THE OKLAHOMA BAR
Journal
Volume 90 — No. 21 — 11/9/2019

Court Issue

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THURSDAY & FRIDAY, DECEMBER 12 & 13
9 A.M. - 2:50 P.M.

Oklahoma County Courthouse
Courtroom of the
Honorable Ray C. Elliott
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Oklahoma City, OK 73102

MCLE 12/2

PROGRAM PLANNERS:

Victor Albert, David T. McKenzie, Jarrod Stevenson, Elliott Crawford, Ray C. Elliott, David B. Autry, Jaye Mendros, Malcolm Savage, Joshua Smith, Cheryl Ramsey, Cody Gilbert and Pamela Snider

ETHICS ADVISOR/MODERATOR:

Garvin A. Isaacs, Jr.,
Garvin A. Isaacs, Inc.,OKC

TRIAL JUDGE:

The Honorable Ray C. Elliott

EVIDENCE ADVISOR:

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This program will provide a reenactment of the criminal jury trial of *The State of Oklahoma v. Chasity Carey*. The program offers a trial-like atmosphere in recreating the events and parties to the case of this criminal matter. Criminal trial experience is unnecessary as you learn from a panel of Oklahoma Criminal Jury Trial Masters. A complete copy of the court transcript is provided in electronic format only to registered guests. This case involves and bondswoman charged with Murder, First Degree. The gun play was captured on video. The verdict was highly controversial. We are going to give the State of Oklahoma another bite at the apple.

Prosecution Counsel: Susan Meinders, Pamela Stillings, Carol Chen, Rick Healy, Corey Stone, Traci Rhone, Clayburn Curtis, Victor Albert, Angela Marsee, Newell Wright, Jr., and Edward J. Kumiega.

Defense Counsel: David B. Autry, Jaye Mendros, Hank Meyer, Elliott Crawford, Jarrod Stevenson, Paul Faulk, Julie Strong, Cheryl Ramsey, David T. McKenzie and Pamela Snider.

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THE OKLAHOMA BAR
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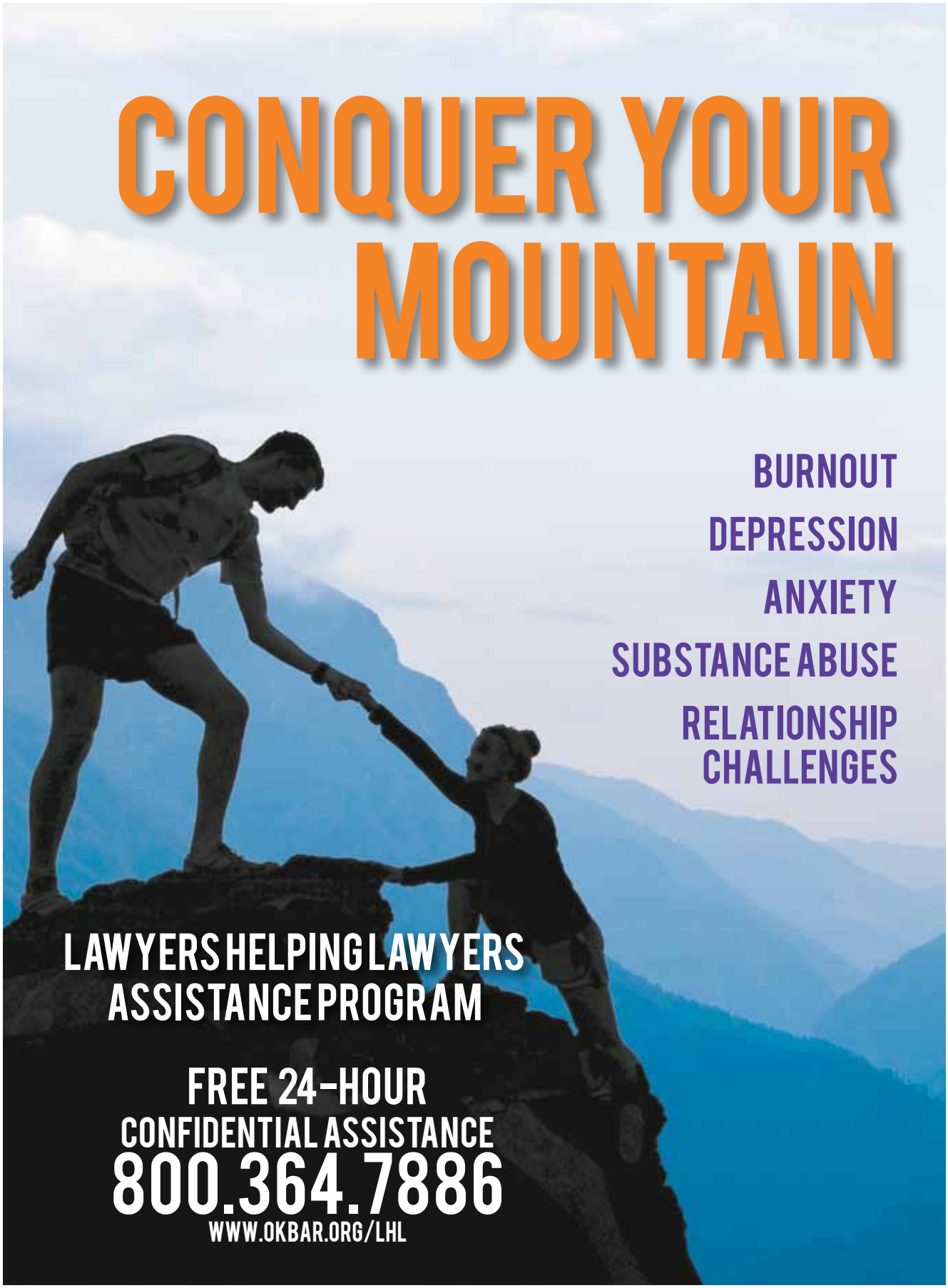
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Oklahoma Bar Association

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NOTICE OF HEARING ON THE PETITION FOR REINSTATEMENT OF MARCO DAX FLORES, SCBD #6840 TO MEMBERSHIP IN THE OKLAHOMA BAR ASSOCIATION

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

Any person desiring to be heard in opposition to or in support of the petition may appear before the Professional Responsibility Tribunal at the Oklahoma Bar Center at 1901 North Lincoln Boulevard, Oklahoma City, Oklahoma, at 9:30 a.m. on **Wednesday, December 18, 2019**. Any person wishing to appear should contact Gina Hendryx, General Counsel, Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, Oklahoma 73152, telephone (405) 416-7007.

PROFESSIONAL RESPONSIBILITY TRIBUNAL

Opinions of Supreme Court

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

2019 OK 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 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.

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2019 OK 69

HUB PARTNERS XXVI, LTD., Plaintiff/Appellant, v. THOMAS BURNELL BARNETT, Defendant/Appellee.

No. 115,995. October 29, 2019

ON CERTIORARI FROM THE COURT OF CIVIL APPEALS, DIVISION IV

¶0 Hub Partners XXVI, Ltd. filed a foreclosure action against Thomas Barnett. The district court granted Hub a money and foreclosure judgment. Barnett filed for bankruptcy. During the bankruptcy, Barnett made court-approved payments to Hub. Barnett failed to pay the debt in full, and the bankruptcy court dismissed his bankruptcy. Over a month after the dismissal, Hub issued an execution on the pre-bankruptcy judgment. Barnett objected to the execution arguing the judgment was dormant pursuant to 12 O.S., § 735, since more than five years had passed and Hub had not renewed the judgment. The district court agreed and granted Barnett's motion to release the dormant judgment and vacate the execution and sale order. Hub appealed, and the Court of Civil Appeals affirmed the district court's judgment. This Court granted certiorari.

COURT OF CIVIL APPEALS' OPINION VACATED; DISTRICT COURT'S JUDGMENT AFFIRMED IN PART AND REVERSED IN PART; REMANDED WITH INSTRUCTIONS.

Kelly M. Parker, LAMUN MOCK CUNNYNGHAM & DAVIS, P.C., Oklahoma City, Oklahoma, for Plaintiff/Appellant.

Charles C. Ward, THE LAW OFFICE OF CHARLES C. WARD, PLLC, Oklahoma City, Oklahoma, for Defendant/Appellee.

Winchester, J.

¶1 In 2011, Plaintiff/Appellant Hub Partners XXVI, Ltd. obtained a money judgment and foreclosure of a mortgage against Defendant/Appellee Thomas Burnell Barnett. Shortly thereafter, Barnett filed for bankruptcy, staying the execution of Hub's foreclosure judgment. In 2016, the bankruptcy court dismissed Barnett's bankruptcy for failure to maintain payments to Hub as ordered by the court. Hub attempted to execute the judgment. Barnett moved the district court to release the dormant judgment and to vacate the execution and sale. The district court granted Barnett's motion. Hub timely appealed, and the Court of Civil Appeals affirmed the district court's judgment. This Court granted certiorari. The issues before the Court are (1) whether Hub's foreclosure judgment is dormant, and (2) whether the mortgage at issue merges with the foreclosure judgment. For the reasons stated herein, we hold that the 2011 foreclosure judgment is dormant, but the mortgage lien does not merge into the foreclosure judgment and continues to secure Barnett's obligation owed to Hub.

I. FACTS AND PROCEDURE

¶2 On July 28, 2010, Hub filed to foreclose on real property and collect on a promissory note executed by two defendants, one of whom was Barnett. The district court granted judgment in Hub's favor and filed the judgment on February 24, 2011. Hub proceeded to execute on the judgment. Barnett then filed for Chapter 13 Bankruptcy on March 4, 2011, staying the execution and sale.

¶3 Barnett's bankruptcy plan, filed and confirmed on August 14, 2011, provided for payments to Hub. The plan covered principal, interest, and arrearages. However, Barnett failed to make payments under the plan, and on July 13, 2016, the bankruptcy court dismissed Barnett's case.

¶4 On August 19, 2016, thirty-seven days after the dismissal of Barnett's bankruptcy, Hub issued an alias execution on the foreclosure judgment. On September 22, 2016, Hub issued its second alias execution. On December 1, 2016, a sheriff's sale was held. However, a day prior, on November 30, 2016, Barnett filed a motion to release the dormant judgment and a motion to vacate the execution and sheriff's sale. Barnett claimed the judgment against him was unenforceable pursuant to Oklahoma's dormancy statute, 12 O.S.2011, § 735. He supported this argument before the district court by referencing facts that Hub attempted the second execution of its judgment over five years after the date of the first execution and Hub never filed a notice of renewal of judgment. In response, Hub argued Barnett's payments under the bankruptcy plan extended the dormancy period and it timely pursued its execution. Hub further contended the dormancy statute did not apply to foreclosure judgments.

¶5 The district court ruled Hub failed to file a notice of renewal of judgment, required by 12 O.S.2011, § 735, and ruled the bankruptcy did not stay the filing of the notice of renewal. The court also held Hub missed the additional thirty-day extension of time for a creditor to execute on its judgment after the dismissal of the bankruptcy per 11 U.S.C. § 108(2). The district court released the judgment and vacated the execution and sheriff's sale. The court further ruled that the note and mortgage merged

into the dormant judgment. Hub timely appealed. The Court of Civil Appeals affirmed the district court's judgment, holding Hub's foreclosure judgment was dormant. This Court granted certiorari.

II. STANDARD OF REVIEW

¶6 The issues in this appeal concern the district court's legal interpretation of Oklahoma's dormancy statute and how it applies to foreclosure judgments. Statutory construction poses a question of law; the correct standard of review is *de novo. State ex rel. Protective Health Servs. State Dep't of Health v. Vaughn*, 2009 OK 61, ¶ 9, 222 P.3d 1058, 1064. Under the *de novo* standard of review, the Court has plenary, independent, and non-deferential authority to determine whether the trial tribunal erred in its legal rulings. *Id*.

III. DISCUSSION

¶7 The two primary issues before this Court are (1) whether Hub's foreclosure judgment is dormant, and (2) whether the mortgage at issue merges with the foreclosure judgment. We address each in turn.

¶8 We first examine Oklahoma's dormancy statute. When the Court examines a statute, our primary goal is to determine legislative intent through the "plain and ordinary meaning" of the statutory language. *In re Initiative Petition No. 397*, 2014 OK 23, ¶ 9, 326 P.3d 496, 501. Because the Legislature expresses its purpose by words, the plain meaning of a statute is deemed to express legislative authorial intent in the absence of any ambiguous or conflicting language. *Id.* Oklahoma's dormancy statute, 12 O.S.2011, § 735, provides in pertinent part:

> A. A judgment shall become unenforceable and of no effect if, within five (5) years after the date of filing of any judgment that now is or may hereafter be filed in any court of record in this state:
>
> 1. Execution is not issued by the court clerk and filed with the county clerk as provided in Section 759 of this title;
>
> 2. A notice of renewal of judgment substantially in the form prescribed by the Administrative Director of the Courts is not filed with the court clerk;
>
> 3. A garnishment summons is not issued by the court clerk; or
>
> 4. A certified copy of a notice of income assignment is not sent to a payor of the judgment debtor.
>
> . . . .
>
> C. This section shall not apply to judgments against municipalities or to child support judgments by operation of law.

The provisions of § 735 are to be strictly construed. *Chandler-Frates & Reitz v. Kostich,* 1981 OK 74, ¶ 10, 630 P.2d 1287, 1290.

¶9 Oklahoma's dormancy statute applies to judgments filed in any court of record in this state. 12 O.S.2011, § 735(A). Under Oklahoma law, a judgment is defined as the final determination of the rights of the parties in an action. 12 O.S.2011, § 681. The judgment in a foreclosure proceeding is the order determining the amount due and ordering the sale to satisfy the mortgage lien. *FDIC v. Tidwell*, 1991 OK 119, ¶ 5, 820 P.2d 1338, 1341. It is a final, appealable judgment. *Id.* According to the plain language of § 735 and § 681, foreclosure judgments fall within the definition of judgments subject to the dormancy statute. Only two exceptions to the dormancy statute are noted – judgments against municipalities and judgments for child support by operation of law. 12 O.S.2011, § 735 (C). Foreclosure judgments are not an included exception.

¶10 This Court in *North v. Haning*, 1950 OK 280, 229 P.2d 574, previously rejected a similar argument that the dormancy statute did not apply to a certain type of judgment. Although *North* involved a judgment for the foreclosure of a special assessment lien, this Court found the judgment was subject to the dormancy statute as there was no exception for such a judgment under § 735. *Id.* ¶ 21, 229 P.2d at 578. Later opinions from this Court recognized that the *North* decision stood for the proposition that the dormancy statute applies to foreclosure judgments. *See State ex rel. Comm'rs of Land Office v. Landess*, 1955 OK 148, ¶ 8, 293 P.2d 574, 577; *State ex rel. Comm'rs of Land Office v. Keller,* 1953 OK 371, ¶ 42, 264 P.2d 742, 750. We apply *North* and its progeny here and hold that a foreclosure judgment is subject to Oklahoma's dormancy statute, 12 O.S.2011, § 735.

¶11 Pursuant to Oklahoma's dormancy statute, a judgment will become unenforceable after five years unless a creditor renews its judgment by one of the following: (1) execution, (2) notice of renewal, (3) garnishment, or

(4) income assignment. 12 O.S.2011, § 735(A). Hub failed to take any action regarding its foreclosure judgment within five years after the district court filed Hub's judgment. Nothing prevented Hub from renewing its judgment during the bankruptcy proceeding. *See 3M Dozer Serv., Inc. v. Baker,* 2006 OK 28, ¶ 13, 136 P.3d 1047, 1051. Hub also failed to file a renewal or execute on its judgment in the additional thirty days allowed after the dismissal of the bankruptcy. 11 U.S.C. § 108(c); *see also 3M Dozer Serv.*, 2006 OK 28, ¶ 14, 136 P.3d at 1051. As a result, Hub's foreclosure judgment is dormant.

¶12 Hub contends Barnett's payments under the bankruptcy plan prevented the dormancy period from running. This Court previously rejected a similar argument in *Chandler-Frates & Reitz*, 1981 OK 74, ¶ 7, 630 P.2d at 1290, holding, "[i]n the absence of a statute to the contrary a partial payment will not prevent the running of a dormancy statute."[1] The Court explained:

> There was no judgment lien at common law. In granting a right which did not exist at common law, the legislature can prescribe certain conditions which must be met by all judgment creditors if dormancy is to be prevented and the lien of a judgment to be continued. There is no limitation other than that of a dormancy statute upon the effective duration of a judgment.

Id. ¶ 8, 630 P.2d at 1290; *see also First of Denver Mortg. Investors v. Riggs,* 1984 OK 36, ¶ 29, 692 P.2d 1358, 1363 (finding that a partial payment does not prevent the running of the dormancy statute), *overruled on other grounds by Drllevich Constr., Inc. v. Stock*, 1998 OK 39, 958 P.2d 1277. The Legislature's restriction on judgments is § 735 – which does not carve out an exception for partial payments on judgments. We conclude Hub's payments under the bankruptcy plan did not prevent the dormancy period from running.

¶13 Hub alternatively argues that Barnett's bankruptcy plan payments satisfied the income assignment option under the dormancy statute, 12 O.S.2011, § 735(A)(4). We reject this argument as well. An "income assignment" and "notice of income assignment" are defined in 12 O.S.2011, §§ 1170(9) and (11).[2] Section 1170's definitions relating to income assignments were promulgated prior to the Legislature's amendment to § 735 in 2000, which added the option of sending a notice of income of assignment. Based on the definitions outlined in §§ 1170(9) and (11), Hub's bankruptcy plan was not an income assignment contemplated by § 735(A)(4).

¶14 Although Hub's foreclosure judgment is dormant, that determination does not complete our analysis. The district court ruled Hub's mortgage lien merged into the foreclosure judgment. A mortgage gives the creditor a security interest in the debtor's real property. *Mortgage, Black's Law Dictionary* (11th ed. 2019), *available at* Westlaw. Foreclosure is the legal proceeding to terminate a debtor's interest in that property, instituted by the creditor. F*oreclosure, Black's Law Dictionary* (11th ed. 2019), *available at* Westlaw. Under Oklahoma law, foreclosure of a mortgage is a multi-step process. 12 O.S.2011, § 686. The foreclosure judgment determines only that there is a valid mortgage lien, which the creditor is entitled to enforce through a sale. *FDIC*, 1991 OK 119, ¶ 5, 820 P.2d at 1341. However, the mortgage lien itself is extinguished only by a sale. 42 O.S.2011, § 22 ("The sale of any property on which there is a lien, in satisfaction of the claim secured thereby . . . extinguishes the lien thereon.") Until such sale, the mortgage as a property right created by contract remains unaffected. *Anderson v. Barr,* 1936 OK 471, ¶ 25, 62 P.2d 1242, 1247. Due to the nature of a mortgage lien, this Court previously held in *Anderson, Id*., and *Methvin v. Am. Sav. & Loan Ass'n of Anadarko*, 1944 OK 177, ¶ 44, 151 P.2d 370, 376, that a mortgage lien does not merge into a foreclosure judgment, nor is it extinguished by a foreclosure judgment.[3] *See also Bank of the Panhandle v. Irving Hill,* 1998 OK CIV APP 140, ¶ 12, 965 P.2d 413, 417 (relying on *Anderson* and *Methvin*, the court ruled a mortgage does not merge with a decree of foreclosure). We follow *Anderson* and *Methvin* and hold the mortgage lien did not merge into Hub's foreclosure judgment.

IV. CONCLUSION

¶15 The dormancy statute extinguished Hub's foreclosure judgment. However, the foreclosure judgment did not extinguish the mortgage lien. The lien can only be extinguished by a sale and application of the proceeds to the judgment, which has not yet occurred. 42 O.S.2011, § 22. We hold that the dormancy statute does not operate to invalidate the mortgage, which continues to secure the obligation owed by Barnett to Hub; the district court erred in finding that the mortgage merged into the dormant judgment. Hub

may prosecute a new action for a judgment based upon the mortgage lien. *Cf. State ex rel. Comm'rs of Land Office v. Weems*, 1946 OK 28, ¶ 12, 168 P.2d 629, 633.

¶16 Based upon our analysis, we affirm the district court's ruling to release the foreclosure judgment and vacate the execution and sheriff's sale as the judgment is dormant. We reverse the district court's ruling that the note and mortgage sued upon merged into the foreclosure judgment. We remand for proceedings consistent with this opinion.

COURT OF CIVIL APPEALS' OPINION VACATED; DISTRICT COURT'S JUDGMENT AFFIRMED IN PART AND REVERSED IN PART; REMANDED WITH INSTRUCTIONS.

CONCUR: Gurich, C.J., Darby, V.C.J., Winchester, Edmondson, Colbert, Combs, and Kane, JJ.

NOT PARTICIPATING: Kauger, J.

Winchester, J.

1. The Court similarly noted ancillary proceedings such as hearings on assets and garnishment proceedings do not prolong the life of a judgment in the absence of the issuance of a writ of execution to enforce the judgment within the statutory period. *Chandler-Frates & Reitz*, 1981 OK 74, ¶ 8, 630 P.2d at 1290.

2. Sections 1170(9) and (11) state as follows:

> A. For the purposes of this subsection and Sections 1171.2 through 1171.4 of this title:
>
> . . . .
>
> 9. "Income assignment" is a provision of a support order which directs the obligor to assign a portion of the monies, income, or periodic earnings due and owing to the obligor to the person entitled to the support or to another person designated by the support order or assignment for payment of support or arrearages or both. The assignment shall be in an amount which is sufficient to meet the periodic support arrearages or other maintenance payments or both imposed by the court order or administrative order. The income assignment shall be made a part of the support order;
>
> . . . .
>
> 11. "Notice of income assignment" means the standardized form prescribed by the United States Secretary of Health and Human Services that is required to be used in all cases to notify a payor of an order to withhold for payment of child support and other maintenance payments.

3. It should be noted that this Court in *North* overruled *Anderson* and *Methvin* to the extent those cases found foreclosure judgments were not subject to the dormancy statute. *North*, 1950 OK 280, ¶¶ 24-25, 229 P.2d at 578-79. However, *North* did not address nor overrule the pronouncement in both *Anderson* and *Methvin* that a mortgage lien is not merged into or extinguished by a foreclosure decree or judgment.

2019 OK 70

STATE OF OKLAHOMA, ex rel. OKLAHOMA BAR ASSOCIATION, Complainant, v. THEODORE KOSS, JR., Respondent.

SCBD 6752. October 29, 2019

BAR DISCIPLINARY PROCEEDING

¶0 The Oklahoma Bar Association commenced disciplinary proceedings against Theodore Koss, Jr. The Professional Responsibility Tribunal found by clear and convincing evidence that Koss committed professional misconduct in failing to give competent representation, failing to communicate with his client, and mishandling settlement funds belonging to his client. The Tribunal also considered Koss's disciplinary history and recommended this Court suspend Koss from the practice of law for two years and one day.

Tracy Pierce Nester, Assistant General Counsel of the Oklahoma Bar Association, Oklahoma City, Oklahoma, for Complainant.

Theodore Koss, Jr., *pro se*.

THE RESPONDENT IS SUSPENDED FOR TWO YEARS AND ONE DAY AND ORDERED TO PAY COSTS

Winchester, J.

¶1 After an investigation into a client's grievance, Complainant Oklahoma Bar Association (OBA) filed its complaint against Respondent Theodore Koss, Jr. pursuant to Rule 6 of the Rules Governing Disciplinary Proceedings.[1] The Professional Responsibility Tribunal (Trial Panel) heard this disciplinary matter and found Koss violated the Oklahoma Rules of Professional Conduct (ORPC)[2] and the Rules Governing Disciplinary Proceedings (RGDP) in failing to give competent representation, failing to communicate with his client, and mishandling settlement funds belonging to his client. The Trial Panel considered Koss's disciplinary history and recommended this Court suspend Koss from the practice of law for two years and one day.

I. FACTS

Fredy Escobar Grievance

¶2 In 1985, Koss received his license to practice law in Oklahoma. In 2016, Fredy Escobar hired Koss to represent him in a pending workers' compensation matter. Escobar sustained a tibial pilon fracture to his left ankle, while in the course of his employment with Cesar Garcia d/b/a Garcia's Construction. The workers' compensation case settled for $9,000. At some point during the pendency of the case, Escobar was incarcerated at the Great Plains Correctional Facility in Hinton, Oklahoma. Koss visited Escobar in the correctional facility to discuss the settlement. Escobar spoke

Spanish, and Koss utilized Cesar Garcia – Escobar's employer and adverse party in the workers' compensation case – as a translator during this meeting.

¶3 Koss testified in front of the Trial Panel that during this meeting, Garcia told him that Escobar agreed to the following division of settlement funds: $1,800 to Koss, which was 20% of the settlement as approved by the workers' compensation court; $200 to Koss for travel expenses; $3,000 to Garcia for the repayment of a loan; and the remaining $4,000 to Escobar. Koss further testified that the agreement regarding the division of the settlement funds was in writing and signed by Escobar. However, Koss could not locate the signed document reflecting this agreement during the OBA's investigation.

¶4 Escobar testified and denied he had an outstanding loan with Garcia. Escobar also denied that he agreed to pay $3,000 to Garcia. Instead, Escobar testified that during the meeting, he agreed to pay $300 to Garcia for translating and travel expenses and to pay $2,000 to Koss. It was his understanding that Koss was to pay him the remaining settlement funds of $6,700. Escobar further testified he never signed a written document regarding the division of the settlement funds.

¶5 Shortly after the meeting at the correctional facility, Koss sent Garcia to retrieve the $9,000 settlement check – payable to Koss and Escobar – from the insurance carrier. Koss directed Garcia to obtain the endorsement of Escobar on the settlement check. Garcia visited Escobar at the correctional facility, obtained Escobar's signature on the settlement check, and returned the settlement check to Koss. Koss deposited the check into his trust account and issued three checks: (1) a check in the amount of $4,000, made payable to Escobar; (2) a check in the amount of $3,000, made payable to Garcia; and (3) a check in the amount of $2,000, made payable to Koss.

¶6 Koss mailed the check in the amount of $4,000 to Escobar at the correctional facility. However, the correctional facility returned the settlement check to Koss, marked undeliverable. Koss did not communicate with Escobar after the correctional facility returned the check, despite receiving inquiries from Escobar as to the status of the settlement funds. Koss also did not inquire with the correctional facility as to why the settlement check was undeliverable or how to properly transmit the settlement funds to Escobar. Instead, Koss gave Escobar's settlement check to Garcia. Escobar never received any portion of the settlement funds. Escobar testified he never authorized Garcia to accept settlement funds on his behalf. Garcia did not cooperate with the OBA during its investigation.

Enhancement

¶7 The Professional Responsibility Commission previously disciplined Koss for misconduct on two occasions. On January 23, 1998, the Commission privately reprimanded Koss for failing to timely refile a personal injury suit after the case had previously been filed and dismissed. On September 28, 2007, the Commission again privately reprimanded Koss for defaulting on an application to assess costs and fees against his client in a post-divorce child support matter. A district court entered a default order against Koss's client, and Koss failed to notify his client of the adverse judgment.

Allegations Deemed Admitted

¶8 Escobar filed a grievance against Koss, and the OBA began an investigation. Koss delayed responding to the grievance and meeting with the OBA to discuss the grievance. Koss also failed to produce documents requested by the OBA. Due to his lack of cooperation during the investigation, the OBA subpoenaed Koss for deposition. Koss again failed to produce all the requested documents at his deposition. On January 15, 2019, the OBA filed a Complaint against Koss setting forth one count of professional misconduct and one count of enhancement due to Koss's disciplinary history. On January 23, 2019, the OBA filed an Amended Complaint, which corrected Koss's official roster address.

¶9 The OBA submitted evidence that it properly served Koss with notice of the Amended Complaint. Koss did not file an answer to the Amended Complaint, and on March 5, 2019, the OBA filed a Motion to Deem Allegations Admitted pursuant to RGDP Rule 6. Koss did not respond to the motion. At the hearing in front of the Trial Panel, Koss did not object to the motion, and the allegations contained in the Amended Complaint were deemed admitted. The Trial Panel proceeded to hear evidence to determine only the discipline to impose on Koss.

¶10 During the hearing, Koss admitted he lacked judgment in not delivering the settlement

check himself or determining the procedures at the correctional institution for transmitting the settlement funds to Escobar. The Trial Panel found Koss committed professional misconduct in violation of ORPC Rules 1.1,[3] 1.3,[4] 1.4,[5] 1.15,[6] and 8.4,[7] as well as a violation of RGDP Rule 1.3.[8]

¶11 Regarding discipline enhancement, the Trial Panel found Koss had a disciplinary history as the Commission privately reprimanded him on two occasions. The Trial Panel recommended this Court suspend Koss from the practice of law for two years and one day. Koss did not file a brief with this Court.

II. STANDARD OF REVIEW

¶12 In disciplinary proceedings, this Court acts as a licensing court in the exercise of our exclusive jurisdiction. *State ex rel. Okla. Bar Ass'n v. Garrett*, 2005 OK 91, ¶ 3, 127 P.3d 600, 602. Our review of the evidence is *de novo* in determining if the OBA proved its allegations of misconduct by clear and convincing evidence. The Trial Panel's recommendations are neither binding nor persuasive. *State ex rel. Okla. Bar Ass'n v. Anderson*, 2005 OK 9, ¶ 15, 109 P.3d 326, 330. This Court's responsibility is not to punish an attorney, but to assess the continued fitness to practice law, and to safeguard the interests of the public, the courts, and the legal profession. *State ex rel. Okla. Bar Ass'n v. Wilburn*, 2006 OK 50, ¶ 3, 142 P.3d 420, 422.

III. DISCUSSION

¶13 The OBA charged Koss with improperly managing his client's settlement funds in violation of ORPC Rule 1.15 – which requires attorneys who are entrusted with the property of clients to hold the property with the care required of a "professional fiduciary." This Court employs three different culpability standards in evaluating the mishandling of funds: (1) commingling,[9] (2) simple conversion,[10] and (3) misappropriation, i.e., "theft by conversion or otherwise."[11] The degree of culpability ascends from the first to the last. *State ex rel. Okla. Bar Ass'n v. Combs*, 2007 OK 65, ¶ 13, 175 P.3d 340, 346.

¶14 The OBA and the Trial Panel view Koss's conduct as rising to simple conversion. We agree. An attorney must promptly deliver to his client any funds that his client is entitled to receive. *See* ORPC Rule 1.15(d). Conversion occurs when an attorney applies money to a purpose other than the purpose for which the client entrusted the funds to the attorney. *State ex rel. Okla. Bar Ass'n v. Miskovsky*, 1990 OK 12, ¶ 13, 804 P.2d 434, 438. Intent is not necessary to prove conversion. *State ex rel. Okla. Bar Ass'n v. Helton*, 2017 OK 31, ¶ 30, 394 P.3d 227, 238.

¶15 The record establishes (a) Koss received a $9,000 settlement check payable to Escobar and himself; (b) Koss paid $3,000 of the settlement funds to Garcia, which was $2,700 more than what Escobar authorized to pay to Garcia; (c) Koss attempted to send $4,000 of the settlement funds to Escobar at the correctional facility, but the correctional facility returned the funds, marked undeliverable; (d) Koss failed to notify Escobar that the funds were returned or to promptly deliver the funds to Escobar at the correctional facility; (e) Koss gave Escobar's settlement check to Garcia; and (f) Koss failed to pay Escobar the settlement funds owed to him. Accordingly, we find that the record establishes by the requisite clear and convincing evidence standard that Koss converted funds owed to Escobar and violated ORPC Rules 1.15(a) and (d) and 8.4(a). Koss's actions are grounds for discipline under RGDP Rule 1.3.

¶16 The OBA charged Koss with other offenses under Count I, namely: (1) failing to give competent representation, (2) failing to act diligently on a matter, and (3) failing to communicate with his client. Koss failed to give competent representation or act diligently in utilizing Garcia – Escobar's employer and adverse party in the workers' compensation case – as a translator and relied upon Garcia to accurately translate communication between Koss and Escobar regarding the division of settlement funds. Koss also entrusted Escobar's settlement funds to Garcia instead of delivering the settlement funds to Escobar himself. Koss never contacted Escobar after the correctional facility returned the settlement check or before he gave the settlement check to Garcia. Koss failed to adequately communicate with Escobar regarding the status of the settlement or obtain permission from Escobar to give the settlement funds to Garcia.

¶17 Professional competence – acting competently and diligently on a matter and communicating with a client – is a *mandatory obligation* imposed upon attorneys. *State ex rel. Okla. Bar Ass'n v. Johnston*, 1993 OK 91, ¶ 28, 863 P.2d 1136, 1145. Koss's failure to maintain these standards through neglectful behavior violates ORPC Rules 1.1, 1.3, and 1.4 and warrants imposition of discipline.

IV. DISCIPLINE

¶18 While we found no previous disciplinary case of this Court that precisely mirrors the situation here, we look to other examples as a baseline. This Court commonly suspends attorneys for simple conversion of client funds, with the length dependent on the surrounding circumstances and degree of harm to the client.

¶19 In *State ex rel. Oklahoma Bar Association v. Mansfield*, 2015 OK 22, ¶ 48, 350 P.3d 108, 123, this Court suspended an attorney for eighteen months for commingling funds and committing simple conversion in violation of ORPC Rule 1.15, when he overpaid himself fees and promptly used the money for personal expenses. This Court imposed the penalty in part because the attorney attempted to cover up his actions. *Id.* Although Mansfield involved a suspension for conversion, it is distinguishable from this case in that Koss failed to safeguard client funds and has a prior disciplinary history. *See Mansfield*, 2015 OK 22, ¶ 41, 350 P.3d at 122. In comparison, this Court in *State ex rel. Oklahoma Bar Association v. Brown,* 1998 OK 123, ¶ 20, 990 P.2d 840, 845, suspended an attorney with a prior disciplinary history for two years and one day for forging an endorsement on a settlement check and failing to satisfy a lien on the check in violation of ORPC Rule 1.15.

¶20 In addition to the unprofessional conduct in mishandling the settlement funds, the record shows Koss's incompetent representation and lack of diligence in hiring an adverse party in the workers' compensation case to act as a translator and the client-communication lapses in the disbursement of settlement funds belonging to Escobar. The record also shows Koss's failure to fully cooperate in his disciplinary investigation or to file any brief before this Court. As another example of comparable misconduct, in *State ex rel. Oklahoma Bar Association v. Whitebook*, 2010 OK 72, 242 P.3d 517, this Court suspended an attorney for two years and one day and ordered him to pay costs for his failure to provide competent representation or act diligently, to keep his clients reasonably informed, and to promptly comply with requests for information. *Id.* ¶ 17, 242 P.3d at 521. The attorney also did not cooperate in the disciplinary proceedings before the trial panel. *Id.* ¶¶ 10-11, 242 P.3d at 520.

¶21 In the present matter, as in *Brown* and *Whitebook*, the totality of the misconduct shown by this record along with a prior disciplinary history warrants suspension for two years and a day and the payment of costs.

V. MITIGATION

¶22 This Court may consider mitigating circumstances in evaluating both the attorney's conduct and assessing the appropriate discipline. *State ex rel. Okla. Bar Ass'n v. Mayes,* 2003 OK 23, ¶ 26, 66 P.3d 398, 408. Other than Koss's recognition that he was negligent in his dealings with Escobar, there are no mitigating circumstances to evaluate. Koss did not make any attempt to reimburse Escobar for the financial loss, but instead, suggested the District Attorney should pursue criminal charges against Garcia, to whom Koss entrusted the settlement check.

VI. CONCLUSION

¶23 The OBA established by clear and convincing evidence that Koss violated ORPC Rules 1.1, 1.3, 1.4, 1.15(a) and (d), and 8.4(a), and RGDP Rule 1.3. This Court suspends Koss from the practice of law for two years and one day. The OBA filed an application to assess the costs of the disciplinary proceedings in the amount of $2,149.56. Koss did not file an objection to this application. These costs include investigation expenses and costs associated with the record, and each is permissible. *See* RGDP Rule 6.16. This Court orders Koss to pay costs in the amount of $2,149.56 within ninety days of the effective date of this opinion.

THE RESPONDENT IS SUSPENDED FROM THE PRACTICE OF LAW FOR TWO YEARS AND ONE DAY AND ORDERED TO PAY COSTS.

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

Combs, J., dissents;

Combs, J., dissenting

I would disbar.

Winchester, J.

1. Rule 6, Rules Governing Disciplinary Proceedings, 5 O.S.2011, ch. 1, app. 1-A.

2. Oklahoma Rules of Professional Conduct, 5 O.S.2011, ch. 1, app. 3-A.

3. ORPC 1.1 provides:
A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

4. ORPC 1.3 provides: "A lawyer shall act with reasonable diligence and promptness in representing a client."

5. ORPC 1.4 provides in pertinent part:
(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
(3) keep the client reasonably informed about the status of the matter;
(4) promptly comply with reasonable requests for information; and
(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

6. ORPC 1.15 provides in pertinent part:
(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the written consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.
. . . .
(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

7. ORPC 8.4 provides in pertinent part:
It is professional misconduct for a lawyer to:
(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

8. RGDP 1.3 provides:
The commission by any lawyer of any act contrary to prescribed standards of conduct, whether in the course of his professional capacity, or otherwise, which act would reasonably be found to bring discredit upon the legal profession, shall be grounds for disciplinary action, whether or not the act is a felony or misdemeanor, or a crime at all. Conviction in a criminal proceeding is not a condition precedent to the imposition of discipline.

9. "Commingling takes place when client monies are combined with the attorney's personal funds." *State ex rel. Okla. Bar Ass'n v. Farrant*, 1994 OK 13, ¶ 8, 867 P.2d 1279, 1284.

10. "[S]imple conversion occurs when an attorney applies a client's money to a purpose other than that for which it came to be entrusted to the lawyer." *State ex rel. Okla. Bar Ass'n v. Combs*, 2007 OK 65, ¶ 15, 175 P.3d 340, 346.

11. Misappropriation occurs when an attorney has purposely deprived a client of money through deceit and fraud. *Id.* ¶ 16, 175 P.3d at 346.

2019 OK 71

State of Oklahoma ex rel. Oklahoma Bar Association, Complainant, v. JULIA MARIE EZELL, Respondent.

SCBD No. 6847. November 4, 2019

ORDER OF IMMEDIATE INTERIM SUSPENSION

¶1 The Oklahoma Bar Association (OBA), in compliance with Rules 7.1 and 7.2 of the Rules Governing Disciplinary Proceedings (RGDP), has forwarded to this Court certified copies of the Information and Judgment and Sentence on a plea of guilty, in the matter of *State of Oklahoma v. Julia Marie Ezell*, CF-2018-3403, in Oklahoma County. On October 16, 2019, Julia Marie Ezell pled guilty to misdemeanor counts of 1) Use of a Computer to Violate Oklahoma Statutes in violation of 21 O.S.2011, § 1958, and 2) False Reports of a Crime in violation of 21 O.S. 2011, § 589. On October 16, 2019, the Court entered a 5 year deferred sentence on the first misdemeanor count, with restitution of $21,810 paid in full upfront, and a 5 year deferred sentence on the second misdemeanor count, with both counts to run concurrently until October 15, 2024.

¶2 Rule 7.3 of the RGDP provides: "Upon receipt of the certified copies of Judgment and Sentence on a plea of guilty, order deferring judgment and sentence, indictment or information and the judgment and sentence, the Supreme Court shall by order immediately suspend the lawyer from the practice of law until further order of the Court." Having received certified copies of these papers and orders, this Court orders that Julia Marie Ezell is immediately suspended from the practice of law. Julia Marie Ezell is directed to show cause, if any, no later than **November 19, 2019,** why this order of interim suspension should be set aside. *See* RGDP Rule 7.3. The OBA has until **December 5, 2019**, to respond.

¶3 Rule 7.2 of the RGDP provides that a certified copy of a plea of guilty, an order deferring judgment and sentence, or information and judgment and sentence of conviction "shall constitute the charge and be conclusive evidence of the commission of the crime upon which the judgment and sentence is based and shall suffice as the basis for discipline in accordance with these rules." Pursuant to Rule 7.4 of the RGDP, Julia Marie Ezell has until **December 20, 2019,** to show cause in writing why a final order of discipline should not be imposed, to request a hearing, or to file a brief and any evidence tending to mitigate the severity of discipline. The OBA has until **January 6, 2020**, to respond.

¶4 DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE on November 4, 2019.

Noma D. Gurich
CHIEF JUSTICE

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

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

Calendar of Events

November

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 video-conference; 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 tele-conference; 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 tele-conference; 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

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

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

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

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

11 **OBA Solo & Small Firm Conference Planning Committee;** 2 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Charles R. Hogshead 918-708-1746

2019 OK CIV APP 54

URBAN OIL & GAS PARTNERS B-1, LP and URBAN FUND II, LP, Plaintiffs/ Appellees, vs. DEVON ENERGY PRODUCTION COMPANY, L.P., Defendant/ Appellant.

Case No. 116,867; Comp w/116,868
February 12, 2019

APPEAL FROM THE DISTRICT COURT OF KINGFISHER COUNTY, OKLAHOMA

HONORABLE ROBERT E. DAVIS, TRIAL JUDGE

AFFIRMED

Karl F. Hirsch, Glenn M. White, HIRSCH, HEATH & WHITE, PLLC, Oklahoma City, Oklahoma, for Plaintiffs/Appellees

Bradley W. Welsh, GABLE & GOTWALS, Tulsa, Oklahoma, for Defendant/Appellant

P. THOMAS THORNBRUGH, JUDGE:

¶1 Defendant, Devon Energy Production Company, L.P. (Devon or Defendant), appeals from the trial court's grant of summary judgment and award of attorney fees in favor of Plaintiffs, Urban Oil & Gas Partners B-1, LP, and Urban Fund II, LP (Plaintiffs or Urban), in Plaintiffs' action to quiet title to Plaintiffs' interest in an oil and gas lease. This action is a companion with Case No. 116,868, a matter involving substantially identical facts alleged by Plaintiffs against Cimarex Energy Co., as Defendant, as to which we simultaneously issue our opinion today. Based on our review of the record and applicable law, we affirm the trial court's judgment and order.

BACKGROUND

¶2 This matter concerns ownership of certain "deep formation" drilling rights in an oil and gas lease known as the "Alig Lease" on minerals located in the SE/4 of Section 22, Township 15 North, Range 12 East, in Kingfisher County. Plaintiffs filed this action claiming they are the current owners of all rights associated with the Alig Lease and seeking to quiet title as against Defendant, which asserted an interest adverse to Plaintiffs in the deep formation rights. Plaintiffs also alleged they were entitled to attorney fees because, prior to filing suit, they submitted notice and a title curative document to Defendant pursuant to Oklahoma's Nonjudicial Marketable Title Procedures Act, 12 O.S. 2011 §§ 1141.1 through 1141.5 ("NMTPA"), but Defendant had not responded.

¶3 Defendant admitted it claimed an interest in the Alig Lease as to mineral rights below 9,414 feet. It claimed that in 1991 Amoco Production Company (Amoco) – a remote predecessor in interest of Plaintiffs – made an "Assignment and Bill of Sale" of the Alig Lease to MW Petroleum Corporation[1] (the "1991 Assignment"), which allegedly "limits the extent of the assignment [in the Alig Lease] from the surface to 9,414 feet in depth." Plaintiffs admit that their title derives from the 1991 Assignment, but assert the assignment was not limited in depth. All parties admit that in 1966 an entity that later became Amoco – Pan American Petroleum Corporation (Pan American) – entered into an Operating Agreement with Brookwood Oil Company as operator, and that the Operating Agreement was still in effect when the 1991 Assignment was made. The *Operating Agreement* covered all of Section 22 *but was effective only as to geologic formations encountered from the earth's surface to 9,414 feet below the surface.*

¶4 In relevant part, the 1991 Assignment, naming Amoco as Assignor, conveyed to MW as Assignee, the following:

> A. All right, title and interest of Assignor in and to the oil and gas leases described on Exhibit "A" (attached hereto and made a part hereof for all purposes), insofar as said leases cover the lands which are specifically described in Exhibit "A" opposite the separate designation of each said lease, subject, however, to the depth limitations described on Exhibit "A" (the "Leases") and, as between the parties hereto, subject to any restrictions, exceptions, reservations, conditions, limitations, burdens, contracts, agreements and other matters applicable to such leases and interests;
>
> All right, title and interest of Assignor in, to and under, or derived from, all presently existing and valid oil, gas or mineral unitization, pooling, operating and communitization agreements, declarations and orders, and in and to the properties covered and the units created thereby, which are appurtenant to the Leases;

> All right, title and interest of Assignor in, to and under, or derived from, all presently existing and valid … operating agreements … insofar as the same are appurtenant to the Leases; … .

¶5 Attached as Exhibit "A" is a schedule of approximately 20 oil and gas leases located in Kingfisher County. The leases are listed by number, original lessor, original lessee, lease date, full legal description, and recordation book and page. The Alig Lease description appears on a page together with a lease known as the Elliot Lease, and is described as follows:

¶6 Defendant also claims Amoco as a remote predecessor. It alleged that in 1998 Amoco made an assignment from Amoco to Gothic Energy (1998 Assignment), under which Amoco as Assignor conveyed to Gothic as Assignee, the following:

> All of Assignor's right, title and interests in, to and under, or derived from, the oil and gas leasehold interests, royalty interests, overriding royalty interests, mineral interests, production payments, net profits interests and surface interests which are described in Exhibit "A"; … .

The Alig and Elliott leases appear on Exhibit A to the 1998 Assignment with the following description:[2]

¶7 In addition to denying Plaintiffs' title, Defendant denied that Plaintiffs had complied with the NMTPA because Plaintiffs' curative instrument not only demanded that Devon relinquish all rights in the Alig Lease below 9,414 feet but also erroneously assumed Defendant claimed an interest in the Elliott Lease. Defendant has disclaimed any interest in the Elliott Lease.

¶8 Both parties sought summary judgment, asserting the undisputed facts supported their respective positions. They agreed that the "single issue" presented was "the proper legal construction" of the 1991 Assignment of the Alig Lease between Amoco and MW.[3]

¶9 The trial court granted Plaintiffs' motion for summary judgment and denied Devon's motion, finding specifically that:

> [T]he 1991 Assignment from Amoco Production Company to MW Petroleum Corporation: (1) transferred all of Amoco Production Company's interest in the oil and gas lease known as the Alig Lease, including the Deep Formation Rights, to MW Petroleum Corporation; and, (2) did not except or reserve unto Amoco Production Company any interest in the Alig Lease… . [and that]

LEASE SCHEDULE

EXHIBIT "A" PAGE ONE OF ONE STATE OF OKLAHOMA COUNTY OF KINGFISHER

* * *

LEASE NO.	LESSOR	LESSEE	DATE	DESCRIPTION	RECORDED BOOK	RECORDED PAGE
All right, title and interest in and to (and subject to) that certain Operating Agreement dated February 2, 1966, by and between Brookwood Oil Company, Operator, and Pan American Petroleum Corporation, Non-Operators, and all amendments thereto, covering All of Section 22, Township 15 North, Range 9 West, limited from the surface to 9,414 feet in depth.						
176824	Mabel Elliott and Grady Elliott, Wife and husband	B.F. Smith, Jr.	12/08/56	Township 15 North, Range 9 West Section 22: N/2 NE/4	168	576
268760	John L. Alig and Catherine Schwarz Alig and Kate Alig	Alvah Hill	07/10/57	Township 15 North, Range 9 West Section 22: SE/4	169	351

LPN	LEASE DATE	GOVT NO	LESSOR	LESSEE	BOOK	PAGE	DESCRIPTION
176824-1	12/08/56		ELLIOTT, MABEL, ET VIR	SMITH, B.F. JR	168	576	T-15-N R-9-W SEC 22; N/2 NE/4
286760-1	07/10/57		ALIG, JOHN L., ET AL	HILL, ALVAH	169	351	T-15-N R-9-W SEC 22: SE/4

> Plaintiffs, through mesne conveyances, are the legal, equitable, and rightful owners of the following oil and gas lease:
>
> Date: 7/10/1957
>
> Lessor: John L. Alig and Catherine Schwarz Alig and Kate Alig
>
> Lessee: Alvah Hill
>
> Description: SE/4 of Section 22-15N-9W, Kingfisher County …
>
> Recorded: Book 169 at Page 351

¶10 Plaintiffs thereafter applied for attorney fees pursuant to the NMTPA. The trial court granted the application over Defendant's objection. Defendant filed this appeal.

STANDARD OF REVIEW

¶11 "Summary judgment settles only questions of law," which this Court reviews "by a *de novo* standard pursuant to the plenary power of the appellate courts without deference to the trial court." *Tucker v. New Dominion, L.L.C.*, 2010 OK 14, ¶ 12, 230 P.3d 882. "Summary judgment shall be affirmed if there is no dispute as to any material fact and the moving party is entitled to judgment as a matter of law." *Beach v. Okla. Dep't of Pub. Safety*, 2017 OK 40, ¶ 11, 398 P.3d 1 (citing 12 O.S.2011 § 2056(C) and *Horton v. Hamilton*, 2015 OK 6, ¶ 8, 345 P.3d 357); *see also Rox Petroleum, L.L.C. v. New Dominion, L.L.C.*, 2008 OK 13, ¶ 2, 184 P.3d 502.

¶12 Also presenting an issue of law is whether a party is entitled to attorney fees pursuant to a contractual or statutory provision. "Whether a party is entitled to an award of attorney fees presents a question of law subject to *de novo* review, that is, without deference." *Act S., LLC v. Reco Elec. Co.*, 2013 OK CIV APP 23, ¶ 10, 299 P.3d 505 (quoting *S.R. v. Stockdale*, 2009 OK CIV APP 68, ¶ 8, 216 P.3d 305).[4]

ANALYSIS

¶13 Although Defendant lists multiple allegations of error concerning the trial court's summary judgment decision, the essential issue presented – as agreed by the parties in the trial court – is whether Amoco's 1991 Assignment to MW reserved in Amoco an interest in the mineral leasehold below 9,414 feet as a matter of law. Our decision concerning attorney fees turns both on this issue and on whether Plaintiffs complied with the NMTPA.

The Trial Court Correctly Construed the 1991 Assignment

¶14 The trial court did not make a specific finding as to whether the 1991 Assignment is or is not ambiguous; however, both parties argued in the trial court that the document was unambiguous and supported their respective interpretations and positions as to its meaning and intent. The fact that the parties disagree or press for different constructions of a contract term does not make the agreement ambiguous. A contract is ambiguous if it is reasonably susceptible to at least two different constructions. *Pitco Prod. Co. v. Chaparral Energy, Inc.*, 2003 OK 5, ¶ 14, 63 P.3d 541. Furthermore, even an ambiguous contract provision will present a question of law for the court "where the ambiguity can be clarified by reference to other parts of the contract, or where the ambiguity arises by reason of the language used and not because of extrinsic facts." *Paclawski v. Bristol Labs., Inc.*, 1967 OK 21, ¶ 24, 425 P.2d 452.

¶15 Based on our review of the 1991 Assignment in its entirety, and considering its provisions as a whole, we find the document is reasonably susceptible to only one interpretation as to the extent of the interest assigned by Amoco to MW. As explained below, we agree with the trial court that the 1991 Assignment assigned Amoco's entire interest to MW Petroleum, without reservation.

¶16 The 1991 Assignment is a contract and a conveyance. The basic rules of construing a conveyance in Oklahoma have been the same for many years.

> When presented with a dispute concerning a conveyance, the trial court's duty is clear. "[T]he court's first priority is to ascertain the true intent of the parties, particularly that of the grantor, as gathered from the four corners of the instrument itself, considering each part and viewed in light of the circumstances attending and leading up to its execution… ." *Messner v. Moorehead*, 1990 OK 17, ¶ 8, 787 P.2d 1270, 1272. "If the language and terms of a conveyance are clear and unambiguous, then the written deed, and the laws in force at the time of the deed's execution will govern the rights and obligations of the grantor and grantee." *Id.*, ¶ 9, 787 P.2d at 1273. If, however, the four corners of a conveyance demonstrate "an intrinsic uncertainty" the instrument is ambiguous. *Id*. "When the

> court determines that a deed is ambiguous, the court has a duty to resolve the ambiguity by considering parol and extrinsic evidence, including the parties' admissions and construction, and other circumstances." *Crockett v. McKenzie*, 1994 OK 3, ¶ 5, 867 P.2d 463, 465.

Plano Petroleum, LLC v. GHK Expl., L.P., 2011 OK 18, ¶ 7, 250 P.3d 328.

¶17 The 1991 Assignment expressly states that Amoco conveyed to MW all of Amoco's "right, title and interest" to the oil and gas leases described on Exhibit A "insofar as said leases cover the lands which are specifically described in Exhibit "A" *opposite the separate designation of each said lease*" (emphasis added). The Assignment also states clearly that some leases were "subject to" "depth limitations," and/or "restrictions, conditions, limitations, burdens, contracts, agreements and other matters applicable to such leases and interests … ."

¶18 As noted above, the only "land" described on Exhibit A "opposite the separate designation of" the Alig lease is the SE/4 of Section 22 of Township 15 North, Range 9 West. Although that page of Exhibit A also states that Amoco assigns its rights under the Operating Agreement with Brookwood,[5] at no point in either the body of the Assignment or in Exhibit A does Amoco expressly "reserve" or "except" any part of its interest in the mineral leasehold from the assignment. In contrast, certain other leases listed in Exhibit A are followed by land descriptions with clearly stated restrictions or exceptions.[6]

¶19 Even so, Defendant contends that the 1991 Assignment unambiguously "limited" Amoco's assignment of the Alig Lease to the first 9,414 feet below the surface. We disagree. The only reference to a depth limitation with regard to the Alig Lease is in Exhibit A's *description of the 1966 Operating Agreement* as "that certain Operating Agreement dated February 2, 1966, by and between Brookwood Oil Company, Operator, and Pan American Petroleum Corporation … and all amendments thereto, covering All of Section 22, Township 15 North, Range 9 West, limited from the surface to 9,414 feet in depth." The purpose of an operating agreement is to manage leases and to explore and develop oil and gas resources. There is nothing in the description of the Brookwood Operating Agreement as it appears on Exhibit A that would lead a reasonable person to believe that by virtue of an unrecorded *operating agreement* Amoco intended to expressly reserve or except from its *lease assignment* all of its interest in the mineral leasehold below 9,414 feet.[7]

¶20 For a reservation of a property interest to be effective "it must appear from the instrument that the grantor intended to and by appropriate words expressed the intent to reserve an interest" in itself. *Rose v. Cook*, 1952 OK 62, ¶ 23, 250 P.2d 848. The Court in *Rose* held that no reservation was created where the only reference to the "alleged" reservation was a statement in a deed's warranty clause as follows: "Except an undivided one-half of all the mineral rights, royalties and oil and gas lease moneys." *Id.* ¶ 0 (Court syllabus no. 2). *See also Whitman v. Harrison*, 1958 OK 141, 327 P.2d 680 (holding that a grantor who conveyed all of her surface rights in 80 acres subject to prior mineral conveyances covering 75 acres, without "expressly reserving" any interest, conveyed the grantor's reversionary interest in certain unexpired term mineral interests). The Court has not required that language of reservation appear only within the habendum clause of the conveyancing instrument, inasmuch as the parties' intent "is to be determined from the entire instrument." *Barber v. Flynn*, 1980 OK 175, ¶ 16, 628 P.2d 1151. Here, however, we find no clear expression within any provision of the 1991 Assignment that Amoco intended to limit, reserve, or except any part of its interest in the mineral leasehold from its conveyance to MW.

¶21 In *Beattie v. State ex rel. Grand River Dam Auth.*, 2002 OK 3, 41 P.3d 377, the Court considered whether a "subject to" clause in a deed reserved in the property's seller certain easement removal and relocation rights so that those rights were not passed to the purchaser of the servient estate. The language in the deed stated, "This deed and conveyance is expressly made subject to," among other things, the five easements in question.[8] *Id.* ¶ 3. In finding the "subject to" language was insufficient to reserve property rights in the seller, the Court stated:

> The "subject to" clause in the quitclaim deed did not reserve the relocation and removal rights in the U.S. The words "subject to" are frequently used in conveyances and have historically been interpreted as meaning "subordinate to," "subservient to," "limited by," or "charged with." *Hendrickson v. Freericks*, 620 P.2d 205, 209 (Alaska 1980). The *Hendrickson* court observed that:

> When used in a deed these words are generally regarded as terms of qualification, not contract. They serve to put a purchaser on notice that he is receiving less than a fee simple. ***There is nothing in their use which connotes a reservation or retention of property rights.***
>
> *Hendrickson*, 620 P.2d at 209 (emphasis added) (citations omitted); *See also Hancock v. Planned Dev. Corp.*, 791 P.2d 183, 186 (Utah 1990) (quoting *Hendrickson*); *Wild River Adventures, Inc. v. Board of Trustees of School Dist. No. 8*, 248 Mont. 397, 812 P.2d 344, 347 (1991) ("There is nothing in the use of the words 'subject to', in their ordinary use, which would even hint at the creation of affirmative rights or connote a reservation or retention of property rights.")… .
>
> Holdings from this Court, reviewing language similar in effect to that of a "subject to" clause, have stated that a conveyance instrument containing terms such as "except right of way" or "less the right of way" successfully convey the grantor's entire interest in the servient estate, while recognizing the encumbrance. *Jennings v. Amerada Petroleum Corp.*, 66 P.2d at 1071 (considering language "except right of way" and "less the right of way") and *Putnam v. Oklahoma City*, 1950 OK 272, 203 Okla. 570, 224 P.2d 270, 272 (considering language "except right of way"). Such words of qualification are simply not intended "to pass a less estate than the whole or entire interest of the grantor therein." *Jennings*, 66 P.2d at 1071.

Beattie, 2002 OK 3 at ¶¶ 17-18.

¶22 For the reasons discussed above, we find that the situation here is similar to that presented in *Beattie*. The "subject to" language appearing on the face of the Assignment and on Exhibit A is inappropriate to show any intent by Amoco to reserve a property interest in the "deep formation" rights as Defendant contends. Rather, such language served only to inform the purchaser assignee that, while Amoco's entire interest in the Alig Lease was being assigned, that lease had previously been encumbered, or qualified, by an agreement that limited drilling to only certain depths. Nothing in the language of the 1991 Assignment suggests an express reservation by Amoco of a property interest in the deeper formations covered by the Alig Lease, and Defendant has not cited any statute, case law, or legal principle under which Amoco might be presumed to have done so.[9]

¶23 Defendant further contends that the trial court would have reached a conclusion in its favor if the court had considered only the "four corners" of the 1991 Assignment. As indicated by our discussion above, however, this argument is unsupported by the record. Although the trial court did not expressly find that the 1991 Assignment was unambiguous, its order did not indicate that it rejected the parties' agreement that the relevant terms of the Assignment were unambiguous. We said above that we agree there is no ambiguity in the Assignment as to the nature and extent of the interest conveyed. Thus, we reject this argument by Defendant as well.

¶24 We find the language of the 1991 Assignment, including Exhibit A, was merely intended to give notice to MW that the leasehold – the ownership of which generally would include the right to search for, develop, and produce oil, gas and other minerals from the leasehold, was already burdened by the terms of an Operating Agreement under which the parties had agreed not to drill below 9,414 feet. However, the 1991 Assignment evidences no intent by Amoco to reserve or retain mineral leasehold rights or to otherwise reduce the property interest being conveyed. We therefore affirm the trial court's decision on this issue.

Attorney Fees

¶25 Defendant also appeals the trial court's award of attorney fees and costs to Plaintiffs pursuant to the NMTPA, 12 O.S.2011 §§ 1141.1 through 1141.5. Defendant does not contest the reasonableness of the fees, costs, and expenses charged but challenges Plaintiffs' statutory entitlement to those items under the Act.

¶26 The NMTPA provides an alternative procedure to an owner who in good faith claims a cloud on their title or other interest in real property, and encourages owners to use curative instruments to remove clouds on title rather than litigation. The Act provides that if an owner, or "requestor," sends notice and a curative instrument to a respondent identifying an apparent cloud on title, and the respondent refuses to sign the instrument,

> then in the event that the requestor files an action to quiet title … and the civil action results in a judgment for the plaintiff which

> could have been accomplished through the execution and delivery of a curative instrument or the taking of corrective action identified in [the requestor's] notice, the plaintiff in the quiet title action, in addition to any other requested relief, shall be entitled to recover damages … and the expenses of litigation … against the respondent, including costs and reasonable attorney fees.

12 O.S.2011 § 1141.5(A)(4).

¶27 The purpose of the NMTPA is "to preserve judicial resources by encouraging resolution of title disputes through curative instruments rather than through quiet title actions." *Stump v. Cheek*, 2007 OK 97, ¶ 10, 179 P.3d 606 (footnote omitted). The Act "accomplishes this purpose by requiring a trial court to award attorney fees, costs, and expenses to a prevailing party in a quiet title action who attempted to first resolve the matter through a curative instrument in accordance with the Act." *Id*.

¶28 Here, prior to filing this action Plaintiffs submitted to Defendant a demand letter asserting a cloud on Plaintiffs' title by virtue of Defendant's apparent claim of an interest in the SE/4 and the N/2 NE/4 of Section 22 leasehold stemming from assignments of the Alig Lease (as to the SE/4) and the Elliott Lease (as to the N/2 NE/4). Plaintiffs tendered a proposed quitclaim assignment by which Defendant would quitclaim to Plaintiffs its interest in both the Alig and Elliott leases.

¶29 Defendant did not respond, and Plaintiffs brought this action to quiet title. Defendant then disclaimed any title or interest in the Elliott lease. It now asserts Plaintiffs are not entitled to fees under the NMTPA because "the proposed curative instrument transmitted by [Plaintiffs] sought relief greater than that awarded by the district court, and thus did not conform to the relief ultimately granted by the district court or to the corrective action contemplated by § 1141.5(A)(4)."[10]

¶30 To support this argument in the trial court, Defendant relied on *Head v. McCracken*, 2004 OK 84, 102 P.3d 670, a case involving a title defect created by an easement against a servient estate. The Supreme Court held that attorney fees were not warranted in that matter, primarily because the easement which the trial court had ultimately granted was significantly narrower than the one the dominant estate holder had requested in his notice prior to filing suit.

¶31 We find the facts in the instant action are more consistent with the purpose of the NMTPA to avoid unnecessary litigation than were the facts presented by *Head v. McCracken.* Here, although the initial curative document submitted by Plaintiffs to Defendant requested that Defendant quitclaim any interest in the lands covered by the Elliott Lease as well as those covered by the Alig Lease, the result of the litigation between the parties was that Defendant disclaimed any interest in the lands covered by the Elliott Lease, and the trial court quieted Plaintiffs' title in the lands covered by the Alig Lease. As such, the judgment for Plaintiffs that ultimately was entered resulted not only in quieting Plaintiff's title as to the lands covered by the Alig Lease, but also in Defendant's disclaimer of any interest in the lands covered by the Elliott Lease. In other words, the same result would have been accomplished if Defendant had merely executed and delivered the curative instrument initially tendered with Plaintiff's notice prior to filing this case.

¶32 Considering the purpose and intent of the NMTPA, we believe the circumstances here "present the precise set of facts and circumstances in which the NMTPA authorizes an award of attorney fees and costs" in favor of Plaintiffs. *Tucker v. Special Energy Corp*., 2013 OK CIV APP 56, ¶¶ 17-20, 308 P.3d 169. Accordingly, we hold the trial court did not err in awarding attorney fees, costs, and expenses to Plaintiffs under authority of the NMTPA.

CONCLUSION

¶33 The trial court's judgment in favor of Plaintiffs and its order awarding them attorney fees, costs, and expenses are affirmed.

¶34 **AFFIRMED**.

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

P. THOMAS THORNBRUGH, JUDGE:

1. The 1991 Assignment reflects that it was recorded in Kingfisher County land records in July 1991. *See* Tab 1 of Plaintiffs' motion for summary judgment.

2. Subsequently, Gothic sold its interest to Chesapeake, which then conveyed to both Cimarex and Devon.

3. See Devon's response/cross-motion for summary judgment, filed 11/20/17, at p.2, quoting Plaintiffs' motion for summary judgment.

4. Generally, the trial court's decision will be affirmed unless the court abused its discretion. *State ex rel. Burk v. City of Okla. City*, 1979 OK 115, ¶ 22, 598 P.2d 659. To reverse for abuse of discretion, it must be found that the trial court made a clearly erroneous conclusion and judgment, against reason and evidence. *Abel v. Tisdale*, 1980 OK 161, ¶ 20, 619 P.2d 608. The parties in the instant action stipulated to the reasonableness of the attorney fees awarded, and argued only as to whether Plaintiffs' were entitled to fees under the NMTPA. Thus, only a question of law is present.

5. Such intent is expressed generally in the body of the Assignment and specifically in Exhibit A, in the language preceding the description of the Alig Lease, stating Amoco's assignment of "[a]ll right, title and interest in and to … that certain Operating Agreement dated February 2, 1966," between Brookwood and Pan American.

6. For example, land descriptions for Leases No. 180081 and 259010, respectively, are as follows (emphasis added):

Township 16 North, Range 9 West
Section 32: NW/4 *less ½ acre in the SW corner described by metes and bounds*

and

Township 16 North, Range 9 West
Section 32: NE/4 *from the surface to the stratigraphic equivalent of 10,600 feet*

7. Although not necessary to our analysis here, we note that the latter conclusion is further supported by the language of the Operating Agreement itself, which in its own Exhibit "A" describes the "lands" covered by the agreement as including *all* of Section 22, 15N, 9W but stating only that the *Agreement itself* is "limited to all formations encountered from the surface of the earth to a depth of 9414 feet." [*See* Appendix to Plaintiff's Summary Judgment Motion, appearing at Tab 5 of Vol. 1 of the record]. We further note that the Alig Lease, which was executed in July 1957, was for a term of 10 years "or as long thereafter as oil or gas, or either of them, is produced from said land." Though the legal effect of a purported severance by reservation – as Defendant proposes – of leasehold rights to formations below 9,414 feet is not at issue here, it appears doubtful that Amoco would have intended to risk the possibility of terminating the lease altogether by attempting to segregate the right to produce from deep formations more than 10 years after execution of the primary lease.

8. The easements were held by the Defendant, Grand River Dam Authority (GRDA). Each contained a provision giving the Plaintiff's seller, the U.S.A., the right to require relocation or removal of GRDA facilities should the U.S. need the property occupied by those facilities. In addition to arguing that the "subject to" language in the deed from the U.S. to the Plaintiffs was sufficient to reserve in the seller its right to demand relocation, GRDA argued that the relocation rights were not assignable at all. The Supreme Court remanded the assignability issue to the trial court for resolution of disputed fact issues, 2002 OK 3 at ¶¶ 7-15, but decided the "subject to" language as a matter of law. *Id*. ¶¶ 16-18.

9. In its trial court brief, Defendant cited *Cox v. Butts*, 1915 OK 442, 149 P. 1020, as standing for the proposition that "subject to" language in a lease assignment can connote the reservation of a property interest. We disagree with this interpretation of the case. Cox held that, without a provision expressly stating as much, an assignee's acceptance of a lease assignment "subject to" the terms of an existing operating agreement did not impose personal liability on the assignee for operational expenses in excess of the proportion attributable to the working interest assigned.

10. Exhibit B to Defendant's Amended Petition in Error. Although Defendant submitted a transcript of the hearing on attorney fees in a supplemental record submitted with its amended petition in error, Defendant did not include or designate for inclusion in the record Plaintiffs' motion for attorney fees or Defendant's response to that motion, and neither party filed briefs on appeal concerning the attorney fee issue. We thus consider Defendant's appeal on this issue based solely on its Amended Petition in Error and the argument in the hearing transcript.

2019 OK CIV APP 56

INTERNATIONAL BANK OF COMMERCE, A Texas State Banking Association, Successor To Local Oklahoma Bank, Formerly Known As Local Federal Bank, F.S.B., Plaintiff/Appellee, vs. JIMMIE A. FRANKLIN and BRENDA D. FRANKLIN, Husband and Wife, Defendants/Appellants, and United States of America, ex rel. Internal Revenue Service; State of Oklahoma, ex rel. Oklahoma Tax Commission; and Ford Motor Credit Company, LLC., Defendants.

Case No. 117,117. September 20, 2019

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE PATRICIA G. PARRISH, TRIAL JUDGE

AFFIRMED

Jimmie A. Franklin, FRANKLIN LAW FIRM, Bethany, Oklahoma, for Defendants/Appellants,

James R. Waldo, JAMES R. WALDO, P.L.L.C., Oklahoma City, Oklahoma, for Plaintiff/Appellee.

BRIAN JACK GOREE, CHIEF JUDGE:

¶1 Jimmie A. Franklin and Brenda D. Franklin, husband and wife (Defendants), appeal the trial court's summary judgment in favor of International Bank of Commerce (IBC or Bank) in this action to foreclose a mortgage. The issues for review are whether the Bank has any available claims against Defendants, or whether the foreclosure is barred by the statute of limitations or 58 O.S. §333.[1]

¶2 On February 13, 1996, Lillian E. Franklin, Jimmie Franklin's mother, executed a note for $48,000.00, with interest payable at a rate of 7% per annum to Local Federal Bank, F.S.B.[2] That same day, Lillian E. Franklin and John O. Franklin, as husband and wife, executed a mortgage on their property in favor of Local Federal Bank, F.S.B. to secure the note. After the execution of the note and mortgage, Lillian and John Franklin died. In the decree of distribution of Lillian's estate, the property encumbered by Bank's mortgage was distributed to Jimmie A. Franklin. No payments were made to Bank after January 2015. In 2017, Bank filed its petition to foreclose on the property. In the foreclosure proceedings below, the trial court granted Bank's motion for summary judgment.

I.

Standard of Review

¶3 Summary judgment procedure is governed by 12 O.S. 2011 §2056 and Rule 13 of the Rules for District Courts of Oklahoma. 12 O.S. Supp. 2013, Ch. 2, App.1. Appellate courts review summary judgments *de novo* because they are based solely on legal determinations. *Carmichael v. Beller,* 1996 OK 48, ¶2, 914 P.2d 1051, 1053. A final order in summary proceedings may be granted only when there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of

law. §2056(C). A fact is "material" if proof of the fact would have the effect of establishing or refuting one of the essential elements of a cause of action or a defense asserted by the parties. *Hadnot v. Shaw,* 1992 OK 21, ¶18, 826 P.2d 978, 985. All inferences and conclusions drawn from the underlying facts contained in the record are to be considered in the light most favorable to the party opposing summary judgment. *Deutsche Bank National Trust v. Brumbaugh*, 2012 OK 3, ¶7, 270 P.3d 151, 153.

II.

Bank's Foreclosure Cause of Action

¶4 The purpose of a foreclosure action is to satisfy, out of the proceeds of a sale of the estate in the mortgaged property, the claim of the holder of the obligation when there is a default in the performance of the act it is given to secure.[3] Foreclosure requires a showing of a valid mortgage and default. A mortgage is a lien which is made security for the performance of an act; it can be a charge on property for payment or discharge of debt. 42 O.S. §1[4] and §5.[5] *See also Williamson v. Winningham,* 1947 OK 231, 186 P.2d 644 (1948). A mortgage on real estate is considered an incident to the debt secured thereby. *Smith v. Bush*, 1935 OK 331, ¶8, 44 P.2d 921. *See also* 42 O.S. §21.[6] "To foreclose, a claim must be adjudicated, and the validity and priority of a lien must be established. There must also be an adjudication of all claims, titles, or interests in the property involved, and the right of redemption must be extinguished so that a valid and effectual sale may be held. " *Peat, Marwick, Mitchell & Co. v. Bates*, 1992 OK CIV APP 120, ¶7, 839 P.2d 208, 210 citing S*tephenson v. Clement*, 1935 OK 374, 43 P.2d 43 0.

¶5 The mortgage on the property at issue came about because Lillian and John Franklin granted a mortgage on their property as security for the promissory note executed by Lillian Franklin. The mortgage is the security instrument given to the bank to secure repayment of the note. The terms of the note require monthly payments. No payments have been made since January 1, 2015, and the note and mortgage are in default. IBC has made a prima facie showing that an action in rem to foreclose its mortgage is appropriate.

III.

Defendants' Statute of Limitations Defense

¶6 Defendants argue that the five-year period of limitations in 12 O.S. §93 expired. Relying on *Scott v. Peters*, 2016 OK 108, 388 P.3d 699, Defendants assert that the action accrued on May 5, 2009, when the probate decree was filed in the county records. The decree distributed the remainder of the estate, including the property at issue, to Jimmie Franklin.

¶7 Defendants' reliance on §93 and *Scott v. Peters* is misplaced. That case involved the untimely action by a seller of real property for reformation of the deed wherein the court determined that the statute of limitations for an action brought by seller/grantor begins to accrue when the deed is filed with the county clerk. The seller alleged that he reserved the mineral interest when conveying the property to buyers. However, the deed did not contain any reservation of mineral interests. The notice, actual or constructive, triggers the accrual of the statute of limitations in an action to reform a deed.

¶8 Here, the issue is not the reformation of a deed; instead, it is the foreclosure of a mortgage encumbering the property at issue. In a foreclosure, default according to the terms of the obligation secured by the mortgage triggers the accrual of the statute of limitations. Likewise, the statute of limitations in a foreclosure relates to the underlying obligation. *See Abboud v. Abboud*, 2000 OK CIV APP 116, ¶6, 14 P.3d 569, 571, wherein the court applied a five-year limitations period on an action to recover upon a contract, agreement, or promise in writing.

¶9 The statute of limitations begins to run when a cause of action accrues, and a cause of action accrues at the time when a plaintiff first could have maintained his action to a successful conclusion. *Turner v. Sooner Oil & Gas Co.*, 1952 OK 171, ¶22-23, 243 P.2d 701, 705. Default in the performance of any act that a mortgage is given to secure is a fundamental condition precedent to bringing an action to foreclose.[7] When default occurs, the right to foreclose accrues. *Id*.

¶10 Default according to the terms of the note and accrual of the statute of limitations occurred January 1, 2015, when the monthly installment payments ceased. The petition was filed August 31, 2017, well within the permissible five-year statute of limitations for actions upon a contract, agreement, or promise in writing. 12 O.S. §95(A)(1).

IV.

Defendants' Proper Party Defense

¶11 Defendants additionally claim Bank is precluded from foreclosing on the property because Defendants are not personally liable on the note and did not assume the note and mortgage. While Defendants would have had to assume the note and mortgage to be personally liable on the debt, their interest in the property is subject to the existing mortgage. Oklahoma law is clear; when real property subject to a mortgage passes by will, the mortgage follows. 46 O.S. §5. "When real property subject to a mortgage passes by succession or will, so does responsibility for satisfying the mortgage. . . unless, in accordance with 58 O.S. 2011 §461, the testator made specific provisions in the will for payment to be made some other way." *In re Estate of Carlson*, 2016 OK 6, ¶16, 367 P.3d 486, 492.

¶12 Not only does a mortgage typically transfer with the property by will or succession, Oklahoma's probate code does not extinguish a creditor's right to foreclose on property encumbered by a mortgage. Title 58 O.S. § 331 et seq. provides the probate procedure for claims against an estate. It sets out the manner in which claims may be filed in order to expeditiously determine liabilities and close estates. *See Haddock v. Williams*, 1963 OK 22,¶22, 378 P.2d 774, 778. Title 58 O.S. §333 is the statute of nonclaims and it operates to destroy the debt or claim of an alleged creditor. *State ex rel. Cent. State Griffin Mem'l Hosp. v. Reed*, 1972 OK 14, ¶¶ 17-19, 493 P.2d 815, 818. Section 333 operates to bar claims that are not presented in the time allowed by statute; it is penal in nature and is strictly construed. *In re Jameson's Estate*, 1919 OK 35,¶12, 182 P. 518, 520. However, §333 provides a notable exception applicable in this case.

Section 333 provides:

> All claims arising upon contracts entered into prior to the decedent's death, whether the same be due, not due or contingent, must be presented on or before the presentment date as provided in the notice, and any claim not so presented is barred forever; provided, however, that when it is made to appear by the affidavit of the claimant, to the satisfaction of the personal representative and the judge of the district court, as duly noted on the claim, that the claimant had no notice by reason of being out of the state and that a copy of the notice to creditors was not mailed to said claimant, the claim may be presented at any time before a final decree of distribution is entered; **provided, further, that nothing in this section, nor in this chapter contained, shall be construed to prohibit the right or limit the time of foreclosure of mortgages upon real property of decedents, but every such mortgage may be foreclosed within the time and in the mode prescribed in civil procedure, except that no balance of the debt secured by such mortgage remaining unpaid after foreclosure shall be a claim against the estate, unless such debt was presented as required by this code.**

(Emphasis Added).

¶13 "The emphasized portion of 58 O.S. 2011 §333 unambiguously creates a simple rule: filing a creditor's claim against the estate is not a condition precedent in order for a creditor secured by a mortgage on real property to foreclose. However, 58 O.S. 2011 § 333 does not allow a creditor to pursue a deficiency judgment after foreclosure, unless a claim was presented to the estate pursuant to the probate code." *Carlson*, ¶27. IBC was not obligated to file a claim with the estate in order to initiate foreclosure proceedings. *See id.* IBC is not seeking a deficiency judgment against Defendants,[8] but foreclosure of any interests they may have in the property[9] so it can be sold to satisfy the amount due on the note. IBC seeks a judgment in rem and not personal liability against the Franklins.

V.

Conclusion

¶14 Jimmie Franklin's parents granted Bank's predecessor a mortgage covering the property at issue. After his parents passed away, the property was distributed to Jimmie Franklin. Oklahoma law makes clear that the mortgage follows property passing by succession or will. 46 O.S. §5. Defendants' interests in the property are subject to the mortgage. Payments were made until January 1, 2015. Upon default, Bank timely filed its petition within the statute of limitations for actions upon a contract, agreement or promise in writing. 12 O.S. §95(A)(1). Bank's foreclosure action was not barred by its failure to file a claim in the probate action. 58 O.S. §333. There is no genuine issue as to any material fact and Bank is entitled to judgment as a matter of law. AFFIRMED.

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

BRIAN JACK GOREE, CHIEF JUDGE:

1. Defendants raise several issues that coincide with the following defenses: statute of limitations, statute of frauds, laches, failure of consideration, defect of parties, estoppel, waiver, unjust enrichment, unclean hands, and fraud. Issues raised by Defendants which were not presented to the trial court are deemed waived. *Jones v. Alpine Ins., Inc.*, 1987 OK 113, ¶11, 764 P.2d 513, 515. Further, defenses which are merely rehearsed without any argument or authority will not be reviewed. *See Graham v. Keuchel*, 1993 OK 6, ¶1 n. 3, 847 P.2d 342, 345.

2. International Bank of Commerce is the successor to Local Federal Bank, F.S.B.

3. George E. Osborne, HANDBOOK ON THE LAW OF MORTGAGES 663 (Jesse H. Choper et al. eds., 2nd ed. 1970) citing *City and County of San Francisco v. Lawton*, 18 Cal. 465, 79 Am.Dec. 187 (Cal. 1861).

4. 42 O.S. §1 provides: "A lien is a charge imposed upon specific property, by which it is made security for the performance of an act."

5. 42 O.S. §5 provides: "Contracts of mortgage and pledge, are subject to all the provisions of the chapter."

6. 42 O.S. §21 provides: "A lien is to be deemed accessory to the act for the performance of which it is a security whether any person is bound for such performance or not, and is extinguishable in like manner with any other accessory obligation."

7. George E. Osborne, HANDBOOK ON THE LAW OF MORTGAGES 679 (Jesse H. Choper et al. eds., 2nd ed. 1970).

8. An action to foreclose a mortgage may be maintained without seeking a personal judgment. *Cahill v. Kilgore*, 1960 OK 88, ¶10, 350 P.2d 928, 93 citing *Irwin v. Sands*, 1953 OK 383, 265 P.2d 1097.

9. "Since the purpose of foreclosure is to end the right to redeem of all persons having interests in the property subject to the mortgage and to vest in the mortgagee or purchaser at foreclosure sale the title as it was at the date of the mortgage, any person having an interest in the property essential to the accomplishment of this purpose should be regarded as essential in the sense that, if not joined, his interest will not be affected by the foreclosure." George E. Osborne, HANDBOOK ON THE LAW OF MORTGAGES 668 (Jesse H. Choper et al. eds., 2nd ed. 1970).

2019 OK CIV APP 57

FIRST NATIONAL BANK & TRUST COMPANY OF ARDMORE, Plaintiff/Appellant, vs. SHARON KELLY, a/k/a SHARON L. KELLY, As Personal Representative of the Estate of GREGORY L. KELLY a/k/a GREGORY LYNN KELLY, Deceased/SHARON KELLY, a/k/a SHARON L. KELLY/ The Unknown Occupants/The County Treasurer of Love County, State of Oklahoma and The Board of County Commissioners of Love County, State of Oklahoma. Defendants/Appellees.

Case No. 117,349. September 20, 2019

APPEAL FROM THE DISTRICT COURT OF LOVE COUNTY, OKLAHOMA

HONORABLE T. TODD HICKS, TRIAL JUDGE

REVERSED AND REMANDED

Carrie Pfrehm, Mike Mordy, MORDY, MORDY, PFREHM & WILSON, P.C., Ardmore, Oklahoma, for Plaintiff/Appellant,

Sharon Kelly, Burneyville, Oklahoma, Pro Se/Appellees,

Assistant District Attorney, Marietta, Oklahoma, for Defendants/Appellees.

BRIAN JACK GOREE, CHIEF JUDGE:

¶1 This is an appeal from a trial court's order awarding attorney fees and costs in a foreclosure action. Plaintiff/Appellant, First National Bank & Trust Company of Ardmore (Bank), sued Sharon Kelly (Kelly), individually and as Personal Representative of the Estate of Gregory L. Kelly, seeking foreclosure of its mortgage for failure to make due payments. Among its covenants, the mortgage contained language binding Kelly to pay Bank's legal expenses in the event litigation ensued. The trial court granted the foreclosure and awarded Bank attorney fees and costs. However, the award was less than Bank requested. The only evidence in the record supports Bank's calculation of the lodestar, which is the number of hours spent on a case multiplied by the attorney's hourly rate. If a trial court enhances or reduces the lodestar when assessing attorney fees, the court should include its specific reasons in the judgment. *State ex rel. Burk v. City of Oklahoma City,* 1979 OK 115, ¶8, 598 P.2d 659, 661. Because the trial court failed to substantiate its reduction in the lodestar with specific factual findings, the trial court abused its discretion. Accordingly, the trial court's decision is reversed and remanded.

BACKGROUND

¶2 Bank filed its Petition in January 2018 seeking judgment against Kelly and foreclosure of its mortgage. Kelly filed an answer in March 2018. Bank then filed its motion for summary judgment. Thereafter, Kelly's counsel filed a motion to withdraw, which the trial court granted in May. The hearing on Bank's motion for summary judgement was continued in order to give Kelly time to find new representation. Kelly did not obtain new representation, and the hearing on the motion for summary judgment took place in June 2018. Subsequently, the trial court granted the motion, awarding Bank $90,398.99, plus interest accrued and accruing thereon at the contractual rate, against Kelly as an individual and Personal Representative. The trial court further foreclosed the Mortgage and related modification agreements and awarded all court costs and a reasonable attorney fee.

¶3 Bank filed a motion to assess attorney fees and costs, requesting fees of $6,783.00 and costs of $2,083.54. Bank included a time log

and applicable rates in the filing. In August 2018, Bank appeared for a hearing on Bank's request for attorney fees and costs. Kelly did not appear. The trial court awarded attorney fees of $4,260.00 and costs of $2,015.87. Bank appeals this award, claiming that the reduction in attorney fees and costs was an abuse of the trial court's discretion, and the original request accurately reflects a reasonable fee.

STANDARD OF REVIEW

¶4 A trial court's award of attorney fees and costs will not be disturbed unless there was an abuse of discretion. *Burk*, 1979 OK 115, ¶22, 598 P.2d 659, 663. An abuse of discretion exists where the court's decision was clearly erroneous, against reason and evidence. *Abel v. Tisdale,* 1980 OK 161, ¶20, 619 P.2d 608, 612. The reviewing court is limited to the issues actually presented in the trial court, "as reflected by the record." *Frey v. Independence Fire and Cas. Co.,* 1985 OK 25, ¶6, 698 P.2d 17, 20.

FAILURE TO FILE ANSWER BRIEF

¶5 Kelly's failure to respond to Bank's motion for attorney's fees has no effect on the trial court's determination of the fee's reasonableness. The moving party has the burden to show that his requested fee is for a reasonable amount, for necessary services, and is authorized by law. *Cory v. City of Norman,* 1988 OK CIV APP 7, ¶5, 757 P.2d 851, 852. Furthermore, Kelly's failure to file an answer brief does not warrant automatic reversal in favor of Bank. The trial court's judgment is presumed correct until the contrary has been shown by the record. *Hamid v. Sew Original*, 1982 OK 46, 645 P.2d 496.

ATTORNEY FEES

¶6 Oklahoma follows the American Rule for recovering attorney fees. Under the American Rule, each litigant pays for its own legal representation. Courts are unable to award attorney fees without statutory authority or a contractual agreement between the parties. *Barnes v. Okla. Farm Bureau Mut. Ins. Co.*, 2000 OK 55, ¶46, 11 P.3d 162, 179; *Rout v. Crescent Pub. Works Auth.*, 1994 OK 85, ¶9, 878 P.2d 1045, 1049. The mortgage between Bank and Kelly authorizes the court to assess attorney fees by the following language:

> **Attorneys' Fees;** Expenses. If Lender institutes any suit or action to enforce any of the terms of this Mortgage, Lender shall be entitled to recover such sum as the court may adjudge reasonable as attorney fees at trial or upon any appeal.

The mortgage language clearly shows both parties' intent that Lender, Bank, receive attorney fees and legal costs to the full extent the law allows and the court finds reasonable. Kelly signed the mortgage and subsequent modification agreements. Agreements to pay attorney fees in promissory notes are valid and enforceable. *Baker Gin Co. v. N.S. Sherman Machine & Iron Works*, 122 P.235, 236 (Okla. 1912).

¶7 The first step in calculating a reasonable attorney fee is to find the lodestar. *Spencer v. Oklahoma Gas & Elec. Co.,* 2007 OK 76, ¶14, 171 P.3d 890, 895. The lodestar is the amount of hours spent on a case multiplied by the timekeeper's hourly fee. *Burk,* 1979 OK 115, ¶10, 598 P.2d 659, 661. Movants for attorney fees must set forth the amount requested along with information that supports that amount. 12 OK § 694.2(B). Typically the supporting information will provide the lodestar amount. Exhibit A to Bank's motion to assess attorney fees and costs provides such information; it is a detailed time log for the foreclosure case. The log includes the amount of time spent on specific tasks furthering the case, the timekeepers responsible for each task, and each timekeeper's hourly fee. This Exhibit provided Bank's basis to request the lodestar amount, $6,783.00 in fees and $2,083.54 in costs. However, the assessment for determining reasonable attorney fees does not begin and end with the lodestar calculation.

¶8 The trial court may also consider twelve factors that could enhance or reduce the lodestar amount. *Arkoma Gas Co. v. Otis Engineering Corp.*, 1993 OK 27, 849 P.2d 392, 394; *Burk*, 1979 OK 115, ¶8, 598 P.2d 659, 661; *Hall v. Globe Life & Acc. Ins. Co.*, 1998 OK CIV APP 163, ¶8, 968 P.2d 1260, 1262. The *Burk* factors are:

1) time and labor required;
2) the novelty and difficulty of the questions presented;
3) the skill requisite to perform the legal service properly;
4) the preclusion of other employment by the attorney due to acceptance of the case;
5) the customary fee;

6) whether the fee is fixed or contingent;

7) time limitations imposed by the client or the circumstances;

8) the amount involved and the results obtained;

9) the experience, reputation and ability of the attorneys;

10) the undesirability of the case;

11) the nature and length of the professional relationship with the client;

12) awards in similar cases.

After providing these factors, the Supreme Court of Oklahoma cautioned trial courts to "set forth with specificity the facts, and computation to support [their] award[s]." *Id*. at 663.

ANALYSIS

¶9 Failure to follow the directives set forth in *Burk* constitutes an abuse of discretion. *Spencer*, 2007 OK 76, ¶11, 171 P.3d 890, 895. Oklahoma has "a strong presumption that the lodestar method, alone, will reflect a reasonable attorney fee." *Parsons v. Volkswagen of America, Inc*., 2014 OK 111, ¶39, 341 P.3d 662, 671. There is no evidence in the record to indicate why the trial court chose to reduce the attorney fees reflected in the lodestar calculation. Absent a reason identified in the record, there is no way to discern whether the trial court arbitrarily reduced the award or appropriately applied the *Burk* factors.

¶10 In *Spencer*, the trial court acknowledged the *Burk* factors at a hearing on an application for attorney fees and costs, but it did not actually apply the factors. At the conclusion of the hearing, the court stated, "the suit was never anything more than a $5,000.00 case," then awarded $2,500 in attorney fees. However, the lodestar supported the requested amount of $8,775.37. On appeal, the Supreme Court of Oklahoma found the trial court's rationale to be arbitrary, requiring reversal.

¶11 The 10th Circuit, applying *Spencer* and *Burk*, found that a general percentage reduction in attorney fees, absent specific factual findings to support that amount, is arbitrary and an abuse of discretion. *Thames v. Evanston Insurance Co.*, 665 Fed. Appx. 716, 722-23 (10th Cir. 2016). However, where the trial court sets forth specific reasons and factual findings substantiating an overall reduction, that award calculation is not arbitrary. *Jane L. v. Bangerter,* 61 F.3d 1505, 1510 – 1511 (10th Cir. 1995); *Payne v. Dewitt*, 1999 OK 93, P19, 995 P.2d 1088, 1096. In the present case, the overall reduction was a little more than twenty-nine percent. The trial court offered no factual findings or specific reasons for the overall reduction.

¶12 The record supports Bank's lodestar calculation. Bank's time log, Exhibit A, reflects carefully recorded, individual accounts of all tasks necessary to the underlying case. Bank calculated the lodestar using those numbers and the hourly fees of each timekeeper. Nothing in the record indicates that the time spent on the case or the timekeepers' hourly fees were unreasonable. An abuse of discretion occurs when a decision has no basis in reason or evidence. In this case, the only evidence in the record supports the lodestar as a reasonable attorney fee, and as a result, the trial court must state its rationale when deviating from the lodestar calculation.

¶13 Reasonableness of attorney fees is left to the trial court's discretion because the trial court is uniquely positioned to see the demands of a case. However, without specific findings substantiating a reduction in the lodestar, the trial court's decision constitutes an abuse of discretion.

¶14 The trial court's order is reversed. The case is remanded for further proceedings. Any order awarding attorney fees must include findings of fact and conclusions of law specifying the basis for any reduction or enhancement of the lodestar, or the reasons why the time expended, the rate charged, or the supporting documentation is unreasonable.

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

2019 OK CIV APP 59

BLUFF CREEK TOWNHOMES ASSOCIATION, INC., Plaintiff/Appellee, vs. DEMARCUS HAMMON, Defendant/Appellant.

Case No. 117,753. September 16, 2019

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE LISA T. DAVIS, TRIAL JUDGE

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS

Michael Loyd, MICHAEL L. LOYD & ASSOCIATES, Bethany, Oklahoma, for Plaintiff/Appellee

Demarcus Hammon, Oklahoma City, Oklahoma, *Pro se*

JANE P. WISEMAN, VICE-CHIEF JUDGE:

¶1 Demarcus L. Hammon appeals a trial court order granting judgment in favor of Bluff Creek Townhomes Association, Inc., foreclosing Bluff Creek's lien on Hammon's townhome, ordering the sale of the townhome, and dismissing Hammon's counterclaim.[1] The primary issue on appeal is whether the trial court's "dismissal" of Hammon's counterclaim was proper. We review this case without appellate briefing pursuant to Oklahoma Supreme Court Rule 1.36, 12 O.S. Supp. 2018, ch. 15, app. 1. Our review tells us the trial court's adjudication was in error, and we reverse and remand for further proceedings.

FACTS AND PROCEDURAL BACKGROUND

¶2 Bluff Creek filed a petition on May 11, 2017, alleging Hammon owns the townhome located at 6552 N. Meridian Avenue, Unit 104, in Oklahoma City, which is subject to the Declaration of Covenants and Restrictions of Bluff Creek Townhomes Unit Ownership of Estates (the Declaration). Bluff Creek alleged the Declaration was recorded with the County Clerk of Oklahoma County, each homeowner in the association "is assessed monthly dues to pay for the utilities, upkeep, and maintenance of the units and common areas," and Hammon was past due in paying dues and owed $8,603.68 as of November 20, 2016, plus ongoing dues of $87.12 a month. It demanded payment, but Hammon refused to pay. Bluff Creek filed a lien on Hammon's property with the County Clerk on December 17, 2013, and refiled a notice of lien on December 5, 2016. Bluff Creek sought judgment in the amount of $8,603.68, plus the ongoing charges of $87.12 a month, attorney fees and costs, and foreclosure of its lien.

¶3 In his answer, Hammon denied he owed past dues or that a lien had been placed on the property. Under the heading "Counterclaims," Hammon said:

> Defendant property that is the subject of this case has mold from water drainage into the property. The mold has caused damage to property whereby Defendant is unable to live in the property. Defendant has notified Plaintiff of damages in excess of $10,000.00 and Plaintiff has refused to fix the property.

Hammon asked the Court to dismiss Bluff Creek's case and find in his favor on his counterclaim.

¶4 In response, Bluff Creek argued that Hammon in his counterclaim failed to state a claim on which any relief could be granted and asked that the counterclaim be dismissed. It also asserted affirmative defenses of statute of limitations, waiver, contributory negligence, estoppel, release and waiver. No separate ruling on Bluff Creek's request to dismiss the counterclaim appears of record.

¶5 Bluff Creek filed a motion for summary judgment urging as undisputed the facts we summarize and quote here. On October 26, 2007, Hammon purchased Unit 104 located in Bluff Creek Townhomes, which is a unit ownership estate. The deed was recorded in the office of the County Clerk of Oklahoma County. When Hammon purchased Unit 104, he was subject to the Declaration. "Hammon had admitted in his deposition, that there were homeowners[']s dues payable monthly to the homeowners[']s association" and "he has not made any payments of his homeowner[s'] dues since some time in 2009." Because Hammon failed to pay homeowners' dues, Bluff Creek's president filed a lien on Hammon's property on December 5, 2016, and recorded it with the County Clerk. According to Bluff Creek's records, Hammon owes $8,603.68 through November 2016, and $87.12 per month thereafter, for a total of $10,453.20.

¶6 Bluff Creek maintained there is no substantial controversy as to any material fact and nothing in Hammon's answer is more than a general denial. It argued Hammon admitted (1) he owns Unit 104, (2) he owes homeowners' association dues, (3) he has not paid the dues, and (4) the property damage he claims was to the interior of his home and its contents. Bluff Creek alleged, "It is stated clearly in the Declarations that the homeowners[']s association insures only the exterior and common elements of the property." Bluff Creek asserts that the Declaration also provides that the unit owners are responsible for insuring their units' contents and personal property and that "'under no circumstances shall the Association be required to purchase any insurance covering … the interior space owned individually by any unit owner.'"

¶7 Hammon filed an objection to Bluff Creek's motion for summary judgment and a

cross-motion for summary judgment. Hammon claimed he never received a copy of Bluff Creek's motion for summary judgment, but a hearing was held on September 28, 2018. He said he was unaware he needed to file a response to the motion for summary judgment. He stated there is no dispute (1) Bluff Creek is seeking to recover the dues it claims he owes, (2) Bluff Creek owners are expected to pay dues of $87.12 a month, (3) he purchased a unit in Bluff Creek, (4) he paid his monthly dues "until 2009 when he decided to stop paying dues after management failed to fix damages done to his property by virtue of the unit flooding because of water seeping into the unit from [the] outside," (5) Bluff Creek is responsible for the unit's exterior "and insuring that maintenance is kept up for the safety and security of the property owners," and (6) water seeped into his unit from the exterior, destroying his personal property and causing mold. He asserted that "tenants have the right to withhold homeowners['] dues when property owners refuse to correct conditions which make the homeowners['] living arrangement unsafe and inhabitable [*sic*]." He claims he refused to pay the dues and moved out of the unit because Bluff Creek refused to fix the defect in the building's exterior. He complained numerous times that seepage from the exterior of the building caused flooding in his home, but Bluff Creek's only response was that it was not responsible for matters involving his home's interior. He asserted Bluff Creek breached the implied warranty of habitability and that violated "Oklahoma Residential Landlord and Tenant Act 41 O.S. § 2001 102(1) et seq."

¶8 Hammon argued he was entitled to summary judgment on his counterclaim and cited the following facts quoted and summarized here as undisputed. There is no dispute that he filed a counterclaim and "that water entered [his] dwelling from the exterior of the building unit where he bought a unit from Bluff Creek Townhouses." "There is no dispute that [he] bought unit 104 formerly owned by a tenant on the grounds of property owned by [Bluff Creek] in 2007." The estimate to repair his unit exceeds $21,000. "There is no dispute that water seeping into the unit caused mold to form inside [his] dwelling place destroying furniture, chairs, clothing, tainting walls, sogging wet carpet and other fixtures, leaving stinking-murky smells." There is no dispute that Bluff Creek "was responsible for securing the outside of the dwelling where the water seeped into the interior of [his] unit." He notified Bluff Creek that the exterior wall needed repair: "[I] n 2009, after I bought the unit that I began complaining about the unit flooding when it rained and that it was brought to the attention of Nathan a man [he] knew as the president of the Homeowners Association."

¶9 Hammon attached his own affidavit, photos of damage to the townhome, and estimates for repairing the damage. He also included a report regarding fungi and mold that said "water migration has come from along the west side through the patio doors." He states in his affidavit that "for almost two years [he] made it known to [Bluff Creek] that water was seeping into his house from the exterior of the property he purchased from former tenants" and that "there is no dispute that [Bluff Creek] is solely responsible for correcting defects in property that they own and [Hammon] agrees that he's responsible for all activity which occurs inside the dwelling."

¶10 On October 26, 2018, the trial court's journal entry of judgment was filed finding Bluff Creek was entitled to enforce its lien in the amount of $10,453.20, the lien is a valid lien on Unit 104, and the property should be sold by the Oklahoma County Sheriff to satisfy the lien. The court further found Bluff Creek "is not liable for damages to [Hammon's] property and that [Hammon's] counter claim should be dismissed."

¶11 On November 1, 2018, Hammon filed a motion to vacate, which the trial court denied.

¶12 Hammon now appeals.[2]

STANDARD OF REVIEW

¶13 "The standard of review for an order dismissing a case for failure to state a claim upon which relief can be granted is *de novo* and involves consideration of whether a plaintiff's petition is legally sufficient." *Fanning v. Brown*, 2004 OK 7, ¶ 4, 85 P.3d 841. "An appeal on summary judgment comes to this court as a *de novo* review." *Deutsche Bank Nat'l Trust Co. v. Richardson*, 2012 OK 15, ¶ 3, 273 P.3d 50.

ANALYSIS

¶14 Title 60 O.S.2011 § 852(C) grants a homeowners' association "the power to enforce any obligation in connection with membership in the owners['] association by means of a levy or assessment which may become a lien upon the separately or commonly owned lots, parcels or

areas of defaulting owners or members." A lien held by a homeowners' association "may be foreclosed in any manner provided by law for the foreclosure of mortgages or deeds of trust, with or without a power of sale." 60 O.S.2011 § 852(C).

¶15 Bluff Creek in its motion states the Declaration establishes the dues obligation and refers to the attached Declaration, but the copy of the summary judgment motion in the record on appeal has no exhibits attached. As a result, we do not know the exact terms of the Declaration. This Court, however, recognizes Hammon admitted that Bluff Creek owners are expected to pay $87.12 in monthly dues and that Hammon stopped paying dues in 2009. However, this Court's inquiry does not end here. Bluff Creek asserted Hammon's counterclaim failed to state a claim on which relief could be granted. The Court found Bluff Creek "is not liable for damages to [Hammon's] property and that [his] counter claim should be dismissed." Even if Hammon failed to pay homeowners' dues, he is not necessarily precluded from seeking damages for Bluff Creek's failure to repair the common areas of the townhomes, which he asserts caused damage to his townhome.

¶16 Title 12 O.S.2011 § 2012(B)(6) governs the defense of failure to state a claim on which relief can be granted. The Oklahoma Supreme Court has consistently held:

> If relief is possible under any set of facts which can be established and is consistent with the allegations, a motion to dismiss should be denied. A motion to dismiss is properly granted only when there are no facts consistent with the allegations under any cognizable legal theory or there are insufficient facts under a cognizable legal theory.

Dani v. Miller, 2016 OK 35, ¶ 11, 374 P.3d 779 (citations omitted). Simply put, Hammon in his counterclaim alleged mold accumulation and damage from water entering his townhome from the exterior and that he notified Bluff Creek but Bluff Creek refused to fix or address the issue. Before the trial court could properly dismiss Hammon's claim under § 2012(B)(6), it was required to find that Hammon's "allegations indicate *beyond any doubt* that [he] can prove no set of facts which would entitle him to relief." *Frazier v. Bryan Mem'l Hosp. Auth.*, 1989 OK 73, ¶ 13, 775 P.2d 281. Hammon's counterclaim asserts a claim for damage to his property from water entering his townhome from the exterior. It is premature to find he can prove no set of facts under this claim that would entitle him to relief.

¶17 And if the trial court found Hammon could prove no set of facts entitling him to relief, the court was required to apply 12 O.S.2011 § 2012(G): "On granting a motion to dismiss a claim for relief, the court shall grant leave to amend if the defect can be remedied and shall specify the time within which an amended pleading shall be filed." If the trial court granted Bluff Creek's motion pursuant to 12 O.S.2011 § 2012(B)(6), its failure to grant Hammon leave to amend was error.

¶18 Hammon states in his summary judgment response that the trial court granted him until October 12, 2018, to respond, and it appears from the record that he filed his objection to the motion for summary judgment and a cross-motion for summary judgment on October 11, 2018. The journal entry of judgment was filed on October 26, 2018. The trial court stated in its order that it examined the pleadings and the evidence introduced. If the trial court considered matters outside the pleadings and based its decision on those documents or exhibits, then it was not dismissing Hammon's claim but was granting judgment in favor of Bluff Creek on his counterclaim and denying Hammon's motion for summary judgment on his counterclaim. Title 12 O.S.2011 § 2012(B) provides:

> If, on a motion asserting the defense numbered 6 of this subsection to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and all parties shall be given reasonable opportunity to present all material made pertinent to the motion by the rules for summary judgment.

¶19 As to compliance with Rule 13 of the Rules for the District Courts, 12 O.S. Supp. 2013, ch. 2, app., Bluff Creek does not appear to have disputed Hammon's statements of undisputed fact in a filing with the Court addressing Bluff Creek's responsibility for repairs to the exterior of the unit or the claim that water seeped into the unit because Bluff Creek failed to investigate or repair the problem. Bluff

Creek may have argued this issue to the trial court, but nothing in the record on appeal indicates it did so. We note that Bluff Creek's argument in its summary judgment motion on the question of its obligations to Hammon speaks only in terms of its duty to "insure" the exterior and common elements of the property, its lack of duty "to purchase any insurance covering . . . the interior space" of any unit owner, and Hammon's responsibility to "insure" his personal property and the unit's contents. Even if undisputed, this insurance argument does not as a matter of law resolve the question of Bluff Creek's duty to any given unit owner if it fails to make exterior repairs, particularly in light of the absence of the Declaration in the record.

¶20 In contrast, Hammon presented his affidavit, photographs of the claimed water damage, an inspection report addressing that damage, and a report indicating water was entering the townhome from outside. Based on these submissions, we conclude Hammon presented evidence, at a minimum, sufficient to show that material facts remain in dispute regarding his counterclaim for property damage.

¶21 A fair reading of Hammon's counterclaim shows that his claims against Bluff Creek arise from the obligations and responsibilities expressed in the Declaration. We analyze the parties' duties pursuant to the Declaration as contractual obligations. *See, e.g., Finance & Inv. Co., Ltd. v. UMA, L.L.C.*, 2009 OK CIV APP 105, ¶ 11, 227 P.3d 1082 ("[A] restrictive covenant is a contract enforceable as any other contract."); *Grindstaff v. Oaks Owners' Ass'n, Inc.*, 2016 OK CIV APP 73, 386 P.3d 1035 (analyzing whether a declaration of covenants, conditions, and restrictions and homeowners' association's bylaws were contracts of adhesion). Hammon asserted a claim arising from the Declaration regarding Bluff Creek's care of the common areas of the townhomes. "The purpose of statutes relating to counterclaims is to make possible the determination of all controversies growing out of a transaction in one proceeding thus avoiding a multiplicity of lawsuits, and such statutes will be liberally construed in order to carry out [this] purpose." *Meyer v. Vance,* 1965 OK 135, ¶ 0, 406 P.2d 996 (syl. no. 3 by the Court). For example, a "defendant may plead as a counterclaim a cause of action arising to him upon the plaintiff's breach of covenant of quiet enjoyment contained in the deed conveying the real estate upon which the mortgage is sought to be foreclosed." *Tracy v. Norvell,* 1923 OK 591, ¶ 0, 219 P. 384 (syl. no. 3 by the Court). A defendant, however, is not allowed to "plead a counterclaim" where his claim is not "connected with the transaction set forth in plaintiff's petition as the foundation of plaintiff's claim." *Id.* ¶ 0 (syl. no. 2 by the Court).

¶22 Hammon's counterclaim against Bluff Creek may give rise to the application of the doctrines of setoff or recoupment. "The equitable doctrine of set-off permits the set-off of an obligation under one contract against the obligation of any other contract between the same parties . . . ." *Nelson v. Linn Midcontinent Exploration, L.L.C.*, 2009 OK CIV APP 99, ¶ 9, 228 P.3d 533. "The validity of a counterclaim or set-off is to be determined by the inquiry whether or not the substance of the facts stated would constitute a cause of action on behalf of the defendant against the plaintiff, if the plaintiff had not sued defendant." *State Bank of Dakoma v. Weaber*, 1926 OK 200, ¶ 0, 256 P. 50 (syl. no. 3 by the Court). A recoupment, on the other hand "is the 'right of the defendant to have a deduction from the amount of the plaintiff's damages, for the reason that the plaintiff has not complied with the cross-obligations or independent covenants arising under the same contract.'" *Nelson*, 2009 OK CIV APP 99, ¶ 7 (quoting *Bank of Oklahoma, N.A. v. Briscoe,* 1995 OK CIV APP 156, ¶ 25, 911 P.2d 311).

¶23 Although it is not disputed that Hammon has not paid his homeowners' dues for the period stated, we cannot determine, in the absence of a copy of the Declaration, whether Hammon may withhold those dues while his damage claim is pending.[3] Based on this record, the trial court either prematurely dismissed Hammon's counterclaim and gave him no opportunity to amend or granted summary judgment to Bluff Creek on his counterclaim. The trial court did find Bluff Creek was not liable to Hammon for any damage. By "dismissing"[4] Hammon's counterclaim, the trial court precluded Hammon from pursuing his claim for property damage caused by Bluff Creek's alleged failure to meet its contractual obligations and from obtaining relief under his counterclaim, if he is able to prove such failure. If, on the other hand, the trial court considered matters outside the pleadings or found Bluff Creek was entitled to summary judgment on undisputed facts, then summary judgment was not proper because Hammon presented suffi-

cient evidence to show material facts remain in dispute.

CONCLUSION

¶24 The trial court erred in either dismissing Hammon's counterclaim without allowing him to amend or granting summary judgment to Bluff Creek on his counterclaim and in determining Bluff Creek was not liable for the damage to Hammon's property. Accordingly, we reverse the decision of the trial court and remand for further proceedings.

¶25 **REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.**

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

JANE P. WISEMAN, VICE-CHIEF JUDGE:

1. We deal at length further in the Opinion with the question of whether this is a dismissal or a summary judgment. *See infra* note 4.

2. Hammon's petition in error seeks reversal of the October 26, 2018, order. He did not amend his petition in error to raise the propriety of the trial court's denial of his motion to vacate, and it is not a subject of this appeal.

3. Hammon relies on the Oklahoma Residential Landlord and Tenant Act, 41 O.S.2011 & Supp. 2018 §§ 101-201 to support his argument regarding Bluff Creek's duty to make repairs to keep the property habitable. This remains an issue for resolution on remand due to unresolved disputed issues of material fact as discussed in this Opinion.

4. We continue to note that, under the plain language of Rule 13 and 12 O.S.2011 § 2056, granting a motion for summary judgment does not result in a *dismissal*, but in a *judgment* in favor of one party or the other.

2019 OK CIV APP 60

THE ESTATE OF MAY GREGORY WYNN, MELISSA WYNN, an individual, and GREGORY WYNN, an individual, Plaintiffs/Appellants, vs. TULSA COUNTY TREASURER, J. DENNIS SEMLER, in his official capacity, Defendant/Appellee, and CHARLES PATTERSON and TRACIE PATTERSON, Intervening Defendants/Counter-Claimants/Third-Party Plaintiffs/Appellees, vs. THE ESTATE OF GLYNN EHRHARDT WYNN, Third-Party Defendant.

Case No. 116,481. December 21, 2018

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

HONORABLE MARY FITZGERALD, JUDGE

AFFIRMED

James C. Thomas, William D. Thomas, Tulsa, Oklahoma, for Appellants,

Kim M. Hall, Tulsa, Oklahoma, for Appellee,

Thomas M. Askew, Sharon K. Weaver, Tulsa, Oklahoma, for Third-Party Plaintiffs/Appellees.

Larry Joplin, Judge:

¶1 The Plaintiffs/Appellants, The Estate of May G. Wynn, Melissa Wynn, and Gregory Wynn, seek review of the August 1, 2017 summary judgment order granting the summary judgment motion of the Tulsa County Treasurer, as well as the grant of partial summary judgment in favor of Charles and Tracie Patterson and the denial of Appellants' motion for summary judgment.

¶2 This case arises from the tax sale of property in Tulsa County, once owned by Glynn and May Wynn.[1] The property was sold at the Tulsa County Treasurer's tax resale auction on June 13, 2016 for delinquent and unpaid 2012 taxes, pursuant to 68 O.S. Supp.2008 §3105 and §3125.[2] Glynn and May Wynn owned the property in joint tenancy with right of survivorship. Glynn Wynn passed away in 2013, after which time the property belonged to May Wynn as a result of the joint tenancy ownership. Their daughter, Melissa Wynn, was named personal representative of Glynn Wynn's estate. Gregory Wynn is the son of Glynn and May Wynn.

¶3 There were two tax sale notifications, listed as "Early Notification of 2016 Tax Resale Auction" dated July 9, 2015 and November 12, 2015.[3] These notices were sent to "Glenn" and May Wynn at their Tulsa, Oklahoma address. Both notices listed an amount due if paid by a certain date. Neither resulted in payment by then owner, May Wynn. A posted notice was posted to the property on March 2, 2016, listing the legal description, contact information for the treasurer's office and notice the property would be sold at the tax resale auction on June 13, 2016 unless the "unpaid taxes and/or special assessments" were paid. A certified mail, final notice was sent to May Wynn on March 8, 2016, with a certified mail return receipt signed by May Wynn dated March 17, 2016. 68 O.S. Supp.2010 §3127.[4] In addition, a final notice was sent via certified mail to Appellant/Melissa Wynn's attorney, William D. Thomas, who was listed as the attorney of record with respect to Glynn Wynn's estate. The March 8, 2016 certified mail was signed for by Michael Thomas and the return receipt was dated March 18, 2016. Also on March 8, 2016, a notice was mailed to Melissa Wynn at an address on 21st Street in Tulsa Oklahoma; this notice was

returned to the County Treasurer's office, stating "unable to forward." The auction of the subject property was also published in the Tulsa Beacon on May 19 and 26, 2016 and June 2 and 9, 2016. May Wynn testified she was aware of the tax sale.

¶4 Oakley Properties, L.L.C. was the successful bidder for the property at the June 13, 2016 auction and Oakley obtained the County Treasurer's Resale Deed the next day, June 14, 2016. The deed was recorded on June 14, 2016 as well.

¶5 The Pattersons are part of these proceedings due to their purchase agreement for $125,000 with Doug Thomas, attorney of Melissa Wynn, personal representative of the estate of Glynn Wynn, for purchase of the subject property. The Pattersons learned the property was purchased at auction by Oakley and they arranged to purchase the property directly from Oakley, bypassing the estate and Melissa Wynn's attorney. The Pattersons intervened in this cause of action to assert their claims against the estate, from which they had initially tried to purchase the property; they sought a judgment to confirm the validity of the tax sale and their purchase from Oakley; they sought to rescind the purchase contract with the Wynn estate and to quiet title.

¶6 In their motion for summary judgment, Appellants assert due process was not satisfied in this case, specifically with respect to Melissa Wynn. Appellants argue Melissa Wynn "held a legitimate claim of entitlement to the property" and "constitutional due process entitlement is not limited to the legal owner of the real property," citing *Bd. of Regents of State Colleges v. Roth,* 408 U.S. 564, 571-72, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) (regarding claims to due process made by a non-tenured professor when his contract was not renewed, the employment contract at issue did not involve delinquent taxes or issues of notice such as those presented in this case). Melissa Wynn claimed entitlement to due process as a "prospective heir" of May Wynn's estate, citing *Kaylor v. Kaylor,* 1935 OK 530, 45 P.2d 743, 744 (regarding unrecorded mortgage as binding between assignor and assignee, *Kaylor* did not address notice required by state actor for delinquent tax sale with respect to prospective heirs) and *Davis v. Morgan,* 1939 OK 468, 95 P.2d 856, 857 (involved an heir in possession of real estate in which he owned an undivided interest, the decision explicitly expresses no opinion regarding an heir not in possession and does not speak to the position of a "prospective" heir who does not currently own an interest in the property at issue).

¶7 Melissa Wynn argues she was entitled to notice as an owner of the real estate and the notice sent to her was returned as undeliverable.[5] However, Melissa Wynn's argument ignores the numerous notices sent to the record owner, May Wynn, the notice sent to Melissa Wynn's attorney of record and signed for at the attorney's office, and notices posted on the property itself, in addition to the publication notices.

¶8 Appellants' argument does not demonstrate what statutory provision entitles Melissa Wynn to notice of the tax sale. Melissa Wynn was not the record owner of the delinquent property and any interest she had was, by Wynn's own admission, that of a "prospective heir," which is not a status provided for in the notice provisions at 68 O.S. Supp.2010 §3127. Appellants have provided no explanation of other legal authority upon which a "prospective heir" might rely to assert a right to notice from the county treasurer for tax sale purposes. In addition, this property did not become part of Glynn Wynn's estate due to the provisions in the deed and instead became May Wynn's property upon her husband's death. As a result, Melissa Wynn's role as the representative of her father's estate did not entitle her to notice of the tax sale under the terms of the statute. 68 O.S. Supp.2010 §3127.

¶9 Upon the record provided, the notices to the record owners, "Glenn" and May Wynn, the posted notices and the certified mailings to the record owners and the publication notices comply with the notice requirements outlined in the statute. We do not find Melissa Wynn was deprived of required due process notice as she has alleged.

¶10 Appellants next assert their right to redeem the property was constitutionally infirm and the tax deed is void as a result. Appellants assert the County Treasurer's practice which resulted in the tax sale to Oakley on June 13, 2016, followed by issuance of the tax deed on June 14th, and filing of the tax deed later that same day, effectively nullified the redemption statute, 68 O.S. Supp.2009 §3113.[6] Appellants argue the abbreviated time-line after the sale meant there was no window of opportunity in which to be heard and no opportunity to redeem their property, effectively depriving

them of due process with respect to the right of redemption. Appellants argue both 68 O.S. §3113 and §3131 require the County Treasurer to allow a reasonable time for the delinquent taxpayer to redeem the property.[7]

¶11 Neither 68 O.S. §3113 nor §3131 use the word "reasonable," nor does either statute provide a time frame within which the delinquent taxpayer's sold property is to be held in limbo prior to the issuance and filing of the tax deed. While we agree the sale and deed filing in this case was conducted in a seemingly abbreviated time frame, Appellants have provided no Oklahoma legal authority to demonstrate the quick turnaround from sale to filing the deed is prohibited. We find no relief is warranted on this proposition of error.

¶12 Appellants also argue they were entitled to notice of the sale in order to be able to effectively exercise their right to redeem the property. Based on the nature of this argument, it appears Appellants' argument here is that they were entitled to notice the property actually sold at auction, in addition to asserting a right to notice of the auction itself. Under a previous format, a county treasurer would "bid off" real estate in the name of the county and record the county's bid and purchase, and then essentially hold the real estate with the county until the time to conduct a resale auction came after a two year redemption period. *Michie v. Haas,* 1928 OK 53, 272 P. 883. If that property so purchased by the county remained unredeemed for a period of two years, the county treasurer was then permitted to "proceed to advertise and sell such real estate at public auction[.]" *Id.* This pre-purchase of real estate by the county treasurer is no longer the format used to address delinquent taxes and the two year redemption period which existed under the previous format is no longer at issue. Instead, the county treasurer places the delinquent real estate at auction after a period of three or more years has passed, under the terms of 68 O.S. Supp.2008 §3105, and does not purchase the property on behalf of the county prior to the auction itself. As a result, the redemption period may be quite abbreviated on the post-auction side of the process, as it was in this case, but provides a greater opportunity to redeem the delinquent property prior to the auction itself. *See* 68 O.S. Supp.2009 §3113.

¶13 We agree with Appellants the delinquent owner has a right to the notice of the sale and the remittance of excess funds as per the terms of 68 O.S. Supp.2009 §3131(C), but Appellants have not cited any current Oklahoma authority entitling them to notice of the sold status of their property for purposes of providing a time limit within which to redeem the property after the auction. As a result, we do not find any relief is available upon this proposition of error.

¶14 Finally, Appellants argue *Cleveland Bd. of Education v. Loudermill*, 105 S.Ct. 1487, 470 U.S. 532, 84 L.Ed.2d 494 and *Daffin v. State ex rel. Oklahoma Dep't of Mines*, 2011 OK 22, ¶20, 251 P.3d 741, 748, stand for the proposition that a legislature has the power to create property rights, such as the right of redemption, but it cannot impose conditions to that property right, such as dictating redemption must occur before the execution of a deed of conveyance.[8]

¶15 Appellants' argument focuses entirely on the time within which to redeem the delinquent property after the resale auction has occurred, stating if the resale deed can be filed only a day after the auction, then Appellants are effectively deprived of the right to redeem. Appellants' *Loudermill* argument is similar to Appellants' second argument put forward in their motion for summary judgment, in which they argued their right to redeem was effectively nullified due to the ability of the tax resale purchaser to file the deed a day after the tax sale. We reach a similar result with respect to this proposition, as the record demonstrates the County Treasurer did not violate the statute in allowing the deed to be filed on June 14, 2016, nor do we find the statute to be constitutionally infirm in light of the years prior to the sale that were available to Appellants had they desired to redeem the property when they began to receive notices.

¶16 It should also be noted the right to redeem may be exercised at any time before the execution of a deed of conveyance and the right is extinguished if not exercised prior to the execution of the deed. 68 O.S. Supp.2009 §3113; *Sherrill v. Deisenroth*, 1975 OK 136, 541 P.2d 862. In addition, the statute dictates that redemption requires "paying to the county treasurer the sum which was originally delinquent including interest at the lawful rate as provided in Section 2913 of this title and such additional costs as may have accrued[.]" 68 O.S. §3113 (emphasis added). The record reveals at no time during Appellants' post-sale inquiry into the possibility of redeeming the property did they tender any of the delinquent sums, therefore not complying with the statute

both in terms of the timing limitations imposed and the actions or payment required in order to redeem the property.

¶17 With respect to the Pattersons' quiet title, unjust enrichment and rescission claims, we affirm the trial court's grant of their partial motion for summary judgment. The trial court determined Oakley Properties L.L.C. acquired the tract through a valid tax resale auction, the deed was recorded on June 14, 2016 and the Pattersons acquired title on or about September 8, 2016 from Oakley Properties. Based on this court's determination with respect to the tax sale, the partial summary judgment was properly rendered in favor of the Pattersons and title is quieted in the Pattersons, due to their purchase from Oakley Properties as the trial court determined; and Appellants should realize no enrichment from the attempted sale of the tract.

¶18 The trial court's August 1, 2017 order granting the summary judgment motion of the Tulsa County Treasurer is AFFIRMED. The trial court's granting of the partial summary judgment motion of Charles and Tracie Patterson is AFFIRMED. The trial court's denial of Plaintiffs'/Appellants' motion for summary judgment is AFFIRMED.

BELL, P.J., and BUETTNER, J., concur.

Larry Joplin, Judge:

1. The legal description of the property is:
E652.7 S207.6 GOV LT 8 & E652.7 SW SW LYING N OF RR R/W SEC 9 19 12 12.995ACS.

2. 68 O.S. §3105(A):
A. The county treasurer shall in all cases, except those provided for in subsection B of this section, where taxes are a lien upon real property and have been unpaid for a period of three (3) years or more as of the date such taxes first became due and payable, advertise and sell such real estate for such taxes and all other delinquent taxes, special assessments and costs at the tax resale provided for in Section 3125 of this title, which shall be held on the second Monday of June each year in each county. The county treasurer shall not be bound before so doing to proceed to collect by sale all personal taxes on personal property which are by law made a lien on realty, but shall include such personal tax with that due on the realty, and shall sell the realty for all of the taxes and special assessments.
68 O.S. §3125:
If any real estate shall remain unredeemed for the period provided for in Section 3105 of this title, the county treasurer shall proceed to sell such real estate at resale, which shall be held on the second Monday of June each year in each county.

3. Prior to the July and November 2015 "early" notices of the resale auction, the following were also sent to Glynn and May Wynn:
2012 tax statement, November 8, 2012;
Delinquency statement, January 17, 2013;
Delinquency statement, February 14, 2013;
Letter notification of tax lien, August 16, 2013;
Delinquency statement with 2013 tax statement, November 7, 2013;
Delinquency statement, January 17, 2014;
Delinquency statement, February 19, 2014;
Delinquency statement with 2014 tax statement, November 7, 2014;
Delinquency statement, January 16, 2015;
Early notification of 2016 tax resale auction, July 9, 2015;
Delinquency statement, November 10, 2015;
Second notice of 2016 tax resale auction, November 12, 2015.

4. 68 O.S. Supp.2010 §3127 Notice of resale:
The county treasurer, according to the law, shall give notice of the resale of such real estate by publication of said notice once a week for four (4) consecutive weeks preceding such sale, in some newspaper, having been continuously published one hundred four (104) consecutive weeks with admission to the United States mails as second-class mail matter, with paid circulation and published in the county where delivered to the mails, to be designated by the county treasurer; and if there be no paper published in the county, or publication is refused, the county treasurer shall give notice by written or printed notice posted on the door of the courthouse. Such notice shall contain a description of the real estate to be sold, the name of the record owner of said real estate as of the preceding December 31 or later as shown by the records in the office of the county assessor, which records shall be updated based on real property conveyed after October 1 each year, the time and place of sale, a statement of the date on which said real estate taxes first became due and payable as provided for in Section 2913 of this title, the year or years for which taxes have been assessed but remain unpaid and a statement that the same has not been redeemed, the total amount of all delinquent taxes, costs, penalties and interest accrued, due and unpaid on the same, and a statement that such real estate will be sold to the highest bidder for cash. It shall not be necessary to set forth the amount of taxes, penalties, interest and costs accrued each year separately, but it shall be sufficient to publish the total amount of all due and unpaid taxes, penalties, interest and costs. The county treasurer shall, at least thirty (30) days prior to such resale of real estate, give notice by certified mail, by mailing to the record owner of said real estate, as shown by the records in the county assessor's office, which records shall be updated based on real property conveyed after October 1 each year, and to all mortgagees of record of said real estate a notice stating the time and place of said resale and showing the legal description of the real property to be sold. If the county treasurer does not know and cannot, by the exercise of reasonable diligence, ascertain the address of any mortgagee of record, then the county treasurer shall cause an affidavit to be filed with the county clerk, on a form approved by the State Auditor and Inspector, stating such fact, which affidavit shall suffice, along with publication as provided for by this section, to give any mortgagee of record notice of such resale. Neither failure to send notice to any mortgagee of record of said real estate nor failure to receive notice as provided for by this section shall invalidate the resale, but the resale tax deed shall be ineffective to extinguish any mortgage on said real estate of a mortgagee to whom no notice was sent. Beginning on April 24, 2008, no encumbrancer of real property in this state shall be permitted to file any instrument purporting to encumber real property in any county of the state with any county clerk unless the instrument states on its face the mailing address of such encumbrancer.

5. On March 8, 2016, notice was sent to Melissa Wynn at an address on 21st street in Tulsa, Oklahoma, but was returned to the Tulsa County Treasurer as undeliverable. This undelivered notice to Melissa Wynn is in addition to the notice sent to her attorney of record on the same date, March 8th, with a returned receipt received on March 18, 2016; and in addition to the tax sale notices referenced in footnote 4.

6. 68 O.S. Supp.2009 §3113. Redemption of real estate:
The owner of any real estate, or any person having a legal or equitable interest therein, may redeem the same at any time before the execution of a deed of conveyance therefor by the county treasurer by paying to the county treasurer the sum which was originally delinquent including interest at the lawful rate as provided in Section 2913 of this title and such additional costs as may have accrued; provided, that minors or incapacitated or partially incapacitated persons may redeem from taxes any real property belonging to them within one (1) year after the expiration of such disability, with interest and penalty at not more than ten percent (10%) per annum. The term incapacitated as used in this section relates to mental incapacitation only, physical disability is not covered under this term or this section.

7. 68 O.S. Supp.2014 §3131. Filing of resale return with county clerk – Issuance of deed – Payment of sale expenses – Remaining funds, disposition:

A. Within thirty (30) days after resale of property, the county treasurer shall file in the office of the county clerk a return, and retain a copy thereof in the county treasurer's office, which shall show or include, as appropriate:
1. Each tract or parcel of real estate so sold;
2. The date upon which it was resold;
3. The name of the purchaser;
4. The price paid therefor;
5. A copy of the notice of such resale with an affidavit of its publication or posting; and
6. The complete minutes of sale, and that the same was adjourned from day to day until the sale was completed.
Such notice and return shall be presumptive evidence of the regularity, legality and validity of all the official acts leading up to and constituting such resale. Within such thirty (30) days, the county treasurer shall execute, acknowledge and deliver to the purchaser or the purchaser's assigns, or to the board of county commissioners where such property has been bid off in the name of the county, a deed conveying the real estate thus resold. The issuance of such deed shall effect the cancellation and setting aside of all delinquent taxes, assessments, penalties and costs previously assessed or existing against the real estate, and of all outstanding individual and county tax sale certificates, and shall vest in the grantee an absolute and perfect title in fee simple to the real estate, subject to all claims which the state may have had on the real estate for taxes or other liens or encumbrances. Twelve (12) months after the deed shall have been filed for record in the county clerk's office, no action shall be commenced to avoid or set aside the deed. Provided, that persons under legal disability shall have one (1) year after removal of such disability within which to redeem the real estate.
B. Any number of lots or tracts of land may be included in one deed, for which deed the county treasurer shall collect from the purchaser the fees provided for in Section 43 of Title 28 of the Oklahoma Statutes. The county treasurer shall also charge and collect from the purchaser at such sale an amount in addition to the bid placed on such real estate, sufficient to pay all expenses incurred by the county in preparing, listing and advertising the lot or tract purchased by such bidder, which sums shall be credited and paid into the resale property fund hereinafter provided, to be used to defray to that extent the costs of resale.
C. When any tract or lot of land sells for more than the taxes, penalties, interest and cost due thereon, the excess shall be held in a separate fund for the record owner of such land, as shown by the county records as of the date said county resale begins, to be withdrawn any time within one (1) year. No assignment of this right to excess proceeds shall be valid which occurs on or after the date on which said county resale began. At the end of one (1) year, if such money has not been withdrawn or collected from the county, it shall be credited to the county resale property fund.

8. *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, held the process due to a terminated employee was a pretermination right to respond, coupled with a posttermination administrative procedure that was provided by the Ohio statute. The employees at issue were not provided an opportunity for hearing prior to the deprivation of their property right in continued employment, which the court determined was an impermissible infringement on the employees' pretermination due process rights.

2019 OK CIV APP 61

ALLEN BROADBENT, Petitioner/Appellant, vs. CLORIE BROADBENT, Respondent/Appellee.

Case No. 116,621. February 14, 2019

APPEAL FROM THE DISTRICT COURT OF COMANCHE COUNTY, OKLAHOMA

HONORABLE GERALD F. NEUWIRTH, TRIAL JUDGE

AFFIRMED

John S. Roose, ROOSE & ROOSE LAW FIRM, P.C., Lawton, Oklahoma, for Petitioner/Appellant

Stephen K. Newcombe, NEWCOMBE, REDMAN, ROSS & NEWCOMBE, P.C., Lawton, Oklahoma, for Respondent/Appellee

JERRY L. GOODMAN, JUDGE:

¶1 Allen B. Broadbent (Husband) appeals a November 14, 2017, decree of dissolution of marriage dividing the marital estate and awarding Clorie M. Broadbent (Wife) custody of the parties' minor children. Based upon our review of the record and applicable law, we affirm.

BACKGROUND

¶2 The parties were married on April 28, 2006, and two children were born of the marriage. Husband filed a petition for divorce on January 27, 2016, requesting sole custody of the minor children and that the trial court equitably divide the parties' real and personal property. On March 23, 2016, the court issued a minute order awarding the parties temporary joint custody of the minor children.

¶3 On March 16, 2017, Husband filed an amended petition, contesting the court's jurisdiction to divide his U.S. Army retirement pursuant to 10 U.S.C. § 1408, the Uniformed Services Former Spouses Protection Act (USFSPA). Husband asserted he was domiciled in Oklahoma solely for the purpose of serving in the U.S. Army and that Oklahoma was not his permanent home. Wife answered, asserting Husband had invoked the jurisdiction of the court when he requested affirmative relief in his original petition.

¶4 A trial was subsequently held on March 22, 2017, and May 10, 2017. At the conclusion of the trial, the court awarded Wife custody of the minor children with standard visitation to Husband. The trial court further determined it had jurisdiction to divide Husband's military retirement, finding Wife was entitled to 24.4% of the benefits. Husband appeals.

STANDARD OF REVIEW

¶5 A trial court is vested with discretion in matters involving custody. *Rowe v. Rowe*, 2009 OK 66, ¶ 3, 218 P.3d 887, 889. An appellate court "will not disturb the trial court's judgment regarding custody absent an abuse of discretion or a finding that the decision is

clearly contrary to the weight of the evidence." *Daniel v. Daniel*, 2001 OK 117, ¶ 21, 42 P.3d 863, 871. "The burden is upon the party appealing from the custody and visitation award to show that the trial court's decision is erroneous and contrary to the child's best interests." *Id*. "In reviewing such custody orders, deference will be given to the trial court since the trial court is better able to determine controversial evidence by its observation of the parties, the witnesses and their demeanor." *Hoedebeck v. Hoedebeck*, 1997 OK CIV APP 69, ¶ 10, 948 P.2d 1240, 1243 (quoting *Newell v. Nash*, 1994 OK CIV APP 143, 889 P.2d 345).

ANALYSIS

¶6 For his first assertion of error on appeal, Husband asserts the trial court lacked jurisdiction to divide his military retirement pursuant to 10 U.S.C. § 1408.

¶7 "Determination of jurisdiction is a question of law." *State ex rel Cartwright v. Okla. Ordnance Works Auth.*, 1980 OK 94, ¶ 4, 613 P.2d 476, 479. Questions of law are reviewed *de novo. K&H Well Serv., Inc. v. Tcina, Inc.*, 2002 OK 62, ¶ 9, 51 P.3d 1219, 1223.

¶8 Under the USFSPA, state courts may divide a military retirement if the state provides for subject matter jurisdiction over the division of military retirement as property of the member and his or her spouse. *See* 10 U.S.C. § 1408(a)(1)(A) and (C). Title 43 O.S.2011, § 102(B) grants Oklahoma district courts authority over divorce proceedings involving service members. Section 102(B) provides:

> Any person who has been a resident of any United States army post or military reservation within the State of Oklahoma, for six (6) months immediately preceding the filing of the petition, may bring action for divorce or annulment of a marriage or may be sued for divorce or annulment of a marriage.

In addition, a state court must have personal jurisdiction over the service member. Under the USFSPA, a state court may exercise personal jurisdiction only if § 1408(c)(4) is satisfied. Section 1408(c)(4) provides:

> A court may not treat the disposable retired pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court.

¶9 In the present case, Husband testified he is neither a resident nor a domiciliary of the state of Oklahoma, as he is only in Oklahoma by reason of his military assignment. He stated he has no intention of remaining in Oklahoma when his assignment ends. Wife did not dispute these assertions. Finally, Husband contends he did not expressly consent to the exercise of Oklahoma jurisdiction over his military retirement. Wife disagrees, asserting Husband impliedly consented when he initiated the dissolution proceeding and failed to timely contest personal jurisdiction. Therefore, the issue before the court was whether Husband consented to the jurisdiction of the court under § 1408(c)(4)(C).

¶10 A review of state courts establishes that there is a split whether consent by a military spouse may be express or implied. This split was recognized by the Court of Civil Appeals (COCA) in *Johnson v. Johnson*, 2016 OK CIV APP 74, 386 P.3d 1049, which addressed whether the husband/service member had consented to the court's jurisdiction. In *Johnson*, three separate domestic actions were filed. First, Husband filed an action for separate maintenance, which was ultimately dismissed by the trial court. Husband subsequently filed a petition for divorce which resulted in a default divorce decree. The decree was later vacated for insufficient service of process on the wife. Finally, the wife filed a petition for divorce, to which the husband filed a special appearance and motion to dismiss, specifically asserting the court had no jurisdiction to divide his military benefits as he was not domiciled in Oklahoma and had not consented to the court's jurisdiction. The court denied the motion and ultimately divided the husband's retirement, finding husband had consented to the court's jurisdiction by filing the previous actions.

¶11 On appeal, COCA ultimately reversed, noting the husband had immediately and expressly contested personal jurisdiction of the court to divide his retirement in the action filed. COCA cited *Wagner v. Wagner*, 768 A.2d 1112 (Pa. 2001), which concluded that "under § 1408(c)(4)(C) . . . courts may not exercise the authority they are provided in the Act to distribute a military member's retirement pay in a divorce action, unless the member consents to the court's jurisdiction over his person specifically to distribute the retirement pay." *Johnson*,

at ¶ 13, at 1054 (citing *Wagner,* 768 A.2d at 1119). The Wagner court held the member's acceptance of service, a general appearance, participation in discovery matters, and attendance at a support proceeding were insufficient to establish consent. The only activity on the member's part which concerned his retirement was the filing of objections to the court's jurisdiction. Thus, the court lacked jurisdiction to divide the military retirement.

¶12 COCA noted, however, that there were conflicting interpretations under § 1408(c)(4)(C) where a service member remains silent regarding the court's authority to divide the military benefits, *i.e.* implied consent. *Johnson,* at ¶ 15, at 1055. The Court cited *Davis v. Davis,* 284 P.3d 23, 27 (Ariz. Ct. App. 2012), which held that § 1408(c)(4)(C) does not require express consent, and that "a state court may exercise personal jurisdiction" over a military member's retirement when that member "makes a general appearance without expressly contesting personal jurisdiction." *Id. See also White v. White,* 543 So.2d 126 (La.App.1989) (consent can be implied after a general appearance, which waives all personal jurisdiction objections); *Judkins v. Judkins,* 441 S.E.2d 139 (CA. 1994) (member consented by making general appearance and filing answer with counterclaims without contesting jurisdiction); *Morris v. Morris*, 894 S.W.2d 859, 862 (Tex.App.1995) (member consented by filing general answer and not contesting court's jurisdiction until appeal).

¶13 We find the court had personal jurisdiction over Husband to divide his military retirement. In the present case, the record provides Husband filed the petition for dissolution of marriage on January 27, 2016, in the Comanche County District Court, requesting the court equitably divide the parties' real and personal property. Thus, Husband voluntarily subjected himself to the court's jurisdiction. Husband did not object to the court's jurisdiction over his retirement for over a year. Accordingly, the Court finds Husband consented to the court's jurisdiction by initiating the dissolution proceeding and failing to timely contest the court's jurisdiction. This assertion of error is therefore denied.

¶14 For his second assertion of error, Husband contends the trial court erred by awarding Wife sole custody of the minor children.

¶15 In his petition for dissolution of marriage, Husband requested sole custody of the minor children. However, at trial Husband requested the court award the parties joint custody of the minor children. The trial court awarded Wife custody of the minor children with standard visitation to Husband. Husband contends this was error.

¶16 Title 43 O.S.2011, § 109 provides, in relevant part:

> A. In awarding the custody of a minor unmarried child or in appointing a general guardian for said child, the court shall consider what appears to be in the best interests of the physical and mental and moral welfare of the child.
>
> B. The court, pursuant to the provisions of subsection A of this section, may grant the care, custody, and control of a child to either parent or to the parents jointly.
>
> For the purposes of this section, the terms joint custody and joint care, custody, and control mean the sharing by parents in all or some of the aspects of physical and legal care, custody, and control of their children.
>
> C. If either or both parents have requested joint custody, said parents shall file with the court their plans for the exercise of joint care, custody, and control of their child. The parents of the child may submit a plan jointly, or either parent or both parents may submit separate plans. Any plan shall include but is not limited to provisions detailing the physical living arrangements for the child, child support obligations, medical and dental care for the child, school placement, and visitation rights. A plan shall be accompanied by an affidavit signed by each parent stating that said parent agrees to the plan and will abide by its terms. The plan and affidavit shall be filed with the petition for a divorce or legal separation or after said petition is filed.

¶17 Although the trial court is vested with discretion in awarding custody, the guiding and paramount principle is the best interests of the child. *Id.*; *see also Daniel v. Daniel*, 2001 OK 117, 42 P.3d 863; *Hoedebeck v. Hoedebeck*, 1997 OK CIV APP 69, 948 P.2d 1240. On appeal, this Court will not disturb the trial court's judgment regarding custody absent an abuse of discretion or a finding the decision is clearly contrary to the weight of the evidence. *Daniel,* 2001 OK 117, at ¶ 21, 42 P.3d at 871. The burden is upon the party appealing from the custody

and visitation award to show the trial court's decision is erroneous and contrary to the children's best interests. *Id.; White v. Polson*, 2001 OK CIV APP 88, 27 P.3d 488.

¶18 Upon reviewing the record, we cannot say the trial court erred in awarding Wife custody of the parties' minor children with visitation to Husband. First, the record establishes that Wife was the primary caregiver for the minor children during the marriage and the sole caregiver for approximately two years while Husband was deployed or stationed out of the U.S. In addition, the record is replete with evidence of hostility and ill will between the parties. Although both parties interfered with the other's relationship with the minor children, Wife testified that she would try to do better in the future. Husband, conversely, intends to continue to retaliate against and make inappropriate statements to Wife after their divorce. Notably, the parties had joint custody of the children during the beginning of the divorce. Husband testified that dealing with Wife was miserable and that there was no point in being nice to Wife. It is clear both parties have no ability to have a joint custody relationship.

¶19 It is well settled that joint custody will not succeed and is not proper where there is hostility and uncooperative behavior between the parents. *See e.g., Daniel,* 2001 OK 117, at ¶ 20, 42 P.3d at 870; *White v. Poison*, 2001 OK CIV APP 88, ¶ 8, 27 P.3d 488, 490. In *Foshee v. Foshee,* 2010 OK 85, ¶ 16, 247 P.3d 1162, 1169, the Court confirmed that joint custody requires:

> parents who: 1) have an ability to communicate with each other even though they are no longer married; 2) are mature enough to put aside their own differences; and 3) who work together and engage in joint discussions with each other and make joint decisions regarding the best interest of their children.

The burden rests on Husband to show the trial court abused its discretion in awarding Wife sole custody; otherwise, the trial court's determination on the issue is presumptively correct. *See Hoedebeck*, 1997 OK CIV APP 69, at ¶ 11, 948 P.2d at 1243.

¶20 Accordingly, we find no error. The trial court's conclusion that the minor children's best interests would be served by placing them with Mother is supported by the evidence. Further, the trial court's conclusion that joint custody was not a viable option is supported by both the evidence and case law. Husband's argument on appeal does not persuade this Court that the trial court abused its discretion on this issue. The trial court's decision is therefore affirmed.

¶21 **AFFIRMED**.

FISCHER, P.J., and THORNBRUGH, J., concur.

2019 OK CIV APP 62

KELLY R. MILLER, Plaintiff, vs. JOSEPH A. MAGNUS, LEE R. LINSENMEYER, III, and CENTRAL RURAL ELECTRIC COOPERATIVE, INC., an Oklahoma corporation, Defendants, GREGORY MEIER and KEN PRIVETT, P.L.C., Appellants, vs. MARTIN, JEAN & JACKSON Appellee.

Case No. 116,993. October 1, 2019

APPEAL FROM THE DISTRICT COURT OF PAYNE COUNTY, OKLAHOMA

HONORABLE PHILLIP CORLEY, TRIAL JUDGE

AFFIRMED

Gregory G. Meier, MEIER & ASSOCIATES, Tulsa, Oklahoma, for Appellants

Michael P. Martin, MARTIN, JEAN & JACKSON, Stillwater, Oklahoma, for Appellee

P. THOMAS THORNBRUGH, JUDGE:

¶1 The firm of Gregory Meier and Ken Privett, P.L.C. (Meier and Privett), appeal a decision by the district court apportioning 100 percent of a contingency fee to the firm of Martin, Jean & Jackson (MJ&J). On review, we find the district court acted within its discretion.

BACKGROUND

¶2 The district court made substantial findings of fact that we will use as the basis for this summary. On or about June 15, 2014, Plaintiff Miller was involved in a motor vehicle collision. Miller was injured by a truck driven by Joseph Magnus. Magnus was a 17 year-old high school student at the time, and was driving a truck pulling a trailer with a backhoe. Magnus swerved to avoid a truck owned by Central Rural Electric Cooperative (CREC) which was stopped in the roadway. In doing so, Magnus's truck crossed the centerline and collided with Miller's vehicle. On June 18, 2014, Miller entered into a contract with MJ&J to represent his interest in claims against the potential Defendants arising out of the colli-

sion. The contract provided MJ&J would be compensated under a 33 1/3 percent contingent fee on the gross amount recovered if this case was resolved before a lawsuit was filed, or 40 percent of the gross amount recovered if suit was filed.

¶3 Shortly after being retained, MJ&J initiated the claims process as to Magnus's parents' insurance and Miller's own insurer. MJ&J settled the property damage claim with the Magnuses' insurer. MJ&J did not charge a fee for settling the property damage claim. MJ&J submitted Miller's medical bills to his own insurer and obtained the medical payment of policy limits of $100,000.00, which was disbursed to Plaintiff. MJ&J negotiated with Miller's health insurance provider to waive its subrogation interest of $225,883 as to the medical payments coverage. No fee was charged to Miller for this work.

¶4 MJ&J obtained a policy limit offer of $250,000.00 from the Magnuses' insurer.[1] Miller did not wish to accept the offer at that time, and requested MJ&J to investigate whether Defendant Magnus had any collectable assets to pursue over the $250,000.00 policy limits. MJ&J arranged a recorded statement of Defendant Magnus and hired another investigator to investigate potential claims against the CREC driver, Lee Linsenmeyer, Ill and CREC. On January 21, 2015, MJ&J received a letter from Defendant Magnus's counsel reiterating the policy limit offer.

¶5 On February 11, 2015, Michael Martin of MJ&J had a meeting with Miller to discuss case status and strategy. Miller stated that he did not want to file a lawsuit at that time. On March 25, 2015, Martin sent Miller a letter asking Miller if he was ready to proceed on the potential claim against CREC. On April 11, 2015, Martin sent Miller a second letter asking Miller to call and discuss the best way to proceed on his case.

¶6 On April 23, 2015, Miller entered a second attorney client agreement and fee agreement with Meier and Privett,[2] but did not inform MJ&J until they received a letter from Miller terminating MJ&J as his counsel on May 7, 2015. On May 15, 2015, Gregory Meier also advised MJ&J that he had been retained by Plaintiff to continue his claims against Defendants. On May 19, 2015, MJ&J notified counsel for Magnus, Miller's new counsel, and the insurance claim representative that MJ&J claimed an attorney's lien.

¶7 On July 30, 2015, Meier and Privett filed a petition for negligence against Defendants Magnus, Linsenmeyer, and CREC.[3] Meier and Privett negotiated a compromise resolution of Aetna's health insurance lien claim from $400,000 down to $85,000 on behalf of Miller. They also achieved a release of hospital lien from St. Francis Health System and a release by the Warren Clinic. Miller then settled his case against Defendant Magnus for the previous policy limits offer of $250,000.00, and Magnus was subsequently dismissed from the lawsuit.[4] On January 22, 2016, MJ&J filed an attorney's lien with the Payne County clerk and filed a Notice of Lien.

¶8 On January 12, 2017, Miller filed a motion to strike and invalidate MJ&J's January 26, 2016, notice of attorney's lien. Through a series of procedural detours, this eventually evolved into a hearing on the allocation of attorney's fees generated by the $250,000 settlement with the Magnuses' insurer. MJ&J claimed that they were entitled to $83,333.33 in contingency fees (a 33 1/3 percent share of the $250,000) plus some expenses. Meier and Privett also claimed that they were entitled to $83,333.33 in contingency fees, and that MJ&J were entitled only to their expenses.

¶9 In a written order dated August 28, 2017, the district court found that MJ&J's lien was valid. It also found:

> . . . that MJ&J were discharged by Plaintiff Miller without cause. This court finds the amount settled by Plaintiff with Defendant Magnus was the same amount negotiated by MJ&J, the $250,000.00 policy limit. Based on *Martin v. Buckman* [1994 OK CIV APP 84], the court finds that MJ&J is entitled to their contingent fee amount of $84,555.15.

Meier and Privett filed a motion for new trial within 10 days, which was denied by the district court. Meier and Privett now appeal.

STANDARD OF REVIEW

¶10 "The reasonableness of attorney fees depends on the facts and circumstances of each individual case and is a question for the trier of fact." *Parsons v. Volkswagen of America, Inc.*, 2014 OK 111, ¶ 9, 341 P.3d 662. "The standard of review for considering the trial court's award of an attorney fee is abuse of discre-

tion." *Id*. "Reversal for an abuse of discretion occurs where the lower court ruling is without rational basis in the evidence or where it is based upon erroneous legal conclusions." *Id*.

ANALYSIS

¶11 The questions presented are these: 1) did MJ&J have a valid attorney's lien in this matter; and 2) if so, what portion, if any, of the result obtained should be attributed to Meier and Privett's work for contingency fee purposes?

I. THE MJ&J LIEN

¶12 Meier and Privett argue on appeal that MJ&J did not perfect a valid attorney's lien in this matter, and hence have no lien claim on the settlement funds for fee purposes. We find, however, no evident argument regarding liens in Meier and Privett's motion for new trial. The motion for new trial acts to limit the issues reviewed on appeal to those raised by that motion. *Onyekuru v. Farmers Ins. Co.*, 2000 OK 81, ¶ 4, 20 P.3d 812 (citing 12 O.S.2001 § 991(b); 6 Okla.Sup.Ct.R. 1.22(c)(1); and *City of Broken Arrow v. Bass Pro Outdoor World, L.L.C.*, 2011 OK 1, ¶ 11, 250 P.3d 305).[5]

II. THE APPORTIONMENT OF THE FEE

¶13 Meier and Privett argued in the district court that MJ&J could not recover fees because it had no attorney's lien. Therefore, they argued, they were entitled to a full 33 1/3 percent contingency fee of $83,333. As noted at n.5 of this Opinion, the lien question is immaterial. In its motion for a new trial, Meier and Privett argued that it was entitled to an apportionment of the fees generated by the $250,000 settlement.[6] The apportionment doctrine in such cases is set out in *Martin v. Buckman*, 1994 OK CIV APP 89, ¶ 42, 883 P.2d 185. The court should consider:

> (1) The amount of the settlement or judgment the discharged attorney had a reasonable possibility of realizing had she been permitted to continue in the case; (2) the nature and extent of the services she rendered within the scope of the contingent fee contract; and (3) the nature and extent of the services rendered by the second lawyer.

Martin further notes that:

> The proportionalization of each attorney's services, of course, is not to be evaluated on an hourly rate basis, but consideration should be given to the nature of the case, and the relative contribution of each attorney to the creation of the contingent fee fund with considerable emphasis on the first attorney's contractual share.

A. The Services Performed by Meier and Privett

¶14 Meier and Privett argue that they performed two services that contributed to "the creation of the contingent fee fund." The first was taking the deposition of Defendant Magnus. Meier and Privett argue that this was necessary because Miller did not believe his prior counsel's assurance that neither Magnus nor his parents had any worthwhile assets to collect beyond the liability insurance limits, and was reluctant to approve a settlement that would release Magnus. Meier and Privett eventually reached the same conclusion as MJ&J, that Magnus and his parents had no other significant reachable assets. Meier and Privett argue, however, that this deposition had a role in creating the contingent fee fund because *Miller would not have accepted the settlement without it*. The second act of Meier and Privett was to negotiate down the outstanding medical liens against the settlement, thereby increasing the amount Miller actually received from the settlements.

¶15 We sympathize with the difficulty presented to the trial court in this matter, because these theories do not appear to have been raised before in any reported apportionment case. Generally the work performed by the second firm in the reported apportionment cases clearly adds some value that was not there while the first firm had the case. In *Duffy v. Cope,* 2000 OK CIV APP 140, ¶ 10, 18 P.3d 366, by example, a $250,000 settlement offer was raised to $600,000 after the second firm worked the case. Meier and Privett cites *Sheffer v. Carolina Forge Co., LLC*, 2017 OK CIV APP 39, 401 P.3d 225, as instructive, but neither theory raised here was discussed in that case. In *Sheffer,* Plaintiff's third counsel, GLC, conducted a mediation that led to a settlement agreement for the sum of $610,000.00. The case makes no mention of any prior settlement offer by the defendant. The work done by GLC in *Sheffer* clearly contributed *new work* towards creation of the fee fund to be divided. Even so, the trial court awarded GLC only 25 percent of the available contractual fee, and COCA upheld this distribution.[7] We find no similar facts here.

1. The Deposition of Magnus

¶16 Meier and Privett argued in their motion for new trial that taking the deposition of Defendant Magnus contributed to the fee fund because Plaintiff Miller "demanded the deposition be taken" and would not settle without it. It also states that Miller would not settle without a determination that no other insurance coverage was available. Meier and Privett's appellate brief implies that Miller believed that Magnus may have been engaged in the business of an employer at the time of the accident (because he was pulling a trailer with a backhoe) or that Magnus' parents might have some other insurance or assets that might be reachable besides their $250,000 policy.

¶17 MJ&J testified that they had already received an affidavit from the Magnuses' insurer stating that no other coverage existed; that they had arranged a recorded statement of Defendant Magnus; and that their investigator had done an asset check regarding any assets of Magnus and his parents, produced a 96 page report; and found nothing worth pursuing. MJ&J argued that Meier and Privett essentially conducted the same investigation and reached the same conclusion, and MJ&J should not be penalized because their ex-client wished to control the method by which facts were established, or hire another firm to duplicate their work.

¶18 It is undisputed that Meier and Privett did not succeed in increasing the settlement fund offered by the Magnuses' insurer. Nor did they obtain any other apparent concession, such as not having to release Magnus as part of the settlement. Nor did they uncover any new facts or any other source of potential damages. The firm's sole contribution in this area was to *convince their client* that there was nothing more to be gained from Magnus and his parents. The question before us is whether this act constitutes a "proportional contribution to the creation of the fee fund to be divided." We find no existing case law remotely addressing this theory.[8]

¶19 Returning to the original factors stated by *Martin*, fees are apportioned based on the "relative contribution of each attorney to the creation of the contingent fee fund with considerable emphasis on the first attorney's contractual share." *Id.*, ¶ 42. We are doubtful that confirming the work of prior counsel for a skeptical client constitutes a contribution to the creation of a contingent fee. Meier and Privett's theory implies that a client could hire and fire, for example, four different counsel in sequence, simply because the *client* believes that each counsel has failed to discover a new source of potential damages, and all four firms may have a fee entitlement for confirming the same facts.

¶20 If any of these hypothetical firms *actually* discover potential new targets for suit, or new monetary sources to satisfy damages, they could certainly be said to have contributed to the creation of a contingent fee. But to split the first firm's fee among three others simply because they confirmed the first firm's analysis of available sources of damages appears both inequitable, and to set an unfortunate precedent. We find that making a second investigation that confirmed the results of MJ&J's investigation did not contribute to the creation of a contingent fee in this case, and does not require a fee allocation.

B. The Lien Reductions

¶21 Meier and Privett's next argument is that they negotiated down various medical liens which would otherwise have consumed the entire settlement, and this constitutes a contribution to the creation of the contingent fee fund. MJ&J argue that lien negotiations are a normal part of settling a case, and are not normally considered to contribute to the contingency fee amount in any way because the fee is based on the gross recovery from the tortfeasor, not on the amount the client eventually receives. We find it clear that MJ&J could not have claimed a 33 1/3 percent fee on the $250,000, and an additional fee for negotiating down the liens.

¶22 The question is, therefore, whether Meier and Privett can receive compensation for performing work that MJ&J would have performed without additional compensation. This question is evidently not addressed by any published case. *Assuming* that lien reductions do contribute to the creation of the contingent fee fund pursuant to *Martin*, equity suggests that such a recovery may be possible if some action of the second firm made it possible to negotiate a lien reduction the first firm could not have achieved. Meier and Privett argues in its brief that it did perform such an action. Page 8 of its brief-in-chief states that it was able to achieve the lien reductions because it had created the prospect of recovering additional funds through "additional litigation with other defendants that [MJ&J] had not pursued."

¶23 If correct, this claim could demonstrate that Meier and Privett had added some value to the case. The brief does not identify the "other defendants" that MJ&J had not pursued, but it is apparently referring to the utility, CREC, and its driver, Linsenmeyer. The district court found, however, that on March 25, 2015, MJ&J sent Miller a letter asking Miller if he was ready to proceed on the potential claim against CREC. On April 11, 2015, Martin sent Miller a second letter asking Miller to call and discuss the best way to proceed on his case, but Miller did not respond. The court's finding is clear that MJ&J did not decline to pursue CREC, but was prevented from doing so by its client.

¶24 As we noted previously, case law is scarce on this issue, and no case raises the theories that we have seen here. Although Meier and Privett clearly performed legitimate work on this case, we find no indication pursuant to the factors announced in *Martin*, that this work contributed to the establishment of the contingent fee fund.

CONCLUSION

¶25 Our standard of review is abuse of discretion and, pursuant to that standard, we find the district court acted within its discretion.

¶26 **AFFIRMED**.

REIF, S.J. (sitting by designation), and FISCHER, P.J., concur.

P. THOMAS THORNBRUGH, JUDGE:

1. Although not explicitly stated, it appears that Magnus was a covered driver under his parents' insurance policy, and had no personal policy.

2. For much of the record, the firm is referred to as "Meier and Associates" but it appears on appeal as "Gregory Meier and Ken Privett, P.L.C." We will use the term "Meier and Privett" throughout.

3. Magnus was never served, however.

4. The docket sheet in this case indicates that in January of 2019, after three and a half years of inconclusive litigation, Miller voluntarily dismissed his claims without prejudice as to the remaining defendants.

5. The argument is also irrelevant to any apportionment. A lien does not create the obligation of the client to pay the attorney. The attorney client contract creates this obligation. The lien decides priority, and also may make a payor liable if a lower priority claimant is paid without satisfying the prior lien. The question of the lien is also irrelevant in a contingency fee-fund apportionment proceeding. Apportionment is not based upon which firm has a priority lien or any lien at all.

6. Meier and Privett's motion for new trial appears to have been made on the grounds that a material change in the law occurred after submission for decision, in the form of *Sheffer v. Carolina Forge Co., LLC*, 2017 OK CIV APP 39, 401 P.3d 225. *Sheffer,* however, states the same apportionment doctrine and factors as *Martin v. Buckman*, 1994 OK CIV APP 89. It is not new authority.

7. There is a common misapprehension that occurs when citing cases decided under an abuse of discretion standard. Meier and Privett's citation implies that, because the *Sheffer* Court found 25 percent to be *within* the court's discretion, that *Sheffer* also holds that 0 percent would have been *outside* the court's discretion. This is not correct, even if the acts undertaken by Meier and Privett and GLC were substantively identical (which they are not). Two courts may reach opposite decisions based on the same facts, and still be within their discretionary powers.

8. The Meier and Privett contract also stated that "you [the client] are not liable to us for any attorney fees arising out of any prior settlement offer in the matter which may be claimed by any previous attorney you retained." No party raised the issue of whether this clause has any effect on Meier and Privett's right to recover a contingency on the $250,000 settlement that was offered before Miller changed counsel.

2019 OK CIV APP 63

EMMERY L. FREJO, Plaintiff/Appellant, vs. STATE of OKLAHOMA, ex rel., DEPARTMENT of PUBLIC SAFETY, Defendant/Appellee.

Case No. 117,050. February 15, 2019

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE JAMES B. CROY, TRIAL JUDGE

AFFIRMED

Nicholas Lee, Norman, Oklahoma, for Appellant,

Megan Simpson, Oklahoma City, Oklahoma, for Appellee.

Larry Joplin, Presiding Judge:

¶1 Appellant, Emmery Frejo, appeals the order revoking her driver's license, issued by the district court on April 24, 2018 for driving under the influence (DUI) on October 13, 2017. Appellant Frejo asserts four propositions of error in her appeal. First, she asserts the Department of Public Safety (DPS) filed an amended order on the eve of Appellant's April 24, 2018 appeal hearing before the district court (order dated April 23, 2018) that provided a different basis on which to revoke her driver's license from that which was indicated in the March 12, 2018 final order from DPS. Appellant's second proposition asserts she was not granted a speedy trial within the sixty (60) day guideline provided in *Nichols v. Dep't of Public Safety*, 2017 OK 20, 392 P.3d 692. Appellant's third proposition asserts DPS failed to conduct the testing on Appellant's breath specimens in accordance with Board of Tests rules and on properly maintained and approved equipment. Appellant's fourth proposition of error asserts the equipment used for the bench checks performed on the breathalyser equipment was not approved by the Board of Tests and therefore violated the Board of Tests rules.

¶2 The right to appeal to the district court from a denial of driving privileges resulting from implied consent revocations is provided for in 47 O.S. Supp.2011 §6-211 and the district court's review of the agency's order is *de novo. Appeal of Dungan*, 1984 OK 21, 681 P.2d 750, 752.[1]

¶3 Appellant was driving shortly before midnight on October 13, 2017 when a highway patrol officer observed her failure to stay in a single lane of traffic and she struck the curb, after which the officer stopped Appellant's vehicle. When the officer stopped the car, he noted the smell of alcohol and asked Appellant to exit the car so that he might determine if the alcohol odor was coming from Appellant or her passenger. The officer testified he believed the smell of alcohol was noticeable on Appellant when she was out of the car and he proceeded to conduct several field sobriety tests as a result, noting multiple signs of intoxication with each of the tests.

¶4 The officer transported Appellant to the Oklahoma County Jail to conduct a breathalyser test using the Intoxilyzer 8000 located at the jail. The officer was trained to operate the machine and received a permit after his training, which was up to date at the time he conducted Appellant's breath tests. Appellant had a twenty-four (24) minute period of "deprivation" prior to the breath tests. The two breath samples taken within four (4) minutes of each other both resulted in readings of .20.

¶5 On October 16, 2017, Appellant requested an administrative hearing. The hearing was set for December 4, 2017. DPS continued the hearing without explanation and it was later set for January 23, 2018, outside the sixty (60) day guideline provided for in *Nichols v. State ex rel. Dep't of Public Safety,* 2017 OK 20, ¶29, 392 P.3d at 698.

¶6 The January 23, 2018 hearing resulted in a revocation order dated March 12, 2018, which stated Appellant "refused to submit to a chemical test after being requested to do so." From this March 12, 2018 order Appellant appealed to the district court. The appeal before the district court was set for April 24, 2018. On April 23, 2018, DPS filed an "amended order" stating Appellant's license was being revoked due to test results showing "an alcohol concentration of 0.08 or more and said test was taken within two hours of the arrest[.]" At the hearing the next day, Appellant objected to the eleventh hour amendment of the March order from which she had appealed. The court overruled the objection and proceeded with the hearing using the amended April 23, 2018 order which set forth a different basis for Appellant's license revocation. The district court issued the appealed from order on April 24, 2018 sustaining the revocation of Appellant's driving privileges and permitting issuance of a modified driver's license with the operation of an ignition interlock device. From this order Appellant brings the instant appeal.

¶7 Appellant's first proposition of error asserts the district court erred when it overruled her objection to the Department's April 23, 2018 filing of an amended order. The appeal of a DPS license revocation to the district court is provided for in 47 O.S. Supp.2011 §6-211. DPS argues there was no harm caused to Appellant by virtue of the April amendment to the March order.

¶8 The Oklahoma Supreme Court has determined that a driver's claim to a driver's license is a protectable property interest and is subject to due process guarantees. *Trusty v. State ex rel. Dep't of Public Safety,* 2016 OK 94, ¶12, 381 P.3d 726, 731. At the same time, the Oklahoma Supreme Court has held "that an order granting or refusing an application for continuance would not be reversed on appeal unless it was clear that there was an abuse of discretion." *Riley v. Lindley,* 1946 OK 27, 165 P.2d 633, 634; 12 O.S. 2001 §667.

¶9 We agree with Appellant that there was not an order implicating her test results until the April 23, 2018 amended order was filed. However, Appellant had knowledge of the events the night of her arrest, she was aware she participated in the breath tests, and Appellant had previously defended the revocation on the basis of the elevated tests at the agency hearing on January 23, 2018. In addition, Appellant does not provide a record of how her defense would have been impacted, she does not elaborate regarding additional witnesses which she was not able to call due to being denied a continuance, nor does she explain whether her questioning of the highway patrol officer would have been different had she been given additional time to prepare. *Keener Oil & Gas v. Bushong*, 1936 OK 147, 56 P.2d 819 (absent showing by the defendant of a necessity to properly present its defense, court's denial of motion for continuance was not in error). Under the circumstances of this case, we do not find the trial court abused its discretion when

it denied Appellant's request for a continuance and required her to proceed at the district court appeal under the terms of the amended order.

¶10 Appellant's second proposition of error asserts she was denied a right to a speedy trial because her administrative hearing was not conducted within sixty (60) days. In *Nichols v. Dep't of Public Safety,* 2017 OK 20, ¶29, 392 P.3d at 698, the Oklahoma Supreme Court found the Department of Public Safety hearing should be held within sixty (60) days of the Department's receipt of notice of the driver's hearing request.

> There is no question that the issue of whether revocation proceedings are taking place in a timely manner is one of increasing concern. At least three Court of Civil Appeals cases have addressed the issue. *It is also impossible for strict rules to exist which will govern the issue in all causes, as facts will vary largely.* Nevertheless, we find it necessary to give some guidance to the Department to assist it in determining a time frame in which it can avoid being subject to claims of violating the constitutional right to a speedy jury trial.
>
> The Department should give notice of revocation in a timely manner. Notice should be given within ten (10) days after receipt of blood tests when the arresting officer will be available to testify. If the officer is not able to appear when test results are received, notice should be given immediately upon the officer being made available to testify. Thereafter, *if the driver requests a hearing, the proceeding should be held within sixty (60) days of the Department's receipt of notice. Where these time frames are followed, the delay, absent extenuating circumstances, should not be found to weigh against the Department.*

Nichols, 2017 OK, 20, ¶¶28-29, 392 P.3d at 698 (emphasis added).

¶11 Without explanation, DPS continued Appellant's scheduled December 4, 2017 agency hearing to January 23, 2018. As a result, the hearing was outside the sixty (60) day guideline provided for in the *Nichols* case. It became apparent at the January 23rd proceeding that the officer had a conflict with the court date due to a sick child. Appellant concedes in her appellate brief that taking care of a sick child is an "extenuating circumstance" as described in *Nichols.* However, she asserts there was still ample time to set the hearing on or before December 22, 2017, which would have been the sixtieth day from her request for hearing. DPS argues getting the hearing reset within the sixty-day period was not practical in view of the notices DPS was required to give, the officer's availability and the condensed holiday schedule.

¶12 *Nichols* states the sixty days is a guideline and not a strict rule. *Id.* And Appellant conceded the officer's inability to be at the December 4th hearing date was an "extenuating circumstance." In view of the rule not being strict, the officer's inability to be at the hearing as it was originally scheduled, the holiday scheduling issues and the fact the hearing was scheduled the next month in January, we decline to find the January 23, 2018 hearing violated Appellant's right to a speedy trial.

¶13 Appellant's third proposition of error asserts Appellant's breath specimens were not done in compliance with Board of Tests for Alcohol and Drug Influence (Board or the Board) rules. Specifically, Appellant asserts her breath tests were done by a dry gas reference method and DPS provided no witness or evidentiary material to establish that the I-8000 machine used to analyze Appellant's breath specimens contained a required nitrogen-ethanol dry gas reference method. O.A.C. 40:30-1-3(e).[2] Alternatively, Appellant argues DPS could have presented evidence the dry canister used contained a manufacturer's label with a .08 target value and DPS failed this as well. O.A.C. 40:25-1-3.[3]

¶14 DPS argues O.A.C. 40:25-1-3 permits use of "*[a]ny* pressurized dry gas canister labeled by the manufacturer with a target value of 0.080 BAC, 2% or .002" and exhibit 5 lists the ethanol/nitrogen components for the canisters and the air test results indicating compliance with the .08 target value. O.A.C. 40:25-1-3(a) (emphasis added). DPS also argues Appellant's reliance on the maintenance provisions of O.A.C. 40:30-1-3(e) is misplaced, because this provision states when maintenance is done, while the approval for the canisters themselves is outlined in O.A.C. 40:25-1-3. Upon the record provided, including exhibit 5, we find no relief is available on this proposition of error.

¶15 Appellant's fourth proposition of error asserts the maintenance procedures followed for the I-8000 machine that conducted her breath analysis included the use of equipment and devices not approved by the Board, therefore violating both Board rules and state law.

Appellant states the maintenance test on the device at issue used a simulator and simulator solutions and there is no Board rule approving simulators or simulator solutions, citing *Sample v. State ex rel. Dep't of Public Safety*, 2016 OK CIV APP 62, 382 P.3d 505.

¶16 *Sample,* 2016 OK CIV APP 62, ¶6, 382 P.3d 505, 508-09, reiterated that Board of Tests rules and regulations require adoption pursuant to the APA (Administrative Procedures Act) and not approval by resolution. However, Appellant does not allege the maintenance rules for the device at issue were passed by resolution. In addition, *Sample* did not address simulators or sample solutions to test equipment operation. As a result, *Sample* does not appear to have broad application in this case.

¶17 This court has previously held the following with respect to the maintenance record of the breath analysis device:

> Both federal and state courts recognize that a breathalyzer maintenance record, when kept as required by law, constitutes admissible evidence of a properly maintained device within the "public records" exception to the hearsay rule of F.R.E. 803 (8), and adopted in the various states. *Wilmer,* 799 F.2d at 501; *DeWater*, 846 F.2d at 529; *Wilkinson*, 804 F.Supp. at 267; Frost, 487 N.W.2d at 11. And, *Derrick* concedes that compliance with the rules and regulations for the maintenance and operation of breathalyzers may be shown otherwise than by the direct testimony of the maintenance supervisor. *Westerman,* 1974 OK CR 151, ¶ 11, 525 P.2d at 1362.
>
> Under these circumstances, we hold a breathalyzer maintenance log is admissible under the [12 O.S.]§ 2803(8) public records exception to the hearsay rule. Further, because a public record carries with it the imprimatur of compliance with the requirements for its keeping, we hold that a breathalyzer maintenance log is admissible as prima facie evidence of compliance with the rules and regulations for the proper operation and maintenance of breathalyzers, even absent the testimony of the maintenance supervisor, particularly where, as here, there is absolutely no evidence of any kind suggesting otherwise than a properly administered breath test on a properly maintained and operating breath testing device.

Derrick v. State ex rel. Dep't of Public Safety, 2007 OK CIV APP 56, ¶¶13-14, 164 P.3d 250, 254.

¶18 The record indicates Appellant's breath tests were properly done on a properly maintained and operating testing device. For this reason, we do not find relief is warranted on this proposition of error. The order of the trial court sustaining the revocation of Appellant's driver's license is AFFIRMED.

GOREE, C.J., and BUETTNER, J., concur.

Larry Joplin, Presiding Judge:

1. *Appeal of Dungan,* 1984 OK 21, 681 P.2d 750, 752 (emphasis added):
   > From the hearing examiner's sustention of the revocation order the appellant appealed to the District Court of Canadian County pursuant to 47 O.S.1981, § 6-211. Appeals from implied consent revocation orders are heard *de novo* in the district court, with the "trial *de novo*" being a trial of the entire case anew, both on the law and on the facts. *Matter of Braddy,* 611 P.2d 235 (Okl.1980).
2. O.A.C. 40:30-1-3(e):
   > (e) Maintenance. Maintenance shall be performed on the CMI 8000 Intoxilyzer, equipped with nitrogen-ethanol dry gas mixture, at such time as the regulator of the nitrogen-ethanol pressurized dry gas cannister fails to provide a gas sample for analysis or by the manufacturers stated expiration date, whichever occurs first. Such maintenance shall be performed by Board personnel, according to the procedure(s) prescribed by the State Director of Tests for Alcohol and Drug Influence.
3. O.A.C. 40:25-1-3. Approved dry gas canisters:
   > (a) Any pressurized dry gas canister labeled by the manufacturer with a target value of 0.080 BAC, 2% or .002, whichever is greater, is hereby approved for use in association with approved evidential breath alcohol measurement devices.
   > (b) The State Director of Tests, in accordance with the needs of the agency, may deploy dry gas canisters approved by this section for the purpose of performing calibration checks of approved evidential breath alcohol measurement devices.
   > (c) The State Director of Tests shall maintain a list of the dry gas canisters approved by this section that have been deployed by the agency.

2019 OK CIV APP 64

MERITOR, INC., Petitioner/Appellant, and TEXTRON, INC., Petitioner, vs. STATE OF OKLAHOMA, *ex rel.* BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA, Respondent, and STATE OF MISSISSIPPI, Intervenor/Appellee.

Case No. 117,498. September 27, 2019

APPEAL FROM THE DISTRICT COURT OF CLEVELAND COUNTY, OKLAHOMA

HONORABLE MICHAEL D. TUPPER, JUDGE

REVERSED AND REMANDED WITH DIRECTIONS

Sanford C. Coats, Melanie Wilson Rughani, CROWE & DUNLEVY, Oklahoma City, Oklahoma, for Petitioner/Appellant,

Stephanie Theban, RIGGS ABNEY, NEAL, TURPEN, ORBISON & LEWIS, Tulsa, Oklahoma, and

Marquette Wolf, TED D. LYON & ASSOCIATES, Mesquite, Texas, for Intervenor/Appellee.

Kenneth L. Buettner, Judge:

¶1 Petitioner/Appellant Meritor, Inc., appeals the denial of its request for a permanent injunction barring Respondent State of Oklahoma, ex rel. Board of Regents of the University of Oklahoma (OU) from releasing certain documents in response to a request filed under the Oklahoma Open Records Act (OORA or the Act). Meritor was a defendant in several suits for groundwater contamination in Mississippi federal and state courts. In preparing its defense to those actions, Meritor's counsel retained a non-testifying consulting expert who had water samples relevant to the litigation analyzed by an OU lab. An attorney representing some of the plaintiffs in the Mississippi actions sought to obtain the OU lab results ("the records") via an OORA request. After OU indicated it would release the records absent a court order barring their release, Meritor unsuccessfully sought a permanent injunction against OU. On *de novo* review of the question of law presented, we find the records sought are exempt from disclosure under OORA on two bases. As a matter of first impression in Oklahoma, we adopt the United States Supreme Court's holding that matters which are "normally or routinely privileged" come within the Act's evidentiary privilege exemption. The records at issue here are work product of an undisclosed, non-testifying expert, which is normally and routinely privileged and therefore exempt from disclosure under the Act. Additionally, the records fall within the Act's research results exemption. We reverse the trial court's order denying Meritor's request for a permanent injunction and remand with directions to the trial court to enter a permanent injunction barring release of the records at issue in this case.

¶2 Meritor filed its Petition seeking an injunction against OU August 24, 2018. It asserted that in 2016, ten plaintiffs had sued it and Petitioner Textron, Inc. in federal court in Mississippi for property damage.[1] Meritor asserted that in preparing its defense in the Mississippi cases, it retained a consulting expert to conduct compound specific isotope analysis (CSIA) on groundwater in the subject property. The consulting expert hired scientists in the Isotope Lab in the Geology and Geophysics Department of OU to perform the analysis. Meritor further asserted it had elected not to use or disclose the consulting expert nor to use the CSIA results in the litigation. Meritor alleged it therefore did not disclose the expert or the results from the OU lab to anyone, including any testifying expert in the Mississippi actions. Meritor alleged it had asserted the consulting expert privilege when the Mississippi plaintiffs sought production of CSIA results in that case.

¶3 Meritor next asserted the Mississippi plaintiffs' counsel, Marquette Wolf, had made an OORA request to its consulting expert's subcontractor, the lab at OU, seeking records relating to "any and all groundwater sampling for CSIA . . . analyses on Chlorinated Ethenes in Grenada, Mississippi . . . Entities involved included Ramboll, T&M, and Thompson Hine."[2] Meritor alleged the documents sought in the OORA request were privileged and not records as defined by the OORA. Meritor asserted OU had indicated that records protected by an evidentiary privilege are not considered records under OORA, but that unless prevented by a court order, it intended to produce the requested materials. Meritor asserted claims for a temporary injunction and for violation of OORA.

¶4 On the same day, Meritor filed a Motion for Temporary Restraining Order and Temporary and Permanent Injunction, in which it asserted it would be irreparably harmed if OU disclosed the records. Following a brief hearing, the trial court entered a Temporary Restraining Order barring release of the records August 24, 2018. On August 23, 2018, Meritor and Marquette Wolf participated in a telephonic hearing with a Federal Magistrate in Mississippi, in which Meritor sought an order from that court barring Marquette Wolf from receiving the records. In its Order, the magistrate determined that in the August 23, 2018 telephonic hearing, Meritor had not presented evidence to show the records were privileged. Notably, the magistrate did not make a finding that the records were not privileged, but instead concluded that the question whether the records could be used in the Mississippi Federal Court was left to the parties and the Federal District Judge presiding there.[3]

¶5 Mississippi Attorney General Jim Hood filed motions to intervene and to dissolve the TRO and an objection to Meritor's request for a permanent injunction August 29, 2018.[4] Inter-

venor argued that OU was required to release the records because the judge in the Mississippi federal case ruled they were not privileged. Meritor did not object to Mississippi's request to intervene.

¶6 OU answered Meritor's Petition September 13, 2018, and denied it had violated the OORA in stating its intent to release the records.

¶7 Hearing on Meritor's motion for a permanent injunction and on Intervenor's motion to dissolve the temporary restraining order was held September 26, 2018. The trial court entered its Order October 1, 2018, in which it found the records are public records, that Meritor created its own problem by having the testing performed at a public institution and thereby voluntarily causing the records to be part of the public domain, that the records are of significant interest to the State of Mississippi, and that Meritor had failed to show that the records were confidential and privileged. The court held that the records created by OU are not subject to the consulting expert or work product privileges, and that Meritor had failed to prove any proprietary interest in the records. The trial court therefore dissolved the temporary restraining order, denied Meritor's motion for permanent injunction, and directed that the records were subject to disclosure under OORA. On motion of Meritor, the trial court stayed its ruling pending appeal.

¶8 Meritor now appeals the denial of its request for a permanent injunction against disclosure of the records.

> As an equitable matter, "[i]njunction is an extraordinary remedy and relief by this means should not be granted lightly." . . . We review the grant or denial of an injunction to determine whether the trial court abused its discretion in making its decision. . . . *"Under an abuse of discretion standard, the appellate court examines the evidence in the record and reverses only if the trial court's decision is clearly against the evidence or is contrary to a governing principle of law. . . ."*

Autry v. Acosta, Inc., 2018 OK CIV APP 8, ¶24, 410 P.3d 1017 (emphasis supplied; citations omitted). The general rule in equitable actions is the appellate court may modify the judgment to render the judgment the trial court should have. *Malnar v. Whitfield*, 1985 OK 82, ¶5, 708 P.2d 1093. The basic facts alleged in Meritor's Petition are not disputed. The first impression question of law presented is whether the Act requires or allows disclosure of public records where those records were created for an undisclosed, retained expert witness hired by attorneys in preparation for litigation. We review questions of law *de novo*, in which we have "plenary independent and non-deferential authority to reexamine a trial court's legal rulings." *Kluver v. Weatherford Hosp. Auth.*, 1993 OK 85, ¶14, 859 P.2d 1081, 1084. Necessarily this rule includes questions of law on the application of OORA to undisputed facts. *County Records, Inc. v. Armstrong*, 2012 OK 60, ¶6, 299 P.3d 865.

¶9 The first provision of OORA sets out the policy goal of the Act:

> As the Oklahoma Constitution recognizes and guarantees, all political power is inherent in the people. Thus, *it is the public policy of the State of Oklahoma that the people are vested with the inherent right to know and be fully informed about their government.*

51 O.S.2011 §24A.2 (emphasis supplied). The Act's expressed purpose "is to ensure and facilitate the public's right of access to and review of government records so they may efficiently and intelligently exercise their inherent political power."[5] *Id.*

¶10 Meritor first argues that the CSIA test results are not "records" as defined by the Act and therefore are not subject to public disclosure.[6] For this argument, Meritor relies on *Farrimond v. State ex rel. Fisher,* 2000 OK 52, 8 P.3d 872. In *Farrimond*, the Oklahoma Insurance Commissioner was appointed as receiver for an insurance company and in that role took possession of the insurance company's records. The plaintiff in *Farrimond* made an OORA request seeking disclosure of the insurance company's records in possession of the Commissioner. The trial court ordered disclosure. On appeal, the Oklahoma Supreme Court found that although the company's records were in possession of a public official, they did not come into public possession "in connection with the transaction of public business, the expenditure of public funds or the administering of public property," as required by the Act. *Id.* at ¶12. The court relied on the Oklahoma Insurance Code provision that where a company has been placed under receivership, the receiver takes possession and title to the company's records by court order, so that "receivership property is in possession of the court, the receiver is the representative of the court,

and the right of the receiver to receivership property is derived from the entity which has been placed in receivership." *Id.* at ¶15, citing *Norman v. Trison Development Corp.*, 1992 OK 67, ¶7, 832 P.2d 6. The court further explained that in insurance receivership cases, "the Insurance Commissioner administers not public property but the property of the failed insurer and he does so under the direction of the district court." 2000 OK 52 at ¶20.

¶11 Meritor contends this case is analogous to *Farrimond* because here a private company submitted its own groundwater samples to be tested by a lab at OU. Plainly OU did more than simply receive and hold the samples.[7] The OU lab conducted specifically requested tests and reported the results to Meritor's consulting expert. Additionally, OU did not hold the materials pursuant to court order or a particular statute, as the Commissioner did in *Farrimond.* Because we find Meritor is entitled to relief based on exemptions, whether or not the documents at issue are records as defined by the Act is not decided.

¶12 Meritor next contends the records may not be disclosed because they are privileged work product. Meritor bears the burden of showing material it submitted to a public body is protected by a privilege:

> The privacy interests of individuals are adequately protected in the specific exceptions to the Oklahoma Open Records Act or in the statutes which authorize, create or require the records. *Except where specific state or federal statutes create a confidential privilege, persons who submit information to public bodies have no right to keep this information from public access nor reasonable expectation that this information will be kept from public access; provided, the person,* agency or political subdivision shall at all times bear the burden of establishing such records are protected by such a confidential privilege.

51 O.S.2011 §24A.2 (emphasis supplied).[8] Meritor presented testimony from one of its attorneys, Timothy Coughlin, who testified that in preparation for the litigation in Mississippi, Meritor hired Laurie LaPat-Polasko, a scientist employed by Ramboll Corporation, as a non-testifying retained expert witness.[9] As such, Meritor was not required to disclose LaPat-Polasko or her opinions during discovery. Fed. Rules of Civ. Proc. Rule 26(b). Intervenor does not dispute this fact. Intervenor also appears to concede that a sub-contractor of LaPat-Polasko would not be discoverable on the same basis, by arguing that Meritor could have kept the test results secret simply by "being careful" to ask its retained expert to have the testing done in a private lab and that Meritor created its own problem by having the CSIA testing done in a public lab. This assertion amounts to an admission that the results would be privileged in the Mississippi litigation. Intervenor argued at the hearing and on appeal, without authority, that Meritor was required to present a written confidentiality agreement with OU to meet its burden of proving the records are privileged. Intervenor also convinced the trial court that the Mississippi Magistrate found that the records are not privileged. We have explained above that the Magistrate's Order found only that Meritor did not present sufficient evidence of privilege at that telephonic hearing.[10]

¶13 In the September 26 hearing, Intervenor presented testimony only from Sharon Hsieh, OU's open records officer. Meritor presented the testimony of Coughlin and Devin Rowe. Coughlin testified that his firm, as counsel for Meritor, and another law firm representing Textron in the Mississippi litigation, hired LaPat-Polasko and her assistant, Rowe, as consulting experts to do CSIA testing. Coughlin testified LaPat-Polasko and Rowe were never identified as testifying experts, although two other Ramboll employees were identified as testifying experts. Coughlin explained that Mr. Peeples, a non-retained testifying expert, was employed by T&M, Meritor's remediation consultant in Mississippi. Coughlin testified T&M drew the water samples from wells and those samples were used by LaPat-Polasko and Rowe for testing. Coughlin knew that LaPat-Polasko intended to have the testing done at OU. Coughlin testified OU billed LaPat-Polasko and after she had arranged for payment, Meritor paid LaPat-Polasko. Coughlin testified that the OU analysis results had been seen only by LaPat-Polasko, Rowe, and the lawyers. Coughlin also testified the results had not been seen by Mr. Peeples, its testifying expert. In response to the question why he knew no one else had seen the results, Coughlin explained:

> We engaged Ms. LaPat(-Polasko) as a consulting expert, and we made that specifically clear. We also made specifically clear the issues of confidentiality and the proprietary nature of the engagement. And because of the work that we're asking to be done, we

made sure that she was walled off and her work was walled off from others.

Coughlin testified no court had ordered Meritor to disclose the CSIA results. Coughlin testified there was not a written contract with OU scientist Dr. Kuder but that he was engaged to do the testing, he completed the testing, and he billed LaPat-Polasko, so that there was an oral agreement.

¶14 Devin Rowe testified he is an employee of Ramboll who assisted LaPat-Polasko in interpreting the CSIA data. Rowe testified he recommended LaPat-Polasko use Dr. Kuder at OU because Rowe had previously used that lab, Rowe knew that only a few labs are able to produce quality data of the type sought, and Rowe considered the OU lab to be the best. Rowe testified he kept no records of this project, but rather he "would review things and prepare stuff and send it to" LaPat-Polasko because it was understood they were keeping the records confidential. Rowe testified Ramboll retained the OU lab as a subcontractor. Rowe testified his only contact in the lab was Dr. Kuder and that it was Dr. Kuder who alerted him when he received Wolf's OORA request. Rowe testified he "consider(ed) our data to be our own proprietary data that's owned by the client who commissioned us to do the work. It's highly unusual for anybody else to see the data."

¶15 This undisputed testimony shows facts known by or opinions held by LaPat-Polasko were not discoverable and were therefore privileged.

> Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:
>
> (i) as provided in Rule 35(b); or
>
> (ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

Fed.R.Civ.Pro. Rule 26(b)(4)(D).[11] In the federal case involving these parties, the U.S. District Judge made the following findings, regarding Mr. Peeples, in a discovery order:

> The Court has reviewed the text and the comments to Rule 26(b)(4) and has found nothing which suggests the rule was intended to alter traditional rules of agency which allow an agent to act on behalf of a principal. Accordingly, the Court is inclined to believe that a consulting expert may, under some circumstances, act as an agent in hiring a contractor to perform certain work in anticipation of litigation and that under such circumstances, the contractor would be deemed a consulting expert under Rule 26(b)(4)(D).

Cooper v. Meritor, Inc., 2018 WL 2223325 (N.D. Miss., May 15, 2018). Intervenor argues the records are not privileged solely because they were created at a public institution in the absence of a written confidentiality agreement. Intervenor has not argued on appeal that the records are not privileged because OU was a subcontractor hired by an undisclosed retained expert.[12]

¶16 In other words, according to Intervenor, the only reason he or Wolf could obtain the records is because the testing was done at a public lab.[13] This suggests that Wolf and Intervenor are using OORA to circumvent the Discovery Rules.[14] The United States Supreme Court has explained that open records acts are not intended to replace the discovery rules. *See U.S. v. Weber Aircraft Corp.*, 465 U.S. 792, 801-802, 104 S.Ct. 1488, 1494, 79 L.Ed.2d 814 (1984) ("Moreover, respondents' contention that they can obtain through the FOIA material that is normally privileged would create an anomaly in that the FOIA could be used to supplement civil discovery. We have consistently rejected such a construction of the FOIA. . . . We do not think that Congress could have intended that the weighty policies underlying discovery privileges could be so easily circumvented.") We have found no Oklahoma authority addressing this precise issue. The United States Supreme Court has addressed this issue in several cases.

¶17 In *F.T.C. v. Grolier Inc.*, 462 U.S. 19, 103 S.Ct. 2209, 76 L.Ed.2d 387 (1983), the Federal Trade Commission had investigated a company as part of a civil penalty action filed by the Justice Department. The suit was later dismissed. Two years later, Grolier, the parent company of the investigated company, filed an FOIA request with the FTC seeking documents related to the investigation of its subsidiary. The FTC declined the request based on FOIA's

Exemption 5, which provides that FOIA does not require disclosure of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency, . . . " *See* 5 U.S.C. §552(b)(5). Grolier appealed the FTC's administrative decision. The U.S. District Court affirmed, finding that the documents in dispute were either attorney work-product, attorney-client communications, or internal pre-decisional agency material. The Court of Appeals found that the documents which were withheld on the basis of the work-product rule were not exempt under FOIA unless the FTC could show that litigation related to the terminated action exists or potentially exists. The Court of Appeals held that FOIA's Exemption 5 was co-extensive with the work-product privilege under the Federal Rules of Civil Procedure and concluded that "a requirement that documents must be disclosed in the absence of the existence or potential existence of related litigation . . . best comported with the fact that the work-product privilege is a qualified one." 462 U.S. at 22-23. The FTC then sought certiorari.

¶18 The Supreme Court agreed that the documents at issue were work-product and that Congress had enacted Exemption 5 with the work-product privilege in mind. *Id.* at 23. After explaining the development of the work-product rule in discovery, the court noted that at the time FOIA was enacted, there was no consensus on the temporal scope of the work-product rule. *Id.* at 24-25. The court noted the test for applying Exemption 5 had been widely held to be whether the requested documents "would be 'routinely' or 'normally' disclosed upon a showing of relevance." *Id.* at 26. Additionally, the court noted that the work-product privilege had been widely held to apply to materials after termination of the litigation for which they were prepared, regardless of whether related litigation was pending or planned. *Id.* The court also noted its own previous holding that "Exemption 5 incorporates the privileges which the Government enjoys under the relevant statutory and case law in the pretrial discovery context." *Id.* at 26-27 (emphasis in original). The court found therefore that it could not be said that work-product materials are routinely available in subsequent litigation. *Id.* The court then explained that although the work-product rule has been held to be qualified, that was not relevant for purposes of deciding whether materials are privileged under Exemption 5 of the FOIA. The court explained:

> It makes little difference whether a privilege is absolute or qualified in determining how it translates into a discrete category of documents that Congress intended to exempt from disclosure under Exemption 5. Whether its immunity from discovery is absolute or qualified, a protected document cannot be said to be subject to "routine" disclosure.
>
> Under the current state of the law relating to the privilege, work-product materials are immune from discovery unless the one seeking discovery can show substantial need in connection with subsequent litigation. Such materials are thus not "routinely" or "normally" available to parties in litigation and hence are exempt under Exemption 5.

Id. at 27. The court further found that *even though the materials sought by Grolier had been ordered to be disclosed in the previous litigation, they still were exempt from disclosure under FOIA Exemption 5 because a prior disclosure under order based on need does not show that such materials are "routinely" discoverable. Id.* at 28 (emphasis supplied). The court explained "(t)he logical result of respondent's position is that whenever work-product documents would be discoverable in any particular litigation, they must be disclosed to anyone under the FOIA." *Id.*

¶19 The court relied on its previous holding that Exemption 5 exempts only those documents normally privileged in the civil discovery context. *Id.* citing *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 95 S.Ct. 1504, 1515, 44 L.Ed.2d 29 (1975). The court concluded that "under Exemption 5, attorney work-product is exempt from mandatory disclosure without regard to the status of the litigation for which it was prepared. Only by construing the exemption to provide a categorical rule can the Act's purpose of expediting disclosure by means of workable rules be furthered." *Id.*

¶20 Although the *Grolier* court decided application of the work-product privilege in the context of Exemption 5 of FOIA, we find its analysis persuasive in our application of the privilege exemption in OORA, in the absence of Oklahoma authority on this question. OORA plainly exempts from disclosure information submitted to a public entity so long as it is covered by a specific federal or state privilege. As noted above, Rule 26 of the Federal Rules of Civil Procedure expressly affords a privilege

from discovery to retained non-testifying experts and materials they create.[15]

¶21 The rationale for this rule is simple: if something is routinely of the type that it would be privileged, it is for the court in which the materials would or would not be discoverable to decide, rather than a public body or court ruling on an open records request. If the documents are found to be privileged, they are privileged whether or not they are public records and a denial of an open records request on this basis avoids inadvertent disclosure of privileged matter. Of course if materials are not privileged, they are discoverable from the litigant possessing them and therefore no open records proceeding is necessary. This rule avoids the exact issue in this case, which is an Oklahoma court attempting to decide whether records were privileged from discovery in cases pending in two forums in another state. The only question an agency or court in Oklahoma needs to resolve in ruling on a claim that public records are privileged is whether those records are of a type that is routinely privileged. Work-product is routinely privileged pursuant to federal and state law and the records in this case are therefore exempt from disclosure.[16]

¶22 Meritor's final argument on appeal is that the records are exempt from disclosure under the research exemption of the Act. Intervenor contends Meritor failed to assert this argument below and therefore waived it, but we agree with Meritor that it did raise this issue in the September 26 hearing on its request for a permanent injunction. The records sought are undisputably research results in which Meritor's counsel has a proprietary interest and the records therefore come within that exemption.[17] Accordingly, we hold the trial court abused its discretion in denying Meritor's request for an injunction on this basis.

¶23 Based on our application of the OORA exemptions to the records in this case, we find Meritor proved by clear and convincing evidence that it was entitled to injunctive relief.

> A party must prove the following to obtain an injunction: "1) the likelihood of success on the merits; 2) irreparable harm to the party seeking injunction relief if the injunction is denied; 3) his threatened injury outweighs the injury the opposing party will suffer under the injunction; and 4) the injunction is in the public interest." . . . The party seeking an injunction must establish the right to injunctive relief "by clear and convincing evidence and the nature of the injury must not be nominal, theoretical or speculative."

Autry, supra, 2018 OK CIV APP 8, at ¶34 (citation omitted). As found by the Federal Magistrate in the August 28, 2018 Order, the question whether the records may be discoverable in litigation in those cases is left to the parties and the courts there. But the risk that Intervenor is attempting to circumvent the discovery rules with an OORA request, for records it admits would not be discoverable had Meritor used a private lab, requires our finding that Meritor is entitled to a permanent injunction barring OU from disclosing the records at issue here. Accordingly, the trial court's order denying that relief is REVERSED AND REMANDED WITH DIRECTIONS to enter a permanent injunction barring disclosure of the records.

GOREE, C.J., and JOPLIN, P.J., concur.

Kenneth L. Buettner, Judge:

1. Five suits against Meritor and Textron were consolidated in the United States District Court for the Northern District of Mississippi. Textron dismissed its claims against OU in September 2018. Intervenor had also sued Meritor in Mississippi state court on behalf of residents of that state.

2. The OORA request was dated June 7, 2018. The request provided, in pertinent part:

> . . . I am requesting an opportunity to inspect and obtain copies of public records that relate to any and all groundwater sampling for CSIA . . . analyses of Chlorinated Ethenes from Grenada(,) Mississippi. Please include all documents, chains of custody, reports, analysis, correspondence including written, typed or recorded in any medium. The tested materials were received by OU in June or July 2017.
>
> In 2017 (OU) performed this analysis with University equipment and personnel (including John Allen and Tmasz Kuder). Compounds including cDCE, TCE and PCE were specified. Entities involved included Ramboll, T&M and Thompson Hine. I have some of the emails involved in this project but believe my information is greatly incomplete. . . .

Meritor asserted Ramboll was the employer of Meritor's consulting expert, T&M was another Meritor expert, and Thompson Hine was Meritor's outside counsel.

After learning of the OORA request, an attorney for Ramboll informed OU that two firms representing Meritor and other defendants in the Mississippi litigation hired a Ramboll scientist "to provide litigation related, non-testifying expert consultant services for the benefit of their clients, Meritor, ... (OU's) lab work and the related records that are the subject of the referenced records request were performed and generated in the context of that engagement, with (OU) acting as a subconsultant/subcontractor to Ramboll . . . ." Ramboll asserted the records were protected by the privileges for trial preparation materials and for non-testifying consulting experts.

3. Wolf urged, and the trial court agreed, that Meritor was not truthful with the court when it averred, in its motion for a temporary restraining order, that there was no dispute the materials were privileged. At the September 26 hearing, Meritor counsel Timothy Coughlin testified that statement referred to the work of its retained consulting expert. As we explain below, this dispute is not relevant to our decision.

4. Intervenor's motions were signed by Marquette Wolf, the same attorney who signed the OORA request. Intervenor also sent a letter to then OU President James Gallogly and Chancellor Glen Johnson requesting their help in obtaining the records sought by Wolf.

5. It bears noting that although the Act does not expressly limit the right to disclosure of records to Oklahoma residents, these policy and purpose statements suggest the Legislature intended for OORA to benefit Oklahomans rather than residents of other states, such as Intervenor or Wolf, who have no "inherent political power" to exercise in Oklahoma because Oklahoma's state government is not "their government."

6. 51 O.S.2011 §24A.3 defines "record" as used in the Act:

> 1. "Record" means all documents, including, but not limited to, any book, paper, photograph, microfilm, data files created by or used with computer software, computer tape, disk, record, sound recording, film recording, video record or other material regardless of physical form or characteristic, created by, received by, under the authority of, or coming into the custody, control or possession of public officials, public bodies, or their representatives in connection with the transaction of public business, the expenditure of public funds or the administering of public property. "Record" does not mean:
> a. computer software,
> b. nongovernment personal effects,
> * * *

7. The unanalyzed water samples would likely fall under the "nongovernmental personal effects" exception to the definition of records. *See* 51 O.S.2011 §24A.3(1)(b).

8. In *Vandelay Entertainment, LLC v. Fallin*, 2014 OK 109, 343 P.3d 1273, the Oklahoma Supreme Court found that the common law and the Oklahoma Constitution afford an executive deliberative process privilege to the Governor which exempts disclosure under the Act, despite the lack of a specific statute expressly providing the privilege.

9. The record shows LaPat-Polasko no longer works for Ramboll. To its response to Intervenor's motion to dissolve the temporary restraining order, Meritor attached the sworn statement of LaPat-Polasko, in which she averred she had been retained by two law firms to provide litigation-related, non-testifying expert consulting services for the benefit of their clients, including Meritor. LaPat-Polasko further averred that in June 2017, she engaged the OU School of Geology and Geophysics as a subcontractor/subconsultant to perform isotope lab work analysis on groundwater samples. LaPat-Polasko asserted she made her expectation of confidentiality clear to Dr. Kuder when she engaged him to do the testing. LaPat-Polasko attached a cover letter and invoice from OU to LaPat-Polasko for testing of samples from the "Meritor Grenada Project". Another Ramboll employee, Devin Rowe, testified at the hearing on Meritor's motion for a permanent injunction.

10. It is also questionable whether this court would be bound by a Mississippi Magistrate's interpretation of Oklahoma law incorporating aspects of federal law.

11. One court has explained:

> There are two situations where exceptional circumstances are commonly identified: (1) where "the object or condition observed by the non-testifying expert is no longer observable by an expert of the party seeking discovery," and (2) where "it is possible to replicate expert discovery on a contested issue, but the costs would be judicially prohibitive."

Bank Brussels Lambert v. Chase Manhattan Bank, 175 F.R.D. 34, 44-45 (S.D.N.Y.1997). In this case, Intervenor asserted that other labs could perform the CSIA testing as well as OU's lab.

12. And, in the case of a disclosed testifying expert, assistants who helped the disclosed expert formulate his opinion will be treated as discoverable in the same way that the disclosed expert is. *Derrickson v. Circuit City Stores, Inc.*, 1999 U.S. Dist. LEXIS 21100, at *18 (D.Md. March 19, 1999). We see no reason why the opposite would not be true in the case of an undisclosed retained consulting expert.

13. Indeed, the record includes a reply in support of a motion to compel production filed by the plaintiffs in the Mississippi Federal case, primarily concerning whether Mr. Peeples was a retained or non-retained testifying expert. That document, submitted by Wolf among other counsel, includes the statement "Plaintiffs do not assert, as Meritor suggests, that they are entitled to discover the results of the CSIA testing – only that they are entitled to discover what Mr. Peeples knew about the testing and the assumptions made in establishing the parameters and protocols for its execution."

14. At the September 26 hearing, counsel for Meritor asserted Wolf was attempting to circumvent discovery and Wolf responded "(w)hether that is the case or not, that is not relevant. I have a client that is not even in this case, ..."

15. We quoted Rule 26(b)(4) above. Rule 26(b)(3) provides (emphasis supplied):

> (3) Trial Preparation: Materials.
> (A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, *subject to Rule 26(b)(4)*, those materials may be discovered if:
> (i) they are otherwise discoverable under Rule 26(b)(1); and
> (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

The Oklahoma Discovery Code mirrors the Federal rules. See 12 O.S.2011 §3226. *Additionally, we note that in New Hampshire Right to Life v. Director, New Hampshire Charitable Trusts Unit*, 169 N.H. 95, 143 A.3d 829 (2016), the New Hampshire Supreme Court held that where the state entity had claimed requested documents were privileged work product in federal litigation, as a matter of comity the state court would apply federal law to determine whether the privilege applied to bar disclosure under that state's open records act.

16. This rule also protects disclosure of privileged material to those not party to the underlying litigation, as Intervenor claimed to be (despite his state court suit against Meritor).

17. The Act provides:

> In addition to other records that a public body may keep confidential pursuant to the provisions of the Oklahoma Open Records Act, *a public body may keep confidential:*
> 1. *Any information related to research, the disclosure of which could affect* the conduct or outcome of the research, the ability to patent or copyright the research, or *any other proprietary rights any entity may have in the research or the results of the research including, but not limited to,* trade secrets and commercial or financial information obtained from an entity financing or cooperating in the research, research protocols, and research notes, data, *results, or other writings about the research;* and
> * * *

51 O.S.2011 §24A.19 (emphasis supplied). The parties dispute whether Meritor's counsel or its consulting expert had any proprietary rights in the records. We find persuasive a decision of the Virginia Supreme Court, which found that the research exemption in that state's open records law was intended to avoid putting public institutions at a disadvantage in comparison to private research facilities and held that this interest was not limited to a commercial or financial advantage. *American Tradition Institute v. Rector and Visitors of University of Virginia*, 287 Va. 330, 756 S.E.2d 435 (2014). The court approved a definition of "proprietary" it had used in an earlier decision: "a right customarily associated with ownership, title, and possession. It is an interest or a right of one who exercises dominion over a thing or property, of one who manages and controls." *Id*. at 341. The record in this case shows Meritor's counsel hired an expert at Ramboll, who requested and paid for the research conducted at OU. We find Meritor had some proprietary interest in the records.

Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS
Thursday, October 24, 2019

F-2017-1306 — Appellant Rebecca Faith Clark was tried by jury and convicted of four counts of Child Abuse by Injury (Counts I-IV) and one count of First Degree Child Abuse Murder (Count V), Case No. CF-2017-460 in the District Court of Pontotoc County. The jury recommended as punishment life imprisonment in each of Counts I-IV and a five thousand dollar ($5,000.00) fine, and life imprisonment without the possibility of parole in Count V. The trial court sentenced Appellant according to the jury's recommendations on imprisonment but rejected the recommendation for a fine. The sentences in Counts I-IV were ordered to be served concurrent to each other but consecutive to the sentence in Count V. It is from this judgment and sentence that Appellant appeals. The Judgment and Sentence is AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur in Part Dissent in Part; Hudson, J., Concur; Rowland, J., Concur.

F-2018-302 — Jorge R. Medina, Appellant, was tried by jury for the crime of Lewd or Indecent Acts to a Child Under 16, in Case No. CF-2015-658, in the District Court of Comanche County. The jury returned a verdict of guilty and recommended as punishment 40 years imprisonment. The Honorable Emmit Tayloe, District Judge, sentenced accordingly, imposing various costs and fees and ordered credit for time served. From this judgment and sentence Jorge R. Medina has perfected his appeal. AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concurs in Part/Dissents in Part; Kuehn, V.P.J., Concurs in Part/Dissents in Part; Lumpkin, J., Concurs in Results; Rowland, J., Concurs.

F-2018-895 — Appellant Kyle Tyree Ward was convicted at a bench trial of the crime of Possession of a Firearm After Conviction of Two or More Felonies in Case No. CF-2017-38 in the District Court of Lincoln County. He was sentenced to seven years imprisonment and fined $100. From this judgment and sentence Kyle Tyree Ward has perfected his appeal. AFFIRMED. Opinion by: Kuehn, V.P.J.; Lewis, P.J., Concur; Lumpkin, J., Concur in Results; Hudson, J., Concur; Rowland, J., Concur.

S-2018-1173 — Kentrell Jamar Brown, Appellee, was charged with Count 1: Loitering Around a Residence to Watch Occupants; Counts 2-14: Taking Clandestine Photographs; and Count 15: Obstructing an Officer, in the District Court of Oklahoma County, Case No. CF-2017-2528. Brown was bound over at preliminary hearing as charged on all thirteen felony counts of taking clandestine photos. Brown thereafter filed a motion to quash alleging the evidence was insufficient to bind him over for trial on Counts 2-14. A hearing was held on the matter on November 13, 2018. At the conclusion of this hearing, the Honorable Ray C. Elliott, District Judge, sustained the motion to quash and dismissed Counts 2-14. Appellant, the State of Oklahoma, now appeals. The District Court's order sustaining Appellee's motion to quash based upon insufficient evidence is REVERSED, Counts 2-14 are REINSTATED and Appellee's case is REMANDED for trial. Opinion by: Hudson, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs; Rowland, J., Concurs.

Thursday, October 31, 2019

F-2017-1307 — Appellant James Rex Clark was tried by jury and convicted of four counts of Child Abuse by Injury (Counts I-IV) and one count of First Degree Child Abuse Murder (Count V), Case No. CF-2017-459 in the District Court of Pontotoc County. The jury recommended as punishment life imprisonment in each of Counts I-IV and a five thousand dollar ($5,000.00) fine, and life imprisonment without the possibility of parole in Count V. The trial court sentenced Appellant according to the jury's recommendations on imprisonment but rejected the recommendation for a fine. The sentences in Counts I-IV were ordered to be served concurrent to each other but consecutive to the sentence in Count V. It is from this judgment and sentence that Appellant appeals. The Judgment and Sentence is AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur; Hudson, J., Concur; Rowland, J., Concur.

C-2019-227 — Petitioner Cynthia Rowshell Gay entered guilty pleas pursuant to a plea agreement with the State to the charges of Count 1, Driving While Under the Influence, and Count 2, Driving While Under Suspension, in the District Court of Oklahoma County, Case No. CF-2019-369. The Honorable Kathryn R. Savage, Special Judge, accepted the pleas on February 19, 2019. Pursuant to her plea agreement, Petitioner received pertinently a five-year sentence on Count 1, with all but the first thirty days suspended and a one year suspended sentence on Count 2, with the sentences running concurrently to one another. On March 1, 2019, Petitioner filed an Application to Withdraw Guilty Plea and on March 21, 2019, the Honorable Kathryn R. Savage, Special Judge, held a hearing on the application to withdraw plea. The Court denied the application to withdraw. The Writ of Certiorari is DENIED. The Judgment and Sentence is AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur; Hudson, J., Concur; Rowland, J., Concur.

C-2018-1174 — Petitioner Steven Joseph Beaty entered guilty pleas to Felony Domestic Assault and Battery, After Former Conviction of Two or More Felonies, (Count I); Misdemeanor Violation of Protective Order (Count II); and Obstructing An Officer (Count III) in the District Court of Grady County, Case No. CF-2018-115. The pleas were accepted by the Honorable Kory Kirkland, District Judge, on October 16, 2018. Petitioner was sentenced in Count I to ten (10) years imprisonment with the last seven (7) years suspended and a fine of $500.00; one year imprisonment and a $200.00 fine in Count II; and one year imprisonment and a $100.00 fine in Count III, along with costs, victim compensation assessments, and referral to the Batterer's Intervention Program. All sentences were ordered to be served concurrently. On October 25, 2018, Petitioner filed a motion to withdraw the guilty pleas. At the conclusion of a hearing held on November 13, 2018, Judge Kirkland denied the motion to withdraw. The Petition for a Writ of Certiorari is DENIED. The judgment of the District Court is AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., Concur in Results; Kuehn, V.P.J., Concur; Hudson, J., Concur; Rowland, J., Concur.

F-2018-1020 — Appellant Renese Bramlett was convicted by jury in the District Court of Tulsa County, Case No. CF-2015-4266, of First Degree Murder. The jury assessed punishment at life imprisonment without the possibility of parole. The Honorable William J. Musseman, District Judge, presided at trial and sentenced accordingly. Bramlett appealed his Judgment and Sentence to this Court in Case No. F-2016-1052. In a published opinion, this Court affirmed Bramlett's judgment but vacated his sentence and remanded the cause to the district court for resentencing. Bramlett's resentencing trial was held on September 10-12, 2018. At the conclusion of the resentencing trial, the jury assessed punishment at life imprisonment without the possibility of parole. The Honorable William J. Musseman, District Judge, who presided over the resentencing trial sentenced Bramlett accordingly. From this judgment and sentence Renese Bramlett has perfected his appeal. AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs in results; Kuehn, V.P.J., concurs in results; Lumpkin, J., concurs; Hudson, J., concurs.

F-2018-360 — Goldy Romeo McNeary, Appellant, was tried by jury for Counts 1 and 2, lewd acts with a child under 16, in Case No. CF-2016-6236 in the District Court of Oklahoma County. The jury returned a verdict of guilty and set punishment at ten years imprisonment on each count. The trial court sentenced accordingly and ordered the sentences served consecutively. From this judgment and sentence Goldy Romeo McNeary 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. 2)
Wednesday, October 23, 2019

117,521 — In the Matter of: D.B., An Adjudicated Deprived Child, Nathan Barber, Appellant, vs. State of Oklahoma, Appellee. Appeal from an Order of the District Court of Hughes County, Hon. B. Gordon Allen, Trial Judge, terminating Father, Nathan Barber's, parental rights to his minor child, DB. On appeal, Father asserts State failed to prove beyond a reasonable doubt that continued custody by him would likely result in serious emotional or physical damage to the minor child. Father contends he was a regular part of DB's life prior to removal from the paternal grandmother's home, DB enjoyed those visits, and that he availed himself of DOC services and programs to assist him in parenting. Finally, Father asserts State's expert testimony was wholly deficient in prov-

ing continued custody by him would likely result in serious emotional or physical damage to the minor child. The minor child has been in state custody her entire life. At the time of DB's birth, Father was incarcerated and he has remained so throughout the duration of her life. Although DB visited Father in prison while placed in the paternal grandmother's home, she has not seen Father in over two years. Thus, Father has no relationship with the minor child. Conversely, it is clear DB has bonded with her foster family, who has provided a stable, safe, and healthy home for her. Accordingly, based on our review of the record, we find there is clear and convincing evidence to support the jury's verdict terminating Father's parental rights pursuant to 10A O.S.2011 and Supp. 2015, § 1-4-904(B)(12) (incarceration) and § 1-4-904(B)(17) (for length of time in foster care). Accordingly, the trial court's order terminating Father's parental rights to his minor child, DB, is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Thornbrugh, J.; Fischer, P.J., and Reif, J. (sitting by designation), concur.

(Division No. 3)
Friday, October 25, 2019

116,920 — Julie Carr, as Trustee of the Julie Carr Revocable Living Trust, Plaintiff/Appellant, vs. The Board of County Commissioners of Hughes County, Oklahoma, Defendant/Appellee. Appeal from the District Court of Hughes County, Oklahoma. Honorable B. Gordon Allen, Trial Judge. Plaintiff Julie Carr, as Trustee of the Julie Carr Revocable Trust, filed this tort action against Defendant Hughes County Board of Commissioners to recover damages allegedly caused while its employee, R. Cellars, who was operating a motor grader, backed into Plaintiff's vehicle. She appeals the judgment based on a jury verdict finding she was 51% negligent and Defendant was 49% negligent. The trial court's judgment based on the jury's verdict is supported by competent evidence, and finding no reversible error with the court's jury instructions or evidentiary rulings, it is AFFIRMED. Opinion by Swinton, J.; Mitchell, P.J., and Bell, J., concur.

117,197 — In Re the Marriage of Thompson: Pamela M. Thompson, Petitioner/Appellant, vs. Ian Thompson, Respondent/Appellee. Appeal from the District Court of Grady County, Oklahoma. Honorable John E. Herndon, Judge. Petitioner/Appellant Pamela M. Thompson (Mother) challenges the trial court's Decree of Dissolution entered in a divorce proceeding between Mother and Respondent/Appellee Ian Thompson (Father). Specifically, Mother contends the trial court erred by failing to award her any equity in the parties' home and by awarding Father full custody of the parties' minor child. We find the court's decisions were not an abuse of discretion or against the clear weight of the evidence. Accordingly, the trial court's Decree of Dissolution is AFFIRMED. Opinion by Mitchell, P.J.; Bell, J., and Swinton, J., concur.

117,438 — In the Matter of the Estate of Alcarla B. Taylor, Deceased. Cheryl Linda Turley, Petitioner/Appellant, vs. Heritage Trust Company, Successor Trustee of the Alcarla B. Taylor Trust, Respondent/Appellee. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Richard Kirby, Judge. In this trust action, Petitioner/ Appellant, Cheryl Linda Turley, the sole beneficiary of the Alcarla B. Taylor Revocable Trust (Trust), appeals from the trial court's interlocutory order sustaining the motion to approve the sale of real property filed by Respondent/Appellee, Heritage Trust Company (Trustee). The trust agreement granted Trustee the authority to sell trust property and the trial court entered an order allowing the Trustee to liquidate trust property after notice and a hearing with no objections. According to the appellate record, the only evidence presented at the hearing on the motion to approve sale of trust property reflected the sales price was the highest price offered at an auction. We hold the trial court's order approving sale of real property was not an abuse of discretion, contrary to law nor against the clear weight of the evidence. The trial court's order is AFFIRMED. Opinion by Bell, J.; Mitchell, P.J., and Swinton, J., concur.

117,448 — Edward Wyre, Jr., Plaintiff/Appellee, vs. Ellena Muhammad, Defendant, and Katrius Muhammad, Intervenor/Appellant. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Sheila Stinson, Judge. In this appeal from a decree of paternity and journal entry, Intervenor/Appellant, Katrius Muhammad, the maternal grandmother of the minor child (Grandmother), appearing *pro se*, challenges the trial court's judgment denying grandparent visitation. Respondent/ Appellee, Edward Wyre, Jr., the natural father and custodial parent of the minor child (Father), also appearing *pro se*, opposed grandparent visitation. Ellena Mohammed, the natural mother of

the child (Mother), is a party to this proceeding, but does not participate in this appeal. After reviewing the record and extant law, we cannot find the trial court abused its discretion when it denied Grandmother's request for visitation rights. Accordingly, the trial court's order is AFFIRMED. Opinion by Bell, J.; Mitchell, P.J., and Swinton, J., concur.

(Division No. 4)
Friday, October 18, 2019

117,407 — Don Stephens, Plaintiff/Appellant, vs. Matt Campbell and Barbara Campbell, Defendants/Appellees. Appeal from Order of the District Court of Osage County, Hon. M. John Kane, Trial Judge. The plaintiff, Don Stephens (Stephens), appeals the trial court's judgment granting summary judgment to the defendants, Matt Campbell and Barbara Campbell (collectively, Campbells). The Diamond Head Addition, Section One, Osage County, Oklahoma, is subject to Restrictions. There are no material facts in dispute. Campbells moved a portable garage onto their residential lot. Stephens claims this action violates the Restrictions. However, the trial court found the Restrictions to be ambiguous regarding the permission to place the garage on the property and the ban to move the garage to the property. The trial court correctly determined that an ambiguity existed and correctly construed the Restrictions in favor of Campbells, as the owners of the burdened estate. Therefore, the trial court did not err by granting summary judgment. AFFIRMED. Opinion from Court of Civil Appeals, Division IV by Rapp, J.; Wiseman, V.C.J., and Barnes, P.J., concur.

117,685 — Southern Heights Community Organization, a Non-Profit Organization, and Masonic Lodge No. 29, Plaintiffs/Appellants, vs. Wilbur Flynn, Defendant/Appellee. Appeal from the District Court of Garfield County, Hon. Dennis W. Hladik, Trial Judge. Plaintiffs, Southern Heights Community Organization, a Non-Profit Organization, (Southern Heights) and Masonic Lodge No. 29 (Masonic Lodge) (collectively referred to as Plaintiffs) appeal the trial court's denial of Plaintiff's Application for Temporary Restraining Order and Temporary Injunction. The crux of this litigation involves two lots owned by First Missionary Baptist Church (Church) and used as a parking lot by Plaintiffs and Church. Defendant, Wilbur Flynn, is the pastor of Church. Southern Heights has used the parking lot for over thirty years to access the door located on the east side of its building. On December 17, 2018, the trial court conducted a hearing on Plaintiffs' Application for Temporary Restraining Order and Temporary Injunction. Plaintiffs presented evidence detailing the history of Plaintiffs' use of the lots for parking. At the conclusion of the evidence, the trial court framed the issue before the court as deciding which party had the right to use the parking lot until the final hearing on the issue, not determining title to the properties. After considering the evidence, the trial court denied Plaintiffs' request for a temporary restraining order and temporary injunction. Here, the trial court correctly noted that the purpose of the hearing was not to determine title to the questioned property, but was to decide who was entitled to use of the vacant lots until a decision after a trial on the merits. The trial court's Order denying Plaintiff's Application for Temporary Restraining Order and Temporary Injunction is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division IV by Rapp, J.; Wiseman, V.C.J., and Barnes, P.J., concur.

Tuesday, October 22, 2019

117,606 — Gary Holloway, Plaintiff/Appellant, vs. Debra Harris, Tony Riddles, and Keith L. Humphrey, individually and employees of the City of Norman Police Department, and City of Norman, a municipal corporation, Defendants/Appellees. Appeal from an order of the District Court of Cleveland County, Hon. Leah Edwards, Trial Judge, granting motions for summary judgment by Defendants Debra Harris, Tony Riddles, Keith L. Humphrey and the City of Norman and denying Plaintiff's motion to reconsider. This action arises out of the state court prosecution of a perjury charge against Plaintiff which was later removed to federal court. After a decision rendered in federal court, the case was remanded to state court resulting in the present action. Plaintiff's second amended petition asserted claims for malicious prosecution, unwarranted seizure, "Violation of State Constitutional Right to Due Process and to be free of Arbitrary and Capricious State Action," and negligence against City. Defendants filed motions for summary judgment. Plaintiff dismissed the negligence claims against City during the summary judgment hearing. The trial court granted summary judgment to Defendants "as to all claims pending before the Court." Plaintiff's motion to reconsider was denied. Because the federal district court disposed of the unwarranted seizure is-

sue on its merits and Plaintiff chose not to appeal the final order, he is precluded from re-litigating the claim in state court. We further agree with the trial court's conclusion that Plaintiff's state constitutional claim fails against Defendants. Finally, we conclude that the record and applicable law are as the trial court described them, requiring entry of summary judgment. Summary judgment being appropriate, the trial court did not abuse its discretion in denying Plaintiff's motion to reconsider. The trial court's decisions are affirmed. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, V.C.J.; Barnes, P.J., and Rapp, J., concur.

Wednesday, October 23, 2019

117,310 — In re the Marriage of: Kaslyn Workman, Petitioner/Appellee, vs. John Kazy, Respondent/Appellant. Appeal from an order of the District Court of Osage County, Hon. John Kane, Trial Judge. John Kazy (Father) appeals an "agreed decree of divorce" asserting the trial court erred in dividing marital property and determining visitation and child support. Our review is impeded by the fact that no transcript of the trial proceedings or narrative statement in place of a transcript has been submitted for our review. It is the appealing party's obligation to support any claims of trial court error by a record of the trial court proceedings demonstrating that error. Without a record of what transpired at trial, no error in property division has been shown, and we are unable to reverse the property division in the Decree as unfair or inequitable. Father argues that he was given only "minimal visitation," but the limited record before us on appeal does not lend itself to a conclusion that the trial court allowed only minimal visitation or abused its discretion in setting visitation. In regard to Father's child support obligation, he has not provided any evidence that the deficiencies he complains of would have lowered the payment any more than the trial court did, and we cannot reverse the child support computation as clearly against the weight of the evidence. We conclude that the trial court did not err when it divided the marital property, set visitation, or calculated child support. Accordingly, the trial court's decisions subject to this appellate review are affirmed. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, V.C.J.; Barnes, P.J., concurs, and Rapp, J., dissents.

Thursday, October 24, 2019

117,884 — Timothy P. Smith, Plaintiff/Appellant, vs. Gretchen Runkle Nicholson and Gretchen Runkle Nicholson, P.C., Defendants/Appellees. Appeal from an order of the District Court of Cleveland County, Hon. Thad Balkman, Trial Judge, granting Defendants' motion to dismiss. This legal negligence action arises out of Defendants' representation of Plaintiff in a guardianship proceeding filed by Plaintiff's sister, Holly Morris, for guardianship of their mother, Patricia Joy Smith. Plaintiff asserts that the trial court improperly dismissed the case. When the trial court dismissed Plaintiff's petition, it found that "the defects in Plaintiff's Petition cannot be remedied through amendment." But we cannot determine what those deficiencies were that led to the petition's dismissal because they are not specified in the order. Whether the trial court correctly held the petition's deficiencies could not be remedied cannot be assessed until the trial court delineates the deficiencies. We must therefore reverse the trial court's order granting Defendants' motion to dismiss with prejudice. The case is remanded for the trial court to state the deficiencies in Plaintiff's claim and then to determine whether the stated defects can be cured by affording Plaintiff a reasonable amount of time to amend. We reverse the trial court's order dismissing Plaintiff's claim pursuant to 12 O.S.2011 § 2012(B)(6) and remand the case for further proceedings consistent with this Opinion. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, V.C.J.; Barnes, P.J., and Rapp, J., concur.

116,455 (Consolidated with Case No. 116,458 and made companion with Case No. 117,503) — Monterey Development Company, LLC, an Oklahoma Limited Liability Company, Plaintiff/Appellee, vs. Sand Resources, LLC, an Oklahoma Limited Liability Company, Defendant/Appellant, and Trinity Resources, Inc., an Oklahoma Corporation, Defendant/Appellant. Appeal from an order of the District Court of Cleveland County, Hon. Thad Balkman, Trial Judge, concluding Sand Resources, LLC, and Trinity Resources, Inc., materially breached a mediation agreement and are jointly and severally liable to Monterey Development Company, LLC, for relocating a lease road and flow line. Competent evidence at trial supports the trial court's findings of fact. We affirm its decision concluding Sand breached the Mediation

Agreement. We further conclude Trinity's obligations arose from the promises in the Warranty Deed of public record, and Trinity is jointly and severally responsible with Sand to ensure the lease road and flow line are relocated. We also affirm the trial court's decisions as to Trinity on the electric line nuisance question and in Monterey's favor on the declaratory judgment request. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, V.C.J.; Barnes, P.J., and Rapp, J., concur.

Friday, October 25, 2019

117,362 — Hazem Mahmoud, Protestant/Appellant, vs. Oklahoma Tax Commission, Respondent/Appellee. Appeal from an order of The Oklahoma Tax Commission denying Appellant Hazem Mahmoud's (Taxpayer) claim for the Aerospace tax credit on his 2016 income tax return. On appeal, Taxpayer argues the OTC erred in denying him the Aerospace tax credit for the 2016 tax year and finding his degrees are not accredited by the Accreditation Board for Engineering and Technology as required by Oklahoma tax laws. The OTC's order (which incorporates by reference the ALJ's order) sets forth with clarity and specificity its findings of fact and conclusions of law which, according to our reading of the record, are fully supported. The tax credit in question is only allowed for persons meeting all the requirements for a "qualified employee," and because Taxpayer does not have a degree from a "qualified program" as required to be considered a "qualified employee," the OTC's disallowance of the tax credit was proper. After a thorough *de novo* review of the record and applicable law, we see no error in the OTC's decision on which to base reversal. We further reject Taxpayer's constitutional challenge. Pursuant to Oklahoma Supreme Court Rule 1.202(d), 12 O.S. Supp. 2018, ch. 15, app. 1, we summarily affirm the OTC's order. SUMMARILY AFFIRMED UNDER RULE 1.202(d). Opinion from the Court of Civil Appeals, Division IV, by Wiseman, V.C.J.; Barnes, P.J., concurs, and Rapp, J., concurs specially.

Friday, October 25, 2019

117,270 — David Bauchmoyer, Petitioner/Appellant, v. Jessica Sanders, Respondent/Appellee. Appeal from the District Court of Tulsa County, Hon. Owen Evans, Trial Judge. This appeal concerns the objection of David Bauchmoyer (Father) to Jessica Sanders' (Mother) proposed relocation of the parties' minor child. Father appeals from the trial court's order modifying the parties' joint custody plan, determining Mother to be the primary physical custodian of the minor child, and allowing Mother's relocation request. Although the trial court must first determine whether a joint physical custody plan will be modified before it can consider a request by one of the parents to relocate, we conclude in this case the trial court did not abuse its discretion in modifying the court-approved joint custody plan even though modification occurred in the same proceeding in which the trial court considered Mother's relocation request. We further conclude the trial court's consideration of the factors set forth in 43 O.S. 2011 § 112.3(J)(1)(a)-(h), and the weight it gave to them is not clearly against the weight of the evidence; therefore, the trial court's determination that relocation is not against B.A.B.'s best interests was not an abuse of discretion. Consequently, based on our review of the record and the applicable law, we conclude the trial court did not abuse its discretion in modifying the Joint Custody Plan and in awarding primary physical custody of the minor child to Mother and in granting Mother's relocation request. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Wiseman, V.C.J., and Rapp, J., concur.

ORDERS DENYING REHEARING
(Division No. 3)
Tuesday, October 8, 2019

117,461 — Loren Simunek, Plaintiff/Appellant, vs. Oklahoma Farm Bureau Mutual Insurance Company and AG Security Insurance Company, Defendants/Appellees. Appellant's Petition for Rehearing and Brief in Support, filed September 26, 2019, is *DENIED*.

Tuesday, October 22, 2019

117,469 — Faramarz Mehdipour, Plaintiff/Appellant, vs. Honorable Judge Richard Ogden, Defendant/Appellee. Appellant's Petition for Rehearing, filed October 14, 2019, is *DENIED*.

(Division No. 4)
Thursday, October 17, 2019

117,641 — David Shawn Fritz, Plaintiff/Appellant, vs. State of Oklahoma *ex rel.* Department of Public Safety, Defendant/Appellee. Appellant's Petition for Rehearing is hereby DENIED.

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

POSITIONS AVAILABLE

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

AN AV RATED OKLAHOMA CITY CIVIL LITIGATION FIRM SEEKS AN ASSOCIATE ATTORNEY with 0-5 years experience. Excellent research and writing skills essential. Deposition experience a plus. The attorney will work with partners on insurance defense and products liability cases. Health insurance and other benefits included. Resume, transcript and writing sample are required. Please send submissions to "Box E," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

THE CRIMINAL DIVISION OF THE TULSA COUNTY DISTRICT ATTORNEY'S OFFICE is seeking applicants for assistant district attorney. Must be able to thrive in fast-paced office where you will be given much discretion in individual situations; must have the ability to effectively interact with victims, family members of victims and witnesses as well as a large office of coworkers and outside agencies, such as police departments and social service agencies; must possess a strong work ethic and high degree of personal integrity; must pass a criminal background check. Salary based on qualifications and experience. Full state of Oklahoma benefits, including generous monthly allowance for purchasing health coverage; paid sick leave and vacation, combined 30 days per year to start. Eleven paid holidays. Please send cover letter, resume, references and a writing sample to Staci Eldridge seldridge@tulsacounty.org.

POSITIONS AVAILABLE

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

Make a Difference as the Attorney for domestic violence survivors

Do you want to ensure that survivors of domestic violence obtain Justice and an end to violence in their lives for themselves and their children? Are you fervent about equal justice? Legal Aid Services of Oklahoma (LASO) is a nonprofit law firm dedicated to the civil legal needs of low-income persons. If you are passionate about advocating for the rights of domestic violence survivors, LASO is the place for you, offering opportunities to make a difference and to be part of a dedicated team. LASO has 20 law offices across Oklahoma. The successful candidate should have experience in the practice of Family Law, with meaningful experience in all aspects of representing survivors of domestic violence.

We are seeking two additional Victim's Attorneys in ***Oklahoma City*** for our partnership with Palomar. These are embedded positions, providing the Attorneys with access to clients in need.

LASO offers a competitive salary and a very generous benefits package, including health, dental, life, pension, liberal paid time off, and loan repayment assistance. Additionally, LASO offers a great work environment and educational/career opportunities.

The online application can be found on our website:

www.legalaidok.org

Legal Aid is an Equal Opportunity/Affirmative Action Employer

CARR AND CARR ATTORNEYS AT LAW IS SEEKING AN ATTORNEY to manage social security disability cases and provide support on other cases involving personal injury. Tulsa office location preferred. Experience with social security disability cases is required. Competitive salary and health insurance. Please send your resume and cover letter to Aimee Allison at aallison@carrcarrokc.com.

WELL ESTABLISHED AND RAPIDLY EXPANDING, TULSA PLAINTIFF'S LAW FIRM is seeking an associate with 2-5+ years' experience. Duties include handling personal injury claims, subrogation matters and interacting with clients. Compensation is competitive. Benefits include 401k, health, vision, dental and life insurance. Commissions and bonuses are paid. Experience with Social Security Disability and veteran's benefit cases is a plus. We practice in a laid back, flexible, client centered environment and want a candidate that will share our values. All resumes are confidential. Please send resume to oklahomalegaljobs@gmail.com.

POSITIONS AVAILABLE

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

PARALEGAL – STAFF COUNSEL ALLSTATE INSURANCE CO. – OKC OFFICE. Under attorney supervision, facilitates the discovery process, including obtaining records, reviewing documents, interviewing clients and preparing trial materials. Identifies, summarizes, and monitors relevant issues. Prepares pleadings and motions. Job qualifications: bachelor's degree in related field or Paralegal Certificate required (ABA approved preferred); insurance defense experience preferred; knowledge of discovery processes; basic researching, proofreading and formatting skills; strong interpersonal skills, effective customer service skills; able to deliver results with a sense of urgency; adapts well to change; able to multi-task in a fast-paced, deadline-driven environment; is a proactive self-starter who can manage his/her time effectively and work independently; regular, predictable attendance is an essential function of this job. The candidate offered this position will be required to submit to a background investigation, which includes a drug screen. As a Fortune 100 company, we provide a very competitive salary including medical and dental insurance, as well as a pension and 401(k). Plus, you'll have a generous paid time off policy. Apply online: career8.successfactors.com/sfcareer/jobreqcareer?jobId=128906&company=Allstate&username.

SOLICITATION OF APPLICANTS INTERESTED IN SERVING AS SUBCHAPTER V TRUSTEES. The United States Department of Justice, Office of the United States Trustee seeks resumes from persons wishing to be considered for inclusion in a pool of trustees who may be appointed on a case-by-case basis to administer cases filed under the Small Business Reorganization Act of 2019 (Subchapter V), which amended chapter 11 of title 11 of the United States Code (Bankruptcy Code). Those with business, managerial, consulting, mediation and operational experience are encouraged to apply. The appointment is for cases filed in the United States Bankruptcy Court for the Northern, Eastern and Western Districts of Oklahoma. Subchapter V trustees may receive compensation and reimbursement for expenses in each case in which they serve pursuant to court order under 11 U.S.C. §330. Trustees are not federal government employees. For additional information, qualification requirements and application procedures go to www.justice.gov/ust/eo/private_trustee/vacancies/11ad.htm.

POSITIONS AVAILABLE

DURBIN LARIMORE & BIALICK PC has an excellent opportunity for attorneys with 2-5 years of general litigation experience. Those candidates with insurance defense and employment law experience a plus, but not required. Generous benefits package and competitive salary. Please send cover letter, resume and references to radams@dlb.net.

ESTABLISHED, AV-RATED TULSA INSURANCE DEFENSE FIRM seeks motivated associate attorney to perform all aspects of litigation including research, brief writing, written discovery, depositions, motion practice and trial. Zero to 5 years of experience, willingness to train candidate who is eager to learn. Great opportunity to gain litigation experience in a firm that delivers consistent, positive results for clients. Submit CV and cover letter to "Box CC," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

CROOKS STANFORD & SHOOP IS SEEKING AN ASSOCIATE ATTORNEY with 3+ years of experience to join our team. Duties would include providing legal research and briefing, assisting with transactional document drafting and review, preparing court pleadings and filings, performing legal research, conducting pretrial discovery and preparing for and attending administrative and judicial hearings. The firm's practice areas include transactional work, commercial litigation, real property, contracts and administrative law. Successful candidates will have strong organizational and writing skills and a willingness to assist with work on all areas of law practiced by the firm. Please email resumes to Amber Johnson at aj@crooksstanford.com.

REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA SEEKS ASSISTANT GENERAL COUNSEL to join a team that provides legal advice to the governing board of six regional universities across Oklahoma. Employment law, contract negotiation and higher education experience preferred. Excellent retirement and health benefits. Salary commensurate with level of experience. Please send resume to General Counsel for RUSO at dlyon@ruso.edu.

FOR SALE

LAND FOR SALE - ROGER MILLS COUNTY - 160 acres near Crawford. 141 acres farmland, sown to wheat, rest improved grassland, Windmill and tank. Good fences. Paved frontage road. Good hunting stock. Call 405/550-0805.

LAW OFFICE CREDENZA – Beautiful 12 ft burl wood drawers with glass storage upper. Lock with key. Sell for $2,000. Originally $12,000 L&M Furniture. Pick up in Perry, OK. Well cared for. Moves in 5 sections. Call 580-307-2466 (leave a message). Will email or text photos.

CLASSIFIED INFORMATION

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

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

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

SEND AD (email preferred) stating number of times to be published to:

advertising@okbar.org, or
Mackenzie Scheer, Oklahoma Bar Association,
PO Box 53036, Oklahoma City, OK 73152.

Publication and contents of any advertisement are not to be deemed an endorsement of the views expressed therein, nor shall the publication of any advertisement be considered an endorsement of the procedure or service involved. All placement notices must be clearly nondiscriminatory.

DO NOT STAPLE BLIND BOX APPLICATIONS.

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THURSDAY & FRIDAY, DECEMBER 5 & 6, 2019

9 A.M. - 2:50 P.M. (EACH DAY)

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

MCLE 6/0 (DAY ONE)
MCLE 6/1 (DAY TWO)

TEXAS CREDIT APPROVED

PROGRAM PLANNER/ MODERATOR:

Brian Huckabee,
Huckabee Law PLLC, Tulsa

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34TH ANNUAL
ADVANCED BANKRUPTCY SEMINAR
"BANKRUPTCY UNREDACTED"

Cosponsored by the OBA Bankruptcy and Reorganization Section

This two-day seminar will focus on a broad range of cutting-edge business and consumer bankruptcy-related legal topics.

DAY ONE TOPICS INCLUDE:

- **Foundations of Discharge of Debt**
- **Putting Them In Receivership**
- **Not a Witch Hunt: LLCs, Banks, and Other Surprising Recovery Sources**
- **Real News: United States Trustee Panel**
- **Colluding to Learn Electronic Evidence**
- **This Session's About Venue: Keeping Our Chapter 11 Cases Home**

DAY TWO TOPICS INCLUDE:

- **The Full Report: Recent Developments in Bankruptcy Law**
- **Chapter 12 Unobstructed**
- **Mulling Bankruptcy Ethics**
- **Cannabis Law Unredacted**
- **Amaze and Delight Your Friend(ly Bankruptcy Judge)s: Unredacted Effective Trial Techniques.**
- **Here to Influence You: Bankruptcy Judges' Panel**

TUITION:

$225 (both days) Early-Bird
$150 (one day) Early-Bird
$250 (both days)
$175 (one day)
$275 (both days) walk-in; $200 (one day) walk-in
$200 webcast per day or $300 webcast bundle both days
$75 licensed 2 years or less each day (late fees apply)
$100 licensed 2 years or less for the webcast

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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.
Oklahoma City, OK 73106

MCLE 3/1 (MORNING PROGRAM)
MCLE 3/3 (AFTERNOON PROGRAM)

FEATURED PRESENTER:

Sean Carter,
Chief Humor Officer, Mesa CLE

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TO REGISTER GO TO WWW.OKBAR.ORG/CLE

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 is $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.