

THE OKLAHOMA BAR
Journal

Volume 90 — No. 22 — 11/30/2019

Court Issue



THURSDAY & FRIDAY,
DECEMBER 12 & 13
9 A.M. - 3:20 P.M.

Oklahoma County Courthouse
Courtroom of the
Honorable Ray C. Elliott
Oklahoma County District Judge
320 Robert S. Kerr Ave, 7th Floor
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,
Oklahoma County District Judge

EVIDENCE ADVISOR:

Debbie Maddox

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Barry and Johnny Albert Memorial Mock Trial:
10th Annual Learning from the

OKLAHOMA CRIMINAL JURY TRIAL MASTERS

The State of Oklahoma v. Chasity Carey

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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\$325 - Walk-ins
\$150 - Members licensed 2-yr or less (late fees apply)
\$25 cancel fee within 4 business days of program

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THE OKLAHOMA BAR Journal

Volume 90 – No. 22 – 11/30/2019

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Oklahoma Bar Association

TAX LAW SECTION

Seven Good Reasons to Join

The OBA Tax Law Section is planning for 2020 and invites OBA members who practice in taxation, business, employment, estate planning and probate, real property, oil and gas, litigation, and other fields to join the Section.

The Tax Section is sending this invitation to all OBA members because it believes they can benefit from being a Tax Section member in many ways, including:

1. Cost effective and *very practical* CLE.
2. The opportunity for attorneys who do not specialize in tax law to connect with those who do so on a daily basis.
3. Learn how recent federal and state income tax law changes might benefit your practice and you individually.
4. Get up to date on the U. S. Supreme Court decisions in the landmark *Wayfair* case on state sales tax implications for businesses in Oklahoma and other states; and the *Kaestner* case on state income taxation of trusts and trust beneficiaries.
5. For attorneys who practice often or full time in taxation, an opportunity to become acquainted with and share knowledge and ideas with even more tax attorneys and professionals.
6. A source for learning more about proposed legislation that may change Oklahoma and federal tax law and affect your clients and practice.
7. Help others via Pro bono opportunities with the U.S. Tax Court calendar calls in Oklahoma.

For how to join the OBA Tax Section and more information contact W. Todd Holman, 2020 OBA Tax Section Chairman at **918-599-7755**, tholman@barberbartz.com.



table of
contents

Nov. 30, 2019 • Vol. 90 • No. 22

page

1368	INDEX TO COURT OPINIONS
1369	OPINIONS OF SUPREME COURT
1392	OPINIONS OF COURT OF CRIMINAL APPEALS
1414	BAR BUSINESS RESULTS ANNOUNCED
1415	CALENDAR OF EVENTS
1416	OPINIONS OF COURT OF CIVIL APPEALS
1436	DISPOSITION OF CASES OTHER THAN BY PUBLICATION

Index to Opinions of Supreme Court

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	1369
2019 OK 72 IN RE: Oklahoma Rules of Professional Conduct (Rule 5.5) SCBD-3490	1370
2019 OK 73 IN RE: Rules Creating and Controlling the Oklahoma Bar Association (Article II, Sec. 5) SCBD 4483	1371
2019 OK 74 STATE OF OKLAHOMA ex rel. OKLAHOMA BAR ASSOCIATION, Complainant, v. BRADLEY ALAN PISTOTNIK, Respondent. SCBD No. 6859	1376
2019 OK 75 CLOUDI MORNINGS, LLC., and AUSTIN MILLER, individually, Plaintiffs/ Appellees, v. THE CITY OF BROKEN ARROW, Defendant/Appellant. No. 117,500	1377
2019 OK 76 STATE OF OKLAHOMA, ex rel., OKLAHOMA BAR ASSOCIATION, Complainant, v. BRANDON DUANE WATKINS, Respondent. SCBD 6621	1382

Index to Opinions of Court of Criminal Appeals

2019 OK CR 27 TYRELL DEONTA BURNS, Appellant, vs. THE STATE OF OKLAHOMA, Appellee No. F-2018-740	1392
--	------

Index to Opinions of Court of Civil Appeals

2019 OK CIV APP 65 BHARAT MITTAL, Plaintiff/Appellant, vs. BLUESTEM EMERGENCY MEDICAL P.L.L.C., a professional limited liability company, and THOMAS W. BRITT, ROGER J. COTNER, HOLLY B. FOUTS, RONALD L. HAY and RUTH M. THOMPSON, Defendants/Appellees. Case No. 115,675	1416
2019 OK CIV APP 66 LANA TYREE and DENISE TIDWELL, Plaintiffs/Appellants, vs. BRENT CORNMAN, Defendant/Appellee, and CHRIS CANDELARIA; JOHN FOSTER; CANDELARIA FOSTER LLC; CANDELARIA FOSTER DESIGN * BUILD LLC; BRENT CORNMAN CONSTRUCTION, INC.; THE CORNMAN COMPANY; TROY BENEAR ROOFING, LLC; CAMPOS CONSTRUCTION, INC.; TRIPLE J CONSTRUCTION ENTERPRISES, INC.; and CARLOS RAMOS, Defendants. Case No. 115,866	1418
2019 OK CIV APP 67 DEE ANN HELM, formerly known as Dee Ann Cramer, Plaintiff/Appellant, vs. BOARD OF COUNTY COMMISSIONERS OF ROGERS COUNTY, OKLAHOMA, Defendant/Appellee. Case No. 117,344; Comp. w/117,455	1430
2019 OK CIV APP 68 MICHAEL EARL HELM, a.k.a. MIKE HELM, Petitioner/Appellant, vs. BOARD OF COUNTY COMMISSIONERS OF ROGERS COUNTY, OKLAHOMA, Respondent/Appellee. Case No. 117,455; Comp. w/117,344	1431
2019 OK CIV APP 69 SAMANTHA PEREZ, Plaintiff/Appellant, vs. MARRIK VANDERSEE, Defendant/Appellee. Case No. 117,636	1433

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 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. Peti-

tions in error which commence an appeal from the same appealable decision or from different appealable decisions in the same case shall so far as possible be filed under the same docket number, except when one of the appeals is brought pursuant to Rule 1.36. If more than one petition in error addressed to the same decision is filed the same day, the court shall determine which of these petitions in error is to be regarded as bringing the principal appeal and which constitutes a counter-appeal, a cross-appeal or some other form of appeal.

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

2019 OK 72

IN RE: Oklahoma Rules of Professional Conduct (Rule 5.5)

SCBD-3490. November 12, 2019

ORDER

¶1 This matter comes on before this Court upon an Application to Amend Rule 5.5 of the Oklahoma Rules of Professional Conduct, 5 O.S. ch. 1, app. 3-A, as set out in Exhibit A attached hereto, to clarify that out-of-state attorneys seeking licensure by reciprocity must also be in compliance with Rule 2 of the Rules Governing Admission to the Practice of Law in the State of Oklahoma.

¶2 This Court finds that it has jurisdiction over this matter and the Rules are hereby amended as set out in Exhibit A attached hereto, effective immediately.

¶3 DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 12th day of NOVEMBER, 2019.

/s/ Noma D. Gurich
CHIEF JUSTICE

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

Kauger, J., not voting.

EXHIBIT A

OKLAHOMA RULES OF PROFESSIONAL CONDUCT

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

RULE 5.5 UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

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

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

- (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
- (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

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

- (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
- (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
- (3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

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

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

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

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

EXHIBIT B

OKLAHOMA RULES OF PROFESSIONAL CONDUCT

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

RULE 5.5 UNAUTHORIZED PRACTICE OF LAW; MULTI-JURISDICTIONAL PRACTICE OF LAW

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

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

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

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

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

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

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

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

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

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

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

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

2019 OK 73

IN RE: Rules Creating and Controlling the Oklahoma Bar Association (Article II, Sec. 5)

SCBD 4483. November 12, 2019

ORDER

¶1 This matter comes on before this Court upon an Application to Amend Art. II Section 5 of the Rules Creating and Controlling the Okla-

homa Bar Association, 5 O.S. ch. 1, app. 1, adding language as set out in Exhibit A attached hereto, clarifying that when seeking a Special Temporary Permit to practice law in the State of Oklahoma, compliance with Rule 2 of the Rules Governing Admission to the Practice of Law in the State of Oklahoma is also required.

¶2 This Court finds that it has jurisdiction over this matter and the Rules are hereby amended as set out in Exhibit A attached hereto, effective immediately.

¶3 DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 12th day of November, 2019.

/s/ Noma D. Gurich
CHIEF JUSTICE

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

Kauger, J., not voting.

EXHIBIT A

Rules Creating and Controlling the Oklahoma Bar Association

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

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

A. Definitions - The following definitions govern this Article:

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

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

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

er, include federal courts or other federal decision-making or recommending bodies which conduct proceedings in Oklahoma.

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

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

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

1. The out-of-state attorney shall make application with the Oklahoma Bar Association, in such form and according to the procedure approved by the Board of Governors of the Oklahoma Bar Association. Said application shall include an affidavit (or unsworn statement under penalty of perjury pursuant to 12 O.S. § 426) which: (a) lists each state or territory of the United States, the District of Columbia, or foreign country in which the out-of-state attorney is admitted; and (b) states that the out-of-state attorney is currently in good standing in such jurisdictions. If an out-of-state attorney commits actual fraud in representing any material fact in the affidavit or unsworn statement under penalty of perjury provided herein, that attorney shall be permanently ineligible for admission to an Oklahoma court or tribunal pursuant to this Rule, or for admission to the Oklahoma Bar Association. The out-of-state attorney shall file a separate application with respect to each proceeding in which he or she seeks to practice.

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

tension are beyond the control of the out-of-state attorney.

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

4. Out-of-state attorneys appearing pro bono to represent indigent criminal defendants, or

on behalf of persons who otherwise would qualify for representation under the guidelines of the Legal Services Corporation due to their incomes and the kinds of legal matters that would be covered by the representation, may request a waiver of the application fee from the Oklahoma Bar Association. Waiver of the application fee shall be within the sole discretion of the Oklahoma Bar Association and its decision shall be nonappealable.

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

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

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

D. Upon being admitted to practice before an Oklahoma court or tribunal, an out-of-state attorney is subject to the authority of that court or tribunal, and the Oklahoma Supreme Court, with respect to his or her conduct in connection with the proceeding in which the out-of-state attorney has been admitted to practice law. More specifically, the out-of-state attorney is bound by any rules of the Oklahoma court or tribunal granting him or her admission to practice and also rules of more general application, including the Oklahoma Rules of Professional Conduct and the Rules Governing Disciplinary Proceedings. Out-of-state attorneys are subject

to discipline under the same conditions and terms as control the discipline of Oklahoma attorneys. Notwithstanding any other provisions of this Article or Subsection, however, out-of-state attorneys shall not be subject to the rules of this Court relating to mandatory continuing legal education.

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

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

2. Attorneys granted a special temporary permit to practice prior to the promulgation of this rule shall be deemed to have a renewal date of January 2, 2010.

3. All attorneys granted a special temporary permit to practice shall comply with the requirements of the Rules for Mandatory Continuing Legal Education with the exception that the annual reporting period shall be the anniversary date of the

issuance of the special temporary permit to practice.

Exhibit B

Rules Creating and Controlling the Oklahoma Bar Association

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

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

A. Definitions - The following definitions govern this Article:

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

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

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

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

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

B. An out-of-state attorney may be permitted to practice before Oklahoma courts or tribunals solely for the purpose of participating in a pro-

ceeding in which he or she has been employed upon the following express conditions:

1. The out-of-state attorney shall make application with the Oklahoma Bar Association, in such form and according to the procedure approved by the Board of Governors of the Oklahoma Bar Association. Said application shall include an affidavit (or unsworn statement under penalty of perjury pursuant to 12 O.S. § 426) which: (a) lists each state or territory of the United States, the District of Columbia, or foreign country in which the out-of-state attorney is admitted; and (b) states that the out-of-state attorney is currently in good standing in such jurisdictions. If an out-of-state attorney commits actual fraud in representing any material fact in the affidavit or unsworn statement under penalty of perjury provided herein, that attorney shall be permanently ineligible for admission to an Oklahoma court or tribunal pursuant to this Rule, or for admission to the Oklahoma Bar Association. The out-of-state attorney shall file a separate application with respect to each proceeding in which he or she seeks to practice.

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

3. Unless a waiver is granted pursuant to Subsection 4, the out-of-state attorney shall pay the sum of Three Hundred Fifty Dollars (\$350.00) as a non-refundable application fee to the Oklahoma Bar Association. If the proceeding is pending on the anniversary of the application, an annual renewal fee of Three Hundred Fifty Dollars (\$350.00) shall be paid to the Oklahoma Bar Association and such fee shall continue to be paid on each anniversary date until the proceeding is concluded or the out-of-state attorney is permitted to withdraw from the proceeding by the applicable Oklahoma court or tribunal. In the event the annual renewal fee is not timely paid, the Oklahoma Bar Association shall mail a renewal

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

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

5. The out-of-state attorney shall associate with an Oklahoma attorney. The associated Oklahoma attorney shall enter an appearance in the proceeding and service may be had upon the associated Oklahoma attorney in all matters connected with said proceeding with the same effect as if personally made on the out-of-state attorney. The asso-

ciated Oklahoma attorney shall sign all pleadings, briefs, and other documents, and be present at all hearings or other events in which personal presence of counsel is required, unless the Oklahoma court or tribunal waives these requirements.

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

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

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

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

1. In addition to compliance with the applicable Rules Governing Admission to the Practice of Law in the State of Oklahoma, A an attorney granted a special temporary permit to practice shall pay an administrative fee to the Oklahoma Bar Association of \$350.00 regardless of the duration of the

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

2. Attorneys granted a special temporary permit to practice prior to the promulgation of this rule shall be deemed to have a renewal date of January 2, 2010.

3. All attorneys granted a special temporary permit to practice shall comply with the requirements of the Rules for Mandatory Continuing Legal Education with the exception that the annual reporting period shall be the anniversary date of the issuance of the special temporary permit to practice.

2019 OK 74

STATE OF OKLAHOMA ex rel.
OKLAHOMA BAR ASSOCIATION,
Complainant, v. BRADLEY ALAN
PISTOTNIK, Respondent.

SCBD No. 6859. November 18, 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 Indictment, Information, Plea Agreement, and Judgment in a Criminal Case, in the matter of *United States of America v. Bradley A.*

CLOUDI MORNINGS, LLC., and AUSTIN MILLER, individually, Plaintiffs/Appellees, v. THE CITY OF BROKEN ARROW, Defendant/Appellant.

No. 117,500. November 19, 2019

APPEAL FROM THE TULSA COUNTY DISTRICT COURT

Honorable Patrick Pickerill, Trial Judge

¶0 The voters of the State of Oklahoma passed State Question 788, codified at 63 O.S. Supp. 2018 §420A et seq., on June 26, 2018, legalizing medical marijuana. Subsequently, the City of Broken Arrow enacted local zoning ordinances No. 3540 and 3542 in an attempt to incorporate the introduction of medical marijuana businesses into their community. On September 25, 2018, the plaintiffs/appellees, filed a Petition for Declaratory Judgment and Injunctive Relief in the Tulsa County District Court asking the court to make a legal determination that the City of Broken Arrow had no authority whatsoever to zone or otherwise regulate medical marijuana businesses within city limits. The trial court agreed with the plaintiffs, and on October 17, 2018, issued a declaratory judgment finding, as a matter of law, that Oklahoma cities were precluded from adopting regulations, zoning overlays, fees or other restrictions relating to medical marijuana business activities. The City appealed. The Oklahoma Legislature enacted 63 O.S. Supp. 2019 §425(f), as amended by SB 1030 (effective August 30, 2019) in an apparent attempt to clarify the voter approved enactment and to provide further direction for municipalities to incorporate marijuana businesses within their city limits. On June 24, 2019, we remanded the cause back to the Tulsa County District Court to enter Findings of Fact and Conclusions of Law specifically addressing: 1) whether Broken Arrow, though enactment of its ordinances, has “unduly change[d] or restrict[ed] zoning laws so as to prevent the opening of a retail marijuana establishment; and 2) the impact of the statutory amendment on the validity of the City ordinances. On October 18, 2019, the trial court entered an order answering our questions and making express findings of fact and conclusions of law. We now dismiss the appeal for lack of case or controversy.

Pistotnik, Case No. 18-CR-10099-01-EFM, in the United States District Court for the District of Kansas. On October 15, 2019, Bradley A. Pistotnik pled guilty to the Information charging three violations of 18 U.S.C. § 3, Accessory After the Fact in relation to 18 U.S.C. § 875(d) (communication of an extortionate threat in interstate commerce), Class A misdemeanors. On October 16, 2019, the Court sentenced Bradley A. Pistotnik to a fine of \$375,000 (\$125,000 per violation); \$55,200 in restitution; and a \$300 assessment, payable in a lump sum payment of \$430,500 due immediately.

¶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 Bradley A. Pistotnik is immediately suspended from the practice of law. Bradley A. Pistotnik is directed to show cause, if any, no later than **December 4, 2019**, why this order of interim suspension should be set aside. See RGDP Rule 7.3. The OBA has until **December 18, 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, Bradley A. Pistotnik has until **January 3, 2020**, 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 20, 2020**, to respond.

¶4 DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE on November 18, 2019.

/s/ Noma D. Gurich
CHIEF JUSTICE

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

APPEAL DISMISSED.

Trevor A. Dennis, Acting City Attorney, City of Broken Arrow,

Charles S. Plumb, Michael F. Smith, Jacob S. Crawford, Tulsa, Oklahoma, Attorneys for Appellant.

John E. Rooney, Jr., Ronald E. Durbin, Tulsa, Oklahoma, Attorney for Plaintiffs/Appellees.

KAUGER, J.:

¶1 We retained this cause to address the authority of a city, such as the City of Broken Arrow, to zone/regulate a medical marijuana establishment within city limits. However, because the cause lacks any case or controversy as to these plaintiffs, and is merely a request for an advisory opinion, we must dismiss the appeal.¹

FACTS/PROCEDURAL POSTURE

¶2 On September 25, 2018, the plaintiffs/appellees, Cloudi Mornings and Austin Miller (collectively Cloudi Mornings) filed a Petition for Declaratory Judgment and Injunctive Relief in the District Court of Tulsa County. In the petition, Cloudi Mornings stated that it is an L.L.C. with its primary business activities located within the City of Broken Arrow and that Austin Miller was a resident of Broken Arrow.

¶3 They contend that as a “business within city limits,” they have a vested interest in City enacted medical marijuana rules related to the voter approved June 26, 2018, Initiative Petition 788 which legalized medical marijuana in the State of Oklahoma. The Initiative Petition became codified as 63 O.S. Supp. 2018 §§420 et seq. (The Act).²

¶4 The original codification governed the legal possession of medical marijuana, caregiver licenses, dispensary licenses,³ licensed commercial growers/packagegers,⁴ processing licenses,⁵ transportation licenses,⁶ and directed the establishment of a regulatory office under the Oklahoma State Department of Health (Health Department).⁷ It also expressly allowed counties and cities to enact medical marijuana guidelines allowing license holders to exceed the state limits regarding legal possession.⁸

¶5 The Act included a provision on discrimination towards license holders⁹ and stated that “no city or local municipality may unduly change or restrict zoning laws to prevent the

opening of a retail marijuana establishment.”¹⁰ It did not define “retail marijuana establishment.” Cloudi Mornings argued that the statutes restricted cities from imposing regulations of activities authorized under the Act and that only the Health Department was entitled to impose any regulations.

¶6 The Health Department created regulations to govern activities under the Act. The regulations are found in the Oklahoma Administrative Code, Title 310, Oklahoma State Department of Health, Ch. 681 and were adopted August 1, 2018, and made effective on August 25, 2018.¹¹ The rules generally cover the application processes of the various licenses, renewals, inspections, inventory, audits, taxes, commercial facilities, packaging, and labeling. Nothing in the rules addressed zoning or location of establishments, but the rules did require premises to meet state and local electrical, fire, plumbing, waste and building codes.

¶7 According to Cloudi Mornings, the City of Broken Arrow met on September 18, 2018, and adopted Ordinance 3540 and 3542, as well as an Amended City of Broken Arrow Manual of Fees.¹² The ordinances purport to zone and restrict marijuana operations within the City, much like any other retail establishment. They address parking, building codes, require City permits and application fees, etc.

¶8 Cloudi Mornings did not assert that it was denied any permits, required to pay a particular fee or was prohibited from locating in a chosen location within the City limits in their Petition. Nor do they allege that the ordinances conflict with Health Department regulations and rules. They did attach to the Petition, an affidavit of plaintiff, Austin Miller, who identifies himself as the Manager of Cloudi Mornings. He states that: the company intends to conduct business in the City of Broken Arrow; the ordinances and fees completely frustrate their commercial purposes; and the ordinances will cause substantial and irreparable harm to the company and other individual residents of Broken Arrow.

¶9 Cloudi Morning argues that the City exceeded its authority by addressing any of these regulation issues all together, and they sought to have the City’s efforts declared null and void. They also filed an application for emergency temporary restraining order and temporary injunction along with their Petition for Declaratory Judgment. On September 28,

2018, the City objected. It argued that Oklahoma Legislature expressly acknowledged that Cities would need zoning and regulations regarding a new industry which was once illegal, and that the Legislature included the express allowance for municipalities to enact reasonable, common sense ordinances.¹³

¶10 The trial court held a hearing on September 28, 2018. At the hearing, Cloudi Mornings argued that after medical marijuana became legal in the State of Oklahoma, they applied for their license, received it, engaged in business. Subsequently, however, the City of Broken Arrow created zoning which, if applied, would mean that Cloudi Mornings is engaged in growing in an area not properly zoned, and not in compliance with City's rules. They offered no measure of monetary damages they may have suffered, but noted that they already had plants growing and had already signed a lease.

¶11 On October 17, 2018, the trial court filed a Final Declaratory Judgment. It held that Oklahoma cities, as a matter of law, were precluded from adopting regulations, zoning overlays, fees or other restrictions to medical marijuana business activities authorized by the Act. Consequently, the City's enactment of the ordinances was not permissible and it enjoined the City from enforcing them. The City appealed and filed a motion to retain on October 31, 2018. We retained the cause on November 15, 2018, and the briefing cycle was completed on May 15, 2019, with the filing of the City's reply brief.

¶12 In the meantime, the Legislature, in the 2019 Legislative session amended portions of the Act. It enacted a new 63 O.S. Supp. 2019 §427 concerning licensure revocations. It also amended §§420 and 425 with multiple amendments. The amendments to §420 relate to record keeping and are not applicable to this cause.¹⁴ The amendments to 63 O.S. Supp. 2019 §425 however are pertinent. The Legislature added to the subsection which originally stated that "[n]o city or local municipality may unduly change or restrict zoning laws to prevent the opening of a retail marijuana establishment." The addition states:

2. For purposes of this subsection, an undue change or restriction of municipal zoning laws means an act which entirely prevents retail marijuana establishments from operating within municipal boundaries as a matter of law. Municipalities may follow their standard planning and zoning proce-

dures to determine if certain zones or districts would be appropriate for locating marijuana-licensed premises, medical marijuana businesses or any other premises where marijuana or its by-products are cultivated, grown, processed, stored or manufactured.

3. For purpose of this section, "retail marijuana establishment" means an entity licensed by the State Department of Health as a medical marijuana dispensary. Retail marijuana establishment does not include those other entities licensed by the Department as marijuana-licensed premises, medical marijuana businesses or other facilities where marijuana or any product containing marijuana or its by-products are cultivated, grown, processed, stored or manufactured.

¶13 Because of the legislative amendments, on June 24, 2019, we remanded the cause and ordered the trial court to enter findings of fact and conclusions of law addressing: 1) whether the ordinances had unduly changed or restricted zoning law so as to prevent the opening of a retail marijuana establishment and 2) the impact of 63 O.S. Supp. 2018 §42(f) on the ordinances. We directed the parties to supplement the appellate record with the court's findings within 90 days.

¶14 On October 18, 2019, the trial court filed its Findings of Fact and Conclusions of Law.¹⁵ Regarding the facts, it found that:

- 1) Miller and Cloudi Mornings were actively engaged in the cannabis growing business within the municipality of the City of Broken Arrow;
- 2) the City ordinances zoned only "Retail Sales businesses," [a/k/a retail marijuana establishments or retail sales establishments], within the City, and such businesses were the only marijuana businesses required by the ordinances to submit an operational and business plan and apply for a City permit and licensing fee;
- 3) multiple establishments were currently and actively operating dispensaries within City limits; and
- 4) the Legislature added a subsection to 63 O.S. Supp. 2018 §425(f) which excluded locations where marijuana was grown from the definition of "retail marijuana establishment."

¶15 Regarding conclusions of law, the trial court determined that:

- 1) the plaintiff/appellees were engaged in an active cannabis growing business within the municipality of the City of Broken Arrow;
- 2) there is no specific statutory protection against undue changes or restrictions in municipal zoning as provided to a business engaged in the growing or processing of cannabis;
- 3) the ordinances did not unduly change or restrict zoning so as to prevent the opening of retail marijuana establishments; and
- 4) the statutory amendments operate as a subsequent clarification of the phrase “unduly change or restrict zoning laws” and defining the term “retail marijuana establishment.”

APPEAL DISMISSED.

¶16 The City argues that: 1) cities possess the full power of local government and may enact ordinance to protect the public peace, order, health and safety; and 2) reasonable regulations to medical marijuana businesses operating within their jurisdiction fall squarely within the City’s purview of authorized regulation. Cloudi Mornings argues that the Act only tasks the Health Department with regulating the marijuana industry and, consequently, cities are powerless to enact marijuana zoning ordinances.

¶17 Cities generally have the authority to enact zoning and regulatory ordinances.¹⁶ The voter-approved version of the Act, acknowledged such authority when it noted that no city or local municipality may unduly change or restrict zoning to prevent the opening of a retail marijuana establishment.¹⁷ The acknowledgment being that city zoning and regulation could occur as long as the ordinances enacted were not unduly changed or restricted in such a way that no retail marijuana establishment could open within city limits.

¶18 If there was any doubt as to the City’s authority, the 63 O.S. Supp. 2019 §425 legislative amendments expressly state that:

- 1) an undue change or restriction of municipal zoning laws means an act which entirely prevents retail marijuana establishments from operating within municipal boundaries as a matter of law;

- 2) a “retail marijuana establishment” means an entity licensed by the State Department of Health as a medical marijuana dispensary but does not include other entities licensed by the Department as marijuana-licensed premises, medical marijuana businesses or other facilities where marijuana or any product containing marijuana or its by-products are cultivated, grown, processed, stored or manufactured; and
- 3) municipalities may follow their standard planning and zoning procedures to determine if certain zones or districts would be appropriate for locating marijuana-licensed premises, medical marijuana businesses or any other premises where marijuana or its by-products are cultivated, grown, processed, stored or manufactured.¹⁸

It is well settled that subsequent amendments to an act can be used to ascertain the meaning of the prior statute.¹⁹ Where the meaning of a prior statute is subject to serious doubt and has not been judicially determined, a presumption arises that a subsequent amendment was meant to clarify, as opposed to change, the prior statute.²⁰ A subsequent statute clarifying a prior statute can be used to determine the meaning of the prior statute even if the interpretation affects alleged vested rights.²¹

¶19 Clearly, the Act authorizes the City to follow standard planning and zoning procedures as to marijuana growers such as Cloudi Mornings. The Act does not even apply the “unduly change or restrict” standard to growers such as Cloudi Mornings. This is a problem for Cloudi Mornings where it was not denied any city permits, required to pay a particular city fee, or prohibited from locating in a chosen location within City limits all together. Nor is there is any indication that the City’s ordinances directly conflict with the Health Department regulations and rules.

¶20 At the trial court hearing of September 28, 2018, Cloudi Mornings admitted that if the City’s zoning applied, then they would not be in compliance with the City’s rules. They also insisted that City’s ordinances and fees “completely frustrate their commercial purposes” and that ordinances will “cause substantial and irreparable financial harm to the company” and other Broken Arrow residents. Nevertheless, it appears the City was acting within its authority under the original enactment as approved by the voters. If the original enact-

ment were unclear, the subsequent amendments certainly clarified the issue.

¶21 In short, there is no longer a case or controversy from which the trial court or this Court could declare any relief as to these particular plaintiffs. The rule does not change when a declaratory judgment is involved.²² We do not issue advisory opinions.²³ We recognize that there are exceptions for matters which are of great public importance. While this may have been a matter of great public importance when it was enacted by the voters, the Legislature's subsequent action expressly authorizes City zoning. Here, without any indication that City's ordinances have exceeded what the Legislature authorized by the Act and its subsequent amendments, there is nothing for us to decide.²⁴ Furthermore, in so far as this cause is concerned, there is no indication that the City has enforced the zoning ordinances against Cloudi Mornings. Nor is there indication that Cloudi Mornings has sought and been denied a variance.²⁵ Accordingly, we dismiss the appeal.

CONCLUSION

¶22 The root of this cause is timing. The voters approved State Question 788 and the City of Broken Arrow responded with ordinances before the Oklahoma Legislature could expand and clarify the legislation. In the meantime, Cloudi Mornings sought and obtained a license to legally grow medical marijuana. It set up shop before the City of Broken Arrow could implement State Question 788, and when it tried to implement it, Cloudi Mornings attempted to thwart the City's efforts with a declaratory judgment.

¶23 However, the Legislature did clarify the legislation with amendments and Cloudi Mornings declaratory judgment arguments were essentially nullified by the Legislative amendments. Because the declaratory relief Cloudi Mornings sought is no longer an issue, Cloudi Mornings has yet to appear to suffer any loss, and it appears the City was acting within its authority under both the original enactment and its amendments, we must dismiss the appeal.

APPEAL DISMISSED.

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

KAUGER, J.:

1. On December 10, 2018, applicants Sooner Green, L.L.C. and Heather Whitsell and The Oklahoma Municipal League filed an application to file an Amicus Curiae Brief without consent by the parties. On December 12, 2018, we deferred consideration of the motion to the decisional stage. Because of our holding, an amicus curiae brief is unnecessary and the applications are hereby denied.

2. Title 63 O.S. Supp. 2018 §420 as enacted provided:

A. A person in possession of a state issued medical marijuana license shall be able to:

1. Consume marijuana legally;
2. Legally possess up to three (3) ounces of marijuana on their person;
3. Legally possess six (6) mature marijuana plants;
4. Legally possess six (6) seedling plants;
5. Legally possess one (1) ounce of concentrated marijuana;
6. Legally possess seventy-two (72) ounces of edible marijuana; and
7. Legally possess up to eight (8) ounces of marijuana in their residence.

B. Possession of up to one and one-half (1.5) ounces of marijuana by persons who can state a medical condition, but not in possession of a state issued medical marijuana license, shall constitute a misdemeanor offense with a fine not to exceed Four Hundred Dollars (\$400.00).

C. A regulatory office shall be established under the Oklahoma State Department of Health which will receive applications for medical license recipients, dispensaries, growers, and packagers within sixty (60) days of the passage of this initiative.

D. The Oklahoma State Department of Health shall within thirty (30) days of passage of this initiative, make available, on their website, in an easy to find location, an application for a medical marijuana license. The license will be good for two (2) years, and the application fee will be One Hundred Dollars (\$100.00), or Twenty Dollars (\$20.00) for individuals on Medicaid, Medicare, or SoonerCare. The methods of payment will be provided on the website.

E. A temporary license application will also be available on the Oklahoma Department of Health website. A temporary medical marijuana license will be granted to any medical marijuana license holder from other states, provided that the state has a state regulated medical marijuana program, and the applicant can prove they are a member of such. Temporary licenses will be issued for thirty (30) days. The cost for a temporary license shall be One Hundred Dollars (\$100.00) Renewal will be granted with resubmission of a new application. No additional criteria will be required.

F. Medical marijuana license applicants will submit their application to the Oklahoma State Department of Health for approval and that the applicant must be an Oklahoma state resident and shall prove residency by a valid driver's license, utility bills, or other accepted methods.

G. The Oklahoma State Department of Health shall review the medical marijuana application, approve/reject the application, and mail the applicant's approval or rejection letter (stating reasons for rejection) to the applicant within fourteen (14) days of receipt of the application. Approved applicants will be issued a medical marijuana license which will act as proof of their approved status. Applications may only be rejected based on applicant not meeting stated criteria or improper completion of the application.

H. The Oklahoma State Department of Health will only keep the following records for each approved medical license:

1. a digital photograph of the license holder;
2. the expiration date of the license;
3. the county where the card was issued; and
4. a unique 24 character identification number assigned to the license.

I. The Department of Health will make available, both on its website, and through a telephone verification system, an easy method to validate a medical license holders authenticity by the unique 24 character identifier.

J. The State Department of Health will ensure that all application records and information are sealed to protect the privacy of medical license applicants.

K. A caregiver license will be made available for qualified caregivers of a medical marijuana license holder who is homebound. The caregiver license will give the caregiver the same rights as the medical license holder. Applicants for a caregiver license will submit proof of the medical marijuana license holder's license status and homebound status, that they are the designee of the medical marijuana license holder, must submit proof that the

caregiver is age eighteen (18) or older, and must submit proof the caregiver is an Oklahoma resident. This will be the only criteria for a caregiver license.

L. All applicants must be eighteen (18) years or older. A special exception will be granted to an applicant under the age of eighteen (18), however these applications must be signed by two (2) physicians and the applicant's parent or legal guardian.

M. All applications for a medical license must be signed by an Oklahoma Board certified physician. There are no qualifying conditions. A medical marijuana license must be recommended according to the accepted standards a reasonable and prudent physician would follow when recommending or approving any medication. No physician may be unduly stigmatized or harassed for signing a medical marijuana license application.

N. Counties and cities may enact medical marijuana guidelines allowing medical marijuana license holders or caregivers to exceed the state limits set forth in subsection A of this section.

3. Title 63 O.S. Supp. 2018 §421.
4. Title 63 O.S. Supp. 2018 §422.
5. Title 63 O.S. Supp. 2018 §423.
6. Title 63 O.S. Supp. 2018 §424.
7. Title 63 O.S. Supp. 2018 §420, *see note 2, supra*.
8. Title 63 O.S. Supp. 2018 §420, *see note 2, supra*.
9. Title 63 O.S. Supp. 2018 §425.
10. Title 63 O.S. Supp. 2018 §425(F) provided:

No city or local municipality may unduly change or restrict zoning laws to prevent the opening of a retail marijuana establishment.

11. The rules were made effective August 25, 2018, or when approved by the Governor, whichever is later. The Governor approved the rules on July 11, 2018.

12. Cloudi Mornings attached the Ordinances and the Manual of Fees to its Petition for Declaratory Judgment, but the attachments are unsigned, unfiled copies.

13. Title 63 O.S. Supp. 2018 §425(F), *see note 10, supra*.
14. Title 63 O.S. Supp. 2019 §420.

15. On October 22, 2019, the Tulsa County Court Clerk filed an official, certified supplement to the record which included the trial court's findings.

16. Title 11 O.S. 2011 §43-101 provides:

For the purpose of promoting health, safety, morals, or the general welfare of the community, a municipal governing body may regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes.

Nuchools v. Board of Adjustment of the City of Tulsa, 1977 OK 3, ¶11, 560 P.2d 556 [The right, power, and authority of the legislative body of cities to enact zoning ordinances arises from the authority of the Oklahoma statutes.]; *See also Mid-Continent Life Insurance v. The City of Oklahoma City*, 1985 OK 41 ¶9, 701 P.2d 421 [Zoning is a legislative function which is due the presumptive validity of any municipal ordinances. Unless zoning decisions of a municipality are found not to have a substantial relation to public health, safety, morals or general welfare or are found to constitute an unreasonable, arbitrary exercise of police power, such judgments will not be overridden by courts.].

17. Title 63 O.S. Supp. 2018 §420, *see note 2, supra*.
18. Title 63 O.S. Supp. 2019 §425, *see also discussion page 9, supra*.
19. *Quail Creek Golf v. Oklahoma Tax Commission*, 1996 OK 35, ¶10, 913 P.2d 302; *See, Texas County Irrigation & Water Resources Ass'n v. Oklahoma Water Resources Board*, 1990 OK 121, ¶6, 803 P.2d 1119; *See also, Board of Education v. Morris*, 1982 OK 142, ¶9, 656 P.2d 258; *Magnolia Pipe Line Co., v. Oklahoma Tax Commission*, 1946 OK 113, ¶11, 167 P.2d 884.

20. *Quail Creek Golf v. Oklahoma Tax Commission*, *see note 20, supra*; *Texas County Irrigation & Water Resources Ass'n v. Oklahoma Water Resources Board*, *see note 20, supra*; *Magnolia Pipe Line Co., v. Oklahoma Tax Commission*, *see note 20, supra*.

21. *Quail Creek Golf v. Oklahoma Tax Commission*, *see note 20, supra*; *Texas County Irrigation & Water Resources Ass'n v. Oklahoma Water Resources Board*, *see note 20, supra*; *Magnolia Pipe Line Co., v. Oklahoma Tax Commission*, *see note 20, supra*. *See also, Polymer Fabricating, Inc. v. Employers Worker's Compensation Association*, 1998 OK 113, ¶15, 980 P.2d 108; *Board of Education, Vici Public Schools, v. Morris*, 1982 OK 142, ¶9, 688 P.2d 258.

22. Title 12 O.S. 2011 §1651 provides:

District courts may, in cases of actual controversy, determine rights, status, or other legal relations, including but not limited to a determination of the construction or validity of any foreign judgment or decree, deed, contract, trust, or other instrument or agreement or of any statute, municipal ordinance, or other gov-

ernmental regulation, whether or not other relief is or could be claimed, except that no declaration shall be made concerning liability or nonliability for damages on account of alleged tortious injuries to persons or to property either before or after judgment or for compensation alleged to be due under workers' compensation laws for injuries to persons. The determination may be made either before or after there has been a breach of any legal duty or obligation, and it may be either affirmative or negative in form and effect; provided however, that a court may refuse to make a determination where the judgment, if rendered, would not terminate the controversy, or some part thereof, giving rise to the proceeding.

Knight v. Miller, 2008 OK 81, ¶¶8-13, 195 P.3d 372; *Gordon v. Fol- lowell*, 1964 OK 74, ¶6, 391 P.2d 242.

23. *Westinghouse Elec. Corp. v. Grand River Dam Authority*, 1986 OK 20, ¶21, 720 P.2d 713.

24. *Hunsucker v. Fallin*, 2017 OK 100, ¶5, 408 P.3d 599 [This Court possesses discretion to grant standing to private parties to vindicate the public interest in cases presenting issues of great public importance. This discretion is properly exercised to grant standing where there are "competing policy considerations" and "lively conflict between antagonistic demands."]; *Osage Nation v. Bd. of Comm'rs*, 2017 OK 34, ¶61, 394 P.3d 1224 [We have recently explained standing must be predicated on cognizable economic harm when a legislative act is challenged as unconstitutional or invalid. A person who seeks to invalidate a statute as unconstitutional must establish standing by showing that the legislation sought to be invalidated detrimentally affects his/her interest in a direct, immediate and substantial manner. Similarly, in some states, standing based upon public nuisance and municipal zoning law is based upon an allegation of injury to the plaintiff which is different in kind from that experienced by the residents in general. Standing to challenge the ordinance itself apart from the construction requires a different analysis, but also must be based upon a legally cognizable interest infringed by the challenged legislation (ordinance)]. Even the Amicus Curie applicants acknowledge in their application that "as framed the issues(s) pending before this Court does not address whether a municipality with its regulatory powers can outright *ban* or *prohibit* lawful activity approved by a vote of the citizens of the State of Oklahoma."

25. A comparable situation might be *Knight v. Miller*, 2008 OK 81, ¶11, 195 P.3d 372 wherein the injured party was merely seeking a declaration that the insurer would be obligated to pay any judgment that he might recover against the tortfeasor. The Court held that the injured party had no legally cognizable or protective interest in the controversy and would not have one unless and until he succeeded in the negligence action.

2019 OK 76

**STATE OF OKLAHOMA, ex rel.,
OKLAHOMA BAR ASSOCIATION,
Complainant, v. BRANDON DUANE
WATKINS, Respondent.**

SCBD 6621. November 19, 2019

**ORIGINAL PROCEEDING FOR ATTORNEY
DISCIPLINE**

¶0 The Oklahoma Bar Association filed a complaint against Brandon Duane Watkins, Respondent, alleging three counts of misconduct. The Professional Responsibility Tribunal found clear and convincing evidence of conversion and misappropriation of funds, neglect, failure to communicate, and enhancement. Upon *de novo* review, we find Respondent guilty of simple conversion, neglect, and failure to communicate.

RESPONDENT IS SUSPENDED FOR TWO YEARS AND ONE DAY; MOTION TO ASSESS COSTS GRANTED.

Tracy Pierce Nester, Oklahoma Bar Association, Oklahoma City, Oklahoma, for Complainant.

Brandon Duane Watkins, Perkins, Oklahoma, Pro Se.

OPINION

DARBY, V.C.J.:

¶1 The Oklahoma Bar Association (Bar) initiated this disciplinary proceeding on January 8, 2018, by filing a complaint against Respondent pursuant to Rule 6 of the Rules Governing Disciplinary Proceedings (RGDP), 5 O.S.2011, ch.1, app. 1-A. The complaint alleged violations of RGDP 1.3 (discredit upon the legal profession) and Oklahoma Rules of Professional Conduct (ORPC) 1.1 (competence), 1.3 (diligence), 1.4 (adequate communication), 1.15 (safeguard client property), 3.2 (expedite litigation), and 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation), 5 O.S.2011, ch. 1, app. 3-A. The Professional Responsibility Tribunal (Trial Panel) found clear and convincing evidence establishing the facts in the complaint and that Respondent violated RGDP 1.3 and ORPC 1.1, 1.3, 1.4, 1.14 [sic], and 3.2.¹ The Trial Panel recommended suspension of two years and one day, and the Bar asked this Court to impose appropriate discipline and assess costs.

¶2 The questions before this Court are (1) whether Respondent violated the ORPC and RGDP, and (2) if so, what discipline should be imposed. We find that Respondent violated numerous rules governing attorney conduct. Due to the nature of Respondent's actions, the length of time they were ongoing, and his past disciplinary history, we determine the proper discipline is suspension for two years and one day.

I. STANDARD OF REVIEW

¶3 The Supreme Court of Oklahoma possesses original, exclusive, and nondelegable jurisdiction to control and regulate the practice of law, licensing, ethics, and discipline of attorneys. *State ex rel. Okla. Bar Ass'n v. Braswell*, 1998 OK 49, ¶ 6, 975 P.2d 401, 404; *see also* 5 O.S.2011, § 13; RGDP 1.1. The Bar has the burden to present clear and convincing evidence demonstrating the lawyer's misconduct. *State ex rel. Okla. Bar Ass'n v. Godlove*, 2013 OK 38, ¶

3, 318 P.3d 1086, 1088; *see also* RGDP 6.12. Clear and convincing evidence is evidence sufficient, both in quality and quantity, to produce a firm conviction of the truth of the allegations. *Godlove*, 2013 OK 38, ¶ 3, 318 P.3d at 1088; *see also* RGDP 6.12.

¶4 The Court reviews the Trial Panel proceeding *de novo* in order to determine whether discipline is warranted and what sanction, if any, is to be imposed. *State ex rel. Okla. Bar Ass'n v. Bednar*, 2019 OK 12, ¶ 2, 441 P.3d 91, 95. To make this assessment and imposition, we must receive a record that permits "(a) an independent on-the-record determination of the critical facts and (b) the crafting of an appropriate discipline." *State ex rel. Okla. Bar Ass'n v. Schraeder*, 2002 OK 51, ¶ 6, 51 P.3d 570, 574. The Bar asserts that the record in this case – consisting of pleadings, transcript, exhibits, application to assess costs, and the Trial Panel Report – is complete and sufficient for our review and the imposition of discipline. We agree.

II. PRIOR DISCIPLINE

¶5 In November 2013, Respondent agreed to represent a husband and wife regarding a promissory note; in July 2014, he filed a breach of contract action on their behalf. Bar Ex. 11. Eventually, the court dismissed the case and awarded the opposing party attorney fees and sanctions against Respondent totaling \$9,099.41. *Id.* As a result, on July 20, 2015, the client filed grievance DC-15-138 against Respondent. Bar Ex. 10.

¶6 On November 30, 2015, Respondent signed a Diversion Program Agreement to complete classes and pay all associated costs; in return, he received a private reprimand and the Professional Responsibility Commission did not seek further discipline. Bar Ex. 10, at OBA 60-67; *see also* RGDP 5.1(c)-(f). Respondent completed Law Practice Management, Trust Accounting Essentials, and Communication and Client Neglect classes between March 22 and April 12, 2016. Complaint at 5, para. 23. On July 15, 2016, Respondent received a private reprimand. Bar Ex. 11, at OBA 68; Complaint at 5, para. 23.

III. FACTS AND PROCEDURAL HISTORY

¶7 In December 2013, Chris Chaney hired Respondent after Chaney's wife was killed in an automobile accident. In January 2014, Respondent filed a petition for letters of administration, appointment of personal representative, and

determination of heirs in *In re Estate of Jeannie Kay Chaney*, No. PB-2014-2 (Craig Co. Dist. Ct.). Bar Ex. 5, at OBA 518. In February, the district court determined heirs and named Chaney as personal representative of the estate. On June 3, 2014, Respondent deposited into his client trust account a \$100,000 settlement check received for the death of Jeannie Chaney.

¶8 On July 1, Respondent filed notice to creditors, an inventory and appraisal of the estate, consent to partial distribution by the other heirs (dated June 12 and 18, 2014), and a petition for partial distribution. The petition stated that pursuant to title 84, section 213(B) (2)(c) of the Oklahoma Statutes, the estate would be distributed one-half (1/2) to Chaney, one-sixth (1/6) to Shaya Emerson, Mrs. Chaney's adult child, and one-sixth (1/6) each to Mrs. Chaney's two minor children. The petition requested distribution of \$70,000 to the personal representative "in order to pay attorney fees and other costs of administration, and for distribution to the above described heirs at law." Bar Ex. 5, at OBA 545. On July 1, 2014, the district court ordered immediate distribution of \$70,000. Bar Ex. 5, at OBA 548.

¶9 Almost five months later, on November 24, 2014, Respondent paid Chaney \$32,570.55. Chaney's settlement statement listed deficits for five "liens filed with court per probate" in the total amount of \$1,858.90² and an attorney fee of \$33,000. The statement averred a "total amount due to all heirs and Mr. Chaney" of \$65,141.11. Chaney signed the settlement statement and accepted the funds due to him personally. At that point, Respondent had presumably paid out \$64,570.55 of the \$70,000.00 ordered by the court.³ Respondent, however, still owed the remaining heirs \$32,570.55.

¶10 On April 30, 2015, Emerson (the decedent's lone adult child) signed a settlement statement from Respondent which referred to her as "client" a total of seven times. Respondent paid Emerson \$10,856.84⁴ – bringing the total amount Respondent had presumably disbursed to \$78,286.29⁵ of the \$70,000.00 ordered for immediate payment almost ten months earlier. But Respondent still owed the remaining heirs \$21,713.71.

¶11 On June 25, 2015, Chaney terminated Respondent's services via letter. Bar Ex. 4, at OBA 39. Chaney requested that Respondent send him the case file and pay the remaining

heirs, or anyone else owed, within ten days. Respondent did not do either.

¶12 On November 21, 2016, almost a year and a half after terminating representation, Chaney filed a grievance that stated in part:

[Respondent] still owes my family part of the settlement. . . . It was our understanding that these funds would be placed into a trust account until the children reach the age of 18. Respondent has been paid to set up these accounts and has still yet to do so. On June 26th, 2015 [sic], I sent [Respondent] a letter of termination, demanding that these funds be paid to the minors within ten (10) days. This has yet to be done.

Bar Ex. 1, at OBA 4. At this point, Respondent had held the funds for the minor children of the deceased for over two-and-a-half years.

¶13 Three months later, on February 21, 2017, Respondent withdrew all of the money in his client trust account and filed a motion to interplead \$23,573.86 for the remaining heirs,⁶ and a motion to withdraw as counsel. The court allowed Respondent's withdrawal as counsel and ordered the court clerk to hold the money pending distribution orders. That same day, Respondent filed his response to the complaint denying the allegations.

¶14 From July 2014 through February 2017, Respondent made nine cash withdrawals,⁷ seventy-nine transfers to his personal checking account,⁸ and two withdrawals for loan payments, *all out of his client trust account*. Respondent made the first loan payment on December 5, 2016 for \$963.41. Bar Ex. 17, at OBA 431-34. He made the second loan payment on January 13, 2017 for \$660.94. *Id.* at OBA 467-70. The payments were credited to two different loan account numbers, but both loan payment slips name Respondent as the account owner. *Id.* at OBA 433, 469.

¶15 The Bar investigated Respondent and on January 8, 2018, filed a formal complaint setting forth three counts of professional misconduct. The complaint alleged first that Respondent converted or misappropriated client funds when he failed to timely pay heirs, his client trust account balance was regularly below the amount he owed, and he never established separate bank accounts in trust for the minor heirs as required by title 12, section 83 of the Oklahoma statutes. Complaint at 2-3, paras. 7-13. Second, the com-

plaint alleged that Respondent committed neglect and failed to communicate with clients: repeatedly neglected to return client calls, failed to notify clients when he relocated offices on three occasions while the case was ongoing, delayed five to ten months before paying the first two heirs, and never created trust accounts for the minor heirs. Complaint at 4, paras. 16-19. Third, the complaint alleged that discipline should be enhanced due to Respondent's diversion program agreement in the previous matter. The Bar submitted evidence that Respondent was properly served with notice. On January 29, 2018, Respondent filed an answer to the complaint.

¶16 On May 10, 2018, at the hearing before the Trial Panel, Chaney testified that from July through November of 2014, he called Respondent's office and cell phone every week and was regularly unable to reach him. Chaney stated that he left numerous messages for Respondent with no response and did not recall Respondent accounting for the delay. Chaney clarified that after he received payment, he mostly left communication to Emerson. Chaney also noted that Respondent relocated his office during this window of time without notifying him or Emerson in any manner.

¶17 Emerson testified that Respondent failed to return calls on at least four occasions and he cancelled previously scheduled meetings at the last moment four times. Emerson testified that on April 30, 2015, she had taken off work early to meet with Respondent when he called attempting to cancel their appointment at the last moment, but she refused to take no for an answer. Emerson stated that when Respondent finally arrived he appeared disheveled, possibly intoxicated, and fidgeted throughout the meeting, making her feel extremely rushed.

¶18 The father of the minor children testified that no one from Respondent's office had contacted him about distributing the funds to his children. The father recalled being told at some point that he needed to get bank accounts for his children, so he called a bank, obtained two account numbers for that purpose, and conveyed the information to Emerson. But, the father did not know if Emerson conveyed that information to Respondent.

¶19 The Bar's investigator, Krystal Willis, testified that Respondent's trust account balance regularly fell below the amount owed to the heirs. Willis stated that Respondent had

only two other accounts, one personal and one operating, at the bank where his trust account was located, but acknowledged that he may have had another trust account elsewhere. She also testified about Respondent's prior discipline and his failure to provide requested documentation, such as evidence of the liens, payments to creditors, and his substance abuse problem and recovery.

¶20 Respondent acknowledged that, "[w]ith regards to this case, yeah, I may have taken too long." Hr'g Tr. 123:19-20, May 10, 2018. Respondent justified his failure to pay or timely respond to Emerson and the other heirs by testifying that he only represented Chaney. Respondent claimed that he had responded to Emerson's calls, but they were unable to coordinate schedules. Respondent also testified that he did not realize that assisting his client in getting trust accounts open for the benefit of the minors was his responsibility. Instead, he claimed that he couldn't open accounts for the guardian of the children, and the father never provided him information to put into the paperwork regarding accounts for the children.

¶21 Respondent testified that he had a rough patch in his life approximately three years before, but that he had not consumed alcohol since April 16, 2016. He admitted that he "very well could have been" intoxicated when he gave Emerson her check. *Id.* at 146:21-25. Respondent had no memory of how he was dealing with client funds at the time due to the level of his drinking. *Id.* at 133:12-17.

¶22 Respondent testified that he did not dispute the accuracy of the trust account records. He stated:

I don't know what happened to the money from the trust account. I – to this day, I don't. I lost my home, I lost my car, I pawned everything that I had of any value, so it sure didn't go to me. I don't know what happened to it, but I know that when I found out it wasn't there, I had to fix it, and I did.

Id. at 124:7-13. Respondent acknowledged without excuse that he should have interpleaded the money to the court as soon as he realized there was a problem. He further explained, "all I know is it – it didn't pay my mortgage, it didn't make my car payment. I don't know what happened to it." *Id.* at 133:20-22. When asked if he had tried to look at the checks in and out of his operating account to reconstruct

what occurred, Respondent answered “[f]rom the records, I can’t tell, Your Honor. I – I cannot tell. I would have loved to come in here today with something to show you, but I can’t figure it out.” *Id.* at 134:1-4.

¶23 Respondent explained that he had been trying to use what he learned in his diversion program classes and do everything possible to fix things. In regard to the Bar’s multiple requests for the case file and a full accounting of work performed, Respondent explained that he did not provide it because he thought he had previously done so when he was represented by counsel. He had no explanation for his failure to provide lien documentation upon request a month before the hearing.

¶24 The Bar requested a one to two year suspension. On June 22, 2018 the Trial Panel filed their report with this Court. The Trial Panel found clear and convincing evidence of misappropriation of funds and neglect, and it concluded that Respondent should be suspended for two years and a day.

IV. ANALYSIS

Count 1: Misappropriation or Conversion

¶25 The Bar alleged that Respondent violated RGDP 1.3⁹ and ORPC 1.1,¹⁰ 1.3,¹¹ 1.15,¹² 3.2,¹³ and 8.4(c)¹⁴ by mismanaging funds entrusted to him. There are three levels of culpability when an attorney mishandles client funds: commingling, simple conversion, and misappropriation. *State ex rel. Okla. Bar Ass’n v. Mayes*, 2003 OK 23, ¶ 18, 66 P.3d 398, 404. We treat mishandling of third party funds the same. *State ex rel. Okla. Bar Ass’n v. Taylor*, 2000 OK 35, ¶ 17, 4 P.3d 1242, 1250.

¶26 Commingling is the least serious level of culpability and occurs when an attorney fails to keep client and attorney money in separate accounts. *Mayes*, 2003 OK 23, ¶ 18, 66 P.3d at 404. Respondent has admitted that he is guilty of commingling and “sloppy bookkeeping.” He regularly commingled his trust account – making earned fee deposits into it, transferring money directly to his personal account, and making cash withdrawals.¹⁵

¶27 When an attorney uses client funds for a purpose other than that for which they are intended, he or she reaches the second level of culpability: simple conversion. *Taylor*, 2000 OK 35, ¶ 17, 4 P.3d at 1250. Respondent argues that he is not guilty of simple conversion. Rather, at

most, he argues the money was simply missing and there is no evidence to establish what it was used for or that he used it. A thorough review of the client trust account records, however, shows that Respondent used client money to make loan payments on two occasions – clear examples of simple conversion at a minimum.¹⁶

¶28 Finally, the most serious level of culpability is misappropriation. *Id.* ¶ 17, 4 P.3d at 1250. Misappropriation occurs when a lawyer purposefully deprives a client of money through deceit and fraud. *Id.* Respondent argues that he is not guilty of misappropriation because there was neither evidence of intent nor did the clients suffer grave economic harm. Misappropriation may be found without grave economic harm occurring when an attorney understands that he is utilizing money that belongs to a client. *Mayes*, 2003 OK 23, ¶ 22 n.26, 66 P.3d at 405-06 n.26. The focus of the test is intent and whether the deprivation occurred through *deceit or fraud*. *State ex rel. Okla. Bar Ass’n v. Farrant*, 1994 OK 13, ¶ 8, 867 P.2d 1279, 1284. A repeated pattern of behavior over time can show intent to misuse funds. *State ex rel. Okla. Bar Ass’n v. Wilson*, 2008 OK 42, ¶ 25, 187 P.3d 708, 716. Respondent’s pattern of withholding funds while making personal use of those funds by means of cash withdrawals and loan payments, especially after completing trust class and after the grievance was filed, is evidence of intent. There is, however, no evidence of Respondent’s deceit or fraud.

¶29 Respondent’s misconduct in this case was deplorable. He failed to ensure that the money for the minor children was placed into separate trust accounts for their benefit. Instead, he egregiously commingled the children’s funds with his business and personal account. Respondent also committed simple conversion when he made two loan payments out of his client trust account – a clear use of money for purposes other than that for which they were entrusted to him. Based on clear and convincing evidence, we hold that Respondent acted without competence or diligence, failed to safeguard client property or expedite litigation, and brought discredit upon the legal profession in violation of RGDP 1.3 and ORPC 1.1, 1.3, 1.15, and 3.2. We do not find clear and convincing evidence of misconduct involving dishonesty, fraud, deceit, or misrepresentation under ORPC 8.4(c).

Count 2: Miscommunication and Neglect

¶30 The Bar further alleged that Respondent violated RGDP 1.3 and ORPC 1.1, 1.3, 1.4,¹⁷ and 3.2, by failing to return funds owed for over two-and-a-half years – one-and-a-half years of which followed his termination from the case. Further, Respondent neglected the case for an extended period, both before and after his services were terminated.

¶31 At the hearing, Respondent did not appear to appreciate the gravity of his misconduct. Respondent gave no explanation for his five and ten-month delays in paying Chaney and Emerson respectively. Respondent did not provide a copy of the representation agreement the Bar requested. Instead, he excused his neglect and lack of communication with the heirs as not required under ORPC 1.4 because they were not his “clients.”

¶32 Even if there was a clear understanding that the heirs were not Respondent’s clients,¹⁸ he still owed them a duty to promptly notify them once he obtained their property, and to promptly deliver it and provide a full accounting on request. ORPC 1.15(d). Respondent also owed Chaney a duty to communicate regarding the status of the matter and “promptly comply with [Chaney’s] reasonable requests for information.” ORPC 1.4(a)(3),(4). Respondent clearly violated these duties. Further, Respondent prepared a settlement statement for Emerson in which he referenced the case number and referred to her as “client” seven times in the statement block above her signature – appearing to acknowledge an existing attorney-client relationship.

¶33 Regardless, a third-party non-client beneficiary can be regarded as a client for disciplinary purposes in certain circumstances. *State ex rel. Okla. Bar Ass’n v. Minter*, 2001 OK 69, ¶ 34, 37 P.3d 763, 777. In *Minter*, the attorney represented clients in connection with selling land to a third-party and providing marketable title. *Id.* ¶ 29, 37 P.3d at 776. The attorney neglected communication from the third-party and delayed extensively before filing deeds that did not clear the title. *Id.* ¶¶ 30-31, 37 P.3d at 776-77. Eventually, the attorney filed a quiet-title action on behalf of the third-party without consulting him. *Id.* ¶ 32, 37 P.3d at 777. We regarded the third-party non-client beneficiary of the attorney-client contract as a client for disciplinary purposes regarding the attorney’s neglect. *Id.* ¶ 34, 37 P.3d at 777.

¶34 Here, Respondent handled the settlement for Jeannie Chaney’s wrongful death and her resulting estate. Respondent’s attorney fee was paid from the entire settlement, including the heirs’ portions. It is clear that the heirs were beneficiaries of Respondent and Chaney’s representation agreement. Where Chaney had no interest in the funds due to the other heirs, Respondent’s professional obligations became obligations to Emerson and the minor children. *See id.* ¶ 34, 37 P.3d at 777. Therefore, Respondent also violated his duty to communicate with the heirs under ORPC 1.4.

¶35 An attorney shall withdraw from representation when the lawyer is discharged; upon termination the lawyer “shall take steps to the extent reasonably practicable to protect a client’s interests, such as . . . surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expenses that has not been earned or incurred.” ORPC 1.16, 5 O.S.2011, ch. 1, app. 3-A. On termination, Chaney requested distribution of the funds and return of the case file within ten days, but Respondent failed to promptly interplead or distribute the funds to the minor children. Rather, he held the money for an additional one-and-a-half years before withdrawing and interpleading the funds on the same day he responded to this grievance. Respondent failed to explain why he did not “consult with[] a lawyer of established competence in the field in question,” as advised by the comments to ORPC 1.1, when he was confused on how to distribute the money. At no point has Respondent returned the case file to Chaney, or provided it to the Bar.

¶36 We find clear and convincing evidence in Count II that Respondent acted without competence or diligence, failed to adequately communicate with clients or expedite litigation, and brought discredit upon the legal profession in violation of RGDP 1.3 and ORPC 1.1, 1.3, 1.4, and 3.2.

V. DISCIPLINE

¶37 The main purpose of our disciplinary authority is to safeguard the interests of the public, the courts, and the legal profession. *State ex rel. Okla. Bar Ass’n v. Friesen*, 2016 OK 109, ¶ 8, 384 P.3d 1129, 1133. Deterrence from similar future conduct is a secondary purpose of discipline. *Godlove*, 2013 OK 38, ¶ 22, 318 P.3d at 1094. Discipline also serves to notify others that certain behavior is not tolerated.

State ex rel. Okla. Bar Ass'n v. Combs, 2007 OK 65, ¶ 36, 175 P.3d 340, 351.

A. Mitigation & Enhancement

¶38 We may consider mitigating circumstances to assess the appropriate measure of discipline. *State ex rel. Okla. Bar Ass'n v. Durland*, 2003 OK 32, ¶ 15, 66 P.3d 429, 432. Respondent had fifteen years of prior unblemished service as an attorney. At the time he committed misconduct, his wife was in grave health which resulted in additional parenting responsibilities being thrust upon him for a special needs child. He was also struggling with alcoholism. Respondent has not consumed any alcohol since April 16, 2016. Respondent states that he made several attempts to overcome his drinking problem – including relocating his practice, attending Alcoholics Anonymous, reaching out to Lawyers Helping Lawyers, and more – but did not present any supporting evidence. We find that there are no mitigating factors regarding Respondent's alcohol consumption, although we do note the maelstrom enveloping his life at that time.

Count III: Enhancement Due to Prior Discipline

¶39 Consideration of prior discipline serves to aid the Court in making its decision and may enhance discipline. RGDP 1.7, 6.2; *State ex rel. Okla. Bar Ass'n v. Mothershed*, 2003 OK 34, ¶ 41, 66 P.3d 420, 428. The Bar relies on Respondent's prior misconduct and his violation of the Diversion Program Agreement for enhancement. Respondent argues that enhancement is inappropriate due to overlap in timing of these cases. The record shows that Chaney terminated Respondent approximately nine months before Respondent completed the diversion program classes in spring 2016. Respondent, however, continued to contumaciously commingle funds and neglect the case long after the classes were completed.

¶40 “A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.” ORPC 8.4 cmt. 2; *Bednar*, 2019 OK 12, ¶ 68, 441 P.3d at 111. Respondent did not interplead the funds or withdraw as counsel until ten months *after* he completed the diversion classes. Of Respondent's seventy-nine transfers to personal checking out of his client trust account, twenty-two were after he completed his classes. Bar Ex. 17, at OBA 357, 379, 391, 413-16, 423, 435-40, 445-48, 449-52, 453,

479. Respondent made both loan payments after he completed the classes and after Chaney filed his grievance. *Id.* at OBA 431-34 (Dec. 5, 2016); *id.* at OBA 467-70 (Jan. 13, 2017).

¶41 When Respondent failed to return the funds and continued to abuse his client trust account, he showed an indifference to his legal obligation and a lack of deterrence following his prior discipline. His completion of law practice classes – performance management, trust accounting essentials, and client communication and neglect – do not appear to have had any positive effect on his communicating with clients, returning funds, or using his trust account properly. Therefore, we find Respondent's prior discipline to be appropriate for enhancement.

B. Appropriate Discipline

¶42 Discipline for misconduct is not punitive. *Mayes*, 2003 OK 23, ¶ 25, 66 P.3d at 406. Rather, appropriate discipline is that which (1) is “consistent with the discipline imposed upon other lawyers who have committed similar acts of professional misconduct and (2) avoids the vice of visiting disparate treatment of an offending lawyer.” *Schraeder*, 2002 OK 51, ¶ 6, 51 P.3d at 574. While each situation involves unique transgressions and mitigation, we find that suspension for two years and one day is the appropriate discipline in accordance with precedent involving extensive neglect and mishandling of client funds.

¶43 In *Whitebook*, we suspended an attorney for two years and one day for failure to act with competence or diligence in representing clients, failure to communicate with clients, and failure to respond to the Bar. *State ex rel. Okla. Bar Ass'n v. Whitebook*, 2010 OK 72, ¶ 26, 242 P.3d 517, 523. The Court considered two grievances against Whitebook regarding clients with probate cases. *Id.* ¶¶ 4, 6, 242 P.3d at 519. Whitebook ceased work on the first case after four months and failed to take any action for eighteen months in the second. *Id.* The first client attempted to contact Whitebook multiple times and occasionally received vague promises from him to complete the probate. *Id.* ¶ 4, 242 P.3d at 519. Whitebook failed to return the unearned fee and failed to communicate with the second client. *Id.* ¶ 6, 242 P.3d at 519. More egregiously than Whitebook, Respondent not only neglected client matters for almost a year before he was terminated, he also took no action to return the client's funds or case files

for more than a year and a half after that – Respondent also commingled funds numerous times and committed simple conversion.

¶44 In *Tully*, we suspended an attorney for two years and one day for depriving his client of \$596.40 by way of deceit and fraud. *State ex rel. Okla. Bar Ass’n v. Tully*, 2000 OK 93, ¶¶ 19, 24, 20 P.2d 813, 817-18. We viewed as mitigation that Tully had no prior history of discipline and clearly suffered from a substance abuse and alcohol problem which he took many steps to address. *Id.* ¶ 22, 20 P.2d at 818. Unlike Tully, Respondent provided no physical evidence of steps taken to recover, but stopped drinking at approximately the same time as his prior diversionary-program classes. Respondent’s recent diversionary classes appear ineffective as they were completed before significant misconduct occurred in this case. Unlike Tully, who committed one act of misconduct with client funds, Respondent repeatedly commingled funds over the course of many months, making seventy-nine transfers out of his client trust account into personal checking, nine cash withdrawals, and two loan payments.

¶45 In *Friesen*, we disbarred an attorney who commingled funds, failed to represent his client with competence and diligence, failed to keep clients informed about the representation, failed to promptly comply with requests for information, and charged an unreasonable fee. 2016 OK 109, ¶¶ 1, 26, 384 P.3d at 1130, 1138. Friesen represented parents in a wrongful death suit for their child. *Id.* ¶ 3, 384 P.3d at 1130. After recovering the funds and taking his attorney fee, Friesen charged over ninety-seven thousand dollars, without the client’s understanding, to be kept on retainer, provide estate planning, and open accounts. *Id.* ¶¶ 3-5, 384 P.3d at 1130-32. Friesen commingled the money, neglected to provide information about the money to the client for over two years, and did not set up bank accounts or provide estate planning because he said he was waiting on information from the clients. *Id.* ¶¶ 6, 9, 13, 384 P.3d at 1132-33, 1135. Friesen had been disciplined twice previously, but not for behavior involving clients. *Id.* ¶ 20, 384 P.3d at 1137.

¶46 Respondent, in one aspect, took his misconduct a step beyond Friesen when he committed simple conversion. But unlike Friesen, Respondent did not charge unreasonable fees without the client’s knowledge. Respondent also responded to the Bar, even though he did not actually provide the requested information.

¶47 Finally, in *Mayes*, we disbarred an attorney who mishandled funds for minor children after the wrongful death of their mother and failed to cooperate in the grievance process. 2003 OK 23, ¶¶ 1, 20-22, 66 P.3d at 400-01, 405-06. Mayes began probate and slowly depleted the trust account until it was overdrawn. *Id.* ¶¶ 2, 19, 66 P.3d at 401, 404-05. Mayes’s client filed a final accounting representing that the remaining funds were still in the account; the Court found this misrepresentation was proof that Mayes’s behavior met the threshold of misappropriation. *Id.* ¶¶ 8, 20-22, 66 P.3d at 402, 405-06. Mayes failed to provide a substantive response to the grievance regarding handling of funds or his delay in payment to the children. *Id.* ¶ 12, 66 P.3d at 403. Mayes was involved in another discipline case during the proceedings. *Id.* ¶ 14, 66 P.3d at 403.

¶48 Like Mayes, Respondent held funds belonging to minor children after the death of their mother and used them for his personal gain for an extended period. While Respondent did not fail to cooperate in the grievance process, he did fail to provide substantive response for his delays and mishandling of funds or to submit requested documentation. More importantly, unlike Mayes, Respondent did not actively misrepresent the status of the funds to the court or anyone else.

¶49 Few breaches of ethics are as serious as commingling and conversion of a client’s money. *State ex rel. Okla. Bar Ass’n v. Raskin*, 1982 OK 39, ¶ 14, 642 P.2d 262, 267. Respondent neglected clients for over two-and-a-half years while engaging in egregious commingling of client trust account funds and using those funds to make loan payments twice. This abuse of entrusted funds is especially deplorable considering the funds were intended for minor children after their mother’s untimely death. *State ex rel. Okla. Bar Ass’n v. Drummond*, 2017 OK 24, ¶ 24, 393 P.3d 207, 216.

This Court will not tolerate attorneys who show total disregard for court mandates, particularly orders directing attorneys to safeguard moneys intended for minor children. Additionally, we will not tolerate attorneys who fail to keep client money and property safeguarded in a trust account, completely severed from the lawyer’s operating account.

Id. While we did not find clear and convincing evidence of misappropriation in order to man-

date disbarment, we found clear and convincing evidence of egregious commingling, simple conversion, and extended neglect. Because Respondent's actions extended over such a long period of time and were so extensive in nature, especially after his completion of the diversion program classes and the filing of the grievance, we find the appropriate discipline is suspension for two years and one day.

VI. ASSESSMENT OF COSTS

¶50 The Bar has asked this Court to assess costs in the amount of \$2,359.65. RGDP 6.16 provides that where violations are proven, the costs shall be surcharged against the disciplined lawyer, unless remitted in whole or in part by the Supreme Court for good cause shown, and shall be paid within ninety days of the effective date of the opinion. Respondent did not respond to the Bar's motion to assess costs. As we find clear and convincing evidence of Respondent's misconduct, we grant the Bar's motion and order Respondent to pay full costs.

VII. CONCLUSION

¶51 Upon *de novo* review, we find clear and convincing evidence of Respondent's professional misconduct. Respondent is suspended for two years and one day. Respondent is ordered to comply with RGDP 9 and to pay the costs of this proceeding in the amount of \$2,359.65.

RESPONDENT IS SUSPENDED FOR TWO YEARS AND ONE DAY; MOTION TO ASSESS COSTS GRANTED.

Concur: Gurich, C.J., Darby, V.C.J., Kauger, Winchester, Edmondson, Colbert, Kane, JJ.

Disqualified: Combs, J.

DARBY, V.C.J.:

1. The Trial Panel also found clear and convincing evidence of several other rules violations that were not pled. As a result, Respondent alleges that the Trial Panel improperly considered allegations that were not in the complaint. The Bar must allege sufficient facts to put the attorney on notice of the charges before the hearing or this Court will not find a violation or assess discipline from such alleged misconduct. *State ex rel. Okla. Bar Ass'n v. Miskovsky*, 1990 OK 12, ¶ 24, 804 P.2d 434, 440. The Bar failed to recognize, allege, or put Respondent on notice of other allegations. The Trial Panel's recognition of additional potential misconduct, however, does not make the proceeding improper. *See id.* The Trial Panel disclaimed consideration of such evidence and potential violations when recommending imposition of discipline. Further, we are not bound by the Trial Panel's findings or recommendations, rather, the ultimate decision-making authority rests with this Court. *State ex rel. Okla. Bar Ass'n v. Bednar*, 2019 OK 12, ¶ 3, 441 P.3d 91, 95.

2. This list includes one "lien" that was never filed with the court.

3. The record does not clearly show when the attorney fee or the liens were paid. Respondent made \$32,000 of unexplained transfers

out of his trust account to his operating and personal checking accounts from July through November 2014. We presume the \$32,000 in unexplained transfers were made in order to pay the \$1,858.90 in liens and the first \$30,141.10 of the \$33,000 attorney fee. The transferred \$32,000 added to the \$32,570.55 paid to Chaney equals \$64,570.55.

4. It is unclear what account this check was drawn on as the account number has been redacted from the copy of the check provided to this Court, but it was not drawn from the trust account. Bar Ex. 7, at OBA 58.

5. Respondent paid Chaney \$32,570.55 and Emerson \$10,856.84. He also presumably paid \$1,858.90 for liens on the estate and the \$33,000 attorney fee. Altogether, \$78,286.29.

6. In his motion to interplead funds, Respondent stated that the amount he was entrusting to the court was owed to "heirs of the probate." Respondent interpleaded \$23,573.86, Bar Ex. 5, at OBA 554, however, the amount due to the remaining heirs was \$21,713.72. *See* Bar Ex. 7, at OBA 56. It is unclear why the additional \$1,860.14 was included.

7. The nine cash withdrawals combined to \$2,820. Bar Ex. 17, at OBA 177-78, 205-07, 225-26, 403-06, 419-22, 437-38, 471-74, 475-78, 491-94.

8. From July to December 2014, Respondent made eleven transfers to his personal checking account totaling \$17,500. Bar Ex. 17, at OBA 119, 125, 131, 141, 147, 153, 159. From January to December 2015, Respondent made 28 transfers to personal checking, totaling \$43,200. *Id.* at OBA 159, 167, 173-76, 183-86, 191, 197, 203-08, 219-22, 223-28, 235-38, 239, 255, 265-68, 283, 289, 297, 303. From January to December 2016, Respondent made 32 transfers to personal checking, totaling \$26,819.90. *Id.* at OBA 313, 319, 329, 335-38, 341-44, 345, 357, 379, 391, 413-16, 423, 435-40, 445-48, 449-52. In January and February 2017, Respondent made eight transfers to personal checking, totaling \$3,380.36. *Id.* at OBA 453, 479. All seventy-nine transfers to personal checking add up to \$90,900.26.

9. "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 . . ." RGDP 1.3, 5 O.S.2011, ch.1, app. 1-A.

10. "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." ORPC 1.1, 5 O.S.2011, ch.1, app. 3-A.

11. "A lawyer shall act with reasonable diligence and promptness in representing a client." ORPC 1.3, 5 O.S.2011, ch.1, app. 3-A.

12. (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 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.

....

ORPC 1.15, 5 O.S.2011, ch.1, app. 3-A.

13. "A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client." ORPC 3.2, 5 O.S.2011, ch.1, app. 3-A.

14. "It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . ." ORPC 8.4(c), 5 O.S.2011, ch.1, app. 3-A.

15. Earned fee deposit: Bar Ex. 17, at OBA 463-64. Transfers to personal checking: *Id.* at OBA 119, 125, 131, 141, 147, 153, 159, 167, 173-76, 183-86, 191, 197, 203-08, 219-22, 223-28, 235-38, 239, 255, 265-68, 283, 289, 297, 303, 313, 319, 329, 335-38, 341-44, 345, 357, 379, 391, 413-16, 423, 435-40, 445-48, 449-52, 453, 479. Cash withdrawals: *Id.* at OBA 177-78, 205-07, 225-26, 403-06, 419-22, 437-38, 471-74, 475-78, 491-94.

16. The Bar argues that Respondent converted or misappropriated client funds, evidenced by him not at all times maintaining a sufficient balance in his client trust account to pay money owed to the clients. But Respondent's egregious commingling requires that the Bar prove Respondent did not have funds in *all commingled accounts combined* for that argument to succeed. The Bar only submitted records for Respondent's client trust account, but did not provide records or additional information regarding Respondent's operating account, personal

checking account, loans, potential second trust account, or other accounts he made transfers to. Given the egregious levels of commingling in this case and the Bar's argument regarding low balance, a thorough review of *all* account records was called for. The Bar did not do that or attempt to reconstruct what happened to the money – failing to note that its evidence clearly and convincingly showed Respondent made loan payments out of client trust account funds and failing to prove its low-balance argument by clear and convincing evidence.

17. (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.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

ORPC 1.4, 5 O.S.2011, ch.1, app. 3-A.

18. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

ORPC 1.7 cmt. 27, 5 O.S.2011, ch.1, app. 3-A.

NOTICE: DESTRUCTION OF RECORDS

Pursuant to Court Order SCBD No. 3159, the Board of Bar Examiners will destroy the admission applications of persons admitted to practice in Oklahoma after 3 years from date of admission.

Those persons admitted to practice during 2015 who desire to obtain their original application may do so by submitting a written request and \$25 processing fee. **Bar exam scores are not included.** Requests must be received by **December 27, 2019.**

Please include your name, OBA number, mailing address, date of admission, and daytime phone in the written request. Enclose a check for \$25, payable to Oklahoma Board of Bar Examiners.

Mail to: Oklahoma Board of Bar Examiners, PO Box 53036, Oklahoma City, OK 73152.



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Opinions of Court of Criminal Appeals

2019 OK CR 27

**TYRELL DEONTA BURNS, Appellant, vs.
THE STATE OF OKLAHOMA, Appellee**

No. F-2018-740. November 7, 2019

SUMMARY OPINION

KUEHN, VICE PRESIDING JUDGE:

¶1 Tyrell Deonta Burns was tried by jury and convicted of Count I, Violation of Mary Rippy Violent Crime Offenders Registration Act; and Count IV, Possession of Drug Paraphernalia, in the District Court of Nowata County, Case No. CF-2015-151.¹ In accordance with the jury's recommendation the Honorable Curtis L. DeLapp sentenced Appellant to ten (10) years imprisonment (Count I); and one (1) year imprisonment and a fine of \$1000.00 (Count IV), to run concurrently. Appellant appeals from these convictions and sentences.²

¶2 Appellant raises four propositions of error in support of his appeal:

- I. There was no evidence that Appellant was notified of his duty to register with local law enforcement pursuant to the Mary Rippy Violent Crime Offenders Registration Act.
- II. The court did not adequately instruct the jury on the elements of violating the Mary Rippy Violent Crime Offenders Registration Act.
- III. State Exhibits 29-32, purported copies of Appellant's prior judgment and sentences, should not have been admitted at trial, as they were neither identified by a witness nor self-authenticating.
- IV. Appellant's maximum 10-year prison term for violating the Mary Rippy Violent Crime Offenders Registration Act is excessive where Appellant was at least partially compliant.

¶3 After thorough consideration of the entire record before us, including the original record, transcripts, exhibits and briefs, we find that the convictions must be reversed with instructions to dismiss.

¶4 In Proposition I Appellant argues the State failed to show he had notice that he was required to register with local law enforcement under the Mary Rippy Violent Crime Offenders Registration Act, 57 O.S.2011, § 594. Notice is a basic requirement of due process. *Horn v. State*, 2009 OK CR 7, ¶ 21, 204 P.3d 777, 783.

¶5 Prior to determining if notice was proven to the jury, we must determine if the Act requires notice to the offender. The Act provides that persons subject to its provisions shall register:

(1) with the Department of Corrections (DOC) within three business days after release; and

(2) with local law enforcement in the jurisdiction where the person resides or intends to reside, within three days after entering that jurisdiction; and

(3) a person must also register with both the DOC and local law enforcement within three days before moving or leaving a previously registered address. 57 O.S.2011, § 594(A).

¶6 This Court has yet to interpret the provisions of Section 594. However, we have interpreted the notice provision in the methamphetamine registration statute, 63 O.S. § 2-701(B), and it is analogous to the Act. *Wolf v. State*, 2012 OK CR 16, ¶ 17, 292 P.3d 512, 517-18. In *Wolf*, we held due process requires that persons subject to the methamphetamine registry must be notified of that status, as that "specific conduct is considered a criminal offense." *Wolf*, ¶ 5, 292 P.3d at 514. We now adopt this finding for the Mary Rippy Violent Crime Offenders registry, holding that before offenders may be charged with a crime for violating the Act, they must have notice that they are subject to the registry. Undeniably, the Act meets this notice requirement, as it provides that persons subject to its registry must be notified.³ Under the Act, an offender must be notified that they must register with DOC *and* local law enforcement.

¶7 This means that, in every case in which an offender, after conviction, is subject to registration under the Act, he must be personally notified of the requirements that he register both with the Department of Corrections and local law enforcement. While Section 594 sets forth

the notice requirement, it does not specify the means of notification. Section 594(D) provides that, *when registering* an offender, DOC or local law enforcement must give the offender certain information. 57 O.S.2011, § 594(D). However, this provision does not discuss who provides the initial notice that registration is required. Section 597 of the Act partially resolves this. 57 O.S.2011, § 597. It puts the responsibility for initial notice on either (a) the person in charge of a correctional institution where the offender is confined, to give notice of the Act's registration requirements prior to discharge or release; or (b) any judge who defers or suspends the sentence of an offender subject to the Act, prior to discharge or release from court. 57 O.S.2011, § 597(A). Either of these persons, as appropriate, must (1) explain the offender's duty to register under the Act, (2) require the offender to sign a written statement acknowledging the explanation and his understanding of it, (3) obtain the address of the offender's residence upon discharge or release, and (4) forward that information to the Department of Corrections. 57 O.S.2011, § 597(A)(1-4). These provisions clearly cover the requirement to register with the DOC, in every case. However, the language does not explicitly provide in every case for a specific person to give notice of the requirement to register with local law enforcement.

¶8 This Court must interpret these statutes to give intelligent effect to the provisions of the Act, and to comply with the specific notice requirements of Section 597. *Leftwich v. State*, 2015 OK CR 5, ¶ 15, 350 P.3d 149, 155. We conclude that the most efficient and secure way to do so is to require judges, in every case in which an offender is subject to registration with DOC and local law enforcement under the Act, to notify the offender of that requirement at the time of sentencing, or, where a defendant pleads guilty or nolo contendere, at the time the plea is taken. In doing so, judges shall comply with the provisions of Section 597(A) by following exactly the process set forth in that statute. We leave it to individual judicial districts to determine how to ensure the record contains the written acknowledgment of notice required by Section 597(A)(2).

¶9 To aid trial courts in cases where the Uniform Plea of Guilty form, Form 13.10, is used, we modify Section 14 of that form to include a checkbox provision stating that the requisite notice has been provided. When a defendant is personally notified of the registration require-

ments, that form is properly filled out and signed, and the record reflects the form was completed with the defendant's participation and understanding, that will fulfill the requirements of Section 597(A). In addition, we modify that section of the Uniform Judgment and Sentence, Form 13.8, titled "Court Clerk's Duty", to reflect the requirement in Section 597(A)(4) that court clerks inform the Department of Corrections in accordance with the provisions of Section 597(A). Copies of the modified forms are attached to this Opinion.

¶10 Now, did the State offer any evidence that the Appellant had notice that he must register with local law enforcement? During deliberations, jurors asked whether any paperwork explicitly instructed Appellant to register in Nowata County. The answer to this question is no, as no such paperwork was admitted into evidence; nor was there any testimony explicitly or implicitly stating that Appellant had been told he needed to register with local law enforcement. State's witness Hadley, from the Department of Corrections, testified that offenders initially register with DOC from the penitentiary before their release. Evidence showed that Appellant did register with the DOC before his release, giving his mother's address in Nowata County. The State argued, and suggests on appeal, that jurors could infer from that fact that notice was also given to Appellant to register with local law enforcement. However, jurors could just as easily infer that offenders were only instructed in prison to register with the DOC, and therefore that inference is weak and unreasonable. Even the State's witness, the Nowata Police Department clerk, testified that she thought offenders could register either with the DOC or with local law enforcement.

¶11 This Court will accept reasonable inferences tending to support a jury verdict. *Day v. State*, 2013 OK CR 8, ¶ 13, 303 P.3d 291, 298. Here, there is no reasonable inference to be made from the evidence, and there is no evidence directly supporting the notice element. While this Court will not mandate any specific type of proof in prosecutions for this crime, the State must produce some evidence in support of this element. Even taking the evidence in the light most favorable to the State, we cannot find that any rational trier of fact could find beyond a reasonable doubt that Appellant had notice he had to register with local law enforcement. This proposition is granted.

¶12 Given our resolution of Proposition I, Propositions III and IV are moot. In Proposition II, Appellant claims the jury was incorrectly instructed on the elements of the crime. Given Proposition I warrants reversal, we need not address the legal arguments in Propositions II, as they are moot. However, we note there is not a Uniform Jury Instruction for Section 594, and the trial court's modification of OUJI-CR 2d 3-40⁴ was lacking. To give guidance to trial courts in future cases, a suggested uniform jury instruction for this offense is as follows:

Failure to Register As a Violent Offender

No person may be convicted of failing to register as a violent offender under the Mary Rippy Violent Crime Offenders Registration Act unless the State has proven beyond a reasonable doubt each element of the crime. These elements are:

First, the person has (been convicted of)/ (received a suspended sentence for) [specify the particular felony listed in 57 O.S.2011, § 593(B)];

Second, the person received notice that he/ she was required to register as a violent offender with the Department of Corrections and (specify particular local law enforcement agency for the area the offender resides or intends to reside);

Third, the person failed to register with the (Department of Corrections)/([specify the particular local law enforcement agency for the area where the offender resides or intends to reside])*;

Fourth, [specify the particular event in 57 O.S.2011, § 594(A) or (B) that triggered the registration requirement].

*note: The trial court should use both or either location according to the allegations of the State.

DECISION

¶13 The Judgments and Sentences of the District Court of Nowata County are **REVERSED**

with instructions to DISMISS. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2019), the **MANDATE is ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT
OF NOWATA COUNTY
THE HONORABLE CURTIS L. DELAPP,
DISTRICT JUDGE

ATTORNEYS AT TRIAL

Zachary T. Young, 423 S. Boulder, Ste. 300,
Tulsa, OK 74103-3814, Counsel for Defendant

Ryan G. Cannonie, Asst. District Attorney, No-
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ATTORNEYS ON APPEAL

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Appellee

OPINION BY KUEHN, V.P.J.

LEWIS, P.J.: CONCUR

LUMPKIN, J.: CONCUR

HUDSON, J.: CONCUR

ROWLAND, J.: CONCUR

1. Appellant was acquitted of the charges in Counts II and III.

2. Defense counsel did not timely perfect the appeal, and this Court granted an appeal out of time. *Burns v. State*, No. PC-2018-0683 (Okl.Cr. July 13, 2018) (not for publication).

3. In this respect the Act differs significantly from the methamphetamine registry we found unconstitutional in *Wolf*. There, the statute required a court clerk to automatically enter a person on the methamphetamine registry upon conviction of a relevant crime, and to notify the Oklahoma Bureau of Narcotics and Dangerous Drugs of the registration, but provided no means for notice to be given to offenders themselves. *Wolf*, ¶ 6, 292 P.3d at 515. By contrast, the Legislature provided in Section 594 that the offender be informed of the duty to register with the Department of Corrections or local law enforcement as appropriate. 57 O.S.2011, § 594(D).

4. This is the jury instruction for Failure to Register as a Sex Offender.

SEE REVISED REGISTRATION FORMS ON FOLLOWING PAGES

Form 13.8 Uniform Judgment and Sentence

IN THE DISTRICT COURT OF _____ COUNTY
THE STATE OF OKLAHOMA

STATE OF OKLAHOMA,)
)
 Plaintiff,)
)
 vs.)
)
 _____,)
)
 Defendant.)

Case No.: _____

Year of Birth: _____
Place of Birth: _____
Last four digits of SS#: _____
DOC #: _____
Last four digits of DL#: _____
State of issuance: _____

JUDGMENT AND SENTENCE

Now, on this _____ day of _____, 20____, this matter comes on before the undersigned Judge, for sentencing and the Defendant, _____, appears personally and by Attorney _____, the State of Oklahoma represented by _____, and the Defendant, having previously:

- () Entered a plea of guilty
- () Entered a plea of Nolo Contendere
- () Been found guilty by jury
- () Been found guilty by Judge after waiver of jury trial
- () Other _____

To/of the crime(s) of:	Statutory Reference
Count _____:	_____ O.S. _____
Count _____:	_____ O.S. _____
Count _____:	_____ O.S. _____

(Attach additional sheet for additional counts or if computerized, add to body of Judgment and Sentence at each appropriate place.)

() The defendant has previously been convicted of _____ (insert number) felony crimes and the sentence has been enhanced in accordance with the provisions set forth in _____ O.S. _____; and,

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by the Court that the Defendant,

_____, is guilty of the above described offenses and is sentenced as follows:

TERM OF IMPRISONMENT

COUNT SENTENCED TO A TERM OF:

_____ ,

Under the custody and control of:

- () Oklahoma Department of Corrections;
- () the _____ County Sheriff; or
- () other: _____

These terms to be served as follows (consecutive/concurrent):

_____ .

Upon release from such confinement, the Defendant shall serve a term of post-imprisonment supervision, under conditions prescribed by the Department of Corrections, for a period of:

_____ .

TERM OF IMPRISONMENT WITH EXECUTION OF SENTENCE SUSPENDED IN PART
(Attach additional sheet(s) to clarify, if necessary)

COUNT SENTENCED TO A TERM OF:

_____ ,

With all except the first _____ suspended under the custody and control of:

() Oklahoma Department of Corrections; or

() the _____ County Sheriff,

pursuant to the rules and conditions of probation entered by the court.

These term(s) to be served as follows (consecutive/concurrent):

TERMS OF IMPRISONMENT WITH EXECUTION OF SENTENCE SUSPENDED
(Attach additional sheet(s) to clarify, if necessary)

COUNT SENTENCED TO A TERM OF:

COUNT SENTENCED TO A TERM OF:

_____ ,

Under the custody and control of:

() Oklahoma Department of Corrections; or

() the _____ County Sheriff,

All of said term(s) of imprisonment suspended pursuant to the rules and conditions of probation entered by the court.

These term(s) to be served as follows (consecutive/concurrent):

_____ .

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED BY THE COURT that in addition to the preceding terms, the Defendant is also sentenced to:

FINE

() The defendant shall pay a fine of \$ _____

() immediately; or

() on or before _____, 20__ at the rate of \$ _____ per _____, or within

_____ days of release from the Department of Corrections.

() payment of \$ _____ is suspended pursuant to Rules and Conditions of probation.

COSTS, VCA, RESTITUTION

() The defendant shall pay costs, fees, and restitution in accordance with the schedule attached as Exhibit _____.

RULES AND CONDITIONS OF PROBATION

The rules and conditions of probation as ordered by the court and signed by the defendant, acknowledging his/her understanding of the rules and conditions, are incorporated as Exhibit _____.

ATTORNEY FEES

() The defendant shall pay court-appointed attorney fee in the amount of \$ _____ on or before _____, 20____, to _____.

HEARING ON ABILITY TO PAY AFTER INCARCERATION

() The defendant shall report to the District Court of _____ County within _____ days of release for a hearing on the defendant's ability to pay fines and costs pursuant to Section VIII of the Rules of the Court of Criminal Appeals, 22 O.S., Ch. 18, App.

IT IS FURTHER ORDERED that judgment is hereby entered against the Defendant as to the fines, costs and assessments set forth above.

The Court further advised the Defendant of his/her rights and procedure to appeal to the Court of Criminal Appeals of the State of Oklahoma, and that if he/she desired to appeal and was unable to afford counsel and a transcript of the proceedings, that the same would be furnished by the State subject to reimbursement of the cost of representation in accordance with Sec. 1355.14 of Title 22. The Court further advised the Defendant that, in the event the above sentence is for a crime involving domestic violence where the Defendant is or was a spouse, intimate partner, parent, or guardian of the victim or is or was involved in another similar relationship with the victim it may be unlawful for him or her to possess, purchase, receive, transport or ship a firearm including a rifle, pistol or revolver or ammunition pursuant to federal law under 18 U.S.C. Section 922(g)(8) or (9), or state law, or both.

In the event the above sentence is for incarceration in the Department of Corrections, the Sheriff of _____ County, Oklahoma, is ordered and directed to deliver the Defendant to the Lexington Assessment and Reception Center at Lexington, Oklahoma, and leave therewith a copy of this Judgment and Sentence to serve as warrant and authority for the imprisonment of the Defendant as provided herein. A second copy of this Judgment and Sentence to be warrant and authority of the Sheriff for the transportation and imprisonment of the Defendant as herein before provided. The Sheriff to make due return to the Clerk of this Court, with his proceedings endorsed thereon.

COURT CLERK'S DUTY
[TRIAL JUDGE TO COMPLETE THIS SECTION]

IT IS FURTHER ORDERED that the Clerk of this Court shall register or report the following circumstances in accordance with the applicable statutory authority:

() As to Count(s) _____, the defendant is ineligible to register to vote pursuant to Section 4-101 of Title 26.

() Pursuant to Section 985.1 of Title 22, the Court departed from the mandatory minimum sentence of imprisonment as to Count(s) _____.

() As to Count(s)_____, the defendant is subject to the Methamphetamine Offender Registry requirements as set forth in Section 2-701 of Title 63.

() As to Count(s)_____, the defendant is subject to the Mary Rippy Violent Crime Offenders Registration Act requirements as set forth in Section 594 of Title 57.

() Defendant is a lawyer and certified copies of this document shall be transmitted to the Chief Justice of the Supreme Court and the General Counsel of the Bar Association within five (5) days as set forth in Rule 7.2 of the Oklahoma Rules of Professional Conduct, 5 O.S.Supp.2014, ch. 1, app. 1-A.

Witness my hand the day and year first above mentioned.

(SEAL)

JUDGE OF THE DISTRICT COURT

(Name of Judge Typed)

ATTEST:

Court Clerk

Deputy Clerk

CLERK'S CERTIFICATION OF COPIES

I, _____, Clerk of the District Court of _____ County, State of Oklahoma, do hereby certify the foregoing to be true, correct, full and complete copy of the original Judgment and Sentence in the case of the State of Oklahoma vs. _____ as the same appears of record in my office.

WITNESS my hand and official seal this _____ day of _____, 20_____.

(SEAL)

By:

Court Clerk

Deputy Court Clerk

SHERIFF'S RETURN

I received this Judgment and Sentence the _____ day of _____, 20____,

and executed it by delivering the Defendant to the Warden of the Lexington Assessment and Reception Center at Lexington, Oklahoma, on the____ day of _____, 20_____.

I also certify the above prisoner has served _____ days in the County Jail on the present charge or

charges.

Sheriff

Deputy Sheriff

Form 13.10 Uniform Plea of Guilty - Summary of Facts

IN THE DISTRICT COURT OF _____ COUNTY
 THE STATE OF OKLAHOMA

STATE OF OKLAHOMA,)	
)	Case No. _____
Plaintiff,)	
)	[NOTE: The trial judge shall ensure the
vs.)	defendant is sworn either prior to completing
)	the Summary of Facts or prior to inquiry by
,)	the Court on the Plea. If the defendant is
)	entering a nolo contendere, or other type
Defendant.)	guilty plea, correct by pen change where term
)	"guilty" used.]
)	
Last four digits of SS# _____)	
Last four digits of DL# _____ State)	
)	
Year of Birth _____ Place of Birth)	
)	
Oklahoma DOC # _____)	
_____)	

PLEA OF GUILTY
SUMMARY OF FACTS

Part A: Findings of Fact, Acceptance of Plea

CIRCLE

- | | | |
|----|--|----------------------|
| 1. | Is the name just read to you your true name?

If no, what is your correct name? _____

I have also been known by the name(s): _____

_____ | Yes No |
| 2. | My lawyer's name is: | |
| 3. | (a) Do you wish to have a record made of these proceedings by a Court Reporter?

(b) Do you wish to waive this right? | Yes No

Yes No |
| 4. | Age: _____ Grade completed in school: _____ | |
| 5. | Can you read and understand this form? (If the answer above is no, Addendum A is to be completed and attached.) | Yes No |

6. Are you currently taking any medications or substances which affect your ability to understand these proceedings? Yes No
7. Have you been prescribed any medication that you should be taking, but you are not taking? Yes No
If so, what kind and for what purpose? _____

8. Have you ever been treated by a doctor or health professional for mental illness or confined in a hospital for mental illness? Yes No
If yes, list the doctor or health professional, place, and when occurred:

9. Do you understand the nature and consequences of this proceeding? Yes No
10. Have you received a copy of the Information and read its allegations? Yes No
11. Does the State move to dismiss or amend any case(s) or count(s) in the information or on page 2 of the information? If so, set forth the cases/counts dismissed or amended. Yes No
12. A. Do you understand you are charged with:
Crime Statutory Reference
- | | | | | |
|-----|-------|------------|-----|----|
| (1) | _____ | O.S. _____ | Yes | No |
| (2) | _____ | O.S. _____ | Yes | No |
| (3) | _____ | O.S. _____ | Yes | No |
| (4) | _____ | O.S. _____ | Yes | No |

For additional charges: List any additional charges on a separate sheet and label as PLEA OF GUILTY ADDENDUM B.

- B. Are you charged after former conviction of a felony? Yes No

If yes, list the felony(ies) charged: _____

13. Have you previously been convicted of a felony? If so, when, where and for what felony/felonies? _____

14. _____ (Check if applicable) Do you understand you are subject to the Delayed Sentencing Program for Young Adults and what that sentencing program involves? Yes No

_____ (Check if applicable) Do you understand that upon a conviction on a plea of guilty to the offense(s) of _____ you will be required to serve a minimum sentence of: Yes No

_____ 85% of the sentence of imprisonment imposed before being eligible for parole consideration and are not eligible for earned or other type of credits which will have the effect of reducing the length of sentence to less than 85% of the sentence imposed? Yes No

_____ % of the sentence of imprisonment imposed or received prior to becoming eligible for state correctional earned credits toward completion of your sentence or eligibility for parole? Yes No

_____ (Check if applicable) Do you understand that a conviction on a plea of guilty to the offense(s) of _____ will subject you to mandatory compliance with the Oklahoma Sex Offender Registration Act? Yes No

_____ (Check if applicable) Do you understand that any person sentenced to imprisonment for two (2) years or more for the offense(s) of _____, involving sexual abuse, sexual exploitation, or illegal sexual conduct, shall be required to serve a term of post-imprisonment supervision for at least three (3) years under conditions determined by the Department of Corrections in addition to the actual term of imprisonment. There will be no post-imprisonment supervision for a sentence of life or life without the possibility of parole for offenses involving sexual abuse, sexual exploitation, or illegal sexual conduct. Yes No

_____ (Check if applicable) Do you understand that a conviction on a plea of guilty to the offense(s) of _____ will subject you to mandatory compliance with the Oklahoma Methamphetamine Offender Registry Act? Yes No

_____ (Check if applicable) Do you understand that a conviction on a plea of guilty to the offense(s) of _____ will subject you to mandatory compliance with the Mary Rippey Violent Crime Offenders Registration Act? Yes No

_____ (Check if applicable) Do you understand that the Court is required to include in the sentence of any person convicted of a felony and sentenced to a term of imprisonment after November 1, 2012, a term of Yes No

post-imprisonment supervision. The post-imprisonment supervision shall be for a period of not less than nine (9) months nor more than one (1) year following confinement of the person and shall be served under conditions prescribed by the Department of Corrections. There will be no post-imprisonment supervision for a sentence of life without the possibility of parole.

15. What is/are the charge(s) to which the defendant is/are entering a plea today?

16. Do you understand the range of punishment for the crime(s) is/are: (List in same order as in No. 15 above)?

- | | | | |
|-----|---|-----|----|
| (1) | Minimum of _____ to a maximum of _____ and/or a fine of \$_____ | Yes | No |
| (2) | Minimum of _____ to a maximum of _____ and/or a fine of \$_____ | Yes | No |
| (3) | Minimum of _____ to a maximum of _____ and/or a fine of \$_____ | Yes | No |
| (4) | Minimum of _____ to a maximum of _____ and/or a fine of \$_____ | Yes | No |

17. Read the following statements: You have the right to a speedy trial before a jury for the determination of whether you are guilty or not guilty and if you request, to determine sentence. (If pleading to capital murder, advise of procedure in 21 O.S. § 701.10(B)). At the trial:

(1) You have the right to have a lawyer represent you, either one you hire yourself or if you are indigent a court appointed attorney.

(2) You are presumed to be innocent of the charges.

(3) You may remain silent or, if you choose, you may testify on your own behalf.

(4) You have the right to see and hear all witnesses called to testify against you and the right to cross-examine them.

(5) You may have your witnesses ordered to appear in court to testify and present evidence of any defense you have to these charges.

(6) The state is required to prove your guilt beyond a reasonable doubt.

(7) The verdict of guilty or not guilty decided by a jury must be unanimous. However, you can waive a jury trial and, if all parties agree, the case could be tried by a Judge alone who would decide if you were guilty or not guilty and if guilty, the appropriate punishment.

Do you understand each of these rights? Yes No

18. Do you understand by entering a plea of guilty you give up these rights? Yes No
19. Do you understand that a conviction on a plea of guilty could increase punishment in any future case committed after this plea? Yes No
20. Have you talked over the charge(s) with your lawyer, advised him/her regarding any defense you may have to the charges and had his/her advice? Yes No
21. Do you believe your lawyer has effectively assisted you in this case and are you satisfied with his/her advice? Yes No
22. Do you wish to change your plea of not guilty to guilty and give up your right to a jury trial and all other previously explained constitutional rights? Yes No
23. Is there a plea agreement? Yes No

What is your understanding of the plea agreement? _____

24. Do you understand the Court is not bound by any agreement or recommendation and if the Court does not accept the plea agreement, you have the right to withdraw your plea of guilty? Yes No
25. Do you understand that if there is no plea agreement the Court can sentence you within the range of punishment stated in question 16? Yes No

26. Do you understand your plea of guilty to the charge(s) is/are after: (check one) Yes No

no prior felony convictions

one (1) prior felony conviction

two (2) or more prior felony convictions

List prior felony convictions to which pleading: _____

27. What (is) (are) your plea(s) to the charge(s) (and to each one of them)?

28. Did you commit the acts as charged in the Information? Yes No

State the factual basis for your plea(s) (attach additional page as needed, labeled as ADDENDUM C):

29. Have you been forced, abused, mistreated, or promised anything by anyone to have you enter your plea(s)? Yes No

30. Do you plead guilty of your own free will and without any coercion or compulsion of any kind? Yes No

31. If you are entering a plea to a felony offense, you have a right to a Pre-Sentence Investigation and Report which would contain the circumstances of the offense, any criminal record, social history and other background information about you. Do you want to have the Report? Yes No

32. (a) Do you have any additional statements to make to the Court? Yes No

(b) Is there any legal reason you should not be sentenced now? Yes No

HAVING BEEN SWORN, I, the Defendant whose signature appears below, make the following statements under oath:

(1) CHECK ONE:

_____(a) I have read, understood and completed this form.

_____(b) My attorney completed this form and we have gone over the form and I understand its contents and agree with the answers. See Addendum "A"

_____(c) The Court completed this form for me and inserted my answers to the questions.

(2) The answers are true and correct.

(3) I understand that I may be prosecuted for perjury if I have made false statements to this Court.

DEFENDANT

I Acknowledge this _____ day of _____, 20__.

Notary Public/Deputy Court Clerk/Judge

33. I, the undersigned attorney for the Defendant, believe the Defendant understands the nature, purpose and consequence of this proceeding. (S)He is able to assist me in formulating any defense to the charge(s). I am satisfied that the Defendant's waivers and plea(s) of guilty are voluntarily given and he/she has been informed of all legal and constitutional rights.

ATTORNEY FOR DEFENDANT

34. The sentence recommendation in question 23 is correctly stated. I believe the recommendation is fair to the State of Oklahoma.

35. Offer of Proof (Nolo contendere plea) _____

36. On entering a plea to a felony offense, the State has a right to a pre-sentence investigation and report. The State waives the right to a pre-sentence investigation? Yes No

ASSISTANT DISTRICT ATTORNEY

THE COURT FINDS AS FOLLOWS:

- 37.
 - A. The Defendant was sworn and responded to questions under oath.
 - B. The Defendant understands the nature, purpose and consequences of this proceeding.
 - C. The Defendant's plea(s) of _____ is/are knowingly and voluntarily entered and accepted by the Court.
 - D. The Defendant is competent for the purpose of this hearing.
 - E. A factual basis exists for the plea(s) (and former conviction(s), if applicable).
 - F. The Defendant is guilty as charged: (check as appropriate)
 - () after no prior felony convictions.
 - () after one (1) prior felony conviction.
 - () after two (2) or more prior felony convictions.
 - G. Sentencing or order deferring sentence shall be: imposed instanter (); or continued until the ____ day of _____, 20__, at _____.m.

If the Pre-Sentence Investigation and Report is requested, it shall be provided to the Court by the ____ day of _____, 20__.

 - H. Defendant is committed to:
 - _____ The RID Program
 - _____ The FORT Program
 - _____ The Delayed Sentencing Program for Young Adults

DONE IN OPEN COURT this ____ day of _____, 20__.

Court Reporter Present

JUDGE OF THE DISTRICT COURT

Deputy Court Clerk

NAME OF JUDGE TYPED OR PRINTED

Part B: Sentence on Plea

Case No. _____

State v. _____

Date: _____

[NOTE ON USE: Part B to be used with the Summary of Facts if contemporaneous with the entry of plea or may be formatted as a separate sentencing form if sentencing continued to future date.]

THE COURT SENTENCES THE DEFENDANT AS FOLLOWS:

TIME TO SERVE

1. You are sentenced to confinement under the supervision of the Department of Corrections for a term of years as follows: (list in same order as in question No. 15 in Part A)

Upon release from such confinement, you shall serve a term of post-imprisonment supervision under conditions prescribed by the Department of Corrections for a period of:

2. The sentence(s) to run:

_____ (concurrently/consecutively)

(OR)

_____ NOT APPLICABLE

3. Defendant shall receive:

_____ Credit for time served

_____ No credit for time served

DEFERRED SENTENCE

1. The sentencing date is deferred until _____, 20__ at _____m.

2. You (will/will not) be supervised. The terms set forth in the Rules and Conditions of Probation found in Addendum D shall be the rules you must follow during the period of deferment.

SUSPENDED SENTENCE or SUSPENDED AS TO PART

1. You are sentenced to confinement under the supervision of the Department of Corrections for a term of years as follows:

To be suspended as follows:

(a) ALL SUSPENDED YES _____ NO _____

(b) suspended except as to the first _____ (months)(years) of the term(s) during which time you are to be held in the custody of the Department of Corrections, the remainder of the sentence(s) to be suspended under the terms set forth in the Rules and Conditions of Probation found in Addendum D.

_____ Said period of incarceration shall be in the custody of the Department of Corrections, to be served in the _____ County Jail, in lieu of the Department of Corrections, pursuant to the Community Service Sentencing Program, 22 O.S. Section 991a - 4.1.

_____ Defendant's term of incarceration shall be calculated as:

_____ Calendar days with credit for good behavior only (57 O.S Section 65)

_____ As calculated by the Sheriff with all implemented and allowable credits allowed by law

2. The sentence(s) to run:

_____ (concurrently/consecutively)

(OR)

_____ NOT APPLICABLE

3. Defendant shall receive:

_____ Credit for time served

_____ No credit for time served

FINES AND COSTS

You are to pay a fine(s), costs, fees and/or restitution to the _____ County District Court Clerk as set out in Addendum E which is attached and made a part of this Order.

[NOTE ON USE: District Courts may develop and utilize schedules for payment of fines and costs as appropriate for each district and attach as Addendum E.]

COURT CLERK'S DUTY
[TRIAL JUDGE TO COMPLETE THIS SECTION]

IT IS FURTHER ORDERED that the Clerk of this Court shall register or report the following circumstances in accordance with the applicable statutory authority:

() As to Count(s) _____, the defendant is ineligible to register to vote pursuant to Section 4-101 of Title 26.

() Pursuant to Section 985.1 of Title 22, the Court departed from the mandatory minimum sentence of imprisonment as to Count(s) _____.

() As to Count(s) _____, the defendant is subject to the Methamphetamine Offender Registry requirements as set forth in Section 2-701 of Title 63.

() Defendant is a lawyer and certified copies of this document shall be transmitted to the Chief Justice of the Supreme Court and the General Counsel of the Bar Association within five (5) days as set forth in Rule 7.2 of the Oklahoma Rules of Professional Conduct, 5 O.S.Supp.2014, ch. 1, app. 1-A.

"NOTICE OF RIGHT TO APPEAL"

Sentence to Incarceration, Suspended or Deferred:

To appeal from this conviction, or order deferring sentence, on your plea of guilty, you must file in the District Court Clerk's Office a written Application to Withdraw your Plea of Guilty within ten (10) days from today's date. You must set forth in detail why you are requesting to withdraw your plea. The trial court must hold a hearing and rule upon your Application within thirty (30) days from the date it is filed. If the trial court denies your Application, you have the right to ask the Court of Criminal Appeals to review the District Court's denial by filing a Petition for Writ of Certiorari within ninety (90) days from the date of the denial. Within ten (10) days from the date the application to withdraw plea of guilty is denied, notice of intent to appeal and designation of record must be filed pursuant to Oklahoma Court of Criminal Appeals Rule 4.2(D). If you are indigent, you have the right to be represented on appeal by a court appointed attorney.

Do you understand each of these rights to appeal?	Yes	No
Do you want to remain in the county jail ten (10) days before being taken to the place of confinement?	Yes	No
Have you fully understood the questions that have been asked?	Yes	No
Have your answers been freely and voluntarily given?	Yes	No

I ACKNOWLEDGE UNDERSTANDING OF RIGHTS AND SENTENCE IMPOSED.

DEFENDANT

I, the undersigned attorney, have advised the Defendant of his appellate rights.

ATTORNEY FOR DEFENDANT

Done in open court, with all parties present, this _____ day of _____, 20____.

Court Reporter Present

JUDGE OF THE DISTRICT COURT

Deputy Court Clerk

NAME OF JUDGE TYPED OR PRINTED

ADDENDUM "A"

CERTIFICATE OF DEFENSE COUNSEL

As the attorney for the defendant, _____, I certify that:

1. The Defendant has stated to me that he/she is (able/unable) to read and understand the attached form, and I have: (check appropriate option)

_____ Determined the Defendant is able to understand the English language.

_____ Determined the Defendant is unable to understand the English language and obtained to interpret.

2. I have read and fully explained to the Defendant the allegations contained in the Information in this case.

3. I have read and fully explained to the Defendant all of the questions in the Plea of Guilty/Summary of Facts and the answers to the questions set out in the Summary of Facts are the Defendant's answers.

4. To the best of my knowledge and belief the statements and declaration made by the Defendant are accurate and true and have been freely and voluntarily made.

Dated this _____ day of _____, 20 ____.

ATTORNEY FOR DEFENDANT

END OF FORM -----



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Bar Business Results Announced

The Oklahoma Bar Association Annual Meeting concluded at noon, Friday, Nov. 8, 2019, after the OBA House of Delegates meeting held at the Cox Convention Center in downtown Oklahoma City. Prior to the meeting and pursuant to Article III, Section 3 of the OBA Bylaws, six members were deemed elected to the OBA Board of Governors due to no other person filing for the position.

Michael C. Mordy of Ardmore will serve as the 2020 OBA president-elect, assuming the office of OBA president on Jan. 1, 2021. Brandi Nowakowski of Shawnee will serve as vice president during the upcoming year with Susan B. Shields of Oklahoma City, who as the current president-elect becomes president Jan. 1, 2020.

OBA members who also ran unopposed and will take



OBA President-Elect Susan Shields presides over the House of Delegates at the Annual Meeting in downtown Oklahoma City Friday, Nov. 8.

office Jan. 1, 2020, are Michael J. Davis, Durant, Supreme Court Judicial District Two; Joshua A. Edwards, Ada, Supreme Court Judicial District Eight; Robin L. Rochelle,

Lawton, Supreme Court Judicial District Nine; and Amber Peckio Garrett, Tulsa, member at large.

The House of Delegates voted to adopt an amended resolution which amends the Oklahoma Rules of the Supreme Court for Mandatory Continuing Legal Education to expand the required legal ethics credit but not increase the total number of credits required annually. The resolution was published in the OBJ 90 7 (September). See the amended resolution at www.okbar.org/resolution-no-one-proposed-amendment-to-rules-of-the-supreme-court-of-oklahoma-for-mandatory-continuing-legal-education.

Revisions and additions to the Oklahoma Title Examination Standards published in the OBJ 90 1188 (Oct. 12, 2019) were approved and are effective immediately.

CALENDAR OF EVENTS

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
- 13 OBA Board of Governors meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City; Contact John Morris Williams 405-416-7000
- OBA Alternative Dispute Resolutions Section meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Clifford R. Magee 918-747-1747
- OBA Estate Planning, Probate and Trust Section meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact A. Daniel Woska 405-657-2271
- 17 OBA Access to Justice Committee meeting;** 11:30 a.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Rod Ring 405-325-3702



- 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
- 18 OBA Family Law Section meeting;** 11:30 a.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Amy E. Page 918-208-0129
- OBA Indian Law Section meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Wilda Wahpepah 405-321-2027
- 19 OBA Diversity Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Telana McCullough 405-267-0672
- 24-25 OBA Closed – Christmas**
- 26 OBA Professionalism Committee meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Linda G. Scoggins 405-319-3510
- 1 OBA Closed – New Year's Day**
- 2 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

Opinions of Court of Civil Appeals

2019 OK CIV APP 65

**BHARAT MITTAL, Plaintiff/Appellant, vs.
BLUESTEM EMERGENCY MEDICAL
P.L.L.C., a professional limited liability
company, and THOMAS W. BRITT, ROGER
J. COTNER, HOLLY B. FOUTS, RONALD L.
HAY and RUTH M. THOMPSON,
Defendants/Appellees.**

Case No. 115,675. January 7, 2019

APPEAL FROM THE DISTRICT COURT OF
WASHINGTON COUNTY, OKLAHOMA
HONORABLE RUSSELL C. VACLAW, JUDGE
REVERSED AND REMANDED

Johnny P. Akers, Frederick S. Esser, Law Center of Akers & Esser, Bartlesville, Oklahoma, for Appellant,

James M. Elias, Rick D. Tucker, Robinett King Elias Buhlinger Brown and Kane, Bartlesville, Oklahoma, for Appellees.

Larry Joplin, Judge:

¶1 Plaintiff/Appellant Bharat Mittal seeks review of the trial court's order awarding attorney's fees to Defendants/Appellees Bluestem Emergency Medical P.L.L.C., a professional limited liability company, and Thomas W. Britt, Roger J. Cotner, Holly B. Fouts, Ronald L. Hay and Ruth M. Thompson (Defendants), after the Court of Civil Appeals affirmed the trial court's order granting the Defendants' motion for summary judgment in *Mittal v. Bluestem Emergency Medical P.L.L.C., et al*, Case No. 112,890 (Ok. Civ. App. Div. II, July 21, 2015) (*Mittal I*), and on remand after the Plaintiff's appeal from the trial court's initial award of attorney's fees to Defendants in *Mittal v. Bluestem Emergency Medical P.L.L.C., et al*, Case No. 113,483 (Ok. Civ. App. Div. IV, February 25, 2016) (*Mittal II*). In this second appeal from the award of attorney's fees, Plaintiff complains that, contrary to the specific directions of the Court of Civil Appeals in *Mittal II*, the trial court on remand failed to make the requisite findings to sustain the trial court's award of attorney's fees.

¶2 We take the following facts from *Mittal II*. "Mittal filed suit against Defendants, claiming that Defendants breached various contracts, breached their fiduciary duty and tortiously

interfered with his contracts." *Mittal II*, p. 2. "The district court granted Defendants' motion for summary judgment and Mittal appealed" in *Mittal I. Id.*

¶3 "While [*Mittal I*] was pending, Defendants filed a post-trial motion for attorney fees and costs." *Mittal II*, p. 2. Defendants asserted that they were entitled to an award of attorney fees pursuant to 12 O.S. 2011 §936 and 12 O.S. 2011 §1101.1." *Id.* "Additionally, Defendants argued that they were entitled to an award of attorney fees pursuant to the court's inherent equitable authority to award fees where a party engaged in oppressive litigation conduct." *Id.*

¶4 "The district court granted the motion over Mittal's objection." *Mittal II*, p.3. "The court's order states that it found 'cause to sustain the motion for each of the different claims Defendants raised[,] [and] [f]urthermore, the fees and costs assessed by counsel for the Defendant, and the time associated thereto, are reasonable time and expenses for this case.'" *Id.* "Mittal filed a Motion for a New Trial, asserting that the grant of attorney fees and costs was an abuse of discretion, that the district court failed to apportion the fees, and that the award was not sustained by evidence[,] [but] [t]he district court denied Mittal's motion" for new trial. *Id.* Plaintiff then commenced his appeal in *Mittal II*.

¶5 On appeal in *Mittal II*, the Court of Civil Appeals reversed the trial court's order awarding attorney's fees to Defendants and remanded for further proceedings. In reversing, the Court of Civil Appeals held:

Lawyers seeking an award of attorney fees are required to "present detailed time records to the court and to offer evidence of reasonable value for the services performed, predicated on the standards within the local legal community." *Green Bay [Packaging, Inc. v. Preferred Packaging, Inc.]* 1996 OK 121, ¶48 [932 P.2d 1091], (quoting *Oliver's Sports Ctr. v. Nat'l. Standard Ins. Co.*, 1980 OK 120, ¶5, 615 P.2d 291). Thereafter, the court must specifically state the basis and calculation for its determination that the fee awarded is reasonable. *Green Bay*, 1996 OK 121 at ¶49. Furthermore, in a

multi-faceted case involving a judgment in which only some of the matters authorize attorney fees the court must distinguish, on the record, between the compensable and non-compensable attorney time and effort, where possible. *Id.*

Mittal asserts two propositions of error on appeal, but one is dispositive. Because the order awarding fees does not reflect the requirements of *State ex rel. Burk v. City of Oklahoma City*, 1979 OK 115, 598 P.2d 659, that order must be reversed. *Burk* demands that a fee award “should set forth with specificity the facts, and computation to support [the] award.” *Id.* at ¶ 22. The order in this case does not satisfy the *Burk* directive.

Defendants asserted alternate theories of recovery in this case: breach of contract, breach of fiduciary duty and tortious interference with contract. Not all of these authorize an award of attorney fees. If the court accepted Defendants’ request for fees pursuant to 12 O.S. 2011 §936, then the time spent on the tort claims must be apportioned out of the total awarded amount. If the court accepted the Defendants’ request for fees pursuant to 12 O.S. 2011 §1101.1(B), then the award must be calculated from the date of the first offer of judgment. Here, it cannot be discerned from the district court’s order or from the record what the district court relied upon, as a matter of law, as grounds for its award. Furthermore, the district court did not distinguish between the compensable and non-compensable matters in its award of attorney fees.

Burk further requires that the district court specify the facts and computation supporting how it arrived at its award. The court must first determine the “lodestar” fee amount, based on time records submitted by the requesting party and the hourly rate for that work. The lodestar amount may be adjusted based on the court’s analysis of several factors, such as novelty or difficulty of issues, loss of opportunity for other employment, or results obtained. The order in this case merely sets forth the amount awarded and a statement that the amount is reasonable.

Because we find it necessary to vacate the district court’s order and remand the matter for reasons discussed above, we do not

determine whether any of the Defendants’ asserted grounds for awarding fees was proper. We hold the award of attorney fees cannot be affirmed based on the record presented. This determination renders it unnecessary for us to consider Mittal’s remaining proposition of error.

The order appealed is vacated and the matter remanded for further proceedings consistent with this opinion.

¶6 On remand, apparently without a hearing and based on the record made in *Mittal II*, the trial court entered its “Order Awarding Attorney Fees on Remand to Satisfy the *Burk v. City of Oklahoma City* Directive.” In its order, the trial court first recognized the “award of attorney fees is sought under Title 12 O.S. §936, Title 12 O.S. §1101.1(B)(3) and perhaps most importantly, upon a finding that the Plaintiff’s case was pursued in bad faith, and in a vexatious, wanton and oppressive manner.”

¶7 In its order on remand, the trial court then said, “this Court found the Plaintiff filed frivolous claims and pursued this case in bad faith and in a vexatious, wanton and oppressive manner. (See *City National Bank and Trust Co. v. Owens*, 1977 OK 86.)” In support of this statement, the court said “[t]his Court has found the Plaintiff sued over matters for which he never had facts supporting the lawsuit,” and attached its previous order granting Defendants’ motion for summary judgment (affirmed in *Mittal I*), in which the trial court held Plaintiff had offered no evidence supporting his asserted claims for breach of contract, breach of fiduciary duty, and tortious interference with a business relationship. And, the trial court then held, “[b]ased upon the undisputed facts stated in the [*Mittal I*] order, this Court could reach no other conclusion than [*Mittal I*] was brought in bad faith, in a vexatious, wanton and oppressive manner,” that is, “it was frivolous and this Court found the Defendants should be entitled to recover their attorney fees and costs.”

¶8 In its order on remand, the trial court first conducted an analysis of Defendants’ attorney fees claim under the *Burk* factors, including, inter alia, the time and labor required, novelty or difficulty of issues, loss of opportunity for other employment, the customary fee, whether the fee is fixed or contingent, limitations imposed by the client or circumstances, the results obtained, the experience, reputation and ability of the attorney, and awards in similar

cases. 1979 OK 115, ¶8, 598 P.2d 659, 661. As to each of the *Burk* factors applicable to the present case, the trial court implicitly held an award of attorney fees proper.

¶9 In its order on remand, the trial court secondly conducted an analysis of Defendants' attorney's fee claim pursuant to the "Court's equitable authority" as delineated in *City National Bank and Trust Co. v. Owens*. Relying on *City National Bank and Trust Co. v. Owens*, the trial court "[f]ound] that it is appropriate, given the facts of this case, to award the full amount of attorney fees requested by the Defendant[s]," that is, "but for the actions of Plaintiff and the baseless lawsuit, no fees should have ever been required of them." The trial court consequently held "Defendant is entitled to a full award of attorney fees, which at the time, was the total sum of \$99,102.50," "\$2,551.80 in costs," the granted judgment to Defendants for the total of \$101,654.30.

¶10 In its order on remand, the trial court lastly analyzed Defendants' attorney fee claim under the "remaining law," 12 O.S. §1101.1(B)(3) and 12 O.S. §2011.1. Under §1101.1(B)(3), the trial court recognized Defendants' \$1,300.00 offer of judgment early in the litigation, then calculated Defendants' attorney fees incurred after the date of the offer in the sum of \$67,687.64, and held the defense of Plaintiff's contract and tort claims was so interrelated as to make apportionment of compensable and non-compensable attorney fee claims impossible. Under §2011.1, the trial court held that, "in any action not arising out of contract, if deemed frivolous, . . . result[s] in the prevailing party being entitled to attorney fees," and that Plaintiff's claims "w[ere] all frivolous," but that "there is no need to make the award based on these requests due to the Court's ruling above [that] the entire lawsuit never had merit or cause to be filed."

¶11 Within ten days, Plaintiff filed a motion to reconsider. Plaintiff asserted the trial court entered the order on remand in the absence of any evidence of his "bad faith" litigation, and without direction by the Court of Civil Appeals in *Mittal II*, without notice to him or an opportunity to appear and object, thus clearly demonstrating the trial court's bias and prejudice toward him. The trial court denied Plaintiff's motion to reconsider and Plaintiff again appeals.

¶12 A motion to reconsider, if filed within ten (10) days of the order, is the functional equiva-

lent of a motion for new trial. *See, e.g., City of Broken Arrow v. Bass Pro Outdoor World, L.L.C.*, 2011 OK 1, 250 P.3d 305; *Strubhart v. Perry Mem'l Hosp. Trust Auth.*, 1995 OK 10, 903 P.2d 263. The trial court's decision to deny a motion for new trial will not be disturbed absent an abuse of discretion. *See, e.g., Bank of Oklahoma, N.A. v. Red Arrow Marina Sales & Service, Inc.*, 2009 OK 77, 224 P.3d 685; *Evers v. FSF Overlake Assoc.*, 2003 OK 53, 77 P.3d 581.

¶13 The right of due process assures to a person whose rights are sought to be affected (1) notice of the time and place of hearing and (2) an opportunity to be heard. *See, e.g., Booth v. McKnight*, 2003 OK 49, 70 P.3d 855. In the present case, it appears the issue of "bad faith" litigation was determined on remand without notice to Plaintiff and without affording Plaintiff an opportunity to appear and present evidence in opposition to the trial court's conclusion of "bad faith" litigation as to warrant the imposition of equitable attorney's fees authorized by Owens. Due process requires that Plaintiff be afforded the opportunity to appear and oppose the allegations of "bad faith" litigation.

¶14 For this reason, the order of the trial court is REVERSED and the cause REMANDED for further proceedings.

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

2019 OK CIV APP 66

**LANA TYREE and DENISE TIDWELL,
Plaintiffs/Appellants, vs. BRENT CORN-
MAN, Defendant/Appellee, and CHRIS
CANDELARIA; JOHN FOSTER; CANDE-
LARIA FOSTER LLC; CANDELARIA FOS-
TER DESIGN * BUILD LLC; BRENT CORN-
MAN CONSTRUCTION, INC.; THE CORN-
MAN COMPANY; TROY BENEAR ROOF-
ING, LLC; CAMPOS CONSTRUCTION,
INC.; TRIPLE J CONSTRUCTION ENTER-
PRISES, INC.; and CARLOS RAMOS,
Defendants.**

Case No. 115,866. April 2, 2019

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA
HONORABLE ALETIA HAYNES TIMMONS,
TRIAL JUDGE

**AFFIRMED IN PART, REVERSED IN
PART AND REMANDED FOR FURTHER
PROCEEDINGS**

C. Craig Cole, John E. Gatloff II, Kindra N. Avila, C. CRAIG COLE & ASSOCIATES, Oklahoma City, Oklahoma, for Plaintiffs/Appellants

Rodney D. Stewart, STEWART LAW FIRM, Oklahoma City, Oklahoma, for Defendant/Appellee

C. Russell Woody, Elizabeth A. Price, HARTZOG CONGER CASON & NEVILLE, Oklahoma City, Oklahoma, for Defendants Candelaria Foster, LLC; John Foster; Chris Candelaria and Candelaria Foster Design * Build, LLC

JOHN F. FISCHER, JUDGE:

¶1 Lana Tyree and Denise Tidwell (plaintiffs) appeal the district court's order dismissing Brent Cornman as a defendant in this breach of contract and construction defect case. The appeal has been assigned to the accelerated docket pursuant to Oklahoma Supreme Court Rule 1.36(b), 12 O.S. Supp. 2013, ch. 15, app. 1, and the matter stands submitted without appellate briefing. The plaintiffs' Second Amended Petition asserts various theories of liability against Brent Cornman based on his actions as the owner of Cornman Construction, Inc. Brent filed a motion to dismiss which the district court granted. The district court dismissed all of the plaintiffs' theories of liability asserted against Brent because it found that all of the plaintiffs' theories were based on acts alleged to have been performed by Brent as an officer or employee of Cornman Construction, Inc. However, an officer of a company may be individually liable in certain instances. We hold that the plaintiffs' petition states a claim for fraud and violation of the Oklahoma Consumer Protection Act against Brent Cornman. The dismissal of those claims is reversed. In all other respects, the judgment appealed is affirmed, and this case is remanded for further proceedings.

BACKGROUND

¶2 In the fall of 2013, the plaintiffs met with Brent Cornman to discuss the possibility of hiring him to build their new home. On October 24, 2013, the plaintiffs signed a contract with Brent's company, Cornman Construction, Inc., to build the home. After construction began, a dispute developed between the parties and Cornman Construction stopped working on the project. The plaintiffs hired another contractor to finish the project. That effort was unsuccessful, and the plaintiffs filed this suit

naming various defendants, including Brent Cornman and Cornman Construction.

¶3 After the plaintiffs' original suit was dismissed, they filed their Second Amended Petition. That suit asserted various theories of liability against one or more of the defendants. Cornman Construction was sued for breach of contract, negligence and fraud. Brent was sued, among other things, for negligence, fraud and violation of the Oklahoma Consumer Protection Act, 15 O.S.2011 §§ 751 through 764.1. Brent filed a motion to dismiss, arguing that all of the conduct for which he was being sued was undertaken on behalf of his company and that he engaged in no conduct for which he could be held individually liable. The district court granted Brent's motion and dismissed the plaintiffs' claim against him with prejudice. The plaintiffs' appeal of the district court's judgment is authorized by 12 O.S.2011 § 994.

STANDARD OF REVIEW

¶4 Appellate review of a motion to dismiss involves a *de novo* consideration as to whether the petition is legally sufficient. *Indiana Nat'l Bank v. Dep't of Human Servs.*, 1994 OK 98, ¶ 2, 880 P.2d 371. The purpose of a motion to dismiss is to test the law that governs the claim in litigation, not the underlying facts. *Reynolds v. Fallin*, 2016 OK 38, ¶ 5, 374 P.3d 799 (citing *Darrow v. Integris Health, Inc.*, 2008 OK 1, ¶ 7, 176 P.3d 1204). *De novo* review is non-deferential, plenary and independent. *Neil Acquisition L.L.C. v. Wingrod Inv. Corp.*, 1996 OK 125, n.1, 932 P.2d 1100.

ANALYSIS

¶5 When reviewing an order granting a motion to dismiss, all allegations in the petition are taken as true. *Gens v. Casady Sch.*, 2008 OK 5, ¶ 8, 177 P.3d 565. For purposes of this appeal, the following facts are treated as undisputed. In the fall of 2013, Brent Cornman discussed with the plaintiffs the possibility of his company, Cornman Construction, Inc., being hired to construct a new home for the plaintiffs. Brent was the chief executive officer of Cornman Construction, Inc. During this discussion, Brent misrepresented his ability and qualifications and the capability of Cornman Construction to build the plaintiffs' home in order to induce the plaintiffs to hire Cornman Construction. On October 24, 2013, the plaintiffs executed a contract with Cornman Construction, Inc. to build their home. During construction, Brent personally performed some of the

site preparation work and supervised the work of others. Cornman Construction also hired subcontractors to perform some of the work. After construction began, Brent requested an advance payment pursuant to the contract, which the plaintiffs paid, and which he diverted to another project. After a dispute developed with the plaintiffs, Cornman Construction stopped work on the home and left the project. The work performed by Cornman Construction and its agents, employees and subcontractors was incomplete, defective, substandard, and caused the plaintiffs to hire additional contractors to try and complete the work. As a result, the plaintiffs incurred damages.

¶6 The plaintiffs' petition asserts seventeen theories of liability. Allegations against Brent Cornman are contained in ten of those. However, because several of the plaintiffs' allegations are duplicated, only five actual theories of liability are asserted against Brent, negligence, breach of implied warranty, unjust enrichment, violation of the Consumer Protection Act and fraud.

I. Negligence

¶7 The plaintiffs filed their Second Amended Petition after the district court dismissed their previously filed negligence claim against Brent Cornman.¹ The plaintiffs asserted their claims for negligence against Brent Cornman and Cornman Construction in their Fourteenth Theory of Recovery. As to Brent, the plaintiffs generally alleged that he owed them a "duty to exercise ordinary care." They expanded on this allegation to allege that Brent also owed them a duty "to act . . . in good faith," a duty to perform the construction contract "in a good, reasonable, and workmanlike manner" and that he had a duty to perform the work "in a commercially reasonable and equitable manner." (Second Amended Petition at 46-66.) These basic allegations are repeated numerous times but are specifically based only on Brent's alleged performance of "grading and dirt work" and "site preparation on the land" where the house was to be constructed. The plaintiffs also alleged that if Cornman Construction hired others to work on the project, Brent had a duty to hire, train and supervise those who performed work on the project for Cornman Construction and that he "failed to use ordinary care in the performance of his direct, personal involvement in the construction and supervision" of the work on the project. The plaintiffs' negligence claim was premised on

Brent's alleged breach of those various duties. (Second Amended Petition, ¶ 206.)

¶8 Any claim of negligence depends on the existence of a duty and the breach of that duty. *Wofford v. Eastern State Hosp.*, 1990 OK 77, ¶ 8, 795 P.2d 516 (cited by plaintiffs in their petition). However:

"[D]uty" is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff

...

The statement that there is or is not a duty begs the essential question – whether the plaintiff's interests are entitled to legal protection against the defendant's conduct. . . .

Brewer v. Murray, 2012 OK CIV APP 109, ¶ 10, 292 P.3d 41 (approved for publication by the Supreme Court) (quoting William L. Prosser, *Law of Torts*, 324-27 (4th ed. 1971)).

¶9 Here, the plaintiffs' interest entitled to protection was defined by the construction contract. It is undisputed that Cornman Construction, Inc., contracted with the plaintiffs to build their home. Although Brent personally negotiated the contract with the plaintiffs on behalf of Cornman Construction, the only contract that the plaintiffs allege was breached was their October 24, 2013 contract with Cornman Construction. The plaintiffs were entitled to have a house built by Cornman Construction according to the contract terms and for the agreed price. For the plaintiffs' negligence claim to survive Brent's motion to dismiss, the plaintiffs must identify some duty that Brent owed to them, the breach of which creates liability in tort. *Wofford*, 1990 OK 77, ¶ 8. The source of Brent's alleged duty is not clear from the plaintiffs' amended petition. There are allegations suggesting a contention that Brent breached implied duties derived from the parties' contractual relationship. But there are also allegations suggesting a contention that Brent breached some duty independent of the parties' contractual relationship. We will address both.

A. Implied Duties

¶10 "Oklahoma jurisprudence recognizes the common-law notion that implied in every contract is a covenant of good faith and fair dealing." *Panama Processes, S.A. v. Cities Serv. Co.*, 1990 OK 66, ¶ 34, 796 P.2d 276. The common law duty of good faith and fair dealing requires "that neither party, because of the purposes of

the contract, will act to injure the parties' reasonable expectations nor impair the rights or interests of the other to receive the benefits flowing from their contractual relationship." *First Nat'l Bank and Trust Co. of Vinita v. Kissee*, 1993 OK 96, ¶ 24, 859 P.2d 502. "The duty to act in good faith also requires a party to abstain from taking unfair advantage of another." *Embry v. Innovative Aftermarket Sys. L.P.*, 2010 OK 82, ¶ 14, 247 P.3d 1158 (affirming summary judgment for the defendant on the plaintiff's negligence theory of recovery based on failure to pay a debt deficiency provided for in the parties' gap protection contract). In addition, there is "inherent in every contract a common-law duty to perform its obligations with care, skill, reasonable experience and faithfulness." *Finnell v. Jebco Seismic*, 2003 OK 35, ¶ 13, 67 P.3d 339. "'Fair dealing' in the implied covenant emphasizes 'reasonable action,' while 'good faith' is marked by 'the exercise of reasonable diligence.'" *Id.* (citations omitted).

¶11 In some circumstances, the breach of these duties may give rise to an action in tort and an action for breach of contract. *Id.* ¶ 13. The plaintiffs cite *Morriss v. Barton*, 1947 OK 260, 190 P.2d 451, for this proposition. *Morriss* held that the plaintiff stated a tort claim against an adjoining landowner who, as the operator of oil and gas wells on the plaintiff's property pursuant to an oil and gas lease, allegedly plugged the plaintiff's wells prematurely to enhance the production from wells located on his property. However, a breach of contract does not give rise to a tort claim in every case. "There is simply no general duty to use reasonable care in the performance of a contract." *Embry*, 2010 OK 82, ¶ 14. Absent some special circumstance, "[a]ny neglect or lack of diligence on the part of the defendants is simply proof of their breach of the implied duty to deal fairly and in good faith, and not an independent theory of recovery." *Id.* "In ordinary commercial contracts, a breach of [the duty of good faith and fair dealing implied in every contract] merely results in damages for breach of contract, not independent tort liability." *Wathor v. Mutual Assurance Administrators, Inc.*, 2004 OK 2, ¶ 5, 87 P.3d 559 (citation omitted) (recognizing tort liability for breach of an insurance contract because of the special relationship between insured and insurer). "Without an independent basis to support a tortious wrongdoing, there is nothing more than an alleged breach of that contract." *Rodgers v. Tecumseh Bank*, 1988 OK 36, ¶ 18, 756 P.2d 1223

(reversing summary judgment on borrowers' claim for breach of contract arising from alleged breach of a commercial loan contract, but affirming grant of summary judgment on claim for tortious breach of contract asserted as a second theory of recovery).

¶12 These are formidable legal obstacles for any plaintiff to overcome when asserting a negligence claim based on an alleged breach of contract. And in this case, there is an additional obstacle. Although Brent signed the contract, he did so as the principal of Cornman Construction. "A basic tenet of American corporate law is that the corporation and its shareholders are distinct, separate entities." *Kenkel v. Parker*, 2015 OK 81, ¶ 12, 362 P.3d 1145. "The general rule is that a contract made with a known agent for a disclosed principal is a contract with the principal alone." *Bane v. Anderson, Bryant & Co.*, 1989 OK 140, ¶ 15, 786 P.2d 1230.

When an agent acting with actual or apparent authority makes a contract on behalf of a disclosed principal,

- (1) the principal and the third party are parties to the contract; and
- (2) the agent is not a party to the contract unless the agent and third party agree otherwise.

Smoot v. B & J Restoration Servs., 2012 OK CIV APP 58, ¶ 20, 79 P.3d 805 (quoting the Restatement (Third) of Agency § 6.01 (2006)). The agent may incur personal liability where the agent "contracts without disclosing his principal, or when he acts without authority, or exceeds his authority . . ." *Bane*, 1989 OK 140, ¶ 15. In addition, officers of a corporation may be liable for corporate acts if they "purport to bind themselves individually." *Hall v. Sullivan-Dollars, Inc.*, 1970 OK 97, ¶ 6, 471 P.2d 453.

¶13 No such allegations appear in the plaintiffs' petition. "The only way a corporation can act is through its officers, directors and employees. To permit liability when the officer is acting within the scope of the corporation would be, in essence, a total disregard of the corporate entity." *Seitsinger v. Dockum Pontiac Inc.*, 1995 OK 29, ¶ 10, 894 P.2d 1077. Consequently, unless they can point to the breach of some duty independent of the common law duties implied in the construction contract, the plaintiffs' negligence claim against Brent Cornman fails as a matter of law.

B. Independent Duties

¶14 In addition to these implied duties, the plaintiffs allege that Brent is personally liable for his own tortious conduct. In *Smoot*, this Court noted the general principle: “An officer or director is, in general, personally liable for all torts which he authorizes or directs or in which he participates, notwithstanding that he acted as an agent of the corporation and not on his own behalf.” *Smoot*, 2012 OK CIV APP 58, n.3 (citing Henry W. Ballantine, *Ballantine on Corporations* § 112 (1946), and additional cases).² The mere fact that corporate officers may be individually liable for their tortious conduct when they are acting on behalf of the corporation does not make every mistake made in the performance of their corporate duties a tort. The principle stated in *Ballantine* cannot be divorced from the “independent basis” necessary to impose tort liability required by *Rodgers v. Tecumseh Bank*, 1988 OK 36, 756 P.2d 1223. “Officers and directors are not generally liable for a corporation’s breach of contract absent some wrongful personal conduct on which liability can be imposed” *Smoot*, 2012 OK CIV APP 58, ¶ 16.

¶15 The plaintiffs find a basis for this personal conduct in *Wofford v. Eastern State Hosp.*, 1990 OK 77, 795 P.2d 516. Plaintiffs argue that Brent owed “a duty of care to all persons who are foreseeably endangered by his conduct with respect to all risks that make the conduct unreasonably dangerous.” *Id.* ¶ 11. *Wofford* identified a duty owed in the absence of any contractual obligation by a psychiatrist to unknown third parties foreseeably endangered by the negligent release of a dangerous mental patient from a psychiatric hospital. Tort liability in *Wofford* was based on the special relationship implied by law to the psychiatrist/patient relationship and extended to third parties who could be foreseeably harmed by the patient. *Id.* ¶¶ 9-11.

¶16 *Wofford* is distinguishable, and the plaintiffs interpret *Wofford* too broadly. The plaintiffs have not alleged that there was, and the allegations in their petition do not support, any claim that there was a special relationship between the plaintiffs and Brent. A defendant does not owe a duty of care to the world; any duty is defined by the interest of a particular plaintiff which the law finds is entitled to protection from the conduct of the defendant. *Brewer v. Murray*, 2012 OK CIV APP 109, ¶ 10, 292 P.3d 41. The interest here is defined by an ordinary

commercial construction contract. “Whether a defendant stands in such relationship to a plaintiff that the law will impose upon the defendant an obligation of reasonable conduct for the benefit of the plaintiff is a question for the court.” *Wofford*, 1990 OK 77, ¶ 10. And, that is the question raised by Brent’s motion to dismiss.

¶17 Nonetheless, it is generally true that:

a person owes a duty of care to another person whenever the circumstances place the one person in a position towards the other person such that an ordinary prudent person would recognize that if he or she did not act with ordinary care and skill in regard to the circumstances, he or she may cause danger of injury to the other person.

Lowery v. Echostar Satellite Corp., 2007 OK 38, ¶ 13, 160 P.3d 959 (refusing to impose tort liability on a dish satellite company whose employee instructed the plaintiff on how to repair the company’s roof-mounted product). In general, 76 O.S.2011 § 1 “imposes a legal duty upon each person, without contract, to abstain from injuring the person or property of another.” *Lowery*, 2007 OK 38, n.3. However, even this general duty is insufficient to support the plaintiffs’ claim against Brent Cornman.

¶18 In their response to Brent’s motion to dismiss, the plaintiffs argue that an agent, even while acting within the scope of his authority, who “steps aside to engage in a tortious act to the injury of property or personal rights of another, . . . becomes liable for the injury done.” *Bane v. Anderson Bryant & Co.*, 1989 OK 140, ¶ 15, 786 P.2d 1230. But the plaintiffs have not alleged that Brent “stepped aside” in some tortious manner, only that he failed to perform work on their project according to the terms of the contract. In *Brown v. Ford*, 1995 OK 101, 905 P.2d 223, a case relied on by the plaintiffs, the sole officer and shareholder of a corporation was subject to tort liability because he committed sexual battery on an employee of the corporation. The duty imposed on him, individually, by the common law to refrain from harmful or offensive contact was independent of his duties as a corporate officer. *See Id.* ¶¶ 11-13.

¶19 And, *Bane* confirms the absence of a basis for the plaintiffs’ negligence claim against Brent. *Bane* involved an action against a securities firm for breach of contract and violation of Oklahoma securities laws. A corporate officer was held individually liable, but not because

he engaged in conduct which resulted in the corporation's breach of contract. He was held liable in tort on two statutory grounds: (1) the tort statute, 76 O.S.2011 § 2 ("One who willfully deceives another, with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers"); and (2) the former Oklahoma Securities Act, 71 O.S.1981 § 408(b) ("Every person who materially participates or aids in a sale or purchase made by any person liable under [section 408(a) of the Oklahoma Securities Act], or who directly or indirectly controls any person so liable, shall also be liable jointly and severally with and to the same extent as the person so liable . . ."). See *Bane*, 1989 OK 140, ¶¶ 16-17. It was the breach of those statutory duties, not his conduct as a corporate officer in the performance of the corporation's contract, which provided the "independent basis" for his tort liability. *Rodgers v. Tecumseh Bank*, 1988 OK 36, ¶ 18, 756 P.2d 1223. No similar duty is alleged by the plaintiffs against Brent. All of the acts on which the plaintiffs base their negligence claim against Brent, are alleged to have been performed "in the course of [his] business" as the owner of Cornman Construction.

¶20 The general basis for a corporate officer's tort liability is stated in section 352 of the Restatement (Second) of Agency:

An agent is not liable for harm to a person other than his principal because of his failure adequately to perform his duties to his principal, unless physical harm results from reliance upon performance of the duties by the agent, or unless the agent has taken control of land or other tangible things.

The plaintiffs do not allege that they were physically harmed by Brent's alleged negligence. The plaintiffs do rely on *J.C. Penney Company v. Barrientez*, 1965 OK 166, 411 P.2d 841, for the second appeal of this principle, but their reliance is misplaced. The "control of land" exception is not applicable here. In *Barrientez*, tort liability was based on the company manager's failure to discharge the company's duty to warn business invitees of hidden dangers on the company's premises. *Id.* ¶ 0 (Syllabus 4).³ That duty is imposed by law on any landowner or occupier, and regardless of any contractual obligation to do so. See *Wood v. Mercedes-Benz of Oklahoma City*, 2014 OK 68, ¶ 5, 336 P.3d 457. No such duty is alleged in this case.

¶21 Illustration 2 for comment "a" to section 352 of the Restatement of Agency captures the legal principle controlling the plaintiffs' negligence claim against Brent.

[Cornman Construction], who has agreed to build a house for [the plaintiffs], employs [Brent Cornman] to build it. [Brent Cornman] is careless in the construction of the house, so that the house does not conform to the contract. [Brent Cornman] is not thereby liable to [the plaintiffs] for the failure to construct the house in accordance with the contract.

Restatement (Second) of Agency § 352 cmt. a, illus. 2 (1958) "An agent's breach of a duty owed to the principal is not an independent basis for the agent's tort liability to a third party. An agent is subject to tort liability to a third party harmed by the agent's conduct only when the agent's conduct breaches a duty that the agent owes to the third party." Restatement (Third) of Agency § 7.02 (2006).

¶22 According to the allegations in the plaintiffs' petition, Brent Cornman may have had a duty to his employer, Cornman Construction, to perform work for his employer with ordinary skill and competence. But those allegations do not support a claim that he had an independent duty to the plaintiffs regarding that work or provide the basis for a negligence claim against him, individually, for violation of his duty to the corporation. *Cf.*, *Wathor v. Mut. Assurance Adm'rs, Inc.*, 2004 OK 2, ¶ 8, 87 P.3d 559 ("Agents of the insurer – even agents whose acts may have been material to a breach of [contract and] the duty [of good faith] - do not normally owe the insured a duty of good faith since agents are not parties to the insurance contract.").

¶23 Further, the plaintiffs have not alleged any damages caused by Brent that are recoverable only in tort. The absence of extra-contractual damages supports the absence of a negligence claim. "For the breach of an obligation not arising from contract, the measure of damages . . . is the amount which will compensate for all detriment proximately caused thereby, whether it could have been anticipated or not." 23 O.S.2011 § 61. What the plaintiffs allege that they are entitled to recover "is the amount which will compensate [them] for all the detriment proximately caused [by Brent], or which, in the ordinary course of things, would be likely to result therefrom." 23 O.S.2011 § 21 (defining the mea-

sure of damages for breach of contract). The plaintiffs seek contract damages, *i.e.*, “the costs of bringing the completed projects back into compliance with the standard of construction intended by the contract.” *Flint Ridge Dev. Co., Inc. v. Benham-Blair and Affiliates, Inc.*, 1989 OK 48, ¶ 11, 775 P.2d 797. See Exhibits P-1 through 2 to the petition (describing contract damages and omitting any claim for injury to person or property). “A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.” 12 O.S.2011 § 2010(C). And, the substance of an incorporated exhibit controls over “any conflicting allegations of the petition.” *Sharp v. Dougherty*, 1951 OK 33, ¶ 30, 235 P.2d 663. *Accord, Exendine v. Iron*, 1931 OK 584, ¶ 5, 4 P.2d 1035. The nature of the damages sought determines whether the action is based in tort or breach of contract. See *Flint Ridge*, 1989 OK 48, ¶¶ 11-12.

¶24 Many of the cases cited by the plaintiffs recite broad statements regarding legal principles that do not reflect the current state of the law. The plaintiffs’ negligence claim against Brent, in essence, seeks to revive the now discredited practice of “tortifying” contract law.⁴ We decline to participate in that effort. As previously stated, the purpose of Brent’s motion to dismiss is to test the law that governs the plaintiffs’ negligence claim, not the plaintiffs’ ability to insert the word “duty” in a sentence. The allegations in the plaintiffs’ Seconded Amended Petition and the facts asserted in support of those allegations do not identify any duty that Brent owed to the plaintiffs, the breach of which would support their negligence claim against him. *But cf.*, Part IV of this Opinion (reversing the judgment as to the plaintiffs’ fraud claim based on Brent’s alleged personal acts of deceit and misrepresentation).

¶25 The district court’s dismissal of the plaintiffs’ negligence claim against Brent Cornman is affirmed.⁵

II. Implied Warranty

¶26 The plaintiffs’ fourth theory of liability asserts a claim for breach of an implied warranty against all defendants. No specific allegations regarding this claim are asserted against Brent Cornman. Instead, the plaintiffs generally allege that a warranty of workmanship and fitness was implied to the work performed on their house by each of the defendants. Although the plaintiffs’ petition contains citations to authority supporting many of their theories of

liability, no authority is cited regarding the plaintiffs’ implied warranty theory. Even though no such authority is required (12 O.S.2011 § 2008(A)(1)) we are unable to discern any cognizable legal theory supporting this claim against Brent.

¶27 Further, neither this theory nor any authority supporting this theory of recovery is addressed in the plaintiffs’ response to Brent Cornman’s motion to dismiss. And, in their motion to settle journal entry, the plaintiffs do not claim that they asserted this theory of recovery against Brent in their amended petition. The district court’s order dismissing the plaintiffs’ fourth theory of liability asserting a claim against Brent Cornman for breach of an implied warranty is affirmed.

III. Unjust Enrichment

¶28 The plaintiffs’ tenth theory of liability asserts a claim for unjust enrichment against all defendants. They assert no specific allegations regarding this claim against Brent. The plaintiffs are “not entitled to pursue a claim for unjust enrichment when [they have] an adequate remedy at law for breach of contract.” *American Biomedical Group, Inc. v. Techtrol, Inc.*, 2016 OK 55, ¶ 27, 374 P.3d 820. The plaintiffs have alleged a breach of contract claim against Cornman Construction. Unjust enrichment is not a theory of liability that the plaintiffs claim they asserted against Brent in their amended petition. The district court’s order dismissing the plaintiffs’ tenth theory of liability asserting a claim against Brent for unjust enrichment is affirmed.

IV. The Consumer Protection Act

¶29 The plaintiffs’ sixth and sixteenth theories of recovery assert a claim against Brent Cornman for violation of the Consumer Protection Act, 15 O.S.2011 §§ 751 through 764.1. The plaintiffs are “consumers” for purposes of the Act. *Lumber 2, Inc. v. Illinois Tool Works, Inc.*, 2011 OK 74, ¶ 15, 261 P.3d 1143. The construction of their home is a “consumer transaction” covered by the Act. 15 O.S.2011 § 752(2). Brent is a “person” as defined in the Act. 15 O.S.2011 § 752(1). The plaintiffs allege that Brent violated sections 753(2), (3), (5), (15) and (20) of the Act. The plaintiffs have a private right of action to recover for any violation of the Act. 15 O.S. 2011 § 761.1 (“The commission of any act or practice declared to be a violation of the Consumer Protection Act shall render the violator liable to the aggrieved consumer . . .”).

¶30 In dismissing the plaintiffs' amended petition, the district court relied on 12 O.S. Supp. 2013 § 682(B):

No suit or claim of any nature shall be brought against any officer, director or shareholder for the debt or liability of a corporation of which he or she is an officer, director or shareholder, until judgment is obtained therefor against the corporation and execution thereon returned unsatisfied.

The district court appears to have found that all of the plaintiffs' theories of liability asserted against Brent were based on actions he is alleged to have taken as an officer, director or shareholder of Cornman Construction, Inc., and that no judgment had yet been obtained against Cornman Construction, Inc.

¶31 Only two published opinions have previously addressed section 682(B), *Maree v. Neuwirth*, 2016 OK 62, 374 P.3d 750, and *Sauders v. Mangum Nursing Center, LLC*, 2016 OK CIV APP 53, 377 P.3d 180. Both cases involved negligence claims asserted against individual officers and members of limited liability companies that operated nursing homes. In each case, the tort resulted from an alleged breach of duty imposed on the individuals by the Oklahoma Nursing Home Care Act, 63 O.S.2011 §§ 1-1900.1 through 1-1943.1. The *Sauders* Court re-fused to apply section 682(B). The Court held that section 682(B) amended the original statute, but the amendment did not become effective until after *Sauders*' cause of action arose. The Court noted that the amendment affected the substantive elements of *Sauders*' claim and was, therefore, not entitled to retroactive application. *Sauders*, 2016 OK CIV APP 53, ¶ 13.

¶32 In *Maree v. Neuwirth*, the Supreme Court issued a writ of prohibition preventing the district court from denying the plaintiff an opportunity to amend her petition to add negligence claims against individuals. The Court stated that, had those claims been included in the original petition, "they would have amounted to a cognizable legal theory . . ." *Maree*, 2016 OK 62, ¶ 9. In footnote one, the Court noted that section 682(B) became effective after the plaintiff's cause of action arose. Consequently, neither case applied section 682(B) to determine whether that statute prevents a plaintiff from filing any negligence claim against a corporate officer, director or shareholder "until judgment is obtained therefor against the cor-

poration and execution thereon returned unsatisfied." That, however, is the issue in this case.

¶33 As the plaintiffs correctly point out, section 682(B) does not prevent:

a suit or claim against an officer, director or shareholder for their own conduct, act or contractual obligation, not within the scope of their role as an officer, director or shareholder, arising out of or in connection with their direct involvement in the same or related transaction or occurrence.

12 O.S. Supp. 2013 § 682(B). Section 682(B) does not prohibit the plaintiffs from asserting a violation of the Consumer Protection Act against Brent Cornman based on his "own conduct," to the extent that conduct was "not within the scope of [his] role as an officer, director or shareholder" of Cornman Construction, Inc. *Id.* Whether the conduct alleged by the plaintiffs was or was not within the scope of Brent Cornman's role as an officer, director or shareholder of Cornman Construction cannot be determined at the pleading stage. It is sufficient that the plaintiffs have alleged that Brent personally violated the Consumer Protection Act. "At this stage of the proceedings it does not appear beyond a doubt that [the plaintiffs] can prove no set of facts in support of [their] theories of recovery." *Fanning v. Brown*, 2004 OK 7, ¶ 22, 85 P.3d 841 (reversing, in part, the dismissal of the plaintiff's petition because she had "pled a cognizable legal theory, *i.e.*, piercing the corporate veil"). *Id.* ¶ 24. That portion of the district court's order dismissing the plaintiffs' sixth and sixteenth theories of liability against Brent Cornman for violation of the Consumer Protection Act is reversed.

V. Fraud

¶34 The plaintiffs' twelfth, thirteenth and fifteenth theories of recovery allege various fraud claims against Brent based on his individual conduct. These allegations differ from those on which the plaintiffs assert their negligence claim against Brent. For example, the plaintiffs allege that they were fraudulently induced to sign the construction contract based on Brent's alleged misrepresentation of material facts. "One who willfully deceives another, with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers." 76 O.S.2011 § 2. This provides an "independent basis" for Brent's tort liability. *Rodgers v. Tecumseh Bank*, 1988 OK 36, ¶ 18, 756 P.2d 1223. That portion of the dis-

trict court's order dismissing the plaintiffs' twelfth, thirteenth and fifteenth theories of liability is reversed.

VI. Declaratory Judgment

¶35 In their eleventh theory of recovery, the plaintiffs assert a claim for a declaratory judgment against Brent Cornman and Cornman Construction, Inc. As relevant to Brent Cornman's motion to dismiss, the plaintiffs seek a declaration that (1) title 12 O.S.2011 § 682 does not prevent a direct action against Brent Cornman; (2) if section 682 bars an action against Brent Cornman until a judgment against Cornman Construction is returned unsatisfied, then section 682 tolls the limitations period for actions against Brent Cornman; and (3) if section 682 is not a bar to an action against Brent Cornman, then the plaintiffs may pursue all relief sought against all other defendants against Brent Cornman. The plaintiffs' petition fails to show that they may be entitled to declaratory relief.

¶36 The Declaratory Judgment Act, 12 O.S. 2011 §§1651 through 1657, does not provide a separate theory of recovery, it is a procedural statute providing a remedy in certain circumstances. See *Conoco, Inc. v. State Dep't of Health*, 1982 OK 94, ¶ 18, 651 P.2d 125. Whether to grant a declaratory judgment is a matter within the discretion of the district court. 12 O.S.2011 § 1651 ("District courts may, in cases of actual controversy, determine rights, status or other legal relations . . .") (emphasis added); *Energy Transp. Sys., Inc. v. Kansas City S. Ry. Co.*, 1981 OK 159, n.11, 638 P.2d 459. See also, *United Fire & Casualty Co. v. Kleppe*, 498 N.W.2d 226, 227 (Wis. 1993) (grant or denial of declaratory judgment is within the discretion of the trial court).⁶ Finally, the district court "may refuse to make a determination where the judgment, if rendered, would not terminate the controversy, or some part thereof, giving rise to the proceeding." 12 O.S.2011 § 1651. See *Associated Builders and Contractors of Okla. v. State ex rel. Okla. Dep't of Labor*, 1981 OK 50, ¶ 25, 628 P.2d 1156 (noting that section 1651 "specifically vests discretion in the trial court to refuse to make a determination of rights where it finds that the judgment, if rendered, would not terminate the controversy").

¶37 The plaintiffs' first requested declaration would not "terminate the controversy." Even if, as this Opinion points out, the district court were to determine that section 682 does not

prevent a direct action against Brent Cornman, other provisions of the law do.

¶38 The plaintiffs also ask for a declaration that, if section 682 does apply, their action against Brent Cornman is tolled until a judgment against Cornman Construction is returned unsatisfied. In other words, they ask for a declaratory judgment that the statute provides what its printed words state: "The statute of limitations on any claim precluded by this section . . . shall not accrue until judgment is obtained against the corporation and execution thereon returned unsatisfied." Such a declaration would result in no practical relief. *Rogers v. Excise Bd. of Greer Cnty.*, 1984 OK 95, ¶ 15, 701 P.2d 754. More importantly, the plaintiffs are asking for the answer to a hypothetical question: If they obtain a judgment against Cornman Construction and the judgment is not satisfied, can they sue Brent Cornman for any unpaid portion of that judgment? The Declaratory Judgment Act is not a vehicle by which a party can obtain the answer to a hypothetical question. *Knight v. Miller*, 2008 OK 81, ¶ 8, 195 P.3d 372.

¶39 The plaintiffs' third requested declaration, like their first, would not terminate this controversy. If section 682 does not bar the plaintiffs' claims against Brent Cornman, the viability of those claims depends on other law and legal principles, which we have addressed in this Opinion.

¶40 We find no abuse of discretion in the district court's denial of the plaintiffs' request for a declaratory judgment. That portion of the district court's order dismissing the plaintiffs' eleventh theory of recovery is affirmed.

CONCLUSION

¶41 The district court correctly dismissed the plaintiffs' theories of recovery asserted against Brent Cornman based on negligence, breach of implied warranty, unjust enrichment and their request for a declaratory judgment. Those portions of the district court's judgment are affirmed. The plaintiffs have sufficiently alleged theories of liability against Brent Cornman based on fraud and violation of the Oklahoma Consumer Protection Act. That portion of the district court's judgment is reversed, and this case is remanded for further proceedings.

¶42 AFFIRMED IN PART, REVERSED IN PART AND REMANDED FOR FURTHER PROCEEDINGS.

THORNBRUGH, C.J., concurs, and WISEMAN, P.J., concurs in part and dissents in part.

WISEMAN, P.J., concurring in part and dissenting in part:

¶1 I concur with the Majority in all aspects of the Opinion except on the question of Plaintiffs' claim against Brent Cornman individually for negligence.

¶2 The Majority characterizes Plaintiffs' negligence claims against him individually as unclear, but finds their allegations suggest "Brent breached implied duties derived from the parties' contractual relationship. But there are also allegations suggesting a contention that Brent breached some duty independent of the parties' contractual relationship." (Opin., ¶ 9). I find their contentions on this point to be straightforward. In their second amended petition, their succinct negligence claim in the "Third Theory of Recovery" is that each Defendant (including Brent) performed or oversaw work on the project, the work was defective and negligently performed, Defendants had a duty to perform the work correctly, and their failure to do so was negligent. (Second amended petition, p. 13). Their claims of negligence against Brent arise from his actual performance of grading, dirt work, and site preparation on the project and from his supervision or non-supervision of other employees. (Second amended petition, p. 46, "Fourteenth Theory of Recovery").

¶3 The Supreme Court in *Finnell v. Jebco Seismic*, 2003 OK 35, 67 P.3d 339, described very clearly the situation confronting us here:

Oklahoma law has long recognized that an action for breach of contract and an action in tort may arise from the same set of facts. . . . [T]here is inherent in every contract a common-law duty to perform its obligations with care, skill, reasonable experience and faithfulness. A person injured by the substandard performance of a duty derived from a contractual relationship may rely on a breach-of-contract or tort theory, or both, but even if the evidence supports both, the claimant can achieve but a single recovery. In the instant case, the contract contains an express undertaking to perform in a prudent and careful manner. Its terms hence provide a basis for recovery for a breach of contract. At the same time, the contract provides the factual background for a claim *ex delicto*, the basis of which is defendants' tortious con-

duct in the performance of a duty derived from the contractual relationship. *The petition's allegations give adequate notice of the dual nature of plaintiffs' claim.*

Id. ¶ 13 (footnotes omitted)(emphasis in the original). The *Finnell* Court cites *Morriss v. Barton*, 1947 OK 260, 190 P.2d 451, which states: "[A]ccompanying every contract is a common-law duty to perform the thing agreed to be done with care, skill, reasonable expediency, and faithfulness, and a negligent failure to observe any of these conditions is a tort as well as a breach of contract." *Id.* ¶ 39 (quoted citation omitted).

¶4 The language in *Embry v. Innovative Aftermarket Systems L.P.*, 2010 OK 82, 247 P.3d 1158, appears to directly contradict this principle. In *Embry*, the Court said:

There is simply no general duty to use reasonable care in the performance of a contract. The duty of a party to a contract to act reasonably and diligently in the performance of a contract are encompassed within the implied covenant of fair dealing and good faith. "Fair dealing" in the implied covenant emphasizes "reasonable action," while "good faith" is marked by "the exercise of reasonable diligence." The duty to act in good faith also requires a party to abstain from taking unfair advantage of another. Any neglect and lack of diligence on the part of the defendants is simply proof of their breach of the implied duty to deal fairly and in good faith, and not an independent theory of recovery. Accordingly, we hold the trial court did not err in eliminating this [negligence] theory of recovery on summary judgment.

Id. ¶ 14 (citations omitted).

¶5 It is difficult to reconcile the divergence between *Finnell* and *Embry* on the question of whether a general common law duty exists in a contract to use reasonable care in performing the obligations of that contract. The *Finnell* case arose from an attorney fee application by plaintiff landowners after a jury verdict for damages to their real property arising from a contract allowing defendant to conduct a 3-D seismic survey on plaintiffs' property. The Supreme Court held that "[a] person injured by the substandard performance of a duty derived from a contractual relationship may rely on a breach-of-contract or tort theory, or both" *Finnell*, 2003 OK 35, ¶ 13, because inherent in

every contract is the duty to perform its obligations “with care, skill, reasonable experience and faithfulness.” *Id.* In *Embry*, plaintiff sued defendants for failure to pay the deficiency remaining on a car loan after the total loss settlement by plaintiff’s insurer was applied to the loan. The Court found the “gap protection contract” was insurance which created the kind of “special relationship” between plaintiff and defendants that could give rise to tort liability for “bad faith,” otherwise known as the breach of the implied duty to deal fairly and in good faith in those situations where such a “special relationship” existed. The Court found it was error to grant summary judgment to defendants on the bad faith claim because defendants’ conduct could reasonably be perceived as tortious bad faith.

¶6 *Embry*, in contrast to the line of cases represented by *Finnell*, found no duty of reasonable care and skill in performing the contract, the breach of which gives rise to a negligence theory of recovery, and it affirmed the trial court’s summary judgment for defendants on plaintiff’s negligence claim. *Embry* found such a duty to be “encompassed within the implied covenant of fair dealing and good faith” and breach of that duty “is simply proof of [defendants’] breach of their implied duty to deal fairly and in good faith, and not an independent theory of recovery.” *Embry*, 2010 OK 82, ¶ 14. Plaintiff was therefore allowed to proceed with his breach of the implied duty to deal fairly and in good faith claim (bad faith) but not his negligence claim. It remains for future determination, for instance in this case, how this holding will be applied in a case, as here, where a tortious bad faith claim is not involved and therefore no separate vehicle is available, other than negligence, to raise as a tort the breach of the duty to perform the contract with reasonable care, skill and diligence.

¶7 As the Majority states, a breach of contract does not give rise to a tort claim in every case. But the converse of that is equally true – the same set of facts may give rise to both a breach of contract claim and a tort claim. In *Finnell*, the Supreme Court went on to say, “The doctrine of mandatory election of remedies is now an anachronism. At the submission stage, the court must charge the jury on all theories of recovery the evidence may support. The court will craft the available relief which the facts justify.” *Finnell*, 2003 OK 35, ¶ 12 (footnotes omitted).

¶8 Although the Majority discusses the implied duty of good faith and fair dealing, this claim is not found in either Plaintiffs’ “Third Theory of Recovery” or “Fourteenth Theory of Recovery” in their second amended petition. Any analogy to cases involving claims of a tortious breach of the “duty of good faith and fair dealing” is misplaced in this context of negligent home construction. The Majority’s further citations to *Rodgers v. Tecumseh Bank*, 1988 OK 36, 756 P.2d 1223, and *Wathor v. Mutual Assurance Administrators, Inc.*, 2004 OK 2, 87 P.3d 559, are misplaced for the same reason. Unlike the plaintiffs in *Rodgers* and *Wathor*, Plaintiffs here do not assert a claim for “bad faith” – *i.e.*, a tortious breach of contract – against Brent because they had no “special relationship” with him, no contract with him individually, they did not claim to have such a contract, and they asserted no breach of contract claim, in bad faith or otherwise, against Brent individually. It is not, as the Majority mentions, a question of an agent incurring personal (contractual) liability when he “contracts without disclosing his principal, or when he acts without authority, or exceeds his authority,” *Bane v. Anderson, Bryant & Co.*, 1989 OK 140, ¶ 15, 786 P.2d 1230, or, as an officer, purports to bind himself individually. *Hall v. Sullivan-Dollars, Inc.*, 1970 OK 97, ¶ 6, 471 P.2d 453. None of these basic tenets of contract law is implicated here because Plaintiffs assert no breach of contract claim against Brent individually. It’s a question of whether a separate tort claim of negligence can be asserted against the individual who carelessly performed the work under the contract when he is the employee or agent of the corporation responsible for doing the work.

¶9 The Majority states, “All of the acts on which the plaintiffs base their negligence claim against Brent are alleged to have been performed ‘in the course of [his] business’ as the owner of Cornman Construction.” (Opin., p. 16). The Majority also states, “The mere fact that corporate officers may be individually liable for their tortious conduct when they are acting on behalf of the corporation does not make every mistake made in the performance of their corporate duties a tort.” (Opin., p. 12). Plaintiffs’ negligence claims against Brent arise not from his conduct as a corporate officer, director or owner, but as the corporate agent doing the actual work or supervising the work of others. These claims exist without regard to Brent’s ownership of the company and would exist if he

had no connection to the company other than as an employee performing the contract.

¶10 And, I would argue, this point by the Majority appears to contradict the time-honored principle reiterated in *Kirby v. Jean's Plumbing Heat & Air*, 2009 OK 65, ¶ 5, 222 P.3d 21: "When considering a defendant's quest for dismissal the court must take as true all of the challenged pleading's allegations together with all reasonable inferences that may be drawn from them." For purposes of testing the sufficiency of this claim, we must assume the allegations under review are true.

¶11 I would treat this claim as the Majority does Plaintiffs' claim against Brent individually for fraud. As the Oklahoma Supreme Court has held in *Bane*, 1989 OK 140:

The general rule is that a contract made with a known agent for a disclosed principal is a contract with the principal alone. However, equally true is the exception to the general rule:

If the agent, acting within the scope of his authority, in the pursuit of a lawful purpose, steps aside to engage in a tortious act to the injury of property or personal rights of another, the agent becomes liable for the injury done.

The exception applies to actions for fraud, negligence, and conversion by the agent.

Id. ¶¶ 15-16 (citations omitted). The Supreme Court reiterated this position in *Carter v. Schuster*, 2009 OK 94, ¶ 20, 227 P.3d 149, where it said the law presumes the agent of a disclosed principal intends by his signature on a contract to bind only his principal, and the agent is not bound in his individual capacity. The Court continued, "This general rule is true when the agent acts within the scope of his authority in the pursuit of a lawful purpose. When the agent steps outside of these parameters to engage in a tortious act, which injures the property or personal rights of another, the agent becomes liable for the injury done. This exception applies to actions for fraud, negligence and conversion by the agent." *Id.* I have found no case law to guide us in ascertaining what constitutes "stepping outside these parameters to engage in a tortious act" for which liability might attach. Although the Majority says Plaintiffs have not alleged that Brent "stepped aside" in some tortious manner, this is not required under our code of notice pleading – "A motion to dismiss should

be denied if relief is possible under any set of facts which can be established and is consistent with the allegations." *Kirby*, 2009 OK 65, ¶ 5.

¶12 This Court has held that "corporate officers may be individually liable for their tortious conduct even if they are acting on behalf of the corporation and regardless of whether a corporation may be held vicariously liable for the torts of its officers and directors." *Smoot v. B&J Restoration Servs.*, 2012 OK CIV APP 58, ¶ 16, 279 P.3d 805. Allowing the negligence claim against Brent to proceed for his individual conduct does not violate the general proposition that "the individual and the corporation are two separate and distinct entities." *Carter*, 2009 OK 94, ¶ 17. The Supreme Court in *Cox v. Kansas City Life Insurance Co.*, 1997 OK 122, 957 P.2d 1181, held that a "plaintiff's right to proceed against the master alone was distinct from his right to proceed against the servant." *Id.* ¶ 19. The Court reiterated, "The rule appears to be quite well established that a plaintiff may bring separate actions against a master and his servant, or a principal and his agent, to recover for the negligence of the servant or agent, where the master's or principal's only responsibility is derivative. . . ." *Id.* (quoted citation omitted).

¶13 "Motions to dismiss are generally viewed with disfavor." *Kirby*, 2009 OK 65, ¶ 5. As the Court summarized in *Kirby*,

The purpose of a motion to dismiss is to test the law that governs the claim in litigation rather than to examine the underlying facts of that claim. A motion to dismiss for failure to state a claim upon which relief may be granted will not be sustained unless it should appear *without doubt* that the plaintiff can prove no set of facts in support of the claim for relief. . . . A motion to dismiss should be denied if relief is possible under any set of facts which can be established and is consistent with the allegations.

Id. (citations omitted)(emphasis added).

¶14 After following the standards that govern us in our *de novo* review of this motion to dismiss, I would reverse the trial court's dismissal of Plaintiffs' negligence claims against Brent Cornman individually and remand for further proceedings, just as the dismissal of their fraud claim against him individually requires reversal and remand. I respectfully concur in part and dissent in part.

JOHN F. FISCHER, JUDGE:

1. The plaintiffs acknowledged that ruling and state that any factual allegations or theories of recovery previously dismissed by the court are included in the Second Amended Petition only for proper notice of their currently pending theories of recovery and to preserve the issue for appeal. The plaintiffs state, therefore, that the allegations and theories of recovery contained in their Second Amended Petition "should be viewed in consistency with the prior rulings of the Court." (Second Amended Petition, footnote 1.) Plaintiffs' Third Theory of Recovery asserts a claim of negligence against all defendants. In footnote 2 to the Second Amended Petition, the plaintiffs specifically state that the district court had previously dismissed their negligence claim against Brent Cornman and, therefore, their allegations of negligence against "All Defendants is for the purposes set forth in Footnote 1, *supra*." The only specific allegations of negligence made against Brent are contained in the Fourteenth Theory of Liability and only that Theory is addressed in the plaintiffs' response to Brent Cornman's motion to dismiss. We will treat the allegations of negligence as they appear in the plaintiffs' Fourteenth Theory of Recovery.

2. The additional cases cited are: *Pate v. Alian*, 2002 OK CIV APP 68, ¶ 20, 49 P3d 85 (party injured by intoxicated driver may recover from corporate officer and owner of a restaurant if officer neglected to perform his duties in serving alcohol to driver); *Preston-Thomas Constr., Inc. v. Central Leasing Corp.*, 1973 OK CIV APP 10, ¶ 10, 518 P2d 1125 (corporate officer liable for conversion of third-party's property while acting on behalf of the corporation); *All American Car Wash, Inc. v. Nat'l Pride Equip., Inc.*, 550 F. Supp. 166 (W.D. Okla. 1981) (corporate officers personally liable if they took part in the commission of a tort or directed officers, agents or employees of the corporation to engage in such acts). See also *Martin v. Johnson*, 1998 OK 127, ¶ 32, 975 P.2d 889 ("If an employee acts in bad faith and contrary to the interests of the employer in tampering with a third party's contract with the employer we can divine no reason that the employee should be exempt from a tort claim for interference with contract.")

3. The Court held: "A managing agent of a retail store is answerable in damages for personal injuries suffered by the store's customers from dangerous conditions on the premises in his possession or under his control, for which he is responsible to the store's owner-proprietor, where the injuries are those for which the proprietor-owner would also be liable."

4. See "The Duty to Speak in Contract Formation," Alvin C. Harrell, 89 Okla. Bar J. no. 5, p. 6, 10, and n.54-55, February 2018.

5. Because we reach this conclusion, we do not address the parties' arguments concerning the applicability of 12 O.S.2011 § 682.

6. Wisconsin adopted the Uniform Declaratory Judgments Act in 1927. Oklahoma adopted a "substantially" similar version of the Act in 1961. *Knight v. Miller*, 2008 OK 81, ¶ 7, 195 P.3d 372.

2019 OK CIV APP 67

DEE ANN HELM, formerly known as Dee Ann Cramer, Plaintiff/Appellant, vs. BOARD OF COUNTY COMMISSIONERS OF ROGERS COUNTY, OKLAHOMA, Defendant/Appellee.

Case No. 117,344; Comp. w/117,455
October 21, 2019

APPEAL FROM THE DISTRICT COURT OF
ROGERS COUNTY, OKLAHOMA

HONORABLE SHEILA A. CONDREN,
JUDGE

REVERSED

Stanley D. Monroe, Ann E. Keele, MONROE & KEELE, PC, Tulsa, Oklahoma, for Plaintiff/Appellant,

Thomas A. LeBlanc, Matthew B. Free, Jessica L. Johnson, BEST & SHARP, Tulsa, Oklahoma, for Defendant/Appellee.

GORÉE, CHIEF JUDGE:

¶1 Dee Ann Helm (Plaintiff/Appellant) was employed by Rogers County as an administrative assistant. Rogers County terminated her employment and she filed a petition to recover unpaid wages and a penalty pursuant to 40 O.S. Supp. 2005 §165.3 of the Protection of Labor Act. The Board of County Commissioners of Rogers County (Defendant/Appellee) filed a motion to dismiss.

¶2 The County argued Helm's claim is barred by the Oklahoma Governmental Tort Claims Act because she did not comply with its notice provisions. The trial court agreed and granted the County's motion to dismiss for failure to state a claim. 12 O.S. §2012(B)(6). Helm appealed. She argues the dismissal was erroneous because her action is contractual and the GTCA does not apply. We review the order *de novo* because a motion to dismiss tests the law governing a claim. *Dani v. Miller*, 2016 OK 35, ¶10, 374 P.3d 779, 785-86. The legal question is whether Plaintiff's claim is a tort within the meaning of 51 O.S. Supp. 2014 §152(14).

¶3 "Tort" is defined by the GTCA as:

A legal wrong, *independent of contract*, involving *violation of a duty* imposed by general law, statute, the Constitution of the State of Oklahoma, or otherwise, resulting in a loss to any person, association or corporation as the proximate result of an act or omission of a political subdivision or the state or an employee acting within the scope of employment.

(§152(14), emphasis added.) Accordingly, we must examine the petition and analyze whether Helm is requesting relief, independent of contract, involving violation of a duty imposed by statute and within the meaning of the Governmental Tort Claims Act.

¶4 Helm's petition states, (1) she was an employee of the County, (2) her employment was terminated, (3) she had accrued unpaid personal and vacation leave for which she was not paid, and (4) pursuant to 40 O.S. §165.3, she is entitled to past-due wages and a statutory penalty of 2% per day. The action seeks damages based on statute. If §165.3 is a statutory tort within the meaning of §152(14) then the action could be governed by the GTCA.

¶5 The County correctly points out that the Legislature broadened the scope of the GTCA

by adding torts that derive from statutes. A statutory tort is a legislatively-crafted, non-contractual duty, unknown to the common law, for the breach of which an action *ex delicto*, will lie. *Morgan v. Galilean Health Enterprises, Inc.*, 1998 OK 130, ¶8, 977 P.2d 357, 361. A liability created by statute, however, is not necessarily a tort. *Sweeten v. Lawson*, 2017 OK CIV APP 51, ¶24, 404 P.3d 885, 892-93 (a claim for statutory replevin is not a tort pursuant to the GTCA); *Barton v. City of Midwest City*, 2011 OK CIV APP 71, ¶¶23-24, 257 P.3d 422, 426 (a statutory proceeding for inverse condemnation is not a tort as defined by 51 O.S. §152(14)).

¶6 Section 165.3(A) of the Protection of Labor Act requires an employer to pay the employee's wages after the employment terminates at the next regular pay period. An exception exists for a bona fide disagreement. If an employer fails to pay the wages, then the employer is liable for liquidated damages of two percent per day up to the amount of the unpaid wages. §165.3(B).¹ County's position is that the statute imposes an implied *duty* to pay undisputed wages at a designated time, and liability for *breach* of that duty. But these statutory rights directly relate to the employer-employee relationship and are not "independent of contract."

¶7 The employer-employee relationship is created by contract, either express or implied. *Cherokee Lines, Inc. v. Bailey*, 1993 OK 111, ¶13, 859 P.2d 1106, 1110. A claim for unpaid wages is a debt arising out of contract. *Hamrick v. State ex rel. Office of the Chief Medical Examiner*, 2011 OK 60, ¶12, 258 P.3d 509, 513 (discussing claims of unclassified state employees to recover unpaid wages under 40 O.S. §165.1 et seq.)

¶8 The remedy provided by §165.3 has as its basis the terms of the contract, namely the agreed upon wages. "Wages" is defined by the Act with reference to remuneration and other similar advantages "agreed upon between the employer and the employee." §165.1(4). An employer's liability for unpaid wages pursuant to §165.3 is calculated according to the contractual agreement of employment and is not a damage for a breach of duty that is "independent of contract." Liability under this statute is not independent of contract – it is actually *dependent* on a contract of employment because an employer-employee relationship is an essential element to recovery under the Act. See *Coen v. Semgroup Energy Partners, G.P., LLC*, 2013 OK CIV APP 75, ¶17, 310 P.3d 657, 662.

¶9 We hold that a claim for liability pursuant to Title 40 O.S. Supp. 2005 §165.3 is not a tort as defined by Title 51 O.S. Supp. 2014 §152(14) of the Oklahoma Governmental Tort Claims Act. The trial court's order granting the County's motion to dismiss is REVERSED.

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

GOREE, CHIEF JUDGE:

1. The entirety of 40 O.S. §165.3 provides:

A. Whenever an employee's employment terminates, the employer shall pay the employee's wages in full, less offsets and less any amount over which a bona fide disagreement exists, as defined by Section 165.1 of this title, at the next regular designated payday established for the pay period in which the work was performed either through the regular pay channels or by certified mail postmarked within the deadlines herein specified if requested by the employee, unless provided otherwise by a collective bargaining agreement that covers the employee.

B. If an employer fails to pay an employee wages as required under subsection A of this section, such employer shall be additionally liable to the employee for liquidated damages in the amount of two percent (2%) of the unpaid wages for each day upon which such failure shall continue after the day the wages were earned and due if the employer willfully withheld wages over which there was no bona fide disagreement; or in an amount equal to the unpaid wages, whichever is smaller; provided, however, that for the purpose of such liquidated damages such failure shall not be deemed to continue after the date of the filing of a petition in bankruptcy with respect to the employer if he thereafter shall have been adjudicated bankrupt upon such petition.

2019 OK CIV APP 68

MICHAEL EARL HELM, a.k.a. MIKE HELM, Petitioner/Appellant, vs. BOARD OF COUNTY COMMISSIONERS OF ROGERS COUNTY, OKLAHOMA, Respondent/Appellee.

**Case No. 117,455; Comp. w/117,344
October 21, 2019**

APPEAL FROM THE DISTRICT COURT OF
ROGERS COUNTY, OKLAHOMA

HONORABLE M. JOHN KANE, JUDGE

REVERSED

Stanley D. Monroe, Ann E. Keele, MONROE & KEELE, PC, Tulsa, Oklahoma, for Petitioner/Appellant,

Benjamin Lepak, Assistant District Attorney, Claremore, Oklahoma, for Respondent/Appellee.

BRIAN JACK GOREE, CHIEF JUDGE:

¶1 Michael Earl Helm (Petitioner/Appellant) was suspended from his office as County Commissioner of Rogers County, Oklahoma. Afterward, he wrote a letter to the Board of County Commissioners of Rogers County (Respondent/Appellee) demanding back pay and ben-

efits from the date of the suspension. The Board denied his request. Helm commenced an action in Rogers County asking the district court to issue an alternative writ of mandamus requiring Board to pay his salary, benefits, and interest in the performance of its duty pursuant to 19 O.S. §153.

¶2 The Board argued Helm’s claim is barred by the Oklahoma Governmental Tort Claims Act because he did not comply with its notice provisions. The trial court agreed and granted the Board’s motion to dismiss for failure to state a claim. 12 O.S. §2012(B)(6). Helm appealed. He argues the dismissal was erroneous because his action requests an extraordinary writ of mandamus and the GTCA does not apply. We review the order *de novo* because a motion to dismiss tests the law governing a claim. *Dani v. Miller*, 2016 OK 35, ¶10, 374 P.3d 779, 785-86. The legal question is whether Petitioner’s claim is a tort within the meaning of 51 O.S. Supp. 2014 §152(14).

¶3 “Tort” is defined by the GTCA as:

A legal wrong, independent of contract, involving violation of a duty imposed by general law, statute, the Constitution of the State of Oklahoma, or otherwise, resulting in a loss to any person, association or corporation as the proximate result of an act or omission of a political subdivision or the state or an employee acting within the scope of employment.

§152(14). Accordingly, we must examine the petition and analyze whether Helm is requesting relief, independent of contract, involving violation of a duty imposed by statute and within the meaning of the Governmental Tort Claims Act.

¶4 Helm filed a Petition for Alternative Writ of Mandamus. He alleges petition states, (1) he was suspended as County Commissioner of Rogers County, (2) The Board is charged with the duty of paying the salary and benefits of all county offices pursuant to 19 O.S. §153, and (3) the Board failed to perform its duty to pay his salary and benefits. Helm petitioned the Court to issue an alternative writ of mandamus requiring Board to perform its duty. If the relief sought is a statutory tort within the meaning of §152(14) then the action could be governed by the GTCA.

¶5 The County correctly points out that the Legislature broadened the scope of the GTCA

by adding torts that derive from statutes. A statutory tort is a legislatively-crafted, non-contractual duty, unknown to the common law, for the breach of which an action *ex delicto*, will lie. *Morgan v. Galilean Health Enterprises, Inc.*, 1998 OK 130, ¶8, 977 P.2d 357, 361. A liability created by statute, however, is not necessarily a tort. *Sweeten v. Lawson*, 2017 OK CIV APP 51, ¶24, 404 P.3d 885, 892-93 (a claim for statutory replevin is not a tort pursuant to the GTCA); *Barton v. City of Midwest City*, 2011 OK CIV APP 71, ¶¶23-24, 257 P.3d 422, 426 (a statutory proceeding for inverse condemnation is not a tort as defined by 51 O.S. §152(14)).

¶6 In *Price v. Board of County Commissioners of Pawnee County*, 2016 OK 16, 371 P.3d 1089, the Supreme Court directed the trial court to grant relief to a county officer who had requested an alternative writ of mandamus requiring the Board of County Commissioners to perform its statutory duty to pay his salary and retirement benefits for the period of his suspension. Mandamus may be issued by a district court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station. 12 O.S. §1451.

¶7 On the authority of *Price* we hold a writ of mandamus is the appropriate remedy for a county officer who claims that a board of county commissioners has failed to perform its duty required by Title 19 O.S. §153.

¶8 Title 19 of the Oklahoma Statutes regulates county government including county officers. Section 153 provides:

The salary of all county officers, their clerks and deputies, shall be paid either monthly or twice a month, out of the county treasury by order of the board of county commissioners: Provided, however, that no salary shall be allowed or paid until their reports are filed and approved by the board of county commissioners, as provided by law.

¶9 The Supreme Court has rarely recognized a private right of action for the violation of rights conferred by a statute. It is only when the terms of the statute are sufficiently clear to divine a legislative intent to fashion a private right of action that a statutory tort may be acknowledged. *See Morgan*, ¶8 (acknowledging the Nursing Home Care Act, 63 O.S. Supp. 1992 §1-1901 et seq. explicitly created a statutory tort with a private right of action).

¶10 A statute creating a private right of action, permitting a citizen to maintain an action to recover damages, is distinct from a regulatory (public-law) statute. *See Holbert v. Echeverria*, 1987 OK 99, 744 P.2d 960. A county's statutory duty to pay its officers a monthly salary out of the county treasury is regulatory in nature, and the district court is authorized to issue a writ of mandamus to compel its performance.

¶11 We hold that when the Legislature expanded the definition of "tort" in the Governmental Tort Claims Act, 51 O.S. §152(14), to include a "duty imposed by . . . statute" its intent was to include statutory torts that create a private right of action and not governmental regulatory laws. Therefore, Helm's petition requesting a writ of mandamus to compel the performance of 19 O.S. §153 was not an action in tort within the meaning of 51 O.S. Supp. 2014 §152(14) of the Oklahoma Governmental Tort Claims Act. The trial court's order granting the Board's motion to dismiss is REVERSED.

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

2019 OK CIV APP 69

**SAMANTHA PEREZ, Plaintiff/Appellant,
vs. MARRIK VANDERSEE, Defendant/
Appellee.**

Case No. 117,636. October 14, 2019

APPEAL FROM THE DISTRICT COURT OF
CUSTER COUNTY, OKLAHOMA

HONORABLE FLOYD DOUGLAS HAUGHT,
TRIAL JUDGE

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS

Kevin Rehl, KEVIN REHL, PLLC (REHL LAW FIRM), Oklahoma City, Oklahoma, for Plaintiff/Appellant

Shanda McKenney, ANGELA D. AILLES & ASSOCIATES, Oklahoma City, Oklahoma, for Defendant/Appellee

P. THOMAS THORNBRUGH, JUDGE:

¶1 Plaintiff, Samantha Perez, appeals a decision of the district court finding that her automobile negligence suit against Defendant, Marrik Vandersee, was time barred. On review, we find that based upon the Oklahoma Supreme Court's recent clarification of the law applicable to the issue presented in matter in *Cole v. Josey*, 2019 OK 39, ___P.3d ___ (petition for rehearing denied Sept. 9, 2019; mandate

issued October 9, 2019), the trial court's decision must be reversed and the cause remanded for further proceedings.

BACKGROUND

¶2 Plaintiff Perez was injured in an automobile accident on November 17, 2014, and timely filed her petition on November 17, 2016, in Custer County, Oklahoma, Case No. CJ-2016-111. Although summons issued on the same date the petition was filed, service was not obtained.

¶3 On May 23, 2017, Defendant filed a special appearance and motion to dismiss based upon Plaintiff's failure to serve summons within 180 days as required by 12 O.S. Supp. 2014 § 2004(I). That motion was set for hearing on June 16, 2017.

¶4 On June 16, 2017, Plaintiff voluntarily dismissed her petition without prejudice to re-filing for the stated reason that her counsel had emergency quintuple bypass heart surgery, and that as a result of his health and subsequent recovery she had been unable to effectuate service upon Defendant. As a result of the voluntary dismissal, no court order dismissing the case for failure to obtain service was entered.

¶5 On June 13, 2018, within one year of the voluntary dismissal, Plaintiff refiled her petition pursuant to the 12 O.S.2011 § 100 "savings statute," in Custer County Case No. CJ-2018-56.

¶6 Defendant filed a motion to dismiss Perez' suit for failure to re-file the lawsuit within one year of the "deemed dismissal" date, which was **May 16, 2017**. The trial court agreed with Defendant that the original petition was deemed dismissed on May 16, 2017, for failure to effect service within 180 days, and that Plaintiff had failed to refile her action within one year in accordance with 12 O.S. § 100. Plaintiff's timely motion for new trial was denied.

STANDARD OF REVIEW

¶7 At issue in this appeal is the district court's interpretation of 12 O.S. Supp. 2014 § 2004(I) and 12 O.S.2011, § 100. Legal questions involving statutory interpretation are subject to de novo review. *Heffron v. District Court of Okla. County*, 2003 OK 75, ¶ 15, 77 P.3d 1069. *De novo* review is non-deferential, plenary and independent. *Neil Acquisition, L.L.C. v. Wingrod Inv. Corp.*, 1996 OK 125, n.1, 932 P.2d 1100.

ANALYSIS

¶8 The sole issue on appeal is whether the re-filing of a petition after the first petition is voluntarily dismissed without effecting service of summons within 180 days must take place within one year of the date of the voluntary dismissal or within one year from the date the petition was “deemed dismissed” under § 2004 (I) for failure to make service.

¶9 On May 29, 2019, the Supreme Court issued its opinion in *Cole v. Josey*, 2019 OK 39, ___P.3d__ (petition for rehearing denied Sept. 9, 2019; mandate issued October 9, 2019), where it stated at ¶ 16:

The one year period in 12 O.S. 2011, §100 begins to run when there is **finality in the judgment**. A case dismissed pursuant to § 2004 (I) still needs a final appealable order to begin this process. The one year period begins the day after there is finality to the appeal or on the day after the order is filed if the judgment is not appealed. The best interpretation of the “deemed dismissed” language is that after the expiration of the 180 days under § 2004 (I), grounds for dismissal have ripened.⁴ However, the dismissal will not be final for purposes of 12 O.S. 2011, § 100 until, at the earliest, a final appealable order is filed.

(Emphasis in original; footnote omitted).

¶10 Here, there was no appealable order dismissing Plaintiff’s original action because she exercised her right to voluntarily dismiss the

action after the case was filed but before defendant was served. Thus, Plaintiff clearly was aware of the fact that the action had been dismissed. Despite this slightly different factual scenario, however, we find the reasoning of *Cole v. Josey* applies to the current case, **and the savings period of 12 O.S.2011 § 100 did not start to run until June 16, 2017, when Plaintiff voluntarily dismissed the action.** Therefore, Plaintiff’s re-filing on June 13, 2018, was not time barred. Accordingly, we reverse the decision of the trial court, and find that Plaintiff’s petition was timely pursuant to the one-year grace period provided by § 100.

¶11 The trial court’s reliance upon the non-precedential opinions of this Court interpreting these two statutes in *Thibault v. Garcia*, 2017 OK CIV APP 36, 398 P.3d 331; *Hough Oilfield Service, Inc. v. Newton*, 2017 OK CIV APP 31, 396 P.3d 230; and *Moore v. Sneed*, 1992 OK CIV APP 107, 839 P.2d 682, was reasonable. However, given the current interpretation of the relevant statutes, we are bound to reverse the trial court’s decision and remand the case in accordance with the dictates of *Cole v. Josey, supra*.

CONCLUSION

¶12 The order of the trial court is reversed. This matter is remanded for further proceedings.

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

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



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Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS Thursday, October 31, 2019

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.

F-2018-623 — Leslie Anne Gregersen, Appellant, was tried by jury for the crime of Conspiracy Against State or Subdivision, in Case No. CF-2015-663, in the District Court of Bryan County. The jury returned a verdict of guilty and recommended as punishment four years imprisonment. The Honorable Mark R. Campbell, District Judge, sentenced accordingly and imposed various costs and fees. Judge Campbell also ordered credit for time served. From this judgment and sentence Leslie Anne Gregersen has perfected her appeal. **AFFIRMED**. Opinion by: Hudson, J.; Lewis, P.J., Concurs in Results; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs; Rowland, J., Concurs.

F-2018-1187 — On May 4, 2017, Appellant Pearlana Hall entered guilty pleas to charges of Larceny of Merchandise, Obstructing an Officer and Possession of Drug Paraphernalia in Tulsa County District Court Case Nos. CF-2017-1785 and CF-2017-1889. By agreement, Appellant was placed in the mental-health court program. On May 17, 2018, the State filed a motion to terminate Appellant's participation from the program. Following a hearing held November 8, 2018, the Honorable April Seibert, Special Judge, granted the State's motion and sentenced Appellant in accordance with the plea agreement. The termination order is **AFFIRMED**. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs.

C-2018-415 — Talisa Nicole Banks, Petitioner, entered blind pleas of guilty to Count 1: Distribution of Controlled Dangerous Substance – Marijuana; Count 2: Unlawful Possession of Controlled Drug, Marijuana, With Intent to Distribute; and Count 3: Possession of Controlled Dangerous Substance – Methamphetamine, in the District Court of Texas County, Case No. CF-2016-64. The Honorable Jon Parsley, District Judge, sentenced Banks to fifteen years imprisonment, with all but the first seven years suspended, plus a \$10,000 fine with \$9,000 suspended on Count 1; a ten year suspended sentence on Count 2; and a ten year suspended sentence on Count 3. Judge Parsley ordered credit for time served and imposed various costs and fees. Judge Parsley further ordered that the sentences on Counts 2 and 3 run concurrently each to the other as well as concurrently to Count 1. Petitioner then filed a motion to withdraw her guilty pleas, and after a hearing before Judge Parsley the motion was denied. Petitioner now seeks a writ of certiorari. The Petition for Writ of Certiorari is **GRANTED**. This case is **REMANDED** to the District Court **FOR APPOINTMENT OF NEW COUNSEL ON PETITIONER'S MOTION TO WITHDRAW HER GUILTY PLEAS** and to **HOLD A NEW HEARING** on said motion to withdraw. Opinion by: Hudson, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs; Rowland, J., Concurs.

F-2018-175 — Charles Randall Hayes, Appellant, was tried by jury and convicted for the crimes of Count 1, felony manslaughter in the first degree while driving under the influence of drugs; Count 2, misdemeanor driving under the influence of drugs; and Count 3, misdemeanor driving left of center in Case No. CF-2016-3231 in the District Court of Tulsa County. The jury set punishment at life imprisonment and a \$10,000.00 fine on Count 1, one year and a \$1,000.00 fine on Count 2, and ten days and a \$500.00 fine on Count 3. The trial court sentenced accordingly and ordered the sentences served concurrently. From this judgment and sentence Charles Randall Hayes has perfected his appeal. The Judgment and Sentence for Count 2 is **REVERSED**

and REMANDED with instructions to DISMISS. Counts 1 and 3 are AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs in results; Hudson, J., concurs; Rowland, J., concurs.

C-2019-132 — James Robert Brown, Petitioner, was charged in Garfield County District Court, in Case No. CF-2018-496, with Domestic Assault and Battery with a Dangerous Weapon, After Former Conviction of Two or More Felonies. Brown, represented by court-appointed counsel, entered a negotiated guilty plea to the charge before the Honorable Paul K. Woodward, District Judge. In accordance with the plea agreement, Judge Woodward sentenced Brown to six years imprisonment. Brown was additionally given credit for time served and ordered to pay various fees and costs. Brown filed a *pro se* motion to withdraw plea, after a hearing was held, Judge Woodward denied the motion. Brown now seeks a writ of certiorari. The Petition for Writ of Certiorari is DENIED. The Judgment and Sentence of the District Court is AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur; Lumpkin, J., Concur; Rowland, J., Concur.

F-2018-588 — Sonia Weidenfelder, Appellant, was tried by jury for the crime of first degree murder in Case No. CF-2017-682 in the District Court of Tulsa County. The jury returned a verdict of guilty and recommended as punishment life imprisonment. The trial court sentenced accordingly. From this judgment and sentence Sonia Weidenfelder has perfected her 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.

C-2018-1040 — Petitioner Rolla Roy Werline, IV, while represented by counsel, entered pleas of guilty to First Degree Manslaughter (Count I); Leaving the Scene of a Fatality Accident (Count II); and Failure to Maintain Insurance (Misdemeanor) (Count III) in the District Court of Ottawa County, Case No. CF-2017-164. The pleas were accepted by the Honorable Robert G. Haney, District Judge, on April 19, 2018. On June 12, 2018, Petitioner was sentenced in Count I to twenty (20) years imprisonment, and a \$1,000.00. fine; five (5) years imprisonment in Count II, all suspended, to run consecutive to Count I; and a \$250.00 fine in Count III. On June 15, 2018, Petitioner filed a Motion to Withdraw Guilty Plea. At a hearing on June 26, 2018, before Judge Haney, the motion was

denied. Petitioner now appeals that denial to this Court. The Petition for a Writ of Certiorari is DENIED. Opinion by: Lumpkin, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur; Hudson, J., Concur; Rowland, J., Concur.

F-2018-668 — Richard Patrick Spaulding, Appellant, was tried by jury for the crime of first degree murder in Case No. CF-2017-682 in the District Court of Tulsa County. The jury returned a verdict of guilty and set punishment at life imprisonment. The trial court sentenced accordingly. From this judgment and sentence Richard Patrick Spaulding 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.

F-2018-349 — John Broomhall, Appellant, was tried by jury for the crime of Assault and Battery with a Dangerous Weapon in Case No. CF-2017-353 in the District Court of Creek County. The jury returned a verdict of guilty and recommended as punishment one year in the Creek County Jail. The trial court sentenced accordingly and fined Appellant \$5000. From this judgment and sentence John Broomhall has perfected his appeal. Judgment and Sentence AFFIRMED; Order of Restitution VACATED; case REMANDED; Application To Supplement Appeal Record or in the Alternative, Request for Evidentiary Hearing DENIED. Opinion by: Kuehn, V.P.J.; Lewis, P.J., concur; Lumpkin, J., concur in results; Hudson, J., concur; Rowland, J., concur.

Thursday, November 7, 2019

C-2018-687 and C-2018-688 — Eric Ryan Rogers, Petitioner, entered negotiated guilty pleas to the crimes of Concealing Stolen Property in CF-2014-26 and to Endeavoring to Distribute Marijuana (Count 1) and Possession of a Sawed-Off Shotgun (Count 2) in Case No. CF-2014-42 in the District Court of Jefferson County. Per agreement, sentencing was continued, and Petitioner was enrolled in the Delayed Sentencing Program for Young Adults. Given Petitioner's progress, the court in August 2015 deferred sentencing in these two cases for ten years on conditions of probation, but imposed financial obligations associated with each case. In March 2018, the State filed an application to accelerate sentencing in both cases, alleging Petitioner had violated probation by committing new misdemeanor crimes. At a consolidated hearing, the district court accept-

ed Petitioner's guilty pleas in the new misdemeanor case and sentenced him to 90 days and fined him \$500 for Possession of Controlled Substance on Count 1, 30 days and a \$100 fine for Public Intoxication in Count 2. The court also granted the State's application to accelerate sentencing in the two older felony cases, and imposed these terms: five years imprisonment in Case No. CF-2014-26, and five years on Count 1 and two years in Count 2 in Case No. CF-2014-42. The sentences were ordered to be served consecutively to each other. Petitioner timely moved to withdraw his guilty pleas in all of these cases. The Honorable Dennis L. Gay, Associate District Judge, denied the motion. The ensuing appeals were consolidated on Petitioner's motion. Eric Ryan Rogers has perfected his appeal of the denial of his motion to withdraw guilty plea. Petition for Certiorari DENIED; case REMANDED for further proceedings. Opinion by: Kuehn, V.P.J.; Lewis, P.J., concur; Lumpkin, J., concur; Hudson, J., concur; Rowland, J., concur.

C-2019-159 — Jarrod Brian Engelbrecht, Petitioner, entered a blind plea of guilty to one count of Assault and Battery with a Dangerous Weapon, in the District Court of Oklahoma County, Case No. CF-2005-6662. The Honorable Tammy Bass-Lesure, District Judge, sentenced Engelbrecht to a five year suspended sentence. Engelbrecht was further ordered to pay restitution in the amount of five hundred dollars and to complete four hundred hours of community service. Engelbrecht's subsequent application for judicial modification of his sentence was denied by Judge Bass-Lesure. Petitioner thereafter filed an application for post-conviction relief seeking an appeal out of time to challenge the validity of his guilty plea. The Honorable Glenn M. Jones, District Judge, recommended that Petitioner be granted an appeal out of time. This court granted Petitioner an appeal out of time authorizing him to file a motion to withdraw his guilty plea. Petitioner then filed an application to withdraw guilty plea with the district court, and after an evidentiary hearing, the Honorable Kendra Coleman, District Judge, denied the application to withdraw the guilty plea. Petitioner then filed his Petition for Writ of Certiorari. The Petition for Writ of Certiorari is DENIED. The Judgment and Sentence of the District Court is AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur; Lumpkin, J., Concur; Rowland, J., Concur.

F-2018-1109 — Victor Martez Conard, Appellant, was found guilty in a non-jury trial in Case No. CF-2016-831 in the District Court of Muskogee County of Trafficking in Illegal Drugs (Methamphetamine), After Former Conviction of Two or More Felonies (Count 1) and Unlawful Possession of a Controlled Dangerous Substance (Marijuana), After Former Conviction of Two or More Felonies (Count 2). Judge Norman Thygesen, Associate District Judge, presided over Appellant's non-jury trial and sentenced him to thirty years imprisonment, with all but the first twenty years suspended, and a fine of \$25,000.00, with all but \$3,000.00 suspended, on Count 1 and ten years imprisonment on Count 2. Judge Thygesen awarded credit for time served on Counts 1 and 2, and ordered Counts 1 and 2 to run concurrently with each other, but consecutively with his McIntosh County cases, namely Case Nos. CF-2012-117, CF-2013-34, and CF-2014-211. Victor Martez Conard has perfected his appeal. AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs in results; Lumpkin, J., concurs; Hudson, J., concurs.

F-2018-663 — Sterling Anthony Blaine, Appellant, was tried by jury for the crimes of Count 1: Indecent or Lewd Acts with a Child Under 16 and Count 2: Possession of Controlled Dangerous Substance-Marijuana, in Case No. CF-2017-13, in the District Court of Oklahoma County. The jury returned a verdict of guilty and recommended as punishment thirty years imprisonment on Count 1 and "zero dollars, time served" on Count 2. The Honorable Glenn M. Jones, District Judge, sentenced accordingly and imposed various costs and fees and ordered credit for time served. From this judgment and sentence Sterling Anthony Blaine has perfected his appeal. AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur in Results; Lumpkin, J., Concur; Rowland, J., Concur.

RE-2018-327 — Appellant Jamar A. Greenwood entered a guilty plea to one count of Larceny from a Person at Night in Oklahoma County Case No. CF-2011-6644. He was sentenced to seventeen (17) years with all but the first five (5) years suspended. On April 22, 2016, the State filed an Amended Application to Revoke Suspended Sentence, alleging multiple probation violations. Greenwood entered a blind plea to the State's Amended Application to Revoke. The District Court of Oklahoma County, the Honorable Bill Graves, revoked

Greenwood's suspended sentence in full. Greenwood appeals. The revocation of Greenwood's suspended sentence is AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur in Results; Hudson, J., Concur in Results; Rowland, J., Dissent.

C-2019-9 — Petitioner Keaundre Lajuan Randle, while represented by counsel, entered a guilty plea pursuant to a plea agreement with the State to the charges of: Count 1, lewd molestation, Counts 2 and 3, first degree rape, and Count 4, enticing a child under 16 into a secluded place, in the District Court of Okmulgee County, Case No. CF-2018-27. The Honorable Pandee Ramirez, Special Judge, accepted the plea on October 16, 2018. Pursuant to his plea agreement, Petitioner received twenty year sentences on each count, running concurrently to one another. On October 26, 2018, Petitioner's counsel filed a Motion to Withdraw Guilty Plea, alleging his plea was not knowingly and voluntarily entered. The motion requested the case be reset for further plea negotiations. On November 14, 2018, a hearing was held on Petitioner's motion before the Honorable Pandee Ramirez, Special Judge. The court denied Petitioner's motion and he now appeals that denial to this Court. The Petition for a Writ Of Certiorari is DENIED. Opinion by: Lumpkin, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur in Part Dissent in Part; Hudson, J., Concur; Rowland, J., Concur.

Thursday, November 14, 2019

M-2017-511 — William Robert Burk, Appellant, was tried by jury for the crime of Obstruction of Public Officer in Case No. CM-2015-1641 in the District Court of Payne County. The jury returned a verdict of guilty and recommended as punishment 30 days in the Payne County Jail and a \$500.00 fine. The trial court sentenced accordingly. From this judgment and sentence William Robert Burk has perfected his appeal. AFFIRMED. Opinion by: Kuehn, V.P.J.; Lewis, P.J., Concur; Lumpkin, J., Dissent; Hudson, J., Concur in Results; Rowland, J., Concur.

F-2017-528 — Darrien Hasmii Clark, Appellant, was tried by jury in the District Court of Oklahoma County as follows: Case No. CF-2013-5582 - Murder in the First Degree; Case No. CF-2013-5809 - Count I, Assault and Battery with a Deadly Weapon, Count II - Concealing Stolen Property and Count III - Pointing a Firearm at Another, all after former conviction of a

felony, and Count IV - Possession of a Firearm by a Convicted Felon; Case No. CF-2013-5914 - Count I - Escape from Custody of a Peace Officer after former conviction of a felony, and Count II - Resisting Arrest (Misdemeanor). In accordance with the jury's recommendation the trial court sentenced Appellant in Case No. CF-2013-5582 to life imprisonment without the possibility of parole. In Case No. CF-2013-5809, Appellant was sentenced to life imprisonment on each of Counts I and III; ten (10) years imprisonment (Count II); and eight (8) years imprisonment (Count IV). In Case No. CF-2013-5914, Appellant was sentenced to ten (10) years imprisonment (Count I) and twelve (12) months imprisonment and a fine of \$500.00 (Count II). All of Appellant's sentences run consecutively. From this judgment and sentence Darrien Hasmii Clark has perfected his appeal. AFFIRMED. Opinion by: Kuehn, V.P.J.; Lewis, P.J., Concur; Lumpkin, J., Concur; Hudson, J., Concur; Rowland, J., Recuse.

F-2018-198 — Appellant Ann Sykes was convicted in a non-jury trial before the Honorable Lawrence W. Parish, District Judge, of Abuse by Caretaker (Neglect) (Count I) and Abuse by Caretaker (Financial Exploitation) (Count II) in the District Court of Okfuskee County, Case No. CF-2016-56. Appellant was sentenced to imprisonment for eight (8) years with the last three (3) years suspended in each count with said sentences ordered to run concurrently. 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 Result; Hudson, J., Concur; Rowland, J., Concur.

C-2018-1184 — Petitioner Hipolito John Herrera pled guilty to Conjoint Robbery in the District Court of Custer County, Case No. CF-2017-353. After a sentencing hearing, the Honorable Doug Haught sentenced Petitioner to 20 years imprisonment, all but the first 10 suspended. The trial court also ordered \$659.83 in restitution, payable to the victim and bail bondsman. Petitioner filed an Application to Withdraw Plea of Guilty, and it was denied. Petitioner has perfected his certiorari appeal. Petition for Writ of Certiorari GRANTED; the Custer County District Court's denial of Petitioner's motion to Withdraw guilty Plea is REVERSED. Opinion by: Kuehn, V.P.J.; Lewis, P.J., Concur; Lumpkin, J., Concur; Hudson, J., Concur; Rowland, J., Concur.

COURT OF CIVIL APPEALS

(Division No. 1)

Friday, November 1, 2019

117,529 — Central Bank of Oklahoma, Plaintiff/Appellant, v. SNS Oil Co.; Campeche Petro, L.P.; Fifth Third Bank; Trena Blackstock; and Frank Dale, Defendant/Appellees, and Maxwell Resources Corporation; H. Thomas Moran, II and Wagner & Brown, LTD, Defendants. Appeal from the District Court of Roger Mills County, Oklahoma. Honorable Floyd Douglas Haight, Judge. Plaintiff Central Bank of Oklahoma (Bank) sued to collect a loan to Defendant Maxwell Resources Corporation (Maxwell). The loan was secured by a number of oil and gas interests. One interest then owned by Maxwell, the lease of the State of Oklahoma 1-16 Well (the 1-16 Well), had since been assigned to Campeche Petro, L.P., of which Wagner Oil Co. (Wagner) is the sole owner. Wagner counter-claimed for quiet title and cancellation of the lease, claiming that the 1-16 Well had previously ceased to produce in paying quantities. Following a bench trial on the issue, the trial court granted Wagner's claims and held that the lease on the 1-16 Well had been cancelled due to failure to produce in paying quantities. Bank moved for new trial, which the trial court denied. Bank appeals. We AFFIRM the holding of the trial court. Opinion by Buettner, J.; Goree, C.J., and Joplin, P.J., concur.

Friday, November 8, 2019

116,491 — William A. Belle Isle, and James P. Brady, Petitioners/Appellees, v. Michael A. Brady, a/k/a Mike Brady, Respondent/Appellant. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Kurt G. Glassco, Trial Judge. The trial judge resolved issues surrounding the administration of a trust by granting the trustee care-services compensation, and by determining the trustee was negligent in his management of certain trust assets. Because the trial court's judgment was not clearly against the weight of evidence or some governing principle of law, we affirm. Opinion by Goree, C.J.; Joplin, P.J., Buettner, J., concur.

116,806 — Ilen Moore, Plaintiff/Appellee, v. H&M Properties LLC, and Mark Hodge, Defendants/Appellants. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Aletia Haynes Timmons, Trial Judge. Defendants appeal the trial court's interpretation of an agreement and an award to Plaintiff of costs, attorney fees, and prejudgment inter-

est. Plaintiff counter-appeals. We affirm in part, and reverse in part. Opinion by Goree, C.J. Buettner, J., concurs; Joplin, P.J., dissents.

117,008 — Pamela Conley, Plaintiff/Counter-Defendant/Appellant, v. St. John Medical Center, Inc., St. John Health System, Inc., Defendant/Cross-Defendants/Appellees, and Shannon Kay Nichols, Defendant/Cross-Claimant/Third Party Plaintiff/Appellee, v. Daniel Parker, Defendant/Counter-Claimant/Appellee. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Linda G. Morrissey, Judge. Plaintiff/Appellant Pamela Conley appeals from a Journal Entry of Judgment granting demurrers and motions for directed verdicts against Conley on some claims and entering judgment on jury verdicts against Conley on the remaining claims. While Conley and Defendant Daniel Parker were involved in a contentious property line dispute, Parker and Defendant Shannon K. Nichols, both then employed by Defendants St. John Medical Center, Inc. (SJMC) and St. John Health System, Inc. (SJHS) (collectively, Hospital), briefly accessed Conley's records on Hospital's computer system, for which Hospital terminated Nichols's and Parker's employment. Conley sued Hospital, Nichols, and Parker for claims including breach of contract, negligent hiring and training, intentional infliction of emotional distress, and invasion of privacy. Parker counter-sued Conley for malicious prosecution, abuse of process, deceit, and negligence *per se*. Defendants cross-sued each other. We find no reversible error and therefore AFFIRM. Opinion by Buettner, J.; Goree, C.J., Joplin P.J., concurs.

117,411 — Nina Umar, Petitioner/Appellee, v. Gohar Umar, Respondent/Appellant. Appeal from the District Court of Canadian County, Oklahoma. Honorable Jack McCurdy, Judge. Respondent/Appellant Gohar Umar (Husband) appeals from a divorce decree dissolving his marriage to Petitioner/Appellee Nina Umar (Wife). Husband is currently incarcerated. Prior to trial, Husband was ordered to obtain counsel. The trial court also ruled that Husband would not be permitted to testify or appear at trial telephonically. Husband requested an extension of time in order to obtain legal representation. When Husband did not appear via counsel at trial, the court denied Husband's motion for an extension of time and entered a divorce order. Husband moved for rehearing, which the trial court denied. Husband appeals. We reverse the order of the trial court and

remand with instructions to allow Husband alternative means to testify and appear in court. REVERSED AND REMANDED WITH INSTRUCTIONS. Opinion by Buettner, J.; Goree, C.J., Joplin, P.J., concur.

117,432 — In Re Marriage of: Cuahutemoc Valenzuela Castaneda, Petitioner/Counter-Respondent, v. Maria Michaela Ruiz, Respondent/Counter-Petitioner/Appellant. Appeal from the District Court of Texas County, Oklahoma. Honorable A. Clark Jett, Judge. Respondent/Counter-Petitioner/Appellant Maria Micaela Ruiz (Wife) appeals from the Journal Entry dissolving the marriage of Wife and Petitioner/Counter-Respondent Cuahutemoc Valenzuela Castaneda (Husband). Wife appeals the trial court's denial of her request for support alimony and the trial court's division of Husband's retirement. Both of these arguments are based on the trial court's determination of the date of separation. Husband has failed to respond to the Petition in Error and failed to file an answer brief. Nevertheless, Wife's brief is not reasonably supportive of the allegations of error and we therefore affirm the trial court's Journal Entry by summary opinion. AFFIRMED. Opinion by Buettner, J. Goree, C.J., concurs. Joplin, P.J. dissents.

117,621 — Express Tire and Wheel, Inc., Plaintiff/Appellee, v. Exotic Auto Plaza, Inc., Defendant/Appellant. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Patricia G. Parrish, Trial Judge. Exotic Auto Plaza, Inc., Defendant/Appellant, appeals the trial court's denial of its motion to vacate the order granting summary judgment to Express Tire and Wheel, Inc., Plaintiff/Appellee. Additionally, Appellant challenges the trial court's order awarding attorney fees and costs. Because material fact issues exist, the trial court erred in granting summary judgment. Opinion by Goree, C.J.; Joplin, P.J., and Buettner, J., concur.

117,748 — In the Matter of Y.I.R., Deprived Child. State of Oklahoma, Petitioner/Appellee, v. April Cato, Respondent/Appellant. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Doris Fransein, Judge. Respondent/Appellant April Cato appeals from a judgment terminating her parental rights as to Y.I.R. entered following a jury trial. The jury found termination was in the child's best interests because Cato had failed to correct a condition that led to the termination of her parental rights to her older children. The judgment is

supported by clear and convincing evidence and we AFFIRM. Opinion by Buettner, J.; Goree, C.J., and Joplin, P.J., concur.

Friday, November 15, 2019

116,817 — Rodney Payne and Julie Payne, d/b/a Arrow P Equine Sales, Plaintiffs/Appellees, v. Vernon Dale Ellis, Jr., a/k/a Dale Ellis, Defendant/Appellant. Appeal from the District Court of Rogers County, Oklahoma. Honorable Carl Gibson, Trial Judge. Rodney Payne and Julie Payne, d/b/a Arrow P Equine Sales (Arrow), Plaintiffs /Appellees, filed a petition for breach of contract against Vernon Dale Ellis Jr. (Appellant) and Julia D. Allen to recover the sum of \$2,706.36, the purchase price of successful bids for a horse and tack at the Payne's auction barn. The trial court's judgment reflected the jury's verdict for Arrow. Ellis appeals. We hold the trial court erred in failing to grant remittitur. Affirmed on condition of remittitur. Opinion by Goree, C.J.; Joplin, P.J., and Buettner, J., concur.

116,858 — In Re The Declaration of Trust Creating the Avery Family Trust as Amended: John Neel Zink, Successor Co-Trustee, Petitioner/Appellant, v. Etta May Avery, Original Co-Trustee; Nancy Ann McGill, Successor Co-Trustee; Mickey G. Shackelford, Successor Co-Trustee, and Henry G. Will, Successor Co-Trustee, Respondents/Appellees. Petitioner/Appellant, John Neel Zink, appeals the February 16, 2018 Order denying his Motion for Temporary Restraining Order and Temporary Injunction pending appeal and until completion of this litigation. Zink was removed as a co-trustee of the Avery Family Trust (Trust) on August 14, 2014, after the Trust was amended in July and August of 2014. In August 2016, Zink filed suit seeking a finding that his removal was invalid, a determination he was still an active co-trustee and injunctive relief to prevent the destruction of improvements on Trust property, known as the "Osage Property." Zink filed his Motion for Temporary Restraining Order and Temporary Injunction in the underlying suit on September 14, 2017. The hearing on the motion was had over three days in January and February 2018, after which the trial court denied Zink's request for injunction and the restraining order. Zink appealed the court's order on March 16, 2018. This court does not find the decision of the trial court denying the injunction and restraining order to be an abuse of discretion nor is the trial court's decision against the clear weight of the evidence. Accordingly, the trial court's or-

der is affirmed. AFFIRMED. Opinion by Joplin, P.J.; Goree, C.J., and Buettner, J., concur.

(Division No. 2)

Thursday, November 14, 2019

117,833 — Multiple Injury Trust Fund, Petitioner, v. Alvis Joe Bradford and The Workers' Compensation Court of Existing Claims, Respondents. Proceeding to Review an Order of a Three-Judge Panel of The Workers' Compensation Court of Existing Claims, Hon. Carla Snipes, Trial Judge. The Multiple Injury Trust Fund (Fund) seeks review of an order of a three-judge panel of the Workers' Compensation Court of Existing Claims, which affirmed the trial court's award of permanent total disability (PTD) in favor of Claimant Alvis Joe Bradford. The Workers' Compensation Court found that Claimant qualified as a "physically impaired person" under the terms of 85 O.S. Supp. 2005 § 171 and was eligible to proceed against the Fund because of the previous adjudication in August 1996 of disability to his left third finger. The Fund argues that Claimant's on-the-job injury to his finger is not in the category of "previous adjudications of disability" that qualifies an injured worker as a physically impaired person. According to the Fund, a finger injury is legally insufficient to establish the threshold jurisdictional requirement for proceeding against the Fund because a finger is not a "major member." The Fund cites *Special Indemnity Fund v. Mendez*, 1996 OK 128, 930 P.2d 184, as controlling authority in support of its argument. After the Legislature amended section 171 in 1993 and removed the word "major," it removed the requirement to distinguish and exclude loss of use of "minor" members of the body in determining whether a claimant meets the threshold jurisdictional requirement of "physically impaired person." The judicial construction of the 1991 version of section 171 in *Mendez* provides no support for the Fund's lack of jurisdiction argument. The Fund next argues that the award of PTD benefits to Claimant is not supported by the evidence and should be vacated. The Court's order is not contrary to law and stands supported by competent evidence. SUSTAINED. Opinion from the Court of Civil Appeals, Division II, by Fischer, P.J.; Reif, S.J. (sitting by designation), and Thornbrugh, J., concur.

116,445 — Landon McFarland, Plaintiff/Appellee, vs. Kevyn Messer, Defendant/Appellant. Appeal from Order of the District Court of Tulsa County, Hon. Owen Evans, Trial

Judge. Appellant Kevyn Messer appeals the district court's decision denying her request for relocation. After review of the record and applicable law, we find that Appellee Landon McFarland did not sustain his burden of demonstrating that relocation is contrary to the child's best interest. As such, the district court's order denying Kevyn's request for relocation is reversed and the matter is remanded to make appropriate adjustments to visitation. REVERSED AND REMANDED. Opinion from the Court of Civil Appeals, Division II, by Fischer, P.J., Reif, S.J. (sitting by designation), and Thornbrugh, J., concur.

Tuesday, November 19, 2019

116,781 — In re the marriage of: Kathleen Redmond, Petitioner/Appellee, vs. Brett Cauthen, Respondent/Appellant. Appeal from Order of the District Court of Oklahoma County, Hon. Martha Oakes, Trial Judge. Appellant Brett Cauthen appeals the district court's order awarding attorney fees and costs to Appellee Kathleen Redmond. We conclude that the district court's order fully explains its decision and that Brett failed to demonstrate an abuse of discretion. Consequently, the order awarding attorney fees and costs is affirmed. AFFIRMED UNDER RULE 1.202(D) AND (E). Opinion from the Court of Civil Appeals, Division II, by Fischer, P.J., Reif, S.J. (sitting by designation), and Thornbrugh, J., concur.

117,124 — Judith H. Rogers and Alana L. Risinger, Plaintiffs/Appellants, vs. Tommy Lee Fisher, individually and Tommy Lee Fisher, Personal Representative of the Estate of Wynona Jane Nelson, Deceased, Defendants/Appellees. Appeal from Order of the District Court of Pottawatomie County, Hon. Dawson Engle, Trial Judge. Appellants Judith Rogers and Alana Risinger appeal the district court's order granting summary judgment in favor of Appellees Tommy Lee Fisher and the Estate of Wynona Jane Nelson. A *de novo* review of the pleadings and other evidentiary materials shows there is no substantial controversy as to any material fact and the Appellees were entitled to judgment as a matter of law. Consequently, the district court did not err in granting summary judgment to Appellees. Because the district court correctly granted judgment pursuant to Rule 13, we find no abuse of discretion in denying Appellants' motion to reconsider. Both decisions are affirmed. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by

Fischer, P.J., Reif, S.J. (sitting by designation) and Thornbrugh, J., concur.

(Division No. 3)
Wednesday, November 6, 2019

117,350 — Elvis R. White, Petitioner, vs. Multiple Injury Trust Fund, Respondent. Proceeding to Review an Order of the Workers' Compensation Court of Existing Claims. Honorable Brad Taylor, Judge. Petitioner, Elvis R. White (Claimant), appeals from an order of the Workers' Compensation Court of Existing Claims, finding that, because Claimant was permanently and totally disabled (PTD) solely as a result of his second work-related injury, rather than due to a combination of multiple injuries, Claimant did not qualify for PTD benefits from the Multiple Injury Trust Fund (MITF). Claimant's first injury occurred in 2012 when a large piece of rock fell onto his right foot. He was adjudicated to have 2.20% disability to the body as a whole as a result of the injury. Claimant returned to work with a new employer and was catastrophically injured on May 28, 2013, when a forklift rolled over his left leg and ankle. The combination of disability findings from that incident totaled 202.50% impairment to the body as a whole. Claimant filed this action seeking PTD benefits from MITF in 2017. The trial court denied the claim, noting the court's independent medical examiner opined Claimant was PTD solely as a result of the 2013 injury. Title 85 O.S. 2011 §404(A) provides that a combination of injuries must render the claimant PTD. Because the trial court failed to make appropriate findings in this respect, we vacate the trial court's order and remand this matter for further proceedings. VACATED AND REMANDED WITH INSTRUCTIONS. Opinion by Bell, J. Swinton, J., concurs; Mitchell, P.J., dissents.

117,909 — In the Matter of the Estate of Virginia Ruth Moore, a deceased person: Charles Darby, individually, and as Administrator of the Estate of Virginia Ruth Moore, Plaintiff/Appellant, vs. Don Abney, Lynda Hendricks, Doyal Jennings, Lige Smith, Loyal Jennings and Nancy Herndon, Defendants/Appellees. Appeal from the District Court of McCurtain County, Oklahoma. Honorable Kenneth Farley, Judge. In this probate proceeding, Plaintiff/Appellant, Charles Darby, individually and as Administrator of the Estate of Virginia Ruth Moore, deceased (Decedent), appeals from the trial court's order distributing the monies in a savings account with a pay-on-death (POD) provision to Decedent's nieces and nephews, the

Defendants/Appellees herein. The savings account was owned by Decedent's daughter, Sylvia Coline White. The POD provision named Decedent as the beneficiary of the account. Decedent, the beneficiary, died before her daughter, the owner of the account. Decedent died intestate with no surviving husband, no surviving issue of a deceased child, and only one surviving child, Sylvia Coline White. Because Decedent died before the POD's right to payment arose, the POD was payable to Decedent's estate pursuant to 6 O.S. 2011 §901. The question is which heir(s) is/are entitled to the POD proceeds payable to Decedent's estate? Because Decedent died intestate with no surviving husband, no other children and no issue of deceased children, the monies in the POD account should have been distributed to Decedent's sole heir, Sylvia Coline White, deceased. We therefore hold the trial court erred in ordering the distribution of the POD monies to Decedent's nieces and nephews. The trial court's order is reversed and remanded to the trial court with instructions to enter an order determining Sylvia Coline White, deceased, as Decedent's sole heir at law. The trial court is also instructed to order the distribution of Decedent's entire estate to the Estate of Sylvia Coline White, deceased, Case No. PB-2018-20, in the District Court of McCurtain County or directly to the heir of such estate in accordance with the decree of distribution entered in Case No. PB-2018-20. REVERSED AND REMANDED WITH INSTRUCTIONS. Opinion by Bell, J.; Mitchell, P.J., and Swinton, J., concur.

Thursday, November 14, 2019

117,051 — Christal Nichole Mahan, Petitioner/Appellee, vs. Frank Thomas, Defendant/Appellant. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Larry D. Shaw, Judge. Defendant/Appellant Frank Thomas appeals the entry of a final victim protection order (VPO) against him. The trial court's findings that a VPO is necessary to protect Petitioner/Appellee Christal Nichole Mahan from domestic abuse and/or harassment and that Thomas represents a credible threat to Mahan's physical safety are clearly against the evidence. The most recent incident of domestic abuse occurred 8 years prior to Mahan filing the petition for a VPO. Thomas has been incarcerated since that time and is serving a lengthy prison sentence. There is no threat of imminent physical harm. There is also no evidence of harassment. The record shows

that over the course of 8 years, Thomas occasionally contacted Mahan from prison with the legitimate purpose of establishing and maintaining a relationship with the parties' minor child. Additionally, Thomas's course of conduct would not cause a reasonable person to suffer substantial emotional distress nor has Mahan presented evidence she has actually suffered substantial emotional distress. We find the trial court abused its discretion by entering a final VPO against Thomas. REVERSED. Opinion by Mitchell, P.J. Bell, J., concurs; Swinton, J., dissents.

117,776 — New Dominion, LLC, an Oklahoma limited liability Company and New Source Energy Corporation, a Delaware corporation, Plaintiffs/Appellants, vs. Kristian B. Kos, an individual, Richard D. Finley, an individual, Dikran Tourian, an individual, and Carol Bryant, an individual, Defendants/Appellees. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Patrick Pickerill, Judge; Honorable Doug Drummond, Judge. Plaintiffs/Appellants New Dominion, LLC and New Source Energy Corporation (collectively, Plaintiffs) appeal from the trial court's order dismissing their claims against Defendants/Appellees Kristian B. Kos, Richard D. Finley, Dikran Tourian, and Carol Bryant (collectively, Defendants) and the order denying their motion for new trial. Defendants are former officers, directors, and/or employees of Plaintiff New Source Energy Corporation (New Source-Corp.), New Source Energy Partners, LP (New Source-LP), and/or New Source Energy GP, LLC (New Source-GP). New Source-LP and New Source-GP assigned their claims against Defendants to Plaintiff New Dominion. Plaintiffs sued Defendants for breach of contract. Plaintiffs claim that by mismanaging the New Source companies Defendants violated the express and implied terms of their respective employment contracts, specifically the implied duty of good faith and fair dealing. Defendants sought to enforce the forum selection clause in the First Amended and Restated Agreement of Limited Partnership of New Source Energy Partners L.P. (Partnership Agreement), which provided Delaware was the agreed-to venue for claims arising out of or relating in any way to the Partnership Agreement and claims for breach of fiduciary duty. The trial court found that the forum selection clause in New Source-LP's Partnership Agreement was enforceable and dismissed the case. After *de novo* review, we find Plaintiffs' breach

of contract claims are based on employment contracts with Defendants, not the Partnership Agreement, and Plaintiffs have not asserted claims for breach of fiduciary duty. Material facts remain in dispute, including whether the employment contracts exist and whether the contracts are in writing. Defendants have not shown that, as a matter of law, the forum selection clause in the Partnership Agreement governs Plaintiffs' claims or that Plaintiffs' claims are barred by the statute of limitations. Defendants are not entitled to summary judgment, and the trial court abused its discretion by denying Plaintiffs' motion for new trial. We REVERSE AND REMAND for further proceedings. Opinion by Mitchell, P.J.; Bell, J., and Swinton, J., concur.

Friday, November 15, 2019

117,155 — In Re the Marriage of Whittington: Kinion E. Whittington, Petitioner/Appellant, vs. Robin Noak Whittington, Respondent/Appellee. Appeal from the District Court of Bryan County, Oklahoma. Honorable Wallace Coppedge, Judge. Petitioner/Appellant Kinion E. Whittington (Father) appeals from the trial court's order sustaining the motion for attorney fees filed by Respondent/Appellee Robin Noak Whittington (Mother) and ordering Father to pay \$16,492.82 for Mother's attorney fees, expenses, and costs stemming from her defense of Father's motion to modify custody. We find the court's decision was an abuse of discretion. We REVERSE. Opinion by Mitchell, P.J.; Bell, J., and Swinton, J., concur.

117,259 — Richard J. Colvin, Petitioner/Appellant, vs. Robert Bosch LLC, Travelers Indemnity Co. of America, and The Workers' Compensation Court of Existing Claims, Respondents/Appellees. Proceeding to Review an Order of a Three-Judge Panel of The Workers' Compensation Court of Existing Claims. Petitioner/Appellant Richard J. Colvin seeks review of the three judge panel's order that vacated a trial judge's order denying the motion to dismiss by Respondent Robert Bosch LLC (Employer) "for want of prosecution pursuant 85 O.S. § 43(B)." The panel's order is VACATED AND REMANDED FOR FURTHER PROCEEDINGS for lack of jurisdiction. Opinion by Swinton, J.; Mitchell, P.J., and Bell, J., concur.

117,281 — Jennifer Lin Cooper, on behalf of herself and all other residents of central Oklahoma similarly situated, Plaintiff/Appellee,

vs. New Dominion, LLC, Defendant/Appellant, and Spess Oil Company, and John Does 1-25, Defendants. Appeal from the District Court of Lincoln County, Oklahoma. Honorable Lori Walkley, Judge. Defendant/Appellant New Dominion, LLC (New Dominion) appeals from an order sustaining the motion of Plaintiff/Appellee Jennifer Cooper (Plaintiff), individually and as putative class representative, to certify a class in an action against New Dominion for damages resulting from earthquakes near Prague, Oklahoma in November 2011. New Dominion argues on appeal that the Plaintiff failed to meet her burden establishing the prerequisites for a class action under 12 O.S. § 2023. Based upon our *de novo* review of the record and applicable law, we find that Plaintiff has established the requirements necessary to certify a class concerning the claims against New Dominion. The trial court correctly sustained Plaintiff's motion to certify a class action. The order is therefore AFFIRMED. Opinion by Swinton, J.; Mitchell, P.J., and Bell, J., concur.

117,526 — Benton Austin, Plaintiff/Appellant, vs. Scott Fetzer Company d/b/a Douglas Quikut, Defendant/Appellee. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Lisa T. Davis, Judge. Plaintiff/Appellant, Benton Austin, appeals from the trial court's grant of summary judgment in favor of Defendant/Appellee, Scott Fetzer Company, in Plaintiff's product liability action. Plaintiff purchased a filet knife and synthetic, leather-like sheath from a Del City department store. The knife was designed by Defendant's business entity, Douglas Quikut. The knife and sheath were then manufactured and packaged by a company in China, and marketed by Defendant in the United States. The product information stated the sheath was to protect the knife. Attached to the side of the sheath is a belt loop. Plaintiff removed the knife and sheath from their packaging and inserted the knife into the sheath. While holding the sheath in his left hand, Plaintiff pulled the knife out of the sheath for the first time. Thereupon, the knife cut through the sheath stitching and sliced the tendons and nerves of Plaintiff's fingers on his left hand. He then sued Defendant, claiming the sheath was defective. The trial court granted summary judgment to Defendant. Upon *de novo* review of the instant record, we conclude there exist disputed issues of material fact that preclude summary adjudication of Plaintiff's claims. We believe a jury

could reasonably find there was a foreseeable danger that ordinary consumers of the subject product would view the sheath as a guard to protect them from the knife's blade while it was stored and being removed from the sheath. REVERSED AND REMANDED. Opinion by Bell, J.; Mitchell, P.J., and Swinton, J., concur.

(Division No. 4)

Wednesday, October 30, 2019

117,588 (companion with 117,587) — Eric Burkhart and Jaclyn Burkhart, Plaintiffs/Appellees, v. David Stanley Dodge, LLC, and US Bank NA, Defendants/Appellants. Appeal from the District Court of Oklahoma County, Hon. Lisa T. Davis, Trial Judge. The sole issue presented on appeal is whether the trial court properly found that Eric Burkhart, who purchased a vehicle from David Stanley Dodge, LLC, was fraudulently induced into signing an arbitration agreement. For the same reasons set forth in the companion case, Case No. 117,587, we conclude the circumstances presented do not support a finding of fraudulent inducement to arbitrate, and we therefore reverse the trial court's order. Because the trial court, having reached its determination as to fraud, did not address the issue of unconscionability, we remand this case to the trial court to address that issue in the first instance. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Rapp, J., and Thornbrugh, J., concur.

117,827 — In the Matter of: I.S., I.S. and R.S., Deprived Children Under the Age of 18 Years, Iris Stacy, Appellant, v. State of Oklahoma, Appellee. Appeal from an Order of the District Court of Bryan County, Hon. Rocky Powers, Trial Judge. The respondent, Iris M. Stacy (Mother), appeals the judgment, as amended, entered after a jury verdict, terminating her parental rights to I.T.S., I.M.S., and R.E.S. (Children). After a jury trial, Mother's parental rights were terminated to all three children. The case history reveals that Children's Father is a violent person and his violence resulted in physical and emotional harm to Children, requiring removal of Children from the home. Father's violence resulted in his imprisonment. Mother began to receive services designed to assist her to correct the conditions leading to the stipulated deprived Children adjudication. She did well and a trial reunification was instituted which lasted for about fifteen months. However, the evidence shows that Mother contin-

ued to maintain contact with Father while he was in prison and then, when he was released, allowed him back in the home. Mother well knew it was her responsibility to keep Father away from Children and the home. This caused immediate termination of the trial reunification and institution of the termination of parental rights phase. The termination case was presented to a jury which returned a verdict of termination for all children. Mother's appeal raises evidentiary and procedural errors. After review, this Court finds that the Journal Entry must be corrected and remands the case for that purpose. This Court finds no error in Jury Instructions, verdict form, or sufficiency of the evidence to support the verdict. This ruling makes Mother's claim of ineffective trial counsel moot. Mother did not have appointed counsel after the adjudication and before the termination petition while she was undertaking to correct the conditions and while the trial reunification was in place. This Court concludes that, under the specific facts of this case, the absence of counsel during the compliance with the ISP phase is not reversible error. Mother was not prejudiced by not having an attorney during this time. The judgment of termination, as amended on remand, is affirmed. AFFIRMED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., and Wiseman, V.C.J., concur.

Thursday, October 31, 2019

117,823 — In the Matter of M.C., A Deprived Child, Michael Clemente, Appellant, v. State of Oklahoma, Appellee. Appeal from the District Court of Cleveland County, Hon. Stephen Bonner, Trial Judge. Michael Clemente (Father) appeals from a February 13, 2019, order upon jury verdict terminating his parental rights to his minor child, MC. We are asked to review whether the trial court erred by allowing the presentation of prejudicial evidence. We conclude that the trial court's admission of evidence of Father's history of criminal behavior, specifically the death of a child during the commission of a robbery, was not an abuse of discretion. After review of the evidence and the record, we further conclude there was clear and convincing evidence that termination was warranted under 10A O.S. Supp. 2015 § 1-4-904(B)(12), as the jury found. The February 13, 2019, order terminating Father's parental rights to MC is therefore affirmed. AFFIRMED. Opinion from the Court of Civil Appeals, Division

IV, by Wiseman, V.C.J.; Barnes, P.J., concurs, and Rapp, J., dissents.

Tuesday, November 5, 2019

117,728 — State of Oklahoma, *ex rel.*, John D. Doak, Insurance Commissioner, as Receiver for Driver's Insurance Company, in Liquidation, Plaintiff/Appellant, v. PC Processing, Inc, Carlos Lidsky, John Ratzei, Alex Campos, Dean White, Davis Counts, Ricardo Verges, Grant Buchanan, Fred Kohn, and Grant Thornton, LLP, Defendants/Appellees. Appeal from an Order of the District Court of Oklahoma County, Hon. Richard C. Ogden, Trial Judge. The plaintiff, State of Oklahoma, *ex rel.* John D. Doak (Receiver) as receiver for Driver's Insurance Company (Driver's), in liquidation appeals an Order dismissing the action as to the defendants, Alex Campos (Campos) and PC Processing, Inc. (PC Processing) for lack of personal jurisdiction and the expiration of the statute of limitations. The trial court has certified the order as a final and appealable order. The trial court erred by dismissing the Third Amended Petition for lack of personal jurisdiction based upon its conclusion that its first dismissal order on that ground served as a basis for issue preclusion. The application of issue preclusion requires a final order. Here, the first Order of the trial court was not a final order and, therefore, could not serve as a basis for issue preclusion. Receiver's contention that the trial court erred by failing to consider late-filed affidavits is not supported by the Record. The trial court permitted the affidavits to be filed and its Orders recite that the parties' written submissions were considered. The trial court also dismissed the Third Amended Petition because the statute of limitations had expired. Receiver's Third Amended Petition listed nine counts and receiver did not defend counts V and VII-IX. The dismissal is affirmed as to those counts without further consideration. Receiver has not listed any error in the petition-in-error relating to the dismissal on the basis that the remaining claims are barred by the statute of limitations. No section of the petition-in-error addressed any issue related to the statute of limitations ruling. This aspect of the ruling of the trial court will not be considered, and, therefore, it is presumed to be correct. Receiver has not demonstrated that there is reversible error. The Order of the trial court dismissing the Third Amended Petition based upon the application of the statute of limitations having expired is affirmed. AFFIRMED. Opinion from Court of

Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., and Wiseman, V.C.J., concur.

Wednesday, November 13, 2019

117,444 (as consolidated in 117,441) — In the Matter of the Estate of Barbara Bell, deceased: Douglas Bell, Appellant, v. Laura Remen, Appellee. Appeal from the District Court of Cleveland County, Hon. Stephen Bonner, Trial Judge. Douglas Bell appeals from the trial court's order denying admission of a will to probate. However, during the pendency of this appeal, all of the beneficiaries under the will settled their disputes. Therefore, a viable controversy no longer exists regarding distribution, and this Court is unable to render any effective relief. Therefore, we must dismiss this appeal as moot. **APPEAL DISMISSED AS MOOT.** Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Wiseman, V.C.J., and Rapp, J., concur.

Thursday, November 14, 2019

117,957 — Brenda Angel-Copeland, Petitioner/Appellee, v. Gregory V. Copeland, Respondent/Appellant. Appeal from the District Court of Tulsa County, Hon. Owen T. Evans, Trial Judge. The marriage of Petitioner and Respondent was dissolved by consent decree (the Decree) filed in 2011. In March 2018, Respondent filed a motion to enforce a certain provision of the Decree. He asserts the provision in question requires that Petitioner sell, at least within a reasonable time, a certain item of personal property – a sculpture, or a copy or "Artist Proof" of the sculpture – and that she then pay a portion of the proceeds from that sale in trust to Respondent, as the provision in question states, "to hold in trust and to cause payment" toward a certain loan incurred during the marriage. It is undisputed that Petitioner has yet to sell the property in question and, in fact, it is her position that "[t]he Decree in no way orders that the Sculpture be sold within any specific period of time, or at all." The trial court denied Respondent's motion, and he then filed a motion to reconsider which was also denied. Based on our review of the Decree, we agree with Respondent that Petitioner has an obligation under the Decree to sell the property, and that she must do so within a reasonable time. We reverse the trial court's order denying Respondent's motion to reconsider, and we remand to the trial court to proceed on the issue of what constitutes a reasonable time. **REVERSED AND REMANDED FOR**

FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Wiseman, V.C.J., and Rapp, J., concur.

117,899 — Carl Dean Wood, II, Plaintiff/Appellant, vs. KKA Real Estate, LLC, an Oklahoma Limited Liability Company, Defendant/Appellee. Appeal from an order of the District Court of Washington County, Hon. Linda S. Thomas, Trial Judge, granting summary judgment to Defendant, KKA Real Estate, LLC. Defendant filed a motion for summary judgment arguing Plaintiff cannot prove a wrongful termination claim pursuant to 56 O.S.2011 § 240.2(D)(18) or pursuant to public policy. Plaintiff was hired as a seasonal employee on an "as needed basis" and "had no contractual entitlement to continue employment." Defendant retained the right to terminate Plaintiff's employment "for any reason" pursuant to the Agreement. Plaintiff does not dispute that the Agreement provides a 60-day probation period giving Defendant the right to terminate employment for any reason. But Plaintiff does dispute why he was terminated. Based on the record before us, we find that issues of material fact remain in dispute as to whether Plaintiff was wrongfully discharged due to a garnishment order Defendant received. With unresolved questions of material fact related to Plaintiff's termination, neither party is entitled to judgment as a matter of law, requiring reversal of the trial court's grant of summary judgment. The summary judgment is reversed and the case remanded for further proceedings. **REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.** Opinion from the Court of Civil Appeals, Division IV, by Wiseman, V.C.J.; Barnes, P.J., and Rapp, J., concur.

**ORDERS DENYING REHEARING
(Division No. 3)**

Friday, November 1, 2019

116,882 — Kast Trust Farms, Petitioner/Appellant, vs. Clayton Twyman, Washita County Assessor, Respondent/Appellee. Appellee's Petition for Rehearing and Brief in Support, filed October 17, 2019, is **DENIED.**

Friday, November 15, 2019

117,448 — Edward Wyre, Jr., Plaintiff/Appellee, vs. Ellena Muhammad, Defendant, and Katrius Muhammad, Intervenor/Appellant. Appellant's Motion to Reconsider, treated herein as a motion for Rehearing, filed November 8, 2019, is **DENIED.**

CLASSIFIED ADS

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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.

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.

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MUNICIPAL JUDGE: Salary \$99,174.40. The City of Oklahoma City seeks a full-time municipal judge. Must be a resident of Oklahoma City with a minimum of four years' experience in Oklahoma as a licensed, practicing attorney. Additional requirements are listed in the application. All interested applicants should apply at www.okc.gov/departments/personnel/careers. Please direct all inquiries to Court Administrator LaShawn R. Thompson at 405-297-2673. Applications with resumes will be accepted until Dec. 16, 2019

NATIONAL LAW FIRM IS SEEKING AN OIL AND GAS ATTORNEY with 3-5 years' experience to join its growing Energy Group in Denver. The ideal candidate should be a highly motivated self-starter who does well working on their own and in a team environment. Significant experience drafting title opinions in the DJ Basin is preferred, as is a license to practice in Colorado. Landman experience is a plus. Excellent academic qualifications and communication skills required. Firm offers a competitive salary and excellent benefits in a friendly, business casual setting. Submit cover letter, resume and writing sample online at www.lathropgage.com.

ENID, OKLAHOMA, LAW FIRM INVITES ASSOCIATES WITH 3+ YEARS' EXPERIENCE TO JOIN OUR TEAM. We are looking for a candidate who is hard working and a self-starter and is knowledgeable in multiple practice areas, including litigation and family law. Candidates must have excellent research skills, analytical thinking skills and writing skills. Salary compensable with experience and can be \$100,000+, benefits and 401K. If hired, must live in Enid or surrounding area. Please submit resumes to "Box Z," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

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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, OK or Tulsa offices. Submit resumes to Ryan@polstontax.com.

THE OKLAHOMA ATTORNEY GENERAL'S OFFICE IS CURRENTLY SEEKING A FULL-TIME ASSISTANT ATTORNEY GENERAL for our Litigation Unit in our Oklahoma City office. This position will handle civil actions and proceedings in state, federal and appellate courts. The successful candidate must maintain the integrity of the Attorney General's Office as well as the confidentiality of information as required by the attorney general. Occasional travel is required. Qualification for this position requires a licensed attorney with a minimum of 10 years of civil experience. Experience representing state or other governmental agencies is preferred. Excellent research, writing and advocacy skills are required. A writing sample must accompany a resume to be considered. Please send resume and writing sample to resumes@oag.ok.gov and indicate which particular position you are applying for in the subject line of the email. The Oklahoma Office of Attorney General is an equal employment employer. All individuals are welcome to seek employment with the Oklahoma Office of Attorney General regardless of race, sex, color, age, national origin, genetic information, religion or disability, so long as the disability does not render the person unable to perform the essential functions of the position for which employed with or without a reasonable accommodation. All employees of the Oklahoma Office of Attorney General are "at will" employees.

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

**Associate District Judge
Fourth Judicial District
Woodward County, Oklahoma**

This vacancy is created by the retirement of the Honorable Don A. Work on September 30, 2019.

To be appointed an Associate District Judge, an individual must be a registered voter of the applicable judicial district at the time (s)he takes the oath of office and assumes the duties of office. Additionally, prior to appointment, the appointee must have had a minimum of two years experience as a licensed practicing attorney, or as a judge of a court of record, or combination thereof, within the State of Oklahoma.

Application forms can be obtained on line at www.oscn.net, click on Programs, then Judicial Nominating Commission or by contacting Tammy Reaves at (405) 556-9300. Applications must be submitted to the Chairman of the Commission at the address below **no later than 5:00 p.m., Friday, January 10, 2020. If applications are mailed, they must be postmarked by midnight, January 10, 2020.**

Jim Webb, Chairman
Oklahoma Judicial Nominating Commission
2100 North Lincoln Boulevard, Suite 3
Oklahoma City, OK 73105

THURSDAY & FRIDAY,
DECEMBER 5 & 6, 2019

9 A.M. - 2:50 P.M. [EACH DAY]

Oklahoma Bar Center
1901 N. Lincoln Blvd.
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MCLE 6/0 [DAY ONE]
MCLE 6/1 [DAY TWO]



PROGRAM PLANNER/
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- 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
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- Cannabis Law Unredacted
- Amaze and Delight Your Friend(ly Bankruptcy Judge)s: Unredacted Effective Trial Techniques.
- Here to Influence You: Bankruptcy Judges' Panel

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Double Tree by Hilton, Warren Place
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MCLE 6/0 (DAY ONE)

MCLE 6/1 (DAY TWO)

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2019 LEGAL UPDATES

DAY ONE TOPICS INCLUDE: DAY TWO TOPICS INCLUDE:

- Bankruptcy Law
- Labor and Employment Law
- Health Law
- Criminal Law
- Oklahoma Tax Law
- Insurance Law
- Business and Corporate Law
- Family Law
- Real Property
- Estate Planning & Probate Law
- Law Office Management and Technology
- Ethics

TUITION:

- \$275 - Both Days Early-Bird - Nov 27, 2018
- \$150 - Day1 and/or Day 2 Early-Bird - Nov 27, 2019
- \$300 - Both Days Nov 23 - Nov 29, 2018
- \$175 - Day 1 and/or Day 2 - Nov 23 - Nov 29, 2019
- \$325 - Both Days Walk-in
- \$200 - Day 1 and/or Day 2 Walk-in
- \$75 - Members licensed 2 years or less (late fees apply)