which] was neither sworn, nor subject to cross-examination. . . . [W]e afford no weight to the transcript."

¶23 Again, the WCC did not merely weigh the evidence to determine if it supported the ALJ's order, it actively ruled on its weight and admissibility. That is not the WCC's mandate.

¶24 Finally, the WCC's order concludes with this statement:

> *Even if credible,* Claimant's testimony alone does not clearly and convincingly prove his admitted use of marijuana did not contribute to his injury. *We are not convinced* that Claimant's decision to remove his safety gloves and voluntarily place his hand in harm's way is evidence of any weight to show that he was clear-headed at the time of the accident and that intoxication did not cause the injury. Without some form of corroborating direct evidence, *we cannot conclude* the chemicals in Claimant's system no longer affected his judgment, physical and cognitive facilities at the time of the accident. Consequently, we find Claimant failed to rebut the presumption that this injury was caused by state of intoxication by clear and convincing evidence.[36]

¶25 We have earlier discussed the errors committed by the WCC regarding its assessment of Claimant's undisputed testimony and the ALJ's reliance on that testimony in reaching its conclusions. We need not repeat that discussion here. We end our analysis by noting that under these facts, we must reject the WCC's underlying inference that the mere presence of marijuana in Claimant's bloodstream inevitably means he was intoxicated. While every intoxicated person will show the presence of an intoxicating substance in their blood, the reverse is not true. The presence of an intoxicating substance in the blood does not automatically mean that person is intoxicated.[37] Though there is a rebuttable presumption of a causal connection between the injury and the use of illegal drugs, the ALJ found Claimant's undisputed testimony of his activities and behaviors following the smoking of the drug overcame that presumption. This is amply supported by the evidence, as it is the only evidence on this point.

CONCLUSION

¶26 The ALJ found that Claimant overcame the presumption by clear and convincing evidence. Reviewing the WCC's order, we find the WCC departed from its duty to determine if the evidence supported the ALJ's order, instead taking it upon itself to comment on, reject, and weigh the evidence. This was error. The WCC's order is reversed and the order of the ALJ is reinstated.

¶27 **REVERSED WITH DIRECTIONS**.

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

1. R. 18-21.
2. R. 5.
3. R. 9.
4. Transcript of Hearing, August 30, 2017, p. 4, ll. 6-20.
5. R. 19.
6. R. 30.
7. Morphine was present in Claimant's system because the post-accident drug test was administered to Claimant in the emergency room while he was on a morphine drip. Employer admitted it is not asserting Claimant was using any other opiate prior to the accident. *See*, Transcript, February 9, 2018, p. 19, ll. 3-8.
8. Transcript, August 30 2017, p. 7, ll. 10, 11, 15.
9. *Id.* p. 8, ll. 1-4.
10. *Id.* ll. 7-23.
11. *Id.* p. 9, ll. 9-15.
12. R. 27, p. 11.
13. *Id.* p. 12.

14. *Id.*
15. R. 19.
16. R. 19.
17. R. 64.
18. R. 20.
19. *Id.* and Transcript, August 30, 2017, p. 28, l. 24.
20. *Id.* p. 26, ll. 18-25, and p. 27, ll. 1-9.
21. R. 20.
22. *Id.* p. 28, ll. 16-28, and p. 29, ll. 1-2.
23. *Id.* at p. 30, ll. 13-21.
24. *Id.* at p. 33, ll. 22-25, and p. 34, ll. 1-5.
25. *Id.* p. 40, l. 6.
26. *Id.* p. 41, ll. 7-9.
27. R. 20.
28. R. 45.
29. R. 20.
30. R. 69.
31. R. 71.
32. Frank Burka did not testify.
33. Transcript of proceedings, August 30, 2017, p. 11, ll. 1-5, 16-25.
34. *Id.* p. 43.
35. *Id.* p. 44, ll. 6-17.
36. R. 71.
37. Such is demonstrated by common experience. Drinking one glass of beer or wine at lunch, followed an hour later by a blood test, will reveal the presence of alcohol in the bloodstream. However, our laws do not impute intoxication occurs until the blood's alcohol content reaches a certain level. Moreover, had Claimant used marijuana under a doctor's order, as permitted by state law, the test would reveal the presence of the drug in his system, and yet the rebuttable presumption would not operate. The critical focus is not whether an intoxicating substance was present in the worker's system, but rather whether there was a causal connection between the accident and a state of intoxication, from whatever source.

2019 OK CIV APP 58

IN THE MATTER OF O.R., AN ALLEGED DEPRIVED CHILD: PAULA WINFREY, Appellant, vs. STATE OF OKLAHOMA, Appellee.

Case No. 117,750. September 20, 2019

APPEAL FROM THE DISTRICT COURT OF ROGERS COUNTY

HONORABLE TERRELL CROSSON, TRIAL JUDGE

REVERSED and REMANDED

Jeffrey A. Price, PRICE & SEARS, P.C., Muskogee, Oklahoma, for Appellant,

Kali Strain, Assistant District Attorney, Claremore, Oklahoma, for Appellee, State of Oklahoma,

Becki A. Murphy, Megan D. Martin, MURPHY FRANCY, PLLC, Tulsa, Oklahoma, for Appellees, Foster Parents,

Kacie Cresswell, BAYSINGER, HENSON, REIMER & CRESSWELL, Owasso, Oklahoma, for Appellee, O.R.,Minor Child.

BRIAN JACK GOREE, CHIEF JUDGE:

¶1 Paula Winfrey is the paternal grandmother and former foster parent of O.R. The Department of Human Services removed O.R. from Winfrey's home when he was eight months old and she filed an objection requesting his return. The juvenile court denied her motion and she commenced this appeal. We interpret the applicable statute *de novo* and review the decision for an abuse of discretion.[1]

¶2 DHS is authorized to move a child in its custody from one foster placement to another when there is an emergency.[2] The court may return a child to the objecting foster parent's home if it finds the decision to remove him was arbitrary, inconsistent with the child's permanency plan or not in his best interests.[3] In this case, the trial court conducted an evidentiary hearing and denied Winfrey's motion on grounds it was filed too late. We hold (1) Winfrey's motion was not time-barred, (2) the decision to remove O.R. was not arbitrary, (3) the removal was not inconsistent with the permanency plan, and (4) the case must be reversed for a determination of O.R.'s best interests.

I.

The Objection was not Time-Barred

¶3 DHS must give a foster parent 5 days advance notice before removing a child from the foster placement, except in an emergency. 10A O.S. §1-4-805(A)(1)(a). If the foster parent objects, the objection must be filed within 5 days after receipt of the notice. §1-4-805(C)(2).

¶4 Law enforcement seized drugs on Winfrey's premises and DHS removed O.R. on July 25, 2018 without giving advance written notice. Winfrey filed an objection almost two months later, on September 20, 2018. The trial judge implicitly found that the removal was an emergency and apparently concluded that in such a case the foster parent is required to file an objection within 5 days of the date the child was actually removed. The statute, however, is silent as to when a foster parent must file an objection when a child is removed without notice.

¶5 The State argues that in an emergency situation the foster parents are given actual notice when the child is physically removed and therefore the same five-day period to object should apply – especially given the law's policy of expediency of permanency for deprived children. This is sound argument. Nevertheless, establishing time periods for requiring action such as filing an objection is a Legislative function. The court incorrectly held the motion was filed out of time under the statute.

II.

The Removal was not Arbitrary

¶6 The decision to remove O.R. from Winfrey's home was connected with police officers' discovery of eight pounds of methamphetamine on the premises. However, mitigating circumstances came to light after the child was removed and they support Winfrey's argument that O.R.'s safety was never in jeopardy. Winfrey concedes the police found drugs, but she proposes the court should have considered all of the circumstances and reached a different conclusion.

¶7 Ms. Winfrey leases a large five bedroom home. Her rental agreement includes an apartment above the garage and that is where someone else's drug stash was discovered. Although she has a key to the apartment she does not use it as living space and it is not accessible from inside her home.

¶8 Apparently, Ms. Winfrey's son put the drugs inside a safe within the apartment. Ms. Winfrey had no prior knowledge of the safe, the drugs, or her son's access to the apartment. The son, Dwayne Winfrey, is the biological father of O.R. and he was taken to jail. DHS removed O.R. and placed him with different foster parents.

¶9 Ms. Winfrey admits that an open investigation concerning the presence of drugs would be grounds for an emergency removal of a foster child. She contends, however, that §1-4-805 should be applied to take into account relevant information that was available but discovered after the emergency removal. According to Winfrey, if the facts later indicated there was no danger, then failing to return the child is an arbitrary decision.

¶10 An arbitrary decision is one that is made without consideration, without a determining principle, or in disregard of the facts. *See Scott v. Oklahoma Secondary School Activities Association*, 2013 OK 84, ¶34, 313 P.3d 891, 902. A court report filed by a Court Appointed Special Advocate indicates that CASA and DHS received a police report stating that Ms. Winfrey's home was raided and a large amount of drugs was found upstairs in a safe. The report states O.R. was removed from the home immediately and "the home of Ms. Winfrey remains under investigation . . ." A Change in Placement Notification for Judge was filed July 27, 2018 with the explanation that there is an "open investigation on relative foster home."

¶11 We conclude the decision to immediately remove O.R. was substantially related to the discovery of drugs on the foster parent's premises. The removal was not arbitrary – it was based on the considered determination that O.R. could be at risk of harm if he were to remain in a home where drugs had been discovered.

¶12 We hold that the question of whether an emergency removal was an *arbitrary* decision for purposes of §1-4-805(C)(4) must be determined by the circumstances at the time of the removal and not those that might be discovered later. However, post-removal facts may be admissible at the statutory hearing if they are relevant to the *best interests* of the child.

III.

The Removal was not Inconsistent with the Permanency Plan

¶13 An individualized service plan was prepared for O.R.'s mother, Karly Dorland, and it stated: "Should reunification occur, Ms. Dorland will be able to provide for her child's basic needs, which include but are not limited to food, clothing, and shelter." The permanency plan was "return to own home." Ms. Winfrey argues DHS's decision to remove O.R. was inconsistent with the permanency plan. We have found no record evidence that the permanency plan was ever anything other than reunification with the natural mother, Karly Dorland, until after she voluntarily relinquished her parental rights. We therefore reject that contention.

IV.

Best Interests of the Child

¶14 Ms. Winfrey proposes that a court should have freedom to decide that an emergency removal was at first reasonably based (*i.e.* not arbitrary) but later shown to be unwarranted. We agree that the Legislature did not intend to prevent the court from considering relevant facts discovered after the moment the child was physically removed due to an emergency.

¶15 "Best interests" is one of three alternative grounds referenced in §1-4-805(C)(4) for determining the propriety of a child's removal from a foster placement. With that in mind, the statute may be read as follows: "The court may order that the child . . . be returned to the home of the objecting foster parent . . . if the court

finds that the placement decision of the Department . . . was . . . not in the best interests of the child." We are convinced the Legislature intended that a child's best interests is the overriding concern, and returning a child could be appropriate even where an emergency removal was not arbitrary at the time it was performed. In this case, the court conducted a trial of the evidence but did not definitively determine whether the removal was in O.R.'s best interests.

¶16 The judge denied the motion because he concluded it was filed too late, but also expressed doubt that the decision to move O.R. was arbitrary, inconsistent with the permanency plan, or contrary to the child's best interests. The court stated: "I think it's out of time based on the statute. That is my reading of it. I think if we did go farther with it, I'm not sure the Court could find that it was arbitrary and consistent [sic] with the permanency plan or not in the best interest of the child based on the testimony I've heard here today. But based on the notice issue, the motion and the objection is overruled." Although the trial judge considered all of the evidence on the merits of the controversy, the court did not decide whether or not the removal was in the child's best interests. We remand the case for that determination.

V.

Conclusion

¶17 DHS possesses authority to protect threatened children by immediately removing them from a dangerous environment. The decision to do so must not be arbitrary, inconsistent with the permanency plan, or contrary to the best interests of the child. The question of whether an emergency removal was an *arbitrary* decision for purposes of §1-4-805(C)(4) must be determined by the circumstances at the time of the removal and not those that might be discovered later. However, post-removal facts may be admissible at the statutory hearing if they are relevant to the *best interests* of the child. A child's best interests is the overriding concern. Therefore, a trial court has authority to return the child to the home of the objecting foster parent based on all of the circumstances, even where an emergency removal was not arbitrary at the time it was performed. In this case, the trial court's decision not to return the child was based on the erroneous conclusion that the foster parent's motion was filed too late. The order is reversed and the case is remanded for a determination of whether O.R.'s removal from Winfrey's home was in his best interests.

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

BRIAN JACK GOREE, CHIEF JUDGE:

1. When an appellate court must interpret a statute it does so without any deference to the trial court. In re T.H., 2015 OK 26, ¶4, 348 P.3d 1089, 1091. We do not reverse decisions concerning the placement of children unless the juvenile court abused its discretion. *In re BTW*, 2010 OK 69, ¶16, 241 P.3d 199, 206, as revised (Oct. 14, 2010).

2. Title 10A O.S. §1-7-103(B)(1).

3. Title 10A O.S. §1-4-805(C)(4) provides: "The court shall conduct an informal placement review hearing within fifteen (15) judicial days on any objection filed by a party, foster parent or group home pursuant to this section. The court may order that the child remain in or be returned to the home of the objecting foster parent or group home if the court finds that the placement decision of the Department or child-placing agency was arbitrary, inconsistent with the child's permanency plan or not in the best interests of the child."

Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS
Thursday, October 10, 2019

F-2018-690 — Appellant Daniel Ross Dage was tried by judge and convicted of Possession of Juvenile Pornography in the District Court of Comanche County, Case No. CF-2017-587. The Honorable Gerald Neuwirth sentenced Appellant to 20 years imprisonment with eight years suspended and fined him $5,000. From this judgment and sentence Daniel Ross Dage has perfected his appeal. REVERSED AND REMANDED FOR A JURY TRIAL. Opinion by: Kuehn, V.P.J.; Lewis, P.J., concur; Lumpkin, J., concur; Hudson, J., concur; Rowland, J., concur.

F-2018-954 — Christian D. Molina-Solorzano, Appellant, was tried in a non-jury trial for the crime of Aggravated Trafficking in Illegal Drugs in Case No. CF-2017-259 in the District Court of Beckham County. Judge F. Douglas Haught, District Judge, found Appellant guilty and sentenced him to fifteen years imprisonment, a $1,000.00 fine, and one year of post-imprisonment supervision. From this judgment and sentence Christian D. Molina-Solorzano has perfected his appeal. AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs in results; Hudson, J., concurs.

RE-2018-604 — Leroy Alexander, Jr., Appellant, appeals from the revocation of the remainder of his fifteen year suspended sentence in Case No. CF-2015-375 in the District Court of Seminole County, by the Honorable George W. Butner, District Judge. AFFIRMED. Opinion by: Kuehn, V.P.J.; Lewis, P.J., concur; Lumpkin, J., concur; Hudson, J., concur; Rowland, J., concur.

C-2018-1050 — James Michael Simmons, Petitioner, pled nolo contendere to making threats by electronic device to perform acts of violence, a misdemeanor, in Case No. CF-2017-350 in the District Court of Mayes County. The Honorable Terry H. McBride, District Judge, accepted the plea and deferred judgment and sentence for one year, subject to rules and conditions of probation and payment of various fees and costs. Petitioner filed a timely application to withdraw his plea which the trial court denied. Petitioner now seeks the writ of certiorari. The petition for writ of certiorari is DENIED. The judgment and sentence is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs; Rowland, J., concurs.

F-2017-1055 — Appellant, William Singleton Wall, III, was charged on February 18, 2014, with Possession of Controlled Dangerous Substance (Oxycodone), Second and Subsequent, in Pontotoc County District Court Case No. CF-2014-61. Appellant entered a plea of nolo contendere on March 25, 2014, and was admitted into the Pontotoc County Drug Court Program. If successful, the case would be dismissed and expunged; if not, Appellant would be sentenced to ten years imprisonment. The State filed an application to terminate Appellant from the Pontotoc County Drug Court Program on April 19, 2017. Following a hearing on the State's application on October 11, 2017, the Honorable Thomas S. Landrith, District Judge, sustained the State's application and terminated Appellant from the Pontotoc County Drug Court Program. Appellant was sentenced to ten years with credit for time served. Appellant appeals from his termination from Drug Court. Appellant's termination from the Pontotoc County Drug Court Program is AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J.: Concur in Result; Kuehn, V.P.J.: Dissent; Hudson, J.: Concur; Rowland, J.: Concur.

Thursday, October 17, 2019

RE-2019-80 — On February 1, 2017, Appellant Jody Lynn Bailey entered pleas of guilty in Oklahoma County District Court Case No. CF-2016-2879. Appellant was convicted and sentenced to fifteen (15) years imprisonment, with all but the first four years suspended. On November 1, 2018, the State filed a motion to revoke the suspended sentences. Following a January 22, 2019, hearing on the motion, Judge Ray C. Elliott revoked the suspended sentences in full. The revocation is AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J.: Concur; Kuehn, V.P.J.: Concur; Hudson, J.: Concur; Rowland, J: Concur.

RE-2018-357 — James Monroe Jones, Appellant, appeals from the revocation of his concur-

rent suspended sentences in Case Nos. CF-2008-7440, CF-2010-130, CF-2010-290, and CF-2013-6519 in the District Court of Oklahoma County, by the Honorable Timothy R. Henderson, District Judge. AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J. , Concur; Kuehn, V.P.J., Concur; Hudson, J., Concur; Rowland, J., Concur.

F-2018-780 — Appellant, Jonas Mickey Rawson, was tried by jury and convicted of: Count 1, Lewd or Indecent Acts to a Child Under 16, Counts 2 and 3, Lewd or Indecent Acts to a Child Under 16, all after Former Conviction of Two or More Felonies, in the District Court of Lincoln County, Case Number CF-2016-392. The jury recommended as punishment life imprisonment on each count. The trial court sentenced Appellant accordingly and ordered the sentences to run consecutively to one another. From this judgment and sentence Appellant appeals. The judgment and sentence is hereby AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur; Hudson, J., Concur; Rowland, J., Concur.

F-2018-563 — Bobby Dale Stockton, Appellant, appeals from an order of the District Court of LeFlore County, entered by the Honorable Marion D. Fry, Associate District Judge, terminating Appellant from Drug Court and sentencing him to seven years imprisonment in accordance with the Drug Court contract in Case No. CF-2016-380. AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs.

F-2018-626 — Carl Douglas Crick, Jr., Appellant, was tried by jury for Counts 1 and 4, first degree rape; Count 2, rape by instrumentation; Counts 3 and 5, lewd or indecent acts with a child under age 16; and Count 6, lewd or indecent acts with a child under 12, in Case No. CF-2014-205 in the District Court of Logan County. The jury returned a verdict of guilty and set punishment at life imprisonment in Counts 1, 2, and 4; twenty years imprisonment in Counts 3 and 5, and fifty years imprisonment in Count 6. The trial court sentenced accordingly ordered the sentences in Counts 1 through 5 to be served concurrently and Count 6 to be served consecutively. From this judgment and sentence Carl Douglas Crick, Jr. has perfected his appeal. The judgment and sentence is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs; Rowland, J., concurs.

COURT OF CIVIL APPEALS
(Division No. 1)
Friday, October 11, 2019

114,263 — Online Oil, Inc., Plaintiff/Appellee, and Realty Developers, LLC, Plaintiff, v. CO&G Production Group, L.L.C. Defendant/Third Party Plaintiff/Appellant. And Jerry Parent, Defendant, v. Kris Agrawal; Coal Gas USA, LLC; Coal Gas Mart, LLC; Realty Management Associates, LLC; Vimala Agrawal; Newton Agrawal, Third Party Defendants/Appellees. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Jefferson D. Sellers, Judge. Defendant/Third Party Plaintiff/Appellant CO&G Production Group, LLC (CO&G), appeals from a trial court order disqualifying its attorney, Charles J. Brackney (Brackney), from representation of any party in this matter. The trial court determined that because Brackney previously represented the opposing party, Plaintiff/Appellee Online Oil, Inc. (Online), in this matter, Rule 1.9(a) of the Rules of Professional Conduct (RPC) prohibited Brackney from representing CO&G in the same case without Online's written consent. The trial court concluded real harm to the integrity of the judicial process would occur if Brackney continued to represent CO&G and ordered Brackney be disqualified. CO&G ap-peals. We AFFIRM the ruling of the trial court under Okla.Sup.Ct.R. 1.202. Opinion by Buett-ner, J.; Goree, C.J., and Joplin, P.J., concur.

Wednesday, October 16, 2019

116,482 — Mary Wilburn, for the Estate of Betty Moles, Deceased. Plaintiff/Appellant, v. Ginger Snow, Defendant/Appellee. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Rebecca Nightingale, Judge. Appellant/Plaintiff, Betty Moles (deceased), seeks review of the trial court's order denying Moles' Motion for New Trial, filed on September 25, 2017. Moles filed a Petition on October 23, 2012 for the Reformation of Instrument and to Quiet Title to Real Estate. On April 2, 2010, Betty Moles' son, Norman Clay Moles (Buddy Moles) (deceased), executed a transfer-on-death deed, corresponding to his home in Tulsa, Oklahoma, in favor of the Defendant, Ginger Snow. Several months later, on December 8, 2010, Buddy Moles executed another transfer-on-death deed, corresponding to the same home in Tulsa, in favor of his mother, Betty Moles. The December 8, 2010 transfer-on-death deed was recorded in the Tulsa County Clerk's Office. According to Moles' Petition,

the December 8, 2010 deed erroneously recited an execution date of April 2, 2010 instead of the actual execution date of December 8, 2010. Betty Moles said the mistaken date was a scrivener's error. She requested the court reform the December transfer-on-death deed in her favor, provide for the correct December execution date for the deed, make a finding that Ginger Snow had no interest in the real estate at issue, and order Ginger Snow to pay Moles' attorney fees and costs pursuant to 12 O.S. Supp.2000 §1141(B). Appellee/Snow filed an Answer to Moles' Petition on November 16, 2012 in which Snow asserted she had the sole interest in the real estate at issue. Snow asserted she was the common law wife of Buddy Moles, had lived in the house at issue with Buddy Moles since 2004, Snow asserted she had the only properly recorded transfer-on-death deed and claimed homestead rights as Buddy Moles' wife. Snow raised three counterclaims in her Answer: 1) a quiet title action, which requested a finding that Betty Moles had no interest in the property; 2) a claim for unjust enrichment, asserting as Buddy Moles' wife she is entitled to the entirety of his estate, and Betty Moles had wrongly taken control of Buddy Moles' real estate, bank accounts, IRA's, 401k's and other assets; and 3) requested a declaratory judgment determining the entirety of Buddy Moles' estate belonged to Snow. Snow also asked for attorney fees, costs, expenses and interest on her claims. The trial court held a non-jury trial on January 5, 2017. The court found Ginger Snow was the common-law wife of Buddy Moles from September 14, 2005 until his death. The trial court found the determinations of Snow's homestead and marital interests, as well as claims against Betty Moles for unjust enrichment should be addressed in the probate matter, In the Matter of the Estate of Norman C. Moles. Betty Moles' cause of action for reformation of the instrument and quiet title were dismissed with prejudice, as per order filed on April 17, 2015. Ginger Snow was awarded attorney fees in the amount of $1,023.33 associated with the April 17, 2015 order, filed on April 28, 2015. "In reviewing a trial court's decision denying a motion for new trial, we use an abuse of discretion standard of review, and will reverse the order if the trial court is deemed to have erred with respect to a pure, simple and unmixed question of law. *Jones, Givens, Gotcher & Bogan, P.C. v. Berger,* 2002 OK 31, ¶5, 46 P.3d 698, 701." *Mooney v. Mooney,* 2003 OK 51, ¶50, 70 P.3d 872, 881. Appellant raised six propositions of error in her appeal. Appellant argued the trial court erred in finding Snow and Buddy Moles were married. We do not find the trial court erred as a matter of law in its determination that Buddy Moles and Ginger Snow were married, as the evidence presented was in keeping with *Standefer v. Standefer,* 2001 OK 37, 26 P.3d 104. Appellant's second proposition asserted the trial court erred in not taking judicial notice of the pretrial order and petition. We do not find the trial court erred in its decision with respect to the court's application of §2202 or the taking of judicial notice. Appellant's third proposition asserted the trial court improperly restrained Appellant's counsel from cross-examining Appellee, Ginger Snow. We do not find error in the trial court's hearsay ruling. Appellant's fourth proposition of error argued the trial court abused its discretion in failing to allow Appellant to offer evidence in rebuttal of Snow's case in chief, effectively limiting Appellant's use of exhibits and witnesses to only the evidence already admitted. This restriction was the result of sanctions imposed by the trial court for violations of discovery orders. The trial court is best qualified to engage in the "fact-specific inquiry" and determine the correct sanction for a discovery violation. *Barnett v. Simmons,* 2008 OK 100, ¶26, 197 P.3d 12, 20. We find no relief is warranted on this proposition. Appellant's fifth proposition of error alleged Appellee/Snow engaged in fraud on the court and the judgment should be vacated. We do not find any relief is warranted on this proposition of error. Appellant's final proposition argued the court permitted Appellee to violate the Rules of Professional Conduct. This proposition is closely related to Appellant's argument in proposition five and does not warrant relief. The September 25, 2017 order of the trial court denying the Appellant's Motion for New Trial is AFFIRMED. Opinion by Joplin, P.J.; Goree, C.J., and Buettner, J., concur.

(Division No. 2)
Tuesday, October 1, 2019

116,536 — Bixby Lumber Company, Inc. d/b/a Building Solutions, an Oklahoma corporation, Plaintiff/Appellant, vs. Cesar Cervantes, Bianca Cervantes, husband and wife, and C&F Concrete, LLC, an Oklahoma limited liability company, Defendants/Appellees. Appeal from Order of the District Court of Okmulgee County, Hon. Kenneth E. Adair, Trial Judge. Bixby Lumber Company, Inc.,

appeals an order awarding attorney fees in favor of the Appellees, Cesar and Bianca Cervantes and C&F Concrete, LLC. The district court did not abuse its discretion in awarding attorney fees for the cost of defending Bixby Lumber's motion to reconsider the court's order vacating a default judgment. Counsel's appellate briefing discusses in detail Oklahoma law authorizing de-fault judgments and the basis for his original motion for a default judgment. That is not the issue. The basis for the order appealed was the district court's determination that counsel sought to have the original default judgment reinstated, after acknowledging the motion to vacate was properly sustained. AFFIRMED. Opinion from Court of Civil Appeals, Division II by Fischer, P.J.; Reif, S.J. (sitting by designation), and Thornbrugh, J., concur.

Thursday, October 10, 2019

117,379 — Lacy Stidman, Plaintiff/Appellant, vs. Fidgets Oilfield Services, LLC, Jeff McPeak and Clint Walker, Defendants/Appellees. Proceeding to review a judgment of the District Court of Pittsburg County, Hon. Tim Mills Trial Judge. Plaintiff Lacy Stidman appeals a decision of the district court finding that her suit against the above named defendants was time barred. On review, we find the district court erred in its decision based on new Supreme Court precedent. On May 29, 2019, the Supreme Court issued its opinion in the case of *Cole v. Josey,* 2019 OK 39, _ P.3d_, wherein the Court stated at ¶ 15 that the "deemed dismissal" after 180 days without service pursuant to 12 O.S. § 2004 will not be final for purposes of 12 O.S. 2011, § 100 until, at the earliest, a final appealable order is filed. we must therefore reverse the decision of the trial court, and find that the one-year grace period provided by § 100 started to run on September 15, 2017, when the district court granted Defendant's motion to dismiss, not on day 181 after filing. REVERSED. Opinion from Court of Civil Appeals, Division II, by Thornbrugh, J.; Fischer, P.J., and Goodman, J., concur.

117,035 — Colclazier & Associates, Plaintiff/Appellee, vs. Steven Seibert, an Individual, Defendant/Appellant, and Triple S. Wildlife Ranch, LLC, an Oklahoma Limited Liability Corporation, Defendant. Proceeding to review a judgment of the District Court of Hughes County, Hon. Wallace Coppedge, Trial Judge. Steven Seibert appeals a decision of the district court finding that Appellant attorney Jerry Colclazier was entitled to enforce a fee agreement and an associated mortgage. Appellant cites alleged violations of the rules of professional conduct as evidence to invalidate the mortgage. Pursuant to 5 O.S. App 3-A (20), these rules are not designed to be a basis for civil liability or create a presumption that a legal duty has been breached. Appellant's allegations of error are based in statutory/common law, and must be assessed according to those principles. We agree with the district court that the mortgage in this case was legally sufficient, and not unconscionable. We further find that the fee contract was not invalidated by the statute of frauds, and that Appellant failed to show that it should be vacated on the grounds of "economic duress." The questions presented here are narrow. We are not called upon to analyze or comment on Appellee's alleged violations of the Rules of Professional Conduct, or any issue besides the existence of the fee contract and the general validity of the mortgage. We find the trial court's decisions to be within the scope of its discretion in those areas. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Thornbrugh, J.; Reif, S.J. (sitting by designation), and Fischer, P.J., concur.

Friday, October 11, 2019

116,741 — In re the marriage of: Michael Jonathan Kisner, Petitioner/Appellant, vs. Amy Joanne Bobert fka Amy Joanne Kisner, Respondent/Appellee. Proceeding to review a judgment of the District Court of Jackson County, Hon. Clark E. Huey, Trial Judge. Michael Jonathan Kisner (Father) appeals the child custody, visitation, and support decisions of the district court. Father argued that income should be imputed to Mother for support purposes. Mother testified that she had changed employment positions because she was pregnant with a second child and this motivated her decision to step into a "lesser role closer to home" with the company. We find no evidence that her position change was motivated by any intent to reduce child support liability, and no error in the district court's refusal to impute income to Mother. We find that the record created by the parties in their attempts to show that joint custody was not appropriate is more than sufficient to support the decision of the trial court that Mother should have sole custody in this case. We find no support in the record for Father's contention that the court erred in awarding visitation because Mother "offered more visitation than the court ordered." The judg-

ment of the district court is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Thornbrugh, J.; Reif, S.J. (sitting by designation), and Fischer, P.J., concur.

(Division No. 3)
Friday, October 11, 2019

117,383 — Schlecht Farms, Inc., Plaintiff/Appellant, vs. Jess Harris, III, Defendant/Appellee, and ATM Industries, Inc., Jon Brown, and Robert Williams, Defendants. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Don Andrews, Trial Judge. Plaintiff/Appellant Schlecht Farms (Plaintiff) appeals from an order determining that an earlier order of summary judgment in favor of Defendant/Appellee Jess Harris III was free from irregularity. Plaintiff argues on appeal that the earlier order of summary judgment should have been vacated because it was not served properly, and it was obtained improperly due to absence of counsel on the date of the hearing. Based upon our review of the record and applicable law, Plaintiff's allegations of error are unavailing. The January 31, 2017 order is free from irregularity. We therefore AFFIRM the trial court's order. Opinion by Swinton, J.; Mitchell, P.J., and Bell, J., all concur.

117,626 — Wilmington Savings Fund Society, FSB, DBA Christiana Trust, as Trustee for the Normandy Mortgage Loan Trust, Series 2015-1, Plaintiff/Appellee, vs. F. Ronald Aubrey and Lana S. Aubrey, Defendants/Appellants. Appeal from the District Court of Cleveland County, Oklahoma. Honorable Lori Walkley, Judge. Defendants/Appellants, F. Ronald Aubrey and Lana S. Aubrey, appeal from the trial court's grant of summary judgment in favor of Plaintiff/Appellee, Wilmington Savings Fund Society, FSB, in this action to foreclose a real estate mortgage. Defendants also appeal from the trial court's denial of their motion to compel discovery responses. Among other things, Defendants contend the trial court erred in deciding both the summary judgment motion and the motion to compel because their lead attorney, Andrew Waldron, was not given notice of the hearing date. Waldron's affidavit, attached to Defendants' motion to vacate, supports this allegation. Wilmington's Response to Petition in Error does not address Defendants' claim and nothing in the appellate record reveals the trial court addressed the same. Due process demands that if a trial court elects to hold a summary judgment hearing, it must ensure all parties are given proper notice of the same. The judgment of the trial court is vacated and this matter is remanded for further proceedings consistent with this Opinion. VACATED AND REMANDED. Opinion by Bell, J.; Mitchell, P.J., and Swinton, J., concur.

117,720 — Charlotte Dilday, Plaintiff/Appellant, vs. The City of Claremore, a municipal corporation, Defendant/Appellee. Appeal from the District Court of Rogers County, Oklahoma. Honorable Sheila A. Condren, Judge. Plaintiff/Appellant Charlotte Dilday (Dilday) appeals from the trial court's order granting summary judgment to Defendant/Appellee the City of Claremore (Claremore) in Dilday's negligence action against Claremore stemming from an incident at the Claremore Recreational Facility (the Rec Center) in which Dilday allegedly slipped and fell on water on the Rec Center's locker room floor. After *de novo* review, we find material questions of fact exist regarding whether the water was an open and obvious hazard such that Claremore did not owe a duty to Dilday to warn or protect against the hazard. The trial court erred by sustaining Claremore's motion for summary judgment. We REVERSE AND REMAND. Opinion by Mitchell, P.J.; Bell, J., and Swinton, J., concur.

(Division No. 4)
Monday, September 30, 2019

117,527 — Oklahoma Department of Rehabilitation Services, and CompSource Mutual Insurance Co., Petitioners/Appellants, vs. Hee Davies and the Oklahoma Workers' Compensation Court of Existing Claims, Respondents/Appellees. Proceeding to review an order of a three-judge panel of the Workers' Compensation Court of Existing Claims, Hon. Michael W. McGivern, Trial Judge, awarding Hee Davies (Claimant) temporary total disability (TTD) benefits. Claimant worked full-time for Employer until she resigned. The court heard evidence that Claimant resigned because she was unable to perform her job duties due to her cumulative trauma injuries that the trial court found resulted from an aggravation of a pre-existing condition. The trial court considered the opinions of three doctors and concluded that Claimant was TTD as of the date of her last exposure on August 31, 2014. We sustain the three-judge panel's decision affirming the trial court's award to Claimant of TTD benefits. SUSTAINED. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, V.C.J.; Barnes, P.J., and Rapp, J., concur.

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