THE OKLAHOMA BAR
Journal
Volume 90 — No. 23 — 12/14/2019

Court Issue

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JOURNAL STAFF

JOHN MORRIS WILLIAMS
Editor-in-Chief
johnw@okbar.org

CAROL A. MANNING, Editor
carolm@okbar.org

MACKENZIE SCHEER
Advertising Manager
advertising@okbar.org

LAURA STONE
Communications Specialist
lauras@okbar.org

LAURA WOLF
Communications Specialist
lauraew@okbar.org

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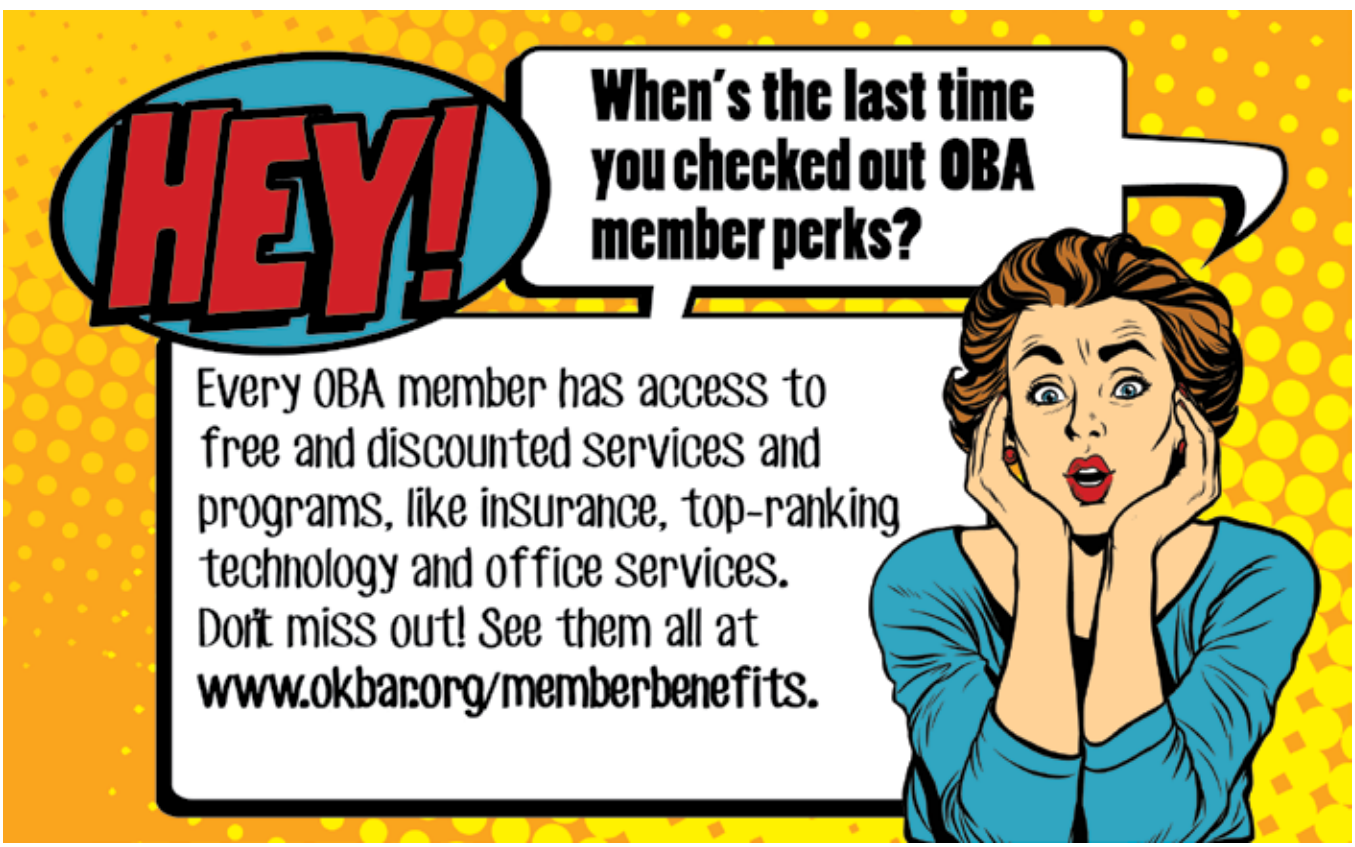
Notice of Judicial Vacancy

Pursuant to 85A O.S. §400, the Judicial Nominating Commission seeks applicants to fill the following judicial office for a two-year term: July 1, 2020 through July 1, 2022.

Judge of the Workers' Compensation Court of Existing Claims

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 17, 2020. If applications are mailed, they must be postmarked by midnight, January 17, 2020.**

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



Oklahoma Bar Association

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Notice of Judicial Vacancy

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

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; MULTIJURISDICTIONAL PRACTICE OF LAW

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

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

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

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

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

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

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

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

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

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

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

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

2019 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 Oklahoma 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, however, include federal courts or other federal decision-making or recommending bodies which conduct proceedings in Oklahoma.

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

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

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

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

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

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

homa 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.

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

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

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

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

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

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

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

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

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

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

5. The out-of-state attorney shall associate with an Oklahoma attorney. The associated Oklahoma attorney shall enter an appearance in the proceeding and service may be had upon the 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, ~~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 77

IN THE MATTER OF THE DISCIPLINARY PROCEEDINGS CONCERNING KENDRA COLEMAN, DISTRICT JUDGE, OKLAHOMA COUNTY, OKLAHOMA.

No. 118,450. December 4, 2019

ORDER AS CORRECTED

¶1 The Council on Judicial Complaints initiated this case by delivering a report to the Chief Justice concerning the Council's investigation of District Judge Kendra Coleman. The report contained an evidentiary record and Findings of Fact, Conclusions of Law and a Recommendation that the Supreme Court en banc file a petition with the Court on the Judiciary to remove Judge Coleman. Given the fact that two members of the Supreme Court sit on the Appellate Division of the Court on the Judiciary, the Chief Justice appointed Special Justices to serve in their place as well as a Special Justice to serve for a currently vacant office on the Supreme Court. Thereafter, the Supreme Court, thus constituted, reviewed the Council's report and voted 5-4 that the allegations and evidence of misconduct set forth in the report did not warrant the filing of a petition for removal.

¶2 The Council on Judicial Complaints plays an important role in protecting and preserving the integrity of the Oklahoma Judiciary. The Council is "an agency in the Executive Department" that independently investigates and

evaluates complaints of judicial misconduct. 20 O.S.2011, §§ 1651 and 1652; Rule 3 of the Rules Governing Complaints on Judicial Misconduct, 5 O.S.2011, Ch.1, App. 4-A.

¶3 While the Council can make recommendations concerning the merits of a complaint and the need for disciplinary proceedings, the Council "may not adjudicate any matter nor impose any sanction." *Mattingly v. Court on the Judiciary, Trial Division*, 2000 OK JUD 1, ¶17, 8 P.3d 943, 949. Neither can the Council "invoke the jurisdiction of the Court on the Judiciary [nor] substitute its own discretion for that of the officers charged with that duty by the constitution. " *Id.* ¶9, 8 P.3d at 947.

¶4 This Court and the other officers and entities designated in Article 7-A, § 4 of the Oklahoma Constitution and in 20 O.S.2011, § 1659, are vested with discretionary authority to decide whether the judicial misconduct detailed in a report by the Council warrants proceedings before the Court on the Judiciary. *Haworth v. Court on the Judiciary, Trial Division,* 1975 OK JUD 1, ¶6, 684 P.2d 1217, 1218.

¶5 This Court exercises this discretionary authority to first determine whether the Council's allegations of misconduct by a judge, even if true, would or would not, call for the judge's removal from office or compulsory retirement. *Mattingly,* ¶¶ 7 and 19, 8 P.3d at 947, 950. In the case at hand, the majority concluded that the alleged misconduct of Judge Coleman would not call for immediate removal and rejected the Council's recommendation to file a petition for removal. This decision did not end the Court's inquiry, but instead triggered this Court's exclusive jurisdiction to decide discipline for misconduct of a judge not serious enough to require removal or compulsory retirement. *Id.* ¶19, 8 P.3d at 950. As explained in the *Mattingly* case, this Court has exclusive jurisdiction to discipline for non-removal misconduct because "to interpret the powers of the Court on the Judiciary . . . to merely discipline rather than remove a judge, would both grant the Court on the Judiciary powers not given by [the Constitution] and deprive the Supreme Court of its responsibility to exercise 'superintendent control' and 'administrative authority' over the courts of this state mandated by [the Constitution]." *Id.* ¶16, 8 P.3d at 949.

¶6 This Court exercises its exclusive jurisdiction to determine discipline for non-removal misconduct pursuant to the Rules Governing Complaints on Judicial Misconduct. 5 O.S.2011, Ch. 1, App. 4-A. In the Preface to the Rules, this Court stated it was providing "a uniform process to investigate and administer judicial discipline for misconduct that does not warrant removal from office or compulsory retirement." The Rules are said to provide "a venue for any person to complain about a judge who the person believes has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts." Rule 1, RGCJM. While this Court utilizes the investigation and screening assistance of the Council on Judicial Complaints pursuant to Rule 3, the Council's Finding of Facts, Conclusions of Law and Recommendation for Discipline are not binding on the Court. Again, the Council may not adjudicate any matter nor impose any sanction." *Mattingly,* ¶17, 8 P.3d at 947.

¶7 The Rules vest the Chief Justice with responsibility to determine "appropriate action . . . to remedy the problem" and reserve to the Court the power to impose "appropriate discipline." Rule 4(c) and (d), RGCJM. Even though this Court may begin its review of non-removal misconduct under its exclusive jurisdiction, the Chief Justice or the Court can later file a petition for removal in exercise of the authority given by Article 7-A, § 4 of the Constitution, if the Chief Justice or the Court deems such action necessary.

¶8 The fact that this Court is divided on the issue of whether a petition for removal should be filed does not mean there is not common concern whether Judge Coleman appreciates the level of conduct expected of every person who aspires to serve as a member of the Oklahoma Judiciary. The majority's conclusion that proceedings for removal are not warranted to address this concern should not be taken to indicate that the majority does not regard this concern to be serious or one that does not require action by this Court. What the majority seeks to achieve by proceeding pursuant to Rule 4 is to impress upon Judge Coleman that future derelictions as recounted in the report of the Council on Judicial Complaints will not be tolerated. The majority also seeks to take steps to ensure Judge Coleman will fully comply with the Code of Judicial Conduct and all personal and professional obligations reflecting on her judicial service.

¶9 The allegations and evidence of misconduct set forth in the Council's report can be summarized as follows:

- Judge Coleman officially took the bench on January 14, 2019.
- On September 17, 2019, Judge Coleman was indicted on four (4) misdemeanor counts of failing to file a state income tax return in violation of 68 O.S.2011, § 240. A criminal case was filed in Oklahoma County CM-2019-3063. This charge was dismissed when the District Attorney subsequently filed a felony charge relating to the same matter.
- Judge Coleman has delinquent tax assessments to both the IRS and the OTC.
- Judge Coleman has outstanding tax assessments for business personal property taxes owed to Oklahoma County for 2014-2018.
- Between 2012 and 2019 Judge Coleman was issued sixty-five (65) parking tickets by the City of Oklahoma City. Eight of those tickets were accumulated after Coleman was elected to her position but before taking the bench.
- In connection with Judge Coleman's candidacy for district judge, she and/or her candidate committee violated the Code of Judicial Conduct and Oklahoma Ethics Rules concerning election expenditures and reports.
- Judge Coleman violated the Code of Judicial Conduct by failing to disqualify herself in all cases presented by the Oklahoma County District Attorney.
- Judge Coleman engaged in oppressive behavior by utilizing or threatening to utilize her powers of contempt.

¶10 In response, Judge Coleman admitted that there was a factual basis for these allegations, but maintains that she did not intentionally act to violate the Code of Judicial Conduct or to deliberately abuse her judicial power. Judge Coleman also related that she has paid the parking tickets and taken steps to rectify her delinquent tax returns and Ethics Commission reports. She reported that she sought and is receiving mentoring from retired Oklahoma Supreme Court Justice Daniel Boudreau. She is doing this to properly perform her judicial duties and conduct herself in any manner consistent with the high standards required for judicial service.

¶11 Of the foregoing only the last three directly relate to Judge Coleman's responsibilities as a judge. As concerns Judge Coleman's decision not to disqualify in all cases presented by the District Attorney, we note that Rule 1 of the Rules Governing Complaints on Judicial Conduct expressly provides that "Appellate review and disqualification procedures exist and should be utilized to address concerns regarding . . . disqualification issues." Also, the procedure for seeking disqualification of a judge - Rule 15, Rules for District Courts, 12 O.S.2011, Ch. 2, App. - does not allow for or even contemplate the wholesale disqualification sought by the District Attorney. Administrative "reassignment" is a preferable alternative. *Mattingly,* ¶23, 8 P.3d at 951.

¶12 As concerns the issue of oppression in office, the Council's report asserts that Judge Coleman improperly used and threatened to use her contempt powers. The evidence in the record shows that Judge Coleman may not have correctly used direct contempt to deal with a disruptive person in her courtroom, but this matter is the subject of an appeal. Rule 1 also provides that judicial misconduct procedure is not intended to be exercised to challenge a judge's decision in a single case.

¶13 Also, the evidence concerning the threatened use of contempt occurred in the course of a heated exchange that Judge Coleman had with the District Attorney and First Assistant that was marked by mutual acrimony. "A judge is guilty of 'oppression in office' when that judge intentionally commits acts which he or she knows, or should know, are obviously and seriously wrong under the circumstances and amount to an excessive use of judicial authority." *State v. Colclazier,* 2002 OK JUD 1, ¶12, 106 P.3d 138, 141-2. "The relevant inquiry is whether the judge formed a specific intent to commit the acts with the requisite knowledge that they were obviously and seriously wrong under the circumstances and amounted to excessive use of judicial authority." *Id.*, 106 P.3d at 142.

¶14 One of the factors to be considered in determining whether discipline is warranted is "the facts and circumstances that existed at the time of the violation." Scope of the Code of Judicial Conduct, 5 O.S.2011, Ch.1, App. 4. In the instances cited in the Council's report, Judge Coleman was acting to preserve order and decorum, even if she did so incorrectly. It is well settled that "Not every violation of the

Code of Judicial Conduct will result in a finding of 'oppression in office,' nor will mere legal error or abuse of discretion result in discipline." *Colclazier,* ¶19, 106 P.3d at 143.

¶15 Judge Coleman's admitted and unexcused violations of the Ethics Commission rules governing campaign financing and reporting are another matter. These rules protect the integrity of the election process. Compliance with these rules is a duty that every candidate, especially candidates for judicial office, owes to the people and electorate of this state. While Judge Coleman's efforts to rectify her delinquent reports is commendable, they do not relieve her of accountability and discipline for this serious violation of the Code of Judicial Conduct. In order to deter Judge Coleman and future candidates for judicial office from failing to comply with Ethics Commission campaign rules, we hereby Reprimand Judge Coleman for this violation and will make this Reprimand public by publishing this opinion.

¶16 Judge Coleman's neglect to pay over sixty parking tickets, and similar neglect to attend to various county, state and federal tax obligations for several years, reflect adversely upon her judicial service, because such neglect raises a reasonable concern that she may likewise neglect her judicial duties. While her belated payment of the parking tickets and recent efforts to rectify her tax delinquencies demonstrate a sense of responsibility to attend to important matters, this Court believes an Admonishment is warranted to impress upon Judge Coleman the imperative of timely addressing all personal legal obligations that arise during or reflect upon her judicial service. As in the case of the Reprimand for failure to timely file Ethics Commission reports, this Admonishment is made public by publication of this order.

¶17 The last issue this Court must address is the pending felony charge that arose from Judge Coleman's neglect of her state tax obligations. This Court finds that final discipline should be deferred until this charge is resolved. In the meantime, Judge Coleman is on Probation with conditions (1) to report monthly to the Council on Judicial Complaints concerning the status of the various tax delinquencies, (2) to complete at least five mentoring sessions pending final discipline with Retired Justice Daniel Boudreau, Retired Judge April Sellers White, or another experienced judge and (3) to comply with all local, state and federal laws, and the Code of Judicial Conduct. Failure to comply with these conditions for deferred final discipline can be the basis for additional discipline and the Council on Judicial Complaints is authorized to bring any breach of these conditions to this Court through the complaint process provided by the Rules Governing Complaints on Judicial Misconduct.

¶18 **RESPONDENT PUBLICLY REPRIMANDED, PUBLICLY ADMONISHED, FINAL DISCIPLINE DEFERRED, PROBATION WITH CONDITIONS**

¶19 DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THE 2ND DAY OF DECEMBER, 2019.

/s/ Noma D. Gurich
CHIEF JUSTICE

Gurich, C.J., Kauger, Edmondson, Colbert, JJ., Reif, S.J., concur;

Winchester **(by separate writing)**, Kane (by separate writing), JJ., Kuehn, S.J. **(by separate writing)** and Wiseman, S.J., dissent.

WINCHESTER, J., with whom KANE, J. and WISEMAN, S.J., join, dissenting:

¶1 The Council on Judicial Complaints thoroughly investigated the numerous allegations of misconduct against Judge Coleman, including a review of all evidence presented and the testimony from several witnesses. The Council found multiple violations of the Code of Judicial Conduct worthy of her removal from office. Pursuant to 20 O.S.2011, § 1658, the Council recommended her removal and referred the matter to this Court for further proceedings.

¶2 I would refer this matter to the Court on the Judiciary for trial, which is the appropriate next step given the extensive evidence of the appearance of impropriety. I will not minimize blatant misconduct. While the various alleged infractions might not necessitate removal from office when considered individually, accumulatively they indicate a clear pattern of disrespect for the judicial office. I dissent from the majority's decision today because I believe Judge Coleman's actions warrant a trial on the matter.

¶3 In her short time on the bench, a span of less than one year, Judge Coleman has been the subject of numerous reports. The Council heard from several witnesses and reviewed all the evidence submitted, determining that the multiple instances of misconduct required Judge

Coleman's removal from office. The Council ultimately found that Judge Coleman lacked the judicial temperament requisite of a judge, was guilty of oppression in office, and failed to follow the law and appreciate the importance of a fair and impartial judiciary.

¶4 If found to be true, the accumulation and sheer numerosity of the allegations against her reflect a pattern of lack of integrity or respect for the law. The majority's decision shields Judge Coleman's actions from review by her peers and erodes the confidence of her fellow judges and the public in the judicial system's willingness to discipline its own members. Accordingly, I dissent.

Kane, J., with whom Wiseman, S.J. joins, dissenting:

¶1 The Council on Judicial Complaints ("the Council") has submitted a recommendation for the Supreme Court to file a Petition to convene the trial division of the Court on the Judiciary ("the Court on the Judiciary") regarding allegations against the respondent judge. A majority of this Court concludes that a more proper exercise of our discretion in this matter would be to divert the subject of the proceedings from the statutory and constitutional processes in place, and proceed, instead, with an *ad hoc* Order, tailored to the responding judge, based upon the alleged facts suggested in the Council's report, without the benefit of a trial.

¶2 While I believe that this Court does have the power to undertake relief in the nature proposed by the majority, I do not believe that this exercise of power has precedence, and I further do not believe that it is a wise or warranted exercise of our power under the facts presented in this case. I believe that a Petition, based upon the concerns expressed by the Council on Judicial Complaints' report, should have been prepared and presented to the Court on the Judiciary for a trial. I therefore dissent.

CONSTITUTIONAL ORIGINS AND FUNCTION OF THE COURT ON THE JUDICIARY

¶3 The Court on the Judiciary is a Constitutional entity. Article VIIA, §2 of the Oklahoma Constitution provides, in part, that the trial division "is vested, subject to the provisions of this Article, with sole and exclusive jurisdiction to hear and determine causes arising thereunder." Article VIIA, §1 of the Oklahoma Constitution provides that the Court on the Judiciary will hear all Petitions for removal, and that:

> Cause for removal from office shall be: Gross neglect of duty; corruption in office; habitual drunkenness; commission while in office of any offense involving moral turpitude; gross partiality in office; oppression in office; or other grounds as may be specified hereafter by the legislature.

Okla. Const. art. VIIA, §1(b). The Court on the Judiciary receives Petitions against judges, based upon investigations undertaken by the Council on Judicial Complaints.

STATUTORY ORIGINS AND FUNCTION OF THE COUNCIL ON JUDICIAL COMPLAINTS

¶4 The Council on Judicial Complaints was created by statute[1] in 1974. The Council stands as an executive agency that can receive and investigate complaints against judges and, thereafter, determine whether such judges should "be made the subject of action before the Court on the Judiciary for the purpose of removal, reprimand or admonition, or . . . be dismissed."[2] Upon a finding that a Petition for removal ought to be filed against a judge, the Council has the option of presenting the request to this Court, so that this Court might file a Petition for removal against the responding judge with the Court on the Judiciary. *See* 20 O.S.2011 §1659. As stated above, the Council did, in fact, make such a request to the Court in this matter.

CONSTITUTIONAL RIGHT OF THIS COURT TO ACT

¶5 Title 20, §1659 appears to suggest that once this Court is in receipt of such a recommendation from the Council, it has a non-discretionary mandatory duty to immediately file a Petition with the Oklahoma Court on the Judiciary.[3] However, in *Haworth v. Court on the Judiciary, Trial Division,* 1975 OK JUD 1, 684 P.2d 1217, it was determined that §1659 was unconstitutional in purporting to convert a constitutionally created discretionary duty into a legislatively created mandatory duty. Thus, upon receipt of a report from the Council, this Court must exercise its Constitutional discretion to determine whether or not to file the Petition with the Court on the Judiciary.

ANALYSIS OF THE MAJORITY'S CONCLUSIONS

¶6 The majority concludes, before a Petition has been filed or a trial commenced, that the violations alleged in the Council's report could not possibly result in the removal of the judge. Specifically the majority makes the finding that the allegations do not "warrant the filing of a petition for removal." I take issue with the proposition that a case for removal is impossible to make. Justice Winchester addressed this and strongly disagreed with the majority's assessment in his dissent, and I join him in dissenting. Perhaps the responding judge has committed removable offenses, and perhaps the judge has not--but it is imprudent for us to decide that question without a trial, based merely on the report and briefs. In this case, the Court has, in effect, *sua sponte* granted a directed verdict against the Council's "removal" request, granted a directed verdict in favor of the proposition that sanctions are warranted, and deferred the balance of the proposed Petition until other related proceedings have concluded.

¶7 Upon concluding that the requested Petition for removal is not warranted, the majority invokes *Mattingly v. Court on Judiciary, Trial Division*, 2000 OK JUD 1, 8 P.3d 943, in support of the proposition that the pursuit of claims for relief seeking less-than-removal from office cannot advance before the Court on the Judiciary. Finally, the majority cites the Preface to the Rules Governing Complaints on Judicial Misconduct, 5 O.S.2011, Ch. 1, App. 4-A, in support of the proposition that this Court has exclusive jurisdiction for judicial misconduct offenses that fall below the "removal from office" standard.

¶8 My concern is that I believe that the Court is prematurely exercising jurisdiction in this matter based upon the misplaced concern that the Court on the Judiciary would lack power to take corrective action if a removal case were presented to them and found to fall short of removal. While I agree with the majority's citation to *Mattingly* as the applicable law, and I further agree that a Petition to the Court on the Judiciary expressly seeking relief less than removal is void for want of jurisdiction, these are not the facts in the present case. *Mattingly* only stands for the proposition that the Court on the Judiciary lacks jurisdiction to impose lesser sanctions if the Petition expressly does not seek removal of the responding judge:

> In *State ex rel. Simms v. McCallister,* 1986 OK JUD 1, 721 P.2d 427, we affirmed the imposition of a four-month suspension on a judge by the Trial Division. The Attorney General argued before the Trial Division in this matter that *McCallister* stands for the proposition that the Court on the Judiciary has jurisdiction to impose sanctions other than removal or compulsory retirement. ***McCallister*, however, is inapposite here as the Trial Division in that case found, with ample record support, that the judge's conduct "constitute[s] oppression in office." Further, the petitioner in *McCallister* had sought the judge's removal from office.** Thus, in *McCallister,* unlike this matter, the Court on the Judiciary's jurisdiction was properly invoked because the petitioner sought the judge's removal and alleged facts to support its allegations.

Mattingly, 2000 OK JUD 1, ¶20 (emphasis added).

¶9 The present case is thus not consistent with *Mattingly* (wherein removal was not alleged or even requested in the Trial Division), but it is on all fours with *McCallister,* wherein removal was requested and a lesser sanction was approved after a trial had been conducted by the Court on the Judiciary. As to the reference to "ample evidence" against the responding judge, it is premature to ascertain whether a trial in this case would have had "ample evidence" of wrongful conduct, since the majority is unfortunately truncating the matter prior to the preparation and conduct of a proper trial.

¶10 We have stretched construction of *Mattingly* beyond the breaking point if we read it to say that the Court on the Judiciary is utterly powerless to act if removal from office is requested by the Council, but the Supreme Court elects to weigh the evidence prior to trial on the merits and conclude that the evidence will not justify removal of the Judge by the Court on the Judiciary. The reasoning in *Mattingly* clarifies the teachings of *McCallister* – where removal is requested and is a legitimate potential consequence of the request, it properly proceeds forward by Petition. Upon presentation to the Court on the Judiciary, that body may either grant the request for removal, impose some intermediate sanction, or deny the request entirely and dismiss the Petition. *Mattingly* did not overrule *McCallister* – it was factually and legally distinguishable, and it very clearly left intact the teachings of *McCallister.*

¶11 As to the Court's citation to the Preface to the Rules Governing Complaints on Judicial Misconduct,[4] please note that Rule 3 provides:

> If, after an investigation, the Council on Judicial Complaints finds evidence of misconduct that does not warrant removal from office or compulsory retirement, they may refer the matter to the Chief Justice for review.

Rule 3, Rules Governing Complaints on Judicial Misconduct, 5 O.S.2011, Ch. 1, App. 4-A (emphasis added). Let the record be perfectly clear, the Council did not make a request to this Court for punishment of less-than-removal in the present case. The decision of this Court to refrain from presenting this matter to the Court on the Judiciary was not because of any request of the Council. Rather, this Court elected to pursue the present course in spite of the Council's express request that a Petition for removal of the judge should be filed with the Court on the Judiciary.[5]

CONSEQUENCES OF THE MAJORITY'S DECISION

A. A Trial with All Accompanying Discovery and Due Process Protections will not happen.

¶12 **(1) The Responding Judge is deprived of a trial.** While the majority may conclude that the allegations forwarded by the Council on Judicial Complaints do not qualify as "removable" offenses, the result of this conclusion is that the responding judge is forever procedurally deprived of the opportunity to have a trial before the Court on the Judiciary to prove that the offenses alleged are either untrue, or are unworthy of any punishment.

¶13 **(2) The Public is deprived of a trial.** Conversely, if the allegations against the judge are capable of being proven, and the prosecution were to be able to meet its burden of proof as to any oppressive, corrupt, or wrongful intent, then the public is deprived of the opportunity of being protected by having such conduct promptly adjudicated.

¶14 **(3) Both sides have lost the procedural mechanisms (before and during trial) which are designed into our existing system.** As of this moment, no finder of fact has taken testimony and weighed conflicting factual positions. We have had no pre-trial discovery and no trial preparation in which evidence is obtained, sifted, and evaluated by the interested parties.[6] We cannot yet fully know how innocuous or culpable the facts of this case may eventually prove to be. I see no reason to prevent the process from fully and fairly distilling the truth. While I do commend the Council on Judicial Complaints for a thorough and exhaustive investigation, an investigation is not a trial, and the Council's report was premised upon the expectation that a trial would shortly ensue. The judge was granted an opportunity to file a response to the Council's recommendation prior to this Court's exercise of jurisdiction, but the trading of briefs is simply not the crucible of truth found in an actual trial.

B. The proper way forward has been made ambiguous for the Council on Judicial Complaints in future cases wherein misconduct is suspected.

¶15 In the present case, the Court has concluded that the Council on Judicial Complaints failed to measure the alleged offenses properly in submitting a removal request. Without a clear delineation of how the report was deficient in setting forth facts that may justify removal, the Council is left without a proper way to measure future cases.

CONCLUSION

¶16 I have every confidence that the majority is proceeding in a fashion that they have concluded in good faith will best protect the public, fairly protect the rights of the accused, and uphold the independence and integrity of our branch of government. However, for the reasons stated above, I believe that the majority has failed to determine and follow the clear and best way forward. The Court is conflating a preliminary conclusion of what a just result may end up being (intermediate sanctions) with a properly requested potential just result (removal). We cannot truly know where justice lies until the case is tried. The complaint clearly sets forth facts that would leave open the legitimate possibility of either removal and/or lesser sanctions and/or exoneration. The Trial Division of the Court on the Judiciary is a Constitutionally created and empowered body ready, willing and able to adjudicate this case upon receipt of a Petition from this Court – this is their job, not ours.

¶17 A case may someday come before us wherein we rightfully have need to assume original jurisdiction and implement discipline outside the stricture of the Court on the Judicia-

ry after receipt of a report from the Council – but this is not that case. The Council on Judicial Complaints has properly and diligently discharged its duty and presented its recommendation to this Court. In my view, having reviewed the Council's recommendation and having carefully considered the Council's report, the applicable statutes, case law, and Constitutional provisions, and submissions of the interested parties, I believe that we should now do our duty – we should file the Petition.

¶18 I dissent.

Kuehn, S.J., with whom Kane, J., and Wiseman, S.J., join, dissenting:

¶1 While I agree with the Majority that the Supreme Court has the jurisdiction to refer this matter to the Court on the Judiciary or retain it, based on the referral by the Council on Judicial Complaints, I part from the decision to retain it. I respectfully dissent.

¶2 By retaining this case the Supreme Court is determining, without a full hearing on the merits, that Judge Coleman has violated the Code of Judicial Conduct and committed the offense of oppression in office, a constitutional violation. Given the number and nature of the allegations, I find this unfair to both Judge Coleman and the people of the State of Oklahoma. I believe the best course is to refer this case to the Court on the Judiciary to determine, after a full hearing, what violations occurred and what punishment, if any, should be imposed as a result. I agree with the Majority that not every referral warrants this procedure, and emphasize that my decision rests on the particular circumstances of this matter.

¶3 If this matter is referred to the Court on the Judiciary, that court may independently reach its own conclusions on the merits and has the authority to fashion appropriate remedies beyond removal or dismissal. No statute or rule *requires* the Court on the Judiciary to remove a respondent who has been recommended for removal by the Council. Title 20, Section 1651(2)(a) explicitly says that referral to the Court on the Judiciary is for the *"purpose of removal, reprimand, or admonition."* This plain language suggests the Court has the authority to impose a variety of punishments. And in fact, the Court has done so. In *State ex rel. Simms v. McCallister,* the Court on the Judiciary agreed the judge had committed oppression of office, rejected the recommended remedy of removal, and imposed a four-month suspension from office without pay; that punishment was upheld on appeal. 1986 OK JUD 1, 721 P.2d 427. In a later case, the Appeals Division found that, where the offense alleged was not serious enough to require removal or compulsory retirement, the Court on the Judiciary lacked "jurisdiction to reprimand, or discipline in any other way." *Mattingly v. Court on Judiciary, Trial Div.*, 2000 OK JUD 1¶ 19, 8 P.3d 943, 950. This language supports my conclusion that, in an appropriate case, the Court on the Judiciary has the authority to fashion appropriate remedies beyond removal or compulsory retirement.

¶4 I would afford Judge Coleman the opportunity for a trial by her peers, as contemplated by statute. I respectfully dissent.

Kane, J., with whom Wiseman, S.J. joins, dissenting:

1. Laws 1974, SB 480, c. 251, § 1, *et seq.*, emerg. eff. May 23, 1974, as thereafter amended.

2. 20 O.S.2011 §1651.

3. Section 1659 dictates that the statutorily authorized body receiving the complaint "shall promptly file a petition invoking the jurisdiction of the trial division of the Court on the Judiciary in accordance with subsection (a) Section 4 of Article 7-A of the Constitution of Oklahoma." 20 O.S. §1659 (emphasis added).

4. Invoked in support of the proposition that this Court has exclusive jurisdiction to determine discipline for "non-removal" classes of judicial misconduct.

5. The Court certainly has the power to undertake their proposed action in contravention of the Council's express wishes, following the Council's careful investigation – but it bears pointing out that this is what is happening.

6. Article VIIA, §3(c) of the Oklahoma Constitution provides:

> In the exercise of its jurisdiction, the Court is vested with full judicial power and authority, including the power to summon witnesses to appear and testify under oath and to compel the production of books, papers, documents, records and other evidential objects; to issue all manner of judicial and remedial process and writs, legal or equitable; to provide for discovery procedures in advance of trial; to make rules governing procedure; to grant full immunity from prosecution or punishment when deemed necessary and proper in order to compel the giving of testimony under oath or the production of books, papers, documents, records or other evidential objects. The specific enumeration of powers herein shall not derogate from the existence of other judicial power and authority in the Court, or from the exercise thereof in aid of its jurisdiction.

2019 OK 78

State of Oklahoma ex rel. Oklahoma Bar Association, Complainant, v. Jay Tayar Silvernail, Respondent.

Rule 6.2A. SCBD 6874. December 3, 2019

CORRECTED ORDER OF IMMEDIATE INTERIM SUSPENSION

¶1 On March 29, 2018, the Complainant, Oklahoma Bar Association (OBA), filed a verified complaint against the respondent, Jay Tayar Silvernail, pursuant to Rule 6 of the Rules Governing Disciplinary Proceedings (RGDP), 5 O.S.2011, ch. 1, app. 1-A. The OBA, with the concurrence

of the Professional Responsibility Commission, requests an emergency interim suspension of Respondent from the practice of law pursuant to Rule 6.2A of the RGDP.

¶2 In support, the Complainant states that in Oklahoma County District Court Case no. CF-2016-4381, a jury returned a guilty against Respondent for assault and battery with a deadly weapon for willfully and knowingly shooting a person with a handgun, with formal sentencing set for December 19, 2019. Complainant alleges that despite Respondent's incarceration pending formal sentencing, Respondent is engaging in the practice of law and operating his law office from the Oklahoma County Detention Facility by participating in telephone conversations with family members, who are not licensed to practice law, regarding the handling of clients' cases and his law practice. The Complainant alleges that Respondent spoke to family members regarding client payments, deposits of client checks into his operating account without discussion of whether the checks were for fees already earned, and transferring money between Respondent's numerous bank accounts. Complainant alleges Respondent spoke to a family member about the possibility of his formal sentencing being continued, which would allow him to continue to practice law longer, and that he could practice vicariously through other people.

¶3 Complainant alleges that Respondent has a conflict of interest in continuing to represent clients pending his formal sentencing in that Respondent's personal interest in retaining client fees paid in advance and those to be paid for his personal financial benefit is in direct conflict with his clients' interests in being competently and diligently represented. Complainant alleges that Respondent's practice of law while in custody poses an immediate threat of substantial and irreparable public harm. Complainant requests an Order of Emergency Interim Suspension; an Order directing Respondent to deposit all monies, checks, or property into his designated IOLTA client trust account so that an audit may be performed; and an Order directing Respondent to assist Complainant in accessing his CLIO accounts to determine what fees, if any, should be refunded to clients.

¶4 On October 30, this Court ordered Respondent to show cause no later than November 14, 2019, why an order of immediate interim suspension, and the other requested orders, should not be entered. On November 14, 2019, Respondent filed a Consent to entry of the requested orders. Respondent waived any objection to the Order of Emergency Interim Suspension, but stated that the Consent was not to be construed as an admission of the truth of the allegations, and reserved the right to contest the allegations of the complaint at a future hearing on the merits of the allegations.

¶5 Upon consideration of the complaint and application for an order of emergency interim suspension and orders to preserve funds, and Respondent's Consent to entry of the emergency suspension and the other requested orders, the Court finds that an Order of Emergency Interim Suspension, and orders to preserve funds, should be entered.

¶6 IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Jay Tayar Silvernail is immediately suspended from the practice of law, pursuant to Rule 6.2A of the RGDP.

¶7 Respondent Jay Tayar Silvernail is further ordered to cease all withdrawals from his client trust accounts, including but not limited to Prosperity Bank account numbered 217804274, and to permit an audit of the same by the Complainant. Respondent is ordered to deposit all monies, checks, or property entrusted to him, or anyone on his behalf, by or on behalf of his clients, into his designated IOLTA client trust account so that an audit may be performed on same. Respondent is ordered to assist Complainant in accessing his CLIO accounts to determine what fees, if any, should be refunded to clients.

¶8 Respondent Jay Tayar Silvernail is ordered to give written notices by certified mail, within 20 days from the date of this order, to all of his clients having legal business then pending of his inability to represent them and the necessity for promptly retaining new counsel. If Jay Tayar Silvernail is a member of, or associated with, a law firm or professional corporation, such notice shall be given to all clients of the firm or professional corporation, which have legal business then pending with respect to which the Respondent had substantial responsibility. Respondent shall also file a formal withdrawal as counsel in all cases pending in any tribunal. Respondent must file, within 20 day from the date of this Order, an affidavit with the Commission and with the Clerk of the Supreme Court stating that he has complied with this Order, together with a list of the clients

so notified and a list of all other State and Federal courts and administrative agencies before which the lawyer is admitted to practice. Proof of substantial compliance by Respondent with this Order shall be a condition precedent to any petition for reinstatement.

¶9 DONE BY ORDER OF THE SUPREME COURT in conference on December 2, 2019.

/s/ Noma D. Gurich
CHIEF JUSTICE

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

2019 OK 79

IN RE: Rules of the Supreme Court of the State of Oklahoma on Licensed Legal Internship (5 O.S. ch. 1 app. 6)

SCBD No. 2109. December 2, 2019

CORRECTED ORDER

¶1 This matter comes on before this Court upon an Application to Amend Rule 2.1A of the Rules of the Supreme Court of the State of Oklahoma on Licensed Legal Internship (hereinafter "Rules"). 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.

¶2 DONE BY THE SUPREME COURT IN CONFERENCE this 2ND day of DECEMBER, 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

RULES OF THE SUPREME COURT ON LICENSED LEGAL INTERNSHIP

Rule 2.1A Academic Legal Intern License

A law student not otherwise eligible for licensure under Rule 2 and enrolled in a law school academic program that requires the utilization of an intern's license must meet the following requirements in order to be eligible for a limited license as an Academic Legal Intern (Adopted May 16, 2011):

(1) Requirements

(a) Be a regularly enrolled student at an accredited law school located in the State of Oklahoma;

(b) Have successfully completed one-third (1/3) of the number of academic hours in a law school program leading to a Juris Doctor Degree required by the American Bar Association Accreditation Standards;

(c) Have a graduating grade point average at his or her law school;

(d) Have approval of his or her law school dean or the dean's designate;

(e) Have either completed or be concurrently enrolled in Professional Responsibility and Evidence Courses;

(f) ~~Successfully pass the examination required by Rule 5.2;~~ Stricken by Legal Intern Committee June 14, 2019.

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

(h) Be enrolled in a law school course that will provide direct law school faculty supervision for the student's activities under the Academic Legal Intern License, including physical presence of a supervising faculty member at all court appearances.

(2) Limitations

All limitations and procedures which apply to the regular limited license shall apply to the academic limited license, except the Academic Legal Intern shall make no court appearance without a faculty supervisor present. The Academic Legal Intern's license may only be used in conjunction with enrollment in a program established pursuant to Rule 4.1(a).

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

(~~3~~4) Expiration of Academic Legal Intern License

Once an Academic Legal Intern is no longer enrolled in a course described in Rule 2.1A(1)(h), the student's Academic Legal Intern License must be placed on inactive

status. If the student ~~wants~~ desires to ~~use~~ obtain a Limited Legal Intern License thereafter, ~~that~~ the student shall ~~have to~~ meet all qualifications for a Limited Legal Intern License under Rule 2.1 or Rule 2.2, including the submission of a current ap-plication, ~~and~~ payment of an application fee, and passing the examination required by Rule 5.2. ~~however, the student shall not have to retake the Legal Internship Examination.~~

EXHIBIT A

RULES OF THE SUPREME COURT ON LICENSED LEGAL INTERNSHIP

Rule 2.1A Academic Legal Intern License

A law student not otherwise eligible for licensure under Rule 2 and enrolled in a law school academic program that requires the utilization of an intern's license must meet the following requirements in order to be eligible for a limited license as an Academic Legal Intern (Adopted May 16, 2011):

(1) Requirements

(a) Be a regularly enrolled student at an accredited law school located in the State of Oklahoma;

(b) Have successfully completed one-third (1/3) of the number of academic hours in a law school program leading to a Juris Doctor Degree required by the American Bar Association Accreditation Standards;

(c) Have a graduating grade point average at his or her law school;

(d) Have approval of his or her law school dean or the dean's designate;

(e) Have either completed or be concurrently enrolled in Professional Responsibility and Evidence Courses;

(f) Stricken by Legal Intern Committee June 14, 2019.

(g) Be registered with the Oklahoma Board of Bar Examiners or provide a criminal background report from the State of Oklahoma; and

(h) Be enrolled in a law school course that will provide direct law school faculty supervision for the student's activities under the Academic Legal Intern License, including physical presence of a supervising faculty member at all court appearances.

(2) Limitations

All limitations and procedures which apply to the regular limited license shall apply to the academic limited license, except the Academic Legal Intern shall make no court appearance without a faculty supervisor present. The Academic Legal Intern's license may only be used in conjunction with enrollment in a program established pursuant to Rule 4.1(a).

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

(4) Expiration of Academic Legal Intern License

Once an Academic Legal Intern is no longer enrolled in a course described in Rule 2.1A(1)(h), the student's Academic Legal Intern License must be placed on inactive status. If the student desires to obtain a Limited Legal Intern License thereafter, the student shall meet all qualifications for a Limited Legal Intern License under Rule 2.1 or Rule 2.2, including the submission of a current application, payment of an application fee, and passing the examination required by Rule 5.2.

INVITATION

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**.

2019 OK CR 29

IN RE: REVISION OF PORTION OF THE RULES OF THE COURT OF CRIMINAL APPEALS

NO. CCAD-2019-2. December 5, 2019

ORDER AMENDING RULE 3.5 C. AND REPUBLISHING PORTION OF THE RULES OF THE COURT OF CRIMINAL APPEALS

¶1 We find that amendment of Rule 3.5 C. of the Rules for the Oklahoma Court of Criminal Appeals is necessary to establish the newly adopted format for citation of authorities. Pursuant to the provision of Section 1051(b) of Title 22 of the Oklahoma Statutes, we hereby amend, adopt, promulgate and republish portions of the *Rules of the Oklahoma Court of Criminal Appeals,* 22 O.S., Ch. 18, App. (2019). As set forth, paragraphs remaining unchanged are noted; underlined text indicates new text; and text with strike-through marks indicates deleted text.

¶2 **SECTION III. PERFECTING AN APPEAL IN THE COURT OF CRIMINAL APPEALS**

Rule 3.5 C. Argument and Citation of Authorities.

(1) Paragraph (1) remains unchanged.

(2) ~~Citation to opinions of the Oklahoma Court of Criminal Appeals shall include citations to the Court's official paragraph citation form. The parallel cite to the relevant edition of the Pacific Reporter is also required. Effective September 1, 2014, citation to opinions of the Oklahoma Court of Criminal Appeals shall be as follows:~~

~~(a) Oklahoma Court of Criminal Appeals Opinions in which mandate has issued prior to January 1, 1954, shall include citations to the official paragraphed citation form and to the Pacific Reporters. Parallel citation to Oklahoma Criminal Reports is strongly encouraged. Examples of permissible citation form include:~~

~~(i) *Hunter v. State,* 1953 OK CR 155, 97 Okl. Cr. 402, 264 P.2d 997.~~

~~(ii) *Hunter v. State*, 1953 OK CR 155, 97 Okl. Cr. 402, 264 P.2d 997, 998.~~

~~(iii) *Hunter v. State*, 1953 OK CR 155, 97 Okl.Cr. 402, 403, 264 P.2d 997, 998.~~

~~(iv) *Hunter v. State*, 1953 OK CR 155, 264 P.2d 997.~~

~~(v) *Hunter v. State*, 1953 OK CR 155, 264 P.2d 997, 998.~~

~~(b) Oklahoma Court of Criminal Appeals Opinions in which mandate has issued after January 1, 1954, shall include citation to the official paragraph citation form public domain format of the Oklahoma Court of Criminal Appeals and to the relevant edition of the Pacific Reporter. Examples of permissible citation form include:~~

~~(i) *Burns v. State* , 1955 OK CR 46, 282 P.2d 258.~~

~~(ii) *Burns v. State*, 1955 OK CR 46, 282 P.2d 258, 259.~~

~~(iii) *Burns v. State*, 1955 OK CR 46, ¶ 9, 282 P.2d 258, 259.~~

~~In "*Burns v. State*, 1955 OK CR 46, ¶ 9, 282 P.2d 258" - "1955" refers to the year the mandate issued, "OK CR" is the court designation for the Oklahoma Court of Criminal Appeals, "46" is the number of that 1955 opinion assigned by the Court, "¶ 9" is paragraph number 9 of the opinion as designated by the Court, and "282 P.2d 258" is the parallel citation to the Pacific 2nd reporter.~~

~~(c) An opinion cited subsequent to issuance of the mandate but prior to official publication shall include citation to the Oklahoma Bar Journal and the official paragraph citation form public domain format of the Oklahoma Court of Criminal Appeals. Examples of permissible citation form include:~~

~~(i) *Robinson v. State*, 1997 OK CR 24, 68 OBJ 1379.~~

~~(ii) *Robinson v. State*, 1997 OK CR 24, 68 OBJ 1379, 1381.~~

~~(iii) *Robinson v. State*, 1997 OK CR 24, ¶ 3, 68 OBJ 1379, 1381.~~

~~(d) Opinions of the Oklahoma Court of Criminal Appeals issued for publication shall be published on the Oklahoma State Courts Network at www.oscn.net. Such opinions may not be cited as authority in a subsequent appellate opinion nor used as authority by a trial court until the mandate in the matter has issued. After the mandate has issued, the opinion as published on the Web site shall constitute the official paragraph citation form public domain format of the Oklahoma Court of Criminal Appeals. *See* Rule 1.0(D) for citation to Rules.~~

(2) Opinions of the Oklahoma Court of Criminal Appeals issued for publication shall be published on the Oklahoma State Court Network website as www.oscn.net. Opinions published on the website shall be the official public domain versions of the Court's opinions. *See* Rule 1.0(D) for citation to Rules.

(a) Citation to opinions of the Oklahoma Court of Criminal Appeals shall include citation to the official public domain citation form and to the relevant edition of the Pacific Reporter. Parallel citation to Oklahoma Criminal Reports is permitted but not required. The official public domain format includes the style of the case, the year the mandate issued, the "OK CR" designation, and the number assigned to the opinion by the Court. Citations shall include pinpoint citations to paragraph and/or page numbers. Examples of permissible parallel citation form include:

(i) *Musonda v. State*, 2019 OK CR 1, 435 P.3d 694.

(ii) *Musonda v. State*, 2019 OK CR 1, ¶ 7, 435 P.3d 694, 696.

~~(b) An opinion cited subsequent to issuance of the mandate but prior to official publication shall include citation to the Oklahoma Bar Journal and the official public domain format of the Oklahoma Court of Criminal Appeals. Examples of permissible parallel citation form include:~~

~~(i) *Robinson v. State*, 1997 OK CR 24, 68 OBJ 1379.~~

~~(ii) *Robinson v. State*, 1997 OK CR 24, 68 OBJ 1379, 1381.~~

~~(iii) *Robinson v. State*, 1997 OK CR 24, ¶ 3, 68 OBJ 1379, 1381.~~

(3) Paragraph (3) remains unchanged.

(4) ~~Citation to opinions of the United States Supreme Court shall include each of the following: U.S., S.Ct., L.Ed. (year).~~

(4) Citation to opinions of the United States Supreme Court shall include: Case name, volume, U.S., first page of case (year). If a U.S. citation is unavailable cite as follows: case name, volume, S.Ct. first page of case (year). Citations shall include pinpoint citations to page numbers.

(5) Paragraph (5) remains unchanged.

(6) Paragraph (6) remains unchanged.

¶3 **IT IS THEREFORE ORDERED ADJUDGED AND DECREED** that these amendments shall become effective on the date of this order.

¶4 **IT IS SO ORDERED.**

¶5 **WITNESS OUR HANDS AND THE SEAL OF THIS COURT** this 5th day of December, 2019.

/s/ DAVID B. LEWIS,
Presiding Judge

/s/ DANA KUEHN,
Vice Presiding Judge

/s/ GARY L. LUMPKIN, Judge

/s/ ROBERT L. HUDSON, Judge

/s/ SCOTT ROWLAND, Judge

ATTEST:
JOHN HADDEN
Clerk

Calendar of Events

December

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 video-conference; Contact Amy E. Page 918-208-0129

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

24-25 **OBA Closed** – Christmas

January

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

3 **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

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

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

OBA Law Day Committee meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City with BlueJeans; Contact Ed Wunch 405-548-5087

16 **OBA Board of Governors meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City; Contact John Morris Williams 405-416-7000

17 **OBA Board of Governors Swearing-In Ceremony;** 10:30 a.m.; Oklahoma Judicial Center; Contact John Morris Williams 405-416-7000

20 **OBA Closed** – Martin Luther King Jr. Day

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

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

February

6 **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

7 **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

2019 OK CIV APP 71

VERDA JEAN KEYS SANDERS, Plaintiff/Appellant, vs. MICHAEL COLE, D.O., an individual; JACK MOCNIK, JR., M.D., an individual; JOHN FITTER, M.D., an individual; ST. JOHN MEDICAL CENTER, INC., a company doing business in the State of Oklahoma, Defendants/Appellees, and JUSTIN THANKACHAN, M.D., an individual; THOMAS NUNN, D.O., an individual; SOUTH TULSA EAR, NOSE AND THROAT, PC, a company doing business in the State of Oklahoma; MAX SWENSON, PA-C, an individual; TIMOTHY McCAY, D.O., an individual; HILLCREST HEALTHCARE SYSTEMS, INC., formerly known as SOUTHCREST HOSPITAL, companies doing business in the State of Oklahoma; GAURANGI ANKLESARIA, M.D., an individual; and CREST CARE FAMILY MEDICINE, PLLC, a company doing business in the State of Oklahoma, Defendants.

Case No. 114,713. April 25, 2019

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

HONORABLE MARY F. FITZGERALD, TRIAL JUDGE

VACATED AND REMANDED FOR FURTHER PROCEEDINGS

Iris A. Philbeck, Sapulpa, Oklahoma, for Plaintiff/Appellant

Charles H. Moody, Leslie C. Weeks, RODOLF & TODD, Tulsa, Oklahoma. for Defendant/Appellee St. John Medical Center

Thomas A. LeBlanc, Matthew B. Free, Dan W. Ernst, BEST & SHARP, Tulsa, Oklahoma, for Defendants/Appellees Michael Cole, D.O., Jack Mocnik, Jr., M.D., & John Fitter, M.D.

JOHN F. FISCHER, PRESIDING JUDGE:

¶1 Verda Jean Keys Sanders appeals a judgment in this medical negligence case in favor of doctors Michael Cole, Jack Mocnik, Jr., John Fitter (the defendant radiologists) and St. John Medical Center, Inc. Because the district court erred in excluding expert testimony offered by Sanders and erred in granting a motion for directed verdict in favor of St. John, we vacate the judgment entered in favor of the defendants and remand this case for further proceedings.[1]

BACKGROUND

¶2 Sanders filed this suit alleging that various physicians misdiagnosed and failed to properly treat the cholesterol granuloma near the base of her skull.[2] As a result, Sanders claimed that she suffered severe and permanent injuries, including loss of hearing, loss of sight and facial paralysis that would not have occurred but for the physicians' negligence. She sued St. John, alleging it was responsible for the actions of the physicians who failed to correctly diagnose and properly treat her condition. The relevant facts are not disputed. The legal consequences of those facts and the district court's rulings in regard thereto are dispositive of this appeal.

¶3 On December 26, 2009, Sanders called an ambulance and told the driver she wanted to be taken to the St. John emergency room. She complained of dizziness, weakness, a headache, severe pain in her left ear, blurred vision and slurred speech. Sanders was evaluated by an emergency room physician, who ordered a CT scan of her head and a CT angiogram of her head and neck. A neurologist at St. John also ordered an MRI of her brain. Although it appears that physicians at St. John initially reviewed these studies, eventually they were referred to the defendant radiologists for interpretation. As a result, Dr. Fitter interpreted the CT scan, Dr. Mocnik interpreted the CT angiogram, and Dr. Cole interpreted the MRI. At some point, Sanders was admitted to St. John under the care of Dr. Thankachan, a hospitalist employed at St. John. Sanders was diagnosed as having Bell's palsy. Dr. Thankachan prescribed antibiotics for a sinus infection. He discharged Sanders on December 29, 2009.

¶4 Sanders returned to St. John on January 20, 2010, complaining of the same symptoms. Again, an emergency room physician employed by St. John ordered a CT scan of Sanders' head. Dr. Fitter interpreted the January 20 study. Sanders was not admitted. She was again diag-

nosed with Bell's palsy and advised that the symptoms would subside over time.

¶5 Sanders returned to St. John on February 18, 2010, complaining of the same symptoms. She was again seen in the emergency room, where another CT scan of her head was ordered. Dr. Cole interpreted the February 18 study. Sanders was prescribed steroids for Bell's palsy and sent home.

¶6 Sanders returned a fourth time to St. John on March 6, 2010. In addition to her previous symptoms, Sanders complained of partial facial paralysis, speech impairment and loss of hearing. She was again prescribed steroids for Bell's palsy and sent home.

¶7 Thereafter, Sanders was seen at other facilities by several other physicians who are no longer involved in this case. On December 21, 2010, Sanders saw Dr. Connor, a neurologist. He reviewed the radiologic studies performed at St. John and diagnosed Sanders as having a tumor at the base of her skull near her ear canal. Dr. Connor referred Sanders to a surgeon for further treatment. That treatment was unsuccessful and Sanders was left with permanent facial paralysis and hearing loss.

¶8 Sanders' case was tried to a jury. After the close of evidence, the district court granted St. John's motion for a directed verdict. The jury then returned a unanimous verdict in favor of the defendant radiologists, which the district court accepted and on which it entered the judgment that is the subject of this appeal. Sanders filed a motion for new trial, which the district court denied. This appeal followed.

STANDARD OF REVIEW

¶9 Sanders could have appealed both the judgment and the denial of her motion for new trial. "[I]f the decision on the motion [for new trial] was against the moving party, the moving party may appeal from the judgment . . . from the ruling on the motion, or from both." 12 O.S.2011 § 990.2(A). However, she did not appeal the ruling on her motion for new trial. Her appeal is confined to four errors of law she contends the district court made during the trial that warrant reversal of the judgment. Issues of law are reviewed by an appellate court pursuant to the *de novo* standard. *Christian v. Gray,* 2003 OK 10, ¶ 41, 65 P.3d 591. *De novo* review is plenary, independent and nondeferential. *Neil Acquisition L.L.C. v. Wingrod Inv. Corp.*, 1996 OK 125, n.1, 932 P.2d 1100.

ANALYSIS

¶10 Of the four assignments of error raised by Sanders, we find that two are dispositive: (1) the district court erred in refusing to permit Sanders' treating physician to testify as an expert witness; and (2) the district court erred in granting St. John's motion for directed verdict.

I. The Expert Witness Issue

¶11 Dr. Connor was the first physician to discover Sanders' tumor. He was offered as a fact witness to testify as one of Sanders' treating physicians. However, he was also listed as an expert witness. As evident from his pretrial deposition, Dr. Connor intended to testify that Sanders' tumor was apparent from the radiologic studies performed at St. John, including the first studies performed on December 26, 2009. It was Dr. Connor's opinion that the failure to correctly diagnose Sanders' condition when she was being treated at St. John caused her subsequent and permanent injuries.

¶12 The defendants filed a motion in limine arguing that (1) Dr. Connor was not a radiologist and, therefore, could not render an expert opinion regarding the standard of care applicable to radiologists; and (2) as a fact witness, Dr. Connor could not testify as an expert regarding causation. The defendants supported their motion in limine with the affidavit of their own expert witness, a board certified radiologist. She stated that the defendant radiologists had not breached the standard of care for radiologists when they failed to detect the tumor in Sanders' head. The district court granted the motion in limine.

¶13 At trial, Dr. Connor was asked if, in his opinion, "missing this diagnosis of her tumor in her head caused her damages." The defendants renewed their objection based on the ruling on their motion in limine. The district court conducted a lengthy discussion out of the presence of the jury. At the conclusion of the discussion and argument, the court ruled that Dr. Connor was testifying as a fact witness and as Sanders' treating physician; therefore, he could not testify as an expert witness. The district court also ruled that, because Dr. Connor was not a radiologist, he could not give an opinion regarding the standard of care for radiologists. The court limited the scope of Dr. Connor's testimony as follows:

> Dr. Connor is here to testify about from the time he saw Ms. Sanders, what he saw,

> what he diagnosed, what his treatment of her is. He can talk about what he saw when he looked at the images, but he can't testify as to a standard of care because he's not a radiologist.

That was error.

¶14 "The facts or data in the particular case upon which an expert bases an opinion or inference may be those **perceived by** or made known to the expert at **or before** the hearing." 12 O.S.2011 § 2703 (emphasis added). The test for competency of a fact witness is whether the witness has "personal knowledge" of the matter. 12 O.S.2011 § 2602. As the district court recognized, a treating physician has personal knowledge of certain facts regarding a patient's condition. But that does not preclude a treating physician from also rendering an opinion as an expert regarding those facts. The defendants have not cited any authority to support the proposition that a fact witness cannot also testify as an expert witness under appropriate circumstances, and we find none. Even a lay witness is permitted to give opinion testimony in certain circumstances. 12 O.S.2011 § 2701. The defendants did not challenge Dr. Connor's qualifications as a neurologist. Therefore, it was error to exclude his expert opinion based on the facts he perceived as Sanders' treating physician. "In Oklahoma a physician treating a patient may use a medical history provided by the patient when making an opinion on causation of the patient's injury." *Christian v. Gray*, 2003 OK 10, ¶ 29, 65 P.3d 591.

¶15 Further, the defendants' argument that Dr. Connor cannot testify as an expert because he is a neurologist and the defendants are radiologists was specifically rejected in *Smith v. Hines*, 2011 OK 51, 261 P.3d 1129. In that case, the doctor defendant argued that because the plaintiff's expert was a neurologist, not an orthopedic surgeon, he was not qualified as an expert to evaluate any damage that occurred during orthopedic surgery. The Court found the defendant's argument "unconvincing." *Id.* n.12. That finding was confirmed in the second *Smith* case. *Smith v. Hines*, 2013 OK 65, ¶ 1, 362 P.3d 646 ("We found that argument unconvincing in [*Smith I*] and we do so here as well.").

¶16 The defendants argue that *Smith* is distinguishable because it involved a summary judgment ruling, and they raise an evidentiary objection to Dr. Connor's testimony. They contend that *Smith* stands only for the proposition that a neurologist's opinion regarding the causation of nerve damage after knee surgery is sufficient to establish a question of fact precluding summary judgment, not that such opinion would be admissible at trial regarding the standard of care. The purported distinction is unclear. "A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated." 12 O.S.2011 § 2056(E). If the Supreme Court found the neurologist's opinion in *Smith* sufficient for summary judgment purposes, it "would be admissible in evidence." *Id.* The defendants' attempt to distinguish *Smith* is unpersuasive.

¶17 Consequently, the fact that Dr. Connor is not certified in the same specialty as the defendant radiologists does not preclude him from being qualified as an expert witness in this case.

> In Oklahoma the testimony of an expert is controlled by the applicable statutes found in the Oklahoma Evidence Code, 12 O.S. [2011] § 2702 (Testimony by Experts); § 2703 (Bases of Opinion Testimony by Expert); § 2704 (Opinion on Ultimate Issue); and § 2705 (Disclosure of Facts or Data Underlying Expert Opinion).

Christian v. Gray, 2003 OK 10, ¶ 5, 65 P.3d 591 (footnotes omitted). Section 2702 establishes a two-pronged test for determining the admissibility of expert witness testimony: "whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592, 113 S. Ct. 2786, 2796 (1993) (adopted by the Oklahoma Supreme Court in *Christian v. Gray*, 2003 OK 10, ¶¶ 9, 14).

¶18 The defendants did not file a "*Daubert* motion" to challenge Dr. Connor's qualifications as a neurologist. Consequently, we are only concerned with the second, "assist the trier of fact" prong of the *Daubert* test: "This requirement 'goes primarily to relevance.'" *Christian v. Gray*, 2003 OK 10, ¶ 9 (quoting *Daubert*, 509 U.S. at 591). The defendants' argument is a simple one; only physicians trained as radiologists can testify regarding whether a radiologist made a mistake by not finding Sanders' tumor. We agree with the concurring Opinion in *Gaines v. Comanche County Medical Hospital*, 2006 OK 39, 143 P.3d 203. **"No profes-**

sion will be permitted to monopolize the expertise in any field of scientific knowledge if another is shown to possess like or equal insight into the matter that lies under judicial inquiry." *Id.* ¶ 12 (Opala, J., with whom Watt, C.J., and Colbert, J., join concurring) (emphasis in original) (footnote omitted).

¶19 Fundamentally, the defendants' argument misconstrues the purpose of the standard of care.

> A medical malpractice claim, like all negligence claims, contains three elements: (1) a duty owed by the defendant to protect the plaintiff from injury, (2) a failure to properly exercise or perform that duty, and (3) plaintiff's injuries proximately caused by the defendant's failure to exercise the required duty of care.

Nelson v. Enid Med. Assocs., Inc., 2016 OK 69, ¶ 8, 376 P.3d 212 (footnote omitted). The standard of care is directed at the second element. *See also* Okla. Uniform Jury Instructions - Civil No. 14.2: "In [(diagnosing the condition of)/ treating/(operating upon)] a patient, a specialist must use [his/her] best judgment and apply with ordinary care and diligence the knowledge and skill that is possessed and used by other specialists in good standing engaged in the same special field of practice at that time."

¶20 The defendants contort the standard of care element into an argument that only a radiologist can determine if another radiologist made a mistake. Clearly there are areas of specific knowledge primarily within the expertise of radiologists, but they are not involved here. The ability to identify Sanders' tumor was, according to Dr. Connor, within the basic knowledge acquired by all medical students. The defendant radiologists may disagree, but this record does not establish that only a radiologist would be qualified by "knowledge and skill" to testify whether the radiologic studies done at St. John showed that Sanders had a tumor. *Id.*

¶21 The standard of care describes the quality of care the defendant radiologists were required to provide to Sanders. It does not limit the evidence admissible to prove that the defendant radiologists did or did not discharge their duty to provide that care, except in the most general sense. And, as the *Smith* cases make clear, "the same special field of practice" does not necessarily mean the same discrete and previously recognized medical specialty. It includes those whose training and experience qualify them to render an opinion regarding the "ordinary care and diligence" required to treat a patient in any particular situation.

¶22 For that reason, the defendants' argument ignores the evidentiary analysis required by the second prong of the *Daubert* test. That analysis "is a flexible one, and focuses on the evidentiary relevance and reliability underlying the proposed submission, and not on the conclusions they generate." *Christian v. Gray,* 2003 OK 10, ¶ 8, 65 P.3d 591 (citation omitted). '"[W]itnesses may be competent to testify as experts even though they may not, in the court's eyes, be the 'best' qualified. Who is 'best' qualified is a matter of weight upon which reasonable jurors may disagree.'" *Nelson v. Enid Med. Assocs., Inc.*, 2016 OK 69, ¶ 36, 376 P.3d 212 (quoting *Feliciano-Hill v. Principi,* 439 F.3d 18, 25 (1st Cir. 2006)). *See also Gaines v. Comanche Cnty. Med. Hosp.*, 2006 OK 39, n.11, 143 P.3d 203 (Opala, J., with whom Watt, C.J., and Colbert, J., join concurring) (noting that the value of expert witnesses' testimony is for the trier of fact to determine). The defendants may argue that a radiologist is "best" qualified to determine whether Sanders' tumor should have been discovered by the defendant radiologists who first reviewed the radiologic studies done at St. John. That does not mean, however, that any other doctor would be unqualified to provide relevant evidence on that issue. And that is the real issue raised by the defendants' motion in limine.

¶23 In his deposition, Dr. Connor testified that "all doctors look at x-rays . . . not all knowledge is confined to a radiologist." He testified that all medical students take radiology as one of the "basics that one learns." Dr. Connor testified that in addition to this basic training, he was a board certified neurologist with years of experience interpreting radiologic studies like those performed on Sanders at St. John. Dr. Connor testified that he discovered an abnormality on the December 26, 2009 studies within fifteen minutes, during the first time he looked at them. He testified that he did not think it required a radiologist to see Sanders' tumor, that it was a large tumor, and: "It takes two seconds to see the thing, you know." Dr. Connor testified in his deposition that as a result of the delay in appropriate treatment, Sanders suffered hearing loss and permanent paralysis of her face.[3] Finally, although Dr. Connor refused to testify that any of the radiologists

breached the standard of care applicable to radiologists, he did testify that they made a "gross error," a "pretty blatant mistake" that "had huge consequences."

¶24 Ultimately, the defendants' argument that Dr. Connor is not qualified to testify as an expert relies on the fact that Dr. Connor would not testify whether the defendant radiologists breached the standard of care for a radiologist.[4] That is not the evidentiary issue relevant to *Daubert*'s second prong. Whether the defendant radiologists breached the applicable standard of care is for the jury to determine. *Nelson*, 2016 OK 69, ¶ 9. The *Daubert* issue is whether Dr. Connor's testimony will "assist" the jury in deciding that issue. "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion . . . ." 12 O.S. Supp. 2013 § 2702. The Supreme Court held in *Smith v. Hines*, 2011 OK 51, 261 P.3d 1129, that a neurologist was qualified to render an opinion regarding the causation of injuries suffered after an orthopedic surgery. *Id.* ¶ 20. In *Nelson v. Enid Medical Associates, Inc.*, 2016 OK 69, 376 P.3d 212, the Court held that a hospitalist is qualified to render an opinion regarding whether a surgeon's four-hour delay in reviewing a CT scan and starting a patient on antibiotics contributed to the patient's death. *Id.* ¶¶ 54, 61. We find no difference between a neurologist's or hospitalist's opinion testimony regarding a surgeon's negligence and a neurologist's testimony regarding any negligence by these radiologists. The district court erred as a matter of law when it excluded the expert opinion testimony of Dr. Connor. *Id.* ¶ 11 (citing *Christian v. Gray*, 2003 OK 10, ¶ 43, 65 P.3d 591).

¶25 In their petition for rehearing, the defendant radiologists argued that this Court could not reverse a jury verdict without reviewing Dr. Connor's trial testimony. During the oral argument, they argued that the exclusion of Dr. Connor's expert testimony was harmless because Dr. Connor testified about causation despite the district court's ruling. We now have the trial testimony of Dr. Connor and do not find any testimony by him to the effect that, in his opinion, the failure of the radiologists to correctly diagnose Sanders' tumor caused her permanent injuries. In fact, counsel for the defendant radiologists renewed his motion in limine objection on several occasions after the district court's initial ruling to prevent Dr. Connor from testifying regarding the role of the radiologists in causing Sanders' injuries. The district court's error of law in excluding Dr. Connor's expert testimony was not cured by Dr. Connor's trial testimony.[5]

II. The Directed Verdict Issue

¶26 In the pretrial order, Sanders listed the following grounds for recovery that she generally asserted against all of the defendants, "medical negligence/negligence" and "respondeat superior." At the close of the evidence, St. John moved for a directed verdict, arguing that Sanders had failed to prove her respondeat superior theory of liability against the hospital. St. John's motion did not address its own potential negligence. Counsel for St. John argued that no evidence had been introduced to show that St. John employed the defendant radiologists or controlled the manner in which they practiced. Counsel quoted from Sanders' trial testimony to establish that no one told Sanders when she arrived at the emergency room on December 26, 2009, that the radiologists were not employed by St. John; no one asked her which radiologist she wanted to use; no one discussed the defendant radiologists' employment status with her; and, had she known that the radiologists were not St. John employees, she would not have insisted on going to another hospital. Based on this evidence, St. John argued that Sanders had failed to prove that the hospital was vicariously liable for any negligence resulting in her injury because (1) there was no evidence of an employment or agency relationship between St. John and the defendant radiologists; (2) no one at St. John made any representation to her about the radiologists; and (3) Sanders did not change her position to her detriment because the employment status of the radiologists did not matter to her.

¶27 The district court took a different approach, finding that Dr. Thankachan was the only physician who provided treatment to Sanders at the hospital, "at least initially." The court found that, although Dr. Thankachan "relied on diagnostic images or reports from the radiologists," he, not the radiologists, was Sanders' "treating physician." The district court relied on *Weldon v. Seminole Municipal Hospital*, 1985 OK 94, 709 P.2d 1058, in which the Supreme Court refused to hold a hospital liable for the negligence of the plaintiff's physi-

cian who merely used the hospital as the "situs" for his treatment. *Id.* ¶ 8. The district court reasoned that ostensible agency would only extend liability to St. John for a physician who provided treatment at the hospital, and Dr. Thankachan had been dismissed from the case. The court commented that Sanders probably would not have changed her position had she known the defendant radiologists were not employed by St. John, "but that's a question of fact I can't answer . . . ." Nonetheless, because, according to the district court, Sanders had failed to prove that anyone other than Dr. Thankachan provided treatment to her at St. John, it granted St. John's motion for a directed verdict. This was error.

¶28 Oklahoma recognizes three circumstances in which a hospital may be held liable for negligent medical care provided at its facility: (1) violation of the hospital's duty to exercise ordinary care regarding its patients, (2) negligent care provided by one with apparent authority to provide patient care at the hospital, and (3) where the hospital is estopped to deny that the provider of negligent care is its agent. The first can result from the negligence of hospital employees, such as employed physicians and nurses, or those who are agents controlled by the hospital. *Johnson v. Hillcrest Health Ctr., Inc.*, 2003 OK 16, 70 P.3d 811 (doctor employee); *Smith v. St. Francis Hosp.*, 1983 OK CIV APP 58, 676 P.2d 279 (controlled agent doctor); *Skidmore v. Oklahoma Hosp.*, 1929 OK 117, 278 P. 334 (nurses). However, a hospital may also be held directly liable for the negligence of an independent contractor if hospital personnel are negligent in granting or continuing staff privileges to an independent contractor that the hospital knows or should know is incompetent. *Strubhart v. Perry Mem'l Hosp. Trust Auth.*, 1995 OK 10, ¶ 42, 903 P.2d 263; Okla. Uniform Jury Instructions - Civil No. 14.15.[6] In addition to a hospital's direct liability, two theories of vicarious liability have also been recognized, liability based on the doctrine of apparent authority, and liability based on estoppel. *Smith,* 1983 OK CIV APP 58, ¶ 13 (cited with approval in *Weldon v. Seminole Mun. Hosp.*, 1985 OK 94, 709 P.2d 1058). St. John failed to establish that it was entitled to a directed verdict regarding any of these theories of liability.

A. St. John's Potential Negligence

¶29 St. John argues that it is not liable because Dr. Thankachan was Sanders' only treating physician and he was dismissed from the case. In its summary judgment briefing, St. John cited *Sisk v. J.B. Hunt Transport, Inc.*, 2003 OK 69, 81 P.3d 55, for the proposition that dismissal with prejudice of an employee releases the employer from any liability based on the respondeat superior doctrine. *Sisk* is not cited in St. John's appellate briefing, but we assume it is making the same argument here. This argument not only misses the point, but also it is not supported by the evidence.

¶30 First, it does not appear from this record that Dr. Thankachan was Sanders' only "treating physician." When Sanders returned to St. John on January 20 and February 18, 2010, the emergency room physicians on duty ordered additional radiologic studies and referred those studies to one or more of the defendant radiologists for interpretation. Based on those interpretations, it does not appear that Sanders was referred to Dr. Thankachan. Regardless, she was not admitted to the hospital. And, she continued to be diagnosed with Bell's palsy rather than a brain tumor. Consequently, the fact that Dr. Thankachan was dismissed from this case does not resolve St. John's potential respondeat superior liability for the acts of its personnel responsible for Sanders' treatment subsequent to December 26, 2009.

¶31 Second, St. John's argument misses the point. To determine St. John's liability for any breach of its duty to Sanders, the jury must decide whether the defendant radiologists were negligent, and, if so, whether St. John employees knew or should have known that the radiologists were incompetent when they granted staff privileges to the defendant radiologists and referred Sanders' radiologic studies to them for interpretation. *Strubhart v. Perry Mem'l Hosp. Trust Auth.*, 1995 OK 10, ¶ 42, 903 P.2d 263. Even after the dismissal of Dr. Thankachan, the same question must be answered as to any such knowledge possessed by the St. John emergency room physicians who referred the January 20 and February 18 radiologic studies to the defendant radiologists for interpretation.[7] In addition, as Sanders correctly argues, any evidence of prior lawsuits against the defendant radiologists based on their professional competence, although apparently excluded by the district court, is relevant to this issue.

¶32 Third, it is undisputed that, on December 26, 2009, the only decision Sanders made regarding her medical treatment was to tell the

ambulance driver that she wanted to go to St. John. The emergency room physician on duty at St. John who ordered the CT scans, and the St. John neurologist who ordered the MRI, selected the defendant radiologists to interpret those studies.[8] Further, it does not appear that the decision to admit Sanders was made until after the defendant radiologists' interpretations had been provided to Dr. Thankachan. Therefore, it is reasonable to infer, as the district court did, that Dr. Thankachan relied on the defendant radiologists' reports when he was deciding that Sanders needed to be admitted to the hospital, diagnosing her condition and determining what treatment she should receive. The defendant radiologists' interpretation of Sanders' radiologic studies provided not only the basis for the initial Bell's palsy diagnosis, but also the basis for that misdiagnosis by all of Sanders' "treating physicians" at St. John.

¶33 Finally, *Weldon v. Seminole Municipal Hospital*, 1985 OK 94, 709 P.2d 1058, does not, as St. John argues, limit a hospital's potential liability for malpractice only to that committed by a "treating physician." *See, e.g., Johnson v. Hillcrest Health Ctr., Inc.*, 2003 OK 16, 70 P.3d 811 (hospital potentially liable for failure of hospital clerk to put lab results in patient's medical chart that were critical to diagnosis and treatment). We also find *Roth v. Mercy Health Center, Inc*., 2011 OK 2, 246 P.3d 1079, instructive in determining who is considered a treating physician for purposes of deciding a hospital's liability. In *Roth*, the Supreme Court reversed summary judgment in favor of a hospital where the orders and medical opinions of two private practice cardiologists consulted by the hospital's physician "were used in treating" a patient and allegedly contributed to the patient's death. *Id.* ¶ 10. Therefore, it does not matter whether the defendant radiologists met with, spoke to or had any direct contact with Sanders during her treatment. Their interpretation of the radiologic studies provided the basis for the misdiagnosis and inappropriate treatment provided to Sanders at St. John regardless of whether they were her "treating physicians."[9]

¶34 The directed verdict cannot be sustained as to St. John's potential negligence based on the erroneous conclusion that Dr. Thankachan was Sanders' only "treating physician." St. John is liable if the defendant radiologists were incompetent and St. John employees knew or should have known that fact but took no action to prevent them from treating Sanders.

B. St. John's Vicarious Liability

¶35 St. John also argues that Sanders failed to prove her respondeat superior theory of liability because the defendant radiologists were not employees of St. John or agents who were subject to the control of St. John regarding the manner in which they provided medical care. "[R]espondeat superior holds the master liable for injury proximately resulting from the negligent act of a servant done while in the course and scope of the servant's employment with the master." F*ox v. Mize,* 2018 OK 75, ¶ 8, 428 P.3d 314 (citation omitted). The fact that the defendant radiologists were not St. John employees appears to be undisputed.[10]

¶36 However, this case was tried and St. John's motion for directed verdict argued on the basis of apparent authority and agency by estoppel. "When issues not raised by the . . . pretrial conference order . . . are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the . . . pretrial conference order." 12 O.S.2011 § 2015(B). One fundamental purpose of the apparent authority doctrine is to hold a defendant liable for the acts of those who are not its employees or controlled agents. "The existence of actual authority between principal and agent is not a pre-requisite to establishing apparent authority." *Stephens v. Yamaha Motor Co., Ltd*., 1981 OK 42, ¶ 8, 627 P.2d 439. Therefore, the fact that the defendant radiologists were not St. John employees does not resolve all of the issues raised by St. John's motion for a directed verdict.

1. Apparent Authority

¶37 Generally, "the theory of respondeat superior is not extended to a hospital if the doctor is considered a private contractor operating on his/her own behalf . . . ." *Anderson v. Eichner*, 1994 OK 136, n.24, 890 P.2d 1329 (citing *Weldon v. Seminole Mun. Hosp*., 1985 OK 94, ¶ 4, 709 P.2d 1058). "But, under the theory of ostensible agency a hospital can be vicariously liable for the negligence of a physician, notwithstanding the physician's independent contractor status …." *Anderson,* 1994 OK 136, n.24. According to the Restatement, "[o]stensible agency is merely a synonym for apparent authority and is so used by many courts." Restatement (Second) of Agency § 8 cmt. e (1958).

> Apparent authority results from a manifestation by the principal to a third person that another is his agent. The manifestation may be made directly to a third person or to the community by signs or by advertising. Restatement 2d, Agency, § 8, 27, 49. But, "apparent authority exists only to the extent that it is reasonable for the third person dealing with the agent to believe that the agent is authorized."

Stephens v. Yamaha Motor Co., Ltd., 1981 OK 42, ¶ 8, 627 P.2d 439 (quoting Restatement (Second) of Agency § 8 cmt. e). In order to establish liability based on apparent authority, therefore, a plaintiff must prove: (1) a manifestation by the defendant that the tortfeasor is the defendant's agent; (2) a belief by the plaintiff that the tortfeasor is the defendant's agent; and (3) a reasonable basis for the plaintiff's belief. *Id.*

¶38 In Oklahoma, this exception to the general rule regarding the vicarious liability of a hospital was first recognized in *Smith v. St. Francis Hospital, Inc.,* 1983 OK CIV APP 58, 676 P.2d 279. In *Smith*, this Court held that a hospital could be held liable for the negligence of a physician providing medical care at the hospital even though the physician was an independent contractor, if there was no pre-existing patient-physician relationship and the patient "looked solely to and relied upon Hospital for his treatment and was treated by medical personnel regulated and authorized by Hospital to render medical services in its emergency room . . . ." *Id*. ¶ 13.

¶39 In *Weldon v. Seminole Municipal Hospital,* 1985 OK 94, 709 P.2d 1058, the Oklahoma Supreme Court recognized that Oklahoma "has joined those jurisdictions which have made an exception to the general rule that a doctor is an independent contractor and a hospital is exempt from invocation of respondeat superior." *Id.* ¶ 4. The Weldon Court applied the test articulated in Smith:

> In order to invoke respondeat superior or agency by estoppel the test as adopted by the Oklahoma Court of Appeals is:
>
> "[W]hether the plaintiff, at the time of his admission to the hospital, was looking to the hospital for treatment of his physical ailments or merely viewed the hospital as the situs where his physician would treat him for his problems."

Id. ¶ 7 (quoting *Smith,* 1983 OK CIV APP 58, ¶ 12). "The Court may also consider whether there was a pre-existing relationship between the plaintiff and the treating physicians. . . . [and] whether the hospital pays the doctor a salary or bills for the doctor's services." *Roth v. Mercy Health Ctr., Inc*., 2011 OK 2, ¶ 32, 246 P.3d 1079 (citations omitted).

¶40 St. John cites *Sparks Bros. Drilling Co. v. Texas Moran Exploration Co*., 1991 OK 129, 829 P.2d 951, for the proposition that a defendant cannot be held vicariously liable unless the plaintiff changed her position to her detriment. *Id.* ¶ 17. *Sparks* relied on *Rosser-Moon Furniture Co. v. Oklahoma State Bank,* 1943 OK 89, ¶ 6, 135 P.2d 336, which in turn relied on the works Corpus Juris Secundum and American Jurisprudence. However, the analysis of apparent authority in those treatises differs from that expressed in the Restatement (Second) of Agency. The Restatement view of apparent authority was adopted in *Stephens v. Yamaha Motor Co., Ltd*., 1981 OK 42, ¶ 8, 627 P.2d 439, after the Court noted that a different articulation of the rule had been used in *Rosser-Moon Furniture.* Detrimental reliance is not an element a plaintiff must prove to establish apparent authority. *Id.*; see also Restatement (Second) of Agency § 8 (1958).[11]

¶41 Consequently, to establish her apparent authority claim, Sanders must prove that: (1) St. John manifested an intent that the defendant radiologists were authorized to provide medical services at its hospital; (2) Sanders believed that the defendant radiologists were authorized to provide medical care on behalf of St. John; and (3) Sanders' belief that the defendant radiologists were authorized to provide medical care at St. John was reasonable. *Stephens,* 1981 OK 42, ¶ 8. To be entitled to a directed verdict, St. John must establish the absence of any evidence supporting at least one of those elements. *Cf., Cook v. Bishop*, 1988 OK 120, ¶ 9, 764 P.2d 189 (a motion for directed verdict is "somewhat like a delayed motion for summary judgment"), and *Runyon v. Reid,* 1973 OK 25, ¶ 13, 510 P.2d 943 (summary judgment for the defendant is proper where there is no controversy as to one fact material to the plaintiff's case and that fact is in the defendant's favor). St. John failed to do so in the district court, and it has failed to do so here.

¶42 St. John held itself out to the public as a place where people like Sanders could come and receive medical treatment on an emergen-

cy basis from physicians authorized to provide that care at the hospital.[12] "It is entirely reasonable that patients entering [St. John] through its emergency room properly relied upon [St. John's] representation that the treating doctors and staff of [St. John's] emergency room were acting on behalf of [St. John], and not as individuals." *Smith v. St. Francis Hosp.,* 1983 OK CIV APP 58, ¶ 12, 676 P.2d 279.

¶43 Further, Sanders testified that she believed that St. John personnel in charge of her medical care would decide which radiologists to use. Based on this record, that belief was reasonable. As the defendants clearly established, Sanders did not know the defendant radiologists. No one at St. John asked her which radiologist she wanted to use, and she relied solely on St. John personnel to select a radiologist. Consequently, this case is distinguishable from *Weldon*, where the negligent physician was the plaintiff's own family physician and instructed her to meet him at the hospital, where he would treat her condition, and the plaintiff looked solely to him, not the hospital, to provide that treatment. *Weldon v. Seminole Mun. Hosp*., 1985 OK 94, ¶ 1, 709 P.2d 1058. This Court's decision in *Smith* has been cited with approval by the Supreme Court in *Weldon*, 1985 OK 94, ¶ 4, and *Roth v. Mercy Health Center, Inc*., 2011 OK 2, ¶ 32, 246 P.3d 1079, for its recognition of a hospital's potential liability for any physician cloaked with the hospital's apparent authority. In contrast to the facts in *Weldon,* the facts in *Smith* are indistinguishable from those here.

> [M]embers of the public [like Sanders] who avail themselves of a hospital's emergency room services under these circumstances have a right to expect competent medical treatment from the medical personnel cloaked with ostensible authority by the hospital's conduct which reasonably leads the public to believe that medical treatment will be afforded by physicians acting on behalf of the hospital, and not on their respective individual responsibility.

Smith, 1983 OK CIV APP 58, ¶ 13. St. John did not argue otherwise. St. John's vicarious liability argument failed to distinguish between apparent authority and agency by estoppel and focused solely on the estoppel doctrine.

¶44 Consequently, for purposes of its motion for directed verdict, St. John has conceded that it may be liable based on the doctrine of apparent authority. This record supports that conclusion. The emergency room physicians employed by St. John, who treated Sanders on each of her first three visits to the hospital, sent the electronic studies they had ordered to the defendant radiologists for interpretation. Again, if the defendant radiologists were not competent and the emergency room physicians knew or should have known that fact, St. John may be liable. In addition, as Sanders' condition continued to deteriorate over a period of three months, it does not appear that any of the emergency room physicians she saw after December 2009 questioned the misdiagnosis or reported Sanders' failure to respond to the treatment that was prescribed. In addition, according to Sanders, the doctors and nurses she encountered at St. John after December 2009 expressed frustration when she continued to return to the hospital and embarrassed her for continuing to seek treatment.[13] If any of this conduct failed to meet the standard of care, St. John may be liable.

2. Agency by Estoppel

¶45 St. John did argue that Sanders failed to prove that the hospital could be held vicariously liable because she did not change her position based on the employment status of the defendant radiologists. Although the elements necessary to prove apparent authority and agency by estoppel are "usually present" in a particular case, apparent authority and estoppel are distinguishable. Restatement (Second) of Agency § 8 cmt. d (1958). Apparent authority is a contract-based theory holding a party liable for its actual statements and representations. *Id.* Estoppel is a tort theory used to prevent loss to an innocent person. *Id.* Although the Supreme Court generally adopted section 8 of the Restatement (Second) of Agency regarding apparent authority in *Stephens v. Yamaha Motor Company, Limited*, 1981 OK 42, ¶ 8, 627 P.2d 439, no Oklahoma decision has specifically addressed all of the elements of estoppel. However, the decisions that have addressed the issue are consistent with section 8 of the Restatement. To estop the defendant from denying that the tortfeasor is its agent, a plaintiff must prove that: (1) the defendant misrepresented that the tortfeasor was its agent or was silent when the defendant had a duty to state that the tortfeasor was not its agent; (2) the plaintiff relied on the defendant's misrepresentation or silence and believed that the tortfeasor was the defendant's agent; and (3) the plaintiff changed positions and suffered a loss based on this belief. Restate-

ment (Second) of Agency § 8B (1958). St. John's argument that Sanders failed to prove detrimental reliance, because she had no knowledge of or concerns regarding the defendant radiologists' employment status, is without merit.

¶46 First, this argument concedes the first two elements of estoppel. St. John failed to disclose that the defendant radiologists were not its agents, and Sanders believed that they were St. John agents. Those elements are also supported by the record.

¶47 Second, even assuming that the relevant inquiry is whether Sanders would have insisted on a different hospital had she known that the defendant radiologists were not employed by St. John, her testimony was that she told the ambulance driver that she wanted to go to St. John and she "thought the hospital made those decisions" about which radiologist to use. Therefore, the evidence on the change-in-position element is at least contested. *See Messler v. Simmons Gun Specialties, Inc., 1984* OK 35, ¶ 28, 687 P.2d 121 (noting that the court disregards evidence favorable to the movant which is disputed when ruling on a motion for a directed verdict). But that is not the relevant inquiry. What is relevant is whether Sanders "has suffered a loss." Restatement (Second) of Agency § 8B cmt. e (1958). Evidence that she did is sufficient to establish the change in position required for estoppel. *Id.* For purposes of St. John's motion for directed verdict, Sanders has satisfied that element. By choosing to go to St. John, her brain tumor was misdiagnosed, resulting in permanent injury.

¶48 Third, as the district court correctly noted, whether Sanders would have insisted on going to another hospital, if she had known the defendant radiologists were not St. John employees, is a question of fact for a jury to determine. *Roth v. Mercy Health Ctr., Inc*., 2011 OK 2, ¶ 32, 246 P.3d 1079 (citing *Reed v. Anderson*, 1927 OK 334, ¶ 4, 259 P. 855).

3. The Limits of St. John's Vicarious Liability

¶49 In its final argument, St. John asserts that a hospital's vicarious liability is limited to emergency room physicians employed by the hospital: "[T]he Supreme Court has affirmatively refused to hold a hospital responsible for non-emergency room physicians since the *Smith* case." We find this argument disingenuous. First, there were at least two physicians for which the hospital in *Smith* could be held liable, the emergency room physician the court found was the controlled agent of the hospital, and a surgeon with privileges at the hospital and to whom the plaintiff was referred by the emergency room physician for treatment. As previously noted, this Court's decision in *Smith* was cited with approval in *Roth*, 2011 OK 2, ¶ 32. *Roth* is particularly dispositive of St. John's argument because it reversed summary judgment in favor of a hospital, finding a material issue of fact as to whether the patient looked to the hospital to provide the medical care rendered by two private practice cardiologists whom the hospital's physician consulted regarding the patient's care. *Id.* ¶ 34.[14]

¶50 A hospital's liability is not determined by a physician's specialty or area of practice, but by the hospital's conduct in manifesting its intent to authorize the physician to provide medical services on behalf of the hospital or by its failure to inform patients that physicians appearing to provide services on behalf of the hospital are not authorized to do so. Restatement (Second) of Agency §§ 8 and 8B (1958).

CONCLUSION

¶51 The central issue in this case is whether the defendant radiologists' failure to identify Sanders' tumor was the proximate cause of her subsequent injuries. The issue raised by St. John's motion for directed verdict is whether it can be held liable for any negligence by those radiologists. St. John had a duty to provide "that care and attention required under all the circumstances that is appropriate to the physical and mental condition of [Sanders]." Okla. Uniform Jury Instructions - Civil No. 14.15. As relevant to this case, that included the duty to determine whether the radiologists were competent before they were selected to interpret the radiologic studies of Sanders' head and neck. See Strubhart v. Perry Mem'l Hosp. Trust Auth., 1995 OK 10, 903 P.2d 263. Likewise, St. John may be liable even if the defendant radiologists were non-agent, independent contractors but appeared to be providing care on behalf of the hospital or under circumstances where St. John would be estopped to deny that fact. Smith v. St. Francis Hosp., 1983 OK CIV APP 58, 676 P.2d 279.

¶52 A motion for directed verdict requires the determination "of whether there is any evidence to support a judgment for the party against whom the motion is made, and the trial court must consider as true all the evidence

and inferences reasonably drawn therefrom favorable to the non-movant, and disregard any evidence which favors the movant." *Gillham v. Lake Country Raceway*, 2001 OK 41, ¶ 7, 24 P.3d 858. "A motion for directed verdict . . . should not be sustained unless there is an entire absence of proof tending to show a right to recover . . . ." *Downing v. First Bank in Claremore*, 1988 OK 67, ¶ 8, 756 P.2d 1227. Considering as true all of the evidence favorable to Sanders, together with all of the inferences that reasonably may be drawn therefrom, and disregarding all the evidence favorable to St. John that is disputed, we cannot conclude that there is an entire absence of proof "tending to show that Sanders does not have a right to recover." *Id.*

¶53 The district court erred in granting St. John's motion for directed verdict. Likewise, and for the reasons previously discussed, it was error to limit the testimony of Dr. Connor to "what he saw, what he diagnosed, what his treatment of [Sanders was]" from the first time he saw her and thereafter. Dr. Connor should have been permitted to testify as an expert witness regarding his opinion of the defendant radiologists' responsibility for the injuries suffered by Sanders. The judgment appealed is vacated, and this case is remanded for further proceedings consistent with this Opinion.

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

THORNBRUGH, C.J. (sitting by designation), and GOODMAN, J., concur.

JOHN F. FISCHER, PRESIDING JUDGE:

1. Our original Opinion in this case was issued on March 9, 2018. The defendant radiologists and St. John filed motions for rehearing, which we granted. Oral argument was held on November 15, 2018. In response to arguments made by the defendants during the oral argument, we ordered that the record be supplemented. We withdraw our original Opinion and issue this Opinion to incorporate our resolution of the issues raised during the oral argument.

2. A cholesterol granuloma is a benign cyst containing an expanding mass. For simplicity, we will, as the parties and the witnesses often did, refer to Sanders' cholesterol granuloma as a tumor. The tumor was located near the petrous bone at the base of Sanders' skull near her inner ear and was compressing the seventh and eighth nerves in that area which control facial muscles, hearing and balance.

3. At trial, the defendants argued that this was a "new opinion" that should not be permitted because it was not previously disclosed. It was not new and was clearly disclosed from Dr. Connor's responses during his deposition. Any details regarding that opinion that had not been previously discussed resulted from the defendants' failure to ask the appropriate questions because they focused, instead, on the fact that Dr. Connor was not a radiologist.

4. Many of the questions that elicited this testimony were premised on defense counsel's suggestion that the standard of care applicable to radiologists allowed them to have an acceptable rate of "misses." Dr. Connor testified that he was not aware of any such allowance, but if it was acceptable, "I think that's farce." If there is such a requirement, it can be presented to the jury on remand as a factor relevant to determining whether the defendant radiologists were negligent.

5. The defendant radiologists also argue that this Court used the wrong standard of review. Rather than the *de novo* standard used by this Court regarding the district court's legal ruling that Dr. Connor could not testify as an expert, the defendant radiologists contend we should have used the clear abuse of discretion standard, citing this Court's Opinion in *C-P Integrated Services, Inc. v. Muskogee City-County Port Authority*, 2009 OK CIV APP 57, 215 P.3d 835. The defendant radiologists suggest that the issue was one of trial management "in the context of days of testimony from numerous witnesses, including Dr. Connor." First, *C-P Integrated* involved a ruling limiting the scope of an expert's testimony. Here the district court ruled Dr. Connor could not provide any testimony as an expert. Second, the defendant radiologists' argument misrepresents the scope of the abuse of discretion standard. The "clear abuse of discretion standard includes appellate review of both fact and law issues." *Christian v. Gray*, 2003 OK 10, ¶ 43, 65 P.3d 591. The defendant radiologists' argument focuses only on the factual aspect of the standard and fails to appreciate that the district court's error was a legal one requiring *de novo* review. "A *de novo* standard applies when the error is one of law." *Id*. (citation omitted) (stating the standard of appellate review required when reviewing a district court's ruling on expert witness testimony).

6. A hospital must exercise ordinary care and attention for its patients. Ordinary care means that care and attention required under all the circumstances that is appropriate to the physical and mental condition of each patient. A hospital has a duty to [(supervise care rendered to a patient by hospital employees)/(use reasonable care when providing the patient with a nurse/physician/(other health care provider))/(ensure that staff privileges are granted only to competent physicians)/(protect patients from staff physicians that it knows or reasonably should know are incompetent)].

7. In its appellate briefing, St. John argues that Sanders did not raise a negligent credentialing claim. However, no citation to the record is provided to support this contention. And, in her appellate briefing, Sanders relies on *Strubhart v. Perry Memorial Hospital Trust Authority*, 1995 OK 10, 903 P.3d 263, for that proposition. Further, during the oral argument counsel for Sanders stated that she had tried to make a credentialing claim but that the district court would not allow it. More importantly, "negligent credentialing" is not a separate tort, it is one way in which a defendant can be found negligent and negligence is a claim clearly asserted by Sanders in the pretrial order. This Opinion does not preclude either party from raising that issue on remand for disposition by the district court.

8. These facts are either admitted by the defendants, disclosed in the supplemented record or apparent from the deposition of Dr. Connor, whose trial testimony was limited by a ruling we have reversed.

9. From the oral argument and the additional materials added to the record it appears that St. John physicians and/or personnel instructed the defendant radiologists to confirm or rule out that Sanders' symptoms were caused by a stroke, which caused the radiologists to focus on a different area of the radiologic studies from where the tumor was located. This Opinion does not preclude or limit the scope of any defense or claim by any party on remand.

10. The exact relationship between the defendant radiologists and the hospital cannot be determined from the appellate record. However, it was clear from the oral argument that the defendant radiologists were not "strangers," but radiologists who had been granted staff privileges by St. John and St. John physicians were authorized to refer radiologic studies of St. John patients to the defendant radiologists for interpretation. In ruling on a motion for directed verdict, the court considers as true all inferences favorable to the non-movant. *Gillham v. Lake Country Raceway*, 2001 OK 41, ¶ 7, 24 P.3d 858.

11. St. John's petition for rehearing points out the confusion in Oklahoma jurisprudence on this issue and argues for a different view of the law that would combine the elements of apparent authority and agency by estoppel, in essence requiring proof of detrimental reliance for all claims where the defendant cannot be held vicariously liable. We decline to adopt that view.

12. In its petition for rehearing, St. John argued there is no evidence in the record that it made any affirmative representation to Sanders that the defendant radiologists or even the emergency room physicians who treated Sanders were its agents. St. John's point is unclear. For example, there is no testimony in this record that there was a sign above the entrance to the hospital that stated "St. John Emergency Room." But it is undisputed that Sanders wanted to go to St. John and that she was treated at St. John's emergency room before being admitted to St. John's hospital. There is no testimony in this record that anyone at St. John told Sanders that the physicians in the emergency room were St. John's agents. But the fact that they were there and provided treatment to Sanders is undisputed. We do not understand

St. John to be arguing that the emergency room physicians, for example, were not authorized to be there, were not authorized to provide Sanders treatment or that they just wandered in off the street and happened to be there when Sanders arrived. It certainly did not do so during the oral argument. Quite obviously, that position would raise additional exposure for St. John, as previously discussed.

13. St. John argues in its petition for rehearing that there is no "trial testimony" to support this statement. Sanders' trial testimony was not included in the original record. This fact is disclosed from the argument made by counsel for St. John in support of its motion in limine representing what Sanders had said during her deposition. (ROA 831, p. 16). Although we gave all parties the opportunity to supplement the record, St. John chose not to add Sanders' trial testimony to confirm its claim that Sanders changed her deposition testimony. Further, St. John argues that this Court created "a cause of action for embarrassment." St. John's argument misses the point. It is not that Sanders was embarrassed as she continued to be seen by St. John physicians and nurses; the point is that on those subsequent visits St. John personnel continued to misdiagnose Sanders' tumor as Bell's palsy. It is clear from the oral argument that Sanders is asserting that claim directly against St. John.

14. In *Roth*, the Supreme Court reserved for future determination whether a hospital can be held liable under the doctrine of apparent authority or estoppel for the negligence of a physician who is consulted by a hospital physician or to whom the hospital's patient is referred for treatment. We do not decide that issue in this case because the state of the record is insufficient. *Cf.* Restatement (Second) of Agency § 255 (1958), regarding the liability of a principal for the acts of subagents.'

2019 OK CIV APP 72

NORTH COLTRANE COMMUNITY ASSOCIATION, INC., Plaintiff/Appellant, vs. BOARD OF COUNTY COMMISSIONERS OF OKLAHOMA COUNTY, Defendant/Appellee, and STONETOWN EDMOND, LLC, Intervening Defendant/Appellee.

Case No. 116,747. April 18, 2019

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE LISA T. DAVIS, JUDGE

REVERSED

Jason A. Dunn, Hilary H. Clifton, PHILLIPS MURRAH P.C., Oklahoma City, Oklahoma, for Plaintiff/Appellant,

David Prater, DISTRICT ATTORNEY, Gretchen Crawford, ASSISTANT DISTRICT ATTORNEY, OKLAHOMA COUNTY, Oklahoma City, Oklahoma, for Defendant/Appellee, Board of County Commissioners of Oklahoma County,

Mitchell D. Blackburn, CONNER & WINTERS, LLP, Oklahoma City, Oklahoma, for Intervening Defendant/Appellee, Stonetown Edmond, LLC.

Kenneth L. Buettner, Judge:

¶1 Plaintiff North Coltrane Community Association, Inc. (the Association), appeals the trial court's denial of its motion for writ of mandamus. The Association sought to compel the Board of County Commissioners of Oklahoma County (the Board) to declare as void a special use permit issued in regard to real property (the Property) owned by Defendant Stonetown Edmond, LLC (Stonetown). The special use permit issued by the Board in 1985 allowed the then property owner to develop the Property as a mobile home park. The trial court found that the special use permit was not void by the passage of time and denied the motion for writ of mandamus. The Association appeals. On appeal, the Board moves to dismiss for mootness. We deny Stonetown's motion to dismiss the appeal and reverse the trial court's denial of writ of mandamus.

¶2 On March 21, 1985, in agreement with the recommendation by the Oklahoma County Planning Commission (the Planning Commission), the Board approved Special Use Permit 66-85 (the Permit), which allowed Stonetown's predecessor-in-interest the opportunity to develop the Property as a mobile home park. The Property was originally zoned as AA Agricultural & Rural Residential (A-2), and the Board's approval of the special use permit was necessary to beginning development of the mobile home park. Following the Board's approval of the Permit, however, the Property remained unimproved and undeveloped for thirty years.

¶3 On November 19, 2015, Hiwassee 80, LLC (Hiwassee), purchased the Property and, relying on the Permit, began constructing a mobile home park. On June 15, 2017, the Planning Commission reviewed the status of the Permit. After hearing comments from the Association as to the current compatibility of the Permit with the surrounding zoning districts, the Planning Commission rejected the Association's arguments and recommended that the Board "take no action" and allow the Permit to remain in place.

¶4 The Board scheduled a meeting for August 30, 2017 to take up the Planning Commission's recommendation regarding the status of the Permit. On August 14, 2017, the Association filed suit against Hiwassee and the Department of Environmental Equality (DEQ), seeking a declaratory judgment that the sewage treatment system for the mobile home park was not in compliance with the Permit. With the suit pending, the Board held its meeting on the status of the Permit, where the Association appeared and argued that the use allowed by the Permit (the construction of a mobile home park) was incompatible with surrounding uses (*i.e.*, the nearby high-end residential neighbor-

hood). Despite the Association's arguments, the Board accepted the Planning Commission's recommendation and "took no action" with regard to the Permit, allowing Hiwassee to continue development of the mobile home park. The Association voluntarily dismissed its suit against Hiwassee and the DEQ the following day.

¶5 The Association then filed suit against Hiwassee and the Board September 19, 2017, seeking a writ of mandamus compelling the Board to declare the Permit void. The Association argued that, according to the Oklahoma County Zoning Regulations effective at the time the Permit was issued – those effective from 1972 to 1991 (the Prior Regulations) – the Permit expired after a year of non-use, *i.e.* in 1986. Stonetown purchased the Property from Hiwassee on the same day that the Association filed suit and was permitted to intervene as a defendant. The trial court denied the Association's motion January 10, 2018. The Association appeals.

¶6 During the pendency of this appeal, Stonetown filed a motion to dismiss for mootness. In its motion, Stonetown argues this matter is moot because the mobile home park has been substantially completed and this Court is no longer able to render effective relief. With Stonetown's motion to dismiss the appeal having been deferred to the decisional stage, we take up the motion here.

¶7 Pursuant to Oklahoma Supreme Court Rule 1.6(c), the "Court may dismiss an appeal … either on its own motion or on the motion of the parties at any stage of the appellate process." Rule 1.6(c), Okla. Supreme Ct. Rules, 12 O.S. 2011 Ch. 15, App. 1 (2011). Under this rule, an appeal may be dismissed only on particular grounds, one of which is mootness. *Id.* An appeal becomes moot when the court is no longer able to grant effective relief and any opinion rendered in the matter would be hypothetical or advisory in nature. *Beach v. Okla. Dep't of Pub. Safety*, 2017 OK 40, ¶ 16, 398 P.3d 1. In order for an appellate court to render relief, the issues in a case must remain part of a "lively 'case or controversy' between antagonistic demands." *State ex rel. Okla. Firefighters Pension and Ret. Sys. v. City of Spencer*, 2009 OK 73, ¶ 4 n.13, 237 P.3d 125 (citing *Am. Ins. Ass'n v. State Indus. Comm'n*, 1987 OK 107, ¶ 6, 745 P.2d 737). An appeal will be dismissed as moot if, after the appeal has commenced, circumstances change such that the appellate court can no longer afford effective relief. *Id.* ¶ 4. The Oklahoma Supreme Court "is the 'final arbiter' of whether this mootness doctrine applies." In re Guardianship of Doornbos, 2006 OK 94, ¶ 2, 151 P.3d 126 (citing *Rogers v. Excise Bd.*, 1984 OK 95, ¶ 15 n. 18, 701 P.2d 754).

¶8 Here, Stonetown argues that this appeal should be dismissed for mootness because the mobile home park has been substantially completed. Stonetown alleges that it has spent approximately $1.72 million on the park since it purchased the property in 2017, and that a total of $2.74 million has been spent since Stonetown's predecessor-in-interest, Hiwassee, first began development. Stonetown alleges that because the Association failed to seek a temporary injunction or stay to maintain the status quo of the development of the park during the pendency of the appeal, the Association is now precluded from seeking relief.

¶9 In support of its argument, Stonetown first cites to *Westinghouse Electric Corp. v. Grand River Dam Authority*, in which a plaintiff's challenge to the award of a contract was dismissed for mootness. 1986 OK 20, ¶ 1, 720 P.2d 713. In *Westinghouse,* an electric corporation sought to invalidate a contract between a defendant corporation and the Grand River Dam Authority (GRDA) on the grounds that conflicts of interest existed with regard to members of the GRDA board who considered the bids and awarded the contract. *Id.* ¶ 2. The Supreme Court determined that because the plaintiff corporation did not seek a temporary injunction preventing performance during the pendency of the controversy, and because the contract had been performed prior to the Court's rendering of a judgment in the appeal, the plaintiff corporation's appeal should be dismissed as moot. *Id.* ¶ 24. The Supreme Court stated, "If a person seeking injunctive relief does not take advantage of the procedures available for preserving the status quo, and the conduct which is sought to be prevented is thus permitted to take place, we cannot provide any relief." *Id.*

¶10 Stonetown also cites to *White v. City of Pawhuska,* 1925 OK 737, ¶¶ 1-2, 239 P. 578, in which the Supreme Court of Oklahoma determined that an appeal challenging the "letting" of a contract was moot where the temporary injunction had been dissolved and the contract had been "let" during the pendency of the appeal. Similarly, Stonetown points to *Wolfe v. Hart's Bakeries, Inc*., 1969 OK 175, ¶¶ 7-8, 460

P.2d 950, in which the Supreme Court dismissed as moot an appeal challenging the delivery of checks, wherein no temporary injunction was sought and the checks had been delivered prior to a rendering of judgment in the appeal.

¶11 In citing to the above cases, Stonetown fails to appreciate an important distinction between those cases and the controversy before us. In *Westinghouse, White,* and *Wolfe,* the Supreme Court dismissed as moot claims in which the sought injunctive relief had not been preserved during the pendency of the appeal. In those cases, the injunctive relief sought by the plaintiffs had become unavailable through the development of circumstances (*e.g*. through the performance of a contract) such that a favorable judgment by the Court would not render any relief to the plaintiffs. This is not the reality here.

¶12 The facts in this case more closely resemble those in *Howard v. Mahoney,* 1940 OK 381, 106 P.2d 267, in which the plaintiff sought to enjoin the use of adjoining property for purposes noncompliant with relevant zoning ordinances. There, the defendant sought to dismiss the appeal as moot because the noncompliant structure on the adjoining property had already been completed, arguing that the Court could no longer render an effective remedy. *Id.* ¶ 6. The Supreme Court rejected the defendant's argument, however, noting that the plaintiff not only sought the cessation of construction of the structure, but also the cessation of continued use of the structure for purposes in violation of the zoning ordinances. *Id.* Noting that "a case will not be dismissed where only one issue may be called moot and there are other issues yet to be determined," the *Mahoney* court declined to dismiss the appeal for mootness. *Id.*

¶13 In this case, the Association seeks the remedy of a writ of mandamus – a remedy available only where there is no remedy available at law, by which a court compels an inferior entity to perform its duty. 12 O.S. 2011, §§ 1451, 1452. If granted here, a writ of mandamus would compel the Board to declare the Permit void. Such a declaration acknowledging the voidance of the Permit would render the current mobile home park development noncompliant with current zoning regulations. As in *Mahoney*, the relief that would be provided by the writ, therefore, is not necessarily the cessation of the mobile home park's development, but the prevention of continued use of the Property in violation of current zoning regulations. Furthermore, Oklahoma law does not allow a property owner to "circumvent, or obtain an exception to, zoning ordinances by putting himself in a position . . . wherein their enforcement will have a harsh, or detrimental, effect on him . . . ." *In re Pierce's Appeal,* 1959 OK 209, ¶ 4, 347 P.2d 790. Because a valid remedy remains available in this controversy, and because a defendant cannot spend its way around compliance with the law, we hold that this appeal is not moot and deny Stonetown's motion to dismiss this appeal.

¶14 We next address the merits of the appeal and determine whether the trial court improperly denied the Association's Motion for Writ of Mandamus. The Oklahoma Statutes provide:

> The writ of mandamus may be issued by the Supreme Court or the district court, or any justice or judge thereof, during term, or at chambers, to any inferior tribunal, corporation, board or person, to compel the performance of any act which the law specially enjoins as a duty, resulting from an office, trust or station; but though it may require an inferior tribunal to exercise its judgment or proceed to the discharge of any of its functions, it cannot control judicial discretion.

12 O.S. 2011 § 1451.

¶15 "The issuance of a writ is addressed to the sound discretion of the trial court." *Boyer v. State Bd. of Exam'rs of Psychologists*, 1992 OK CIV APP 80, ¶ 12, 834 P.2d 450 (citing *Fears v. Cattlemen's Inv. Co*., 1971 OK 22, ¶ 31, 483 P.2d 724). Unless the judgment of the trial court is arbitrary, capricious, or an abuse of discretion, its determination must not be disturbed. *Id.* (citing *Dale v. City of Yukon*, 1980 OK CIV APP 55, ¶ 12, 618 P.2d 954). "An abuse of discretion occurs when a court bases its decision on an erroneous conclusion of law or where there is no rational basis in evidence for the ruling." *Christian v. Gray*, 2003 OK 10, ¶ 43, 65 P.3d 591. A writ of mandamus may lie where the party seeking the writ has a "clear legal right to the relief sought," the respondent has "a plain legal duty in which the exercise of discretion is not implicated," and there is no adequate remedy at law. *Colclazier v. State ex rel. Okla. Indigent Def. Sys. Bd*., 1997 OK 161, ¶ 6, 951 P.2d 622. The party seeking mandamus has the burden of showing that it is has a clear legal

right and that the defendant has a plain legal duty. *Chandler (U.S.A.), Inc., v. Tyree*, 2004 OK 16, ¶ 25, 87 P.3d 598 (citing *Lee v. Myles*, 1964 OK 56, ¶ 8, 390 P.2d 489).

¶16 We first consider whether the Association has demonstrated it has a "clear legal right" to have the Board declare the Permit void. The Association argues that it has such a right because its members have a particularized interest in the Property being developed according to the relevant zoning regulations. The Board and Stonetown argue that no such right exists and the Association misconstrues the regulations.

¶17 The existence of a "clear legal right" in this case hinges upon the interpretation of the zoning regulations effective at the time the Permit was issued. "The meaning of an ordinance, like that of a statute, is to be divined from the language found in its text." *Tinker Inv. & Mortg. Corp. v. City of Midwest City*, 1994 OK 41, ¶ 13, 873 P.2d 1029. Where the language of an ordinance is ambiguous, we give deference to the construction given by the body charged with its execution. *Elliott v. State ex rel. Kirkpatrick*, 1931 OK 320, ¶ 10, 1 P.2d 370.

¶18 The Oklahoma County Zoning Regulations effective from 1972-1991 (the Prior Regulations) stated, in relevant part:

> The building permit authorizing the "Special Use" shall become void under the following Conditions:
>
> 1. Failure of the applicant to comply with all of the general and special requirements established by the Board of County Commissioners as a basis for authorizing the "Special Use".
>
> 2. Any change in the "Special Use" from that specifically authorized.
>
> 3. A discontinuance of the "special use" for one year.
>
> 4. Failure to use the building permit within one year.

Oklahoma County, Zoning Regulations Art. V. § 2(d) (effective 1972-1991).

¶19 The Board and Stonetown assert that the Board has interpreted the Prior Regulations so that the term "building permit" is distinct from "special use permit," such that only an underlying building permit, not the associated special use permit, would become void after one year of non-use. The respondents argue that we should give deference to the Board's interpretation. The Board and Stonetown fail, however, to demonstrate the Board ever interpreted the Prior Regulations.[1] In fact, the Board admits that when considering the continued validity of seventeen (17) special use permits – including the Permit at issue here – at a 2017 meeting, the Board considered the continuation of the permits pursuant to the current zoning regulations, not those effective in 1985. The Board's 2017 review of the Permit therefore does not constitute an interpretation of the Prior Regulations.

¶20 Stonetown further argues that the language of the current zoning regulations is evidence of the Board's interpretation of the Prior Regulations. Under current regulations, the Board has discretion to revoke a Special Permit where it can be shown that the special use is no longer compatible with the uses of the surrounding land. Stonetown contends that because the current regulations require affirmative action by the Board in order to revoke a special use permit, the Prior Regulations also impliedly required such affirmative action.

¶21 Where a statute is ambiguous and an amendment is made which construes and clarifies prior language, a court should accept the amendment as legislative intent as to the meaning of the previous ambiguous language. *Gentry v. Berry Mach. & Tool Co.*, 2012 OK CIV APP 12, ¶ 15, 274 P.3d 845 (citing *Quail Creek Golf and Country Club v. Okla. Tax Comm'n*, 1996 OK 35, ¶ 10, 913 P.2d 302). An amendment will not be considered, however, where the previous statute is not ambiguous. *Id.* While the previous language in this case was ambiguous regarding the term "building permit," the Prior Regulations were not ambiguous as to the Board's role in revoking a permit unused for one year. The Prior Regulations stated that such a permit "shall become void" upon the occurrence of certain conditions. This language is not ambiguous regarding the nondiscretionary nature of an unused permit's expiration. We therefore hold that the amendment to the zoning regulations requiring affirmative action by the Board in revoking a special use permit was not a clarification of previously ambiguous language and will not be considered in interpreting the Prior Regulations.

¶22 Because the Board has not interpreted the Prior Regulations, we construe the disputed provision of the Prior Regulations according to its plain text and traditional rules of statu-

tory construction. The disputed language states: "The building permit authorizing the "Special Use" shall become void under [certain conditions]." In arguing the term "building permit" was intended to have a distinct meaning from "special use permit," the Board refers to Article VIII of the Prior Regulations, titled "Building Permits," which discusses the process to obtain a permit for the construction of a building or structure.

¶23 Traditional canons of statutory construction provide where the same words or terms are used in multiple places within a statute, we will presume those words to have the same meaning throughout, unless there is clear legislative intent to the contrary. *Walton v. Donnelly,* 1921 OK 258, ¶ 10-13, 201 P. 367. "A statute will be given a construction, if possible, which renders every word operative, rather than one which makes some words idle and meaningless." *Estes v. ConocoPhillips Co.*, 2008 OK 21, ¶ 16, 184 P.3d 518. "Legislative purpose and intent may also be ascertained from the language in the title to a legislative enactment." *McIntosh v. Watkins,* 2019 OK 6, ¶ 4, 2019 WL 925519.

¶24 If we were to accept the Board and Stonetown's interpretation of the Prior Regulations, we would need to conclude the Board intended Stonetown's predecessor be required to obtain a separate "building permit" – in addition to the already issued Special Use Permit – before initiating development of the Property. No such building permit was obtained, nor will one likely ever be obtained, as the nature of modular homes is such that no on-site building is required. Further, the Board and Stonetown's interpretation would suggest that the building permit, not the special use permit, would officially "authorize" the Special Use of the Property. Such an interpretation would effectively render the special use permits under Article V pointless. We will not favor an interpretation that renders words idle or meaningless, much less one which renders an entire article ineffective.

¶25 Instead, drawing from the language of Article V and from the headings therein, we conclude that the words "building permit" in the disputed provision were meant to refer to a "Special Use Permit" issued pursuant to that Article. In the next subsection, the regulations provide a list of "buildings and uses for which such special permits may be issued," including: public buildings, hospitals, cemeteries, airports, miniature golf courses, and trailer or tourist courts (*i.e.* mobile home parks). Looking to this language, it is reasonable to conclude that the enacting body considered specific types of buildings to be a "special use" for which a "Special Use Permit" could be issued. With this in mind, it appears likely that a permit for a "special use" and a permit for a "special building" would be governed by the same provisions, and correlating language might be used interchangeably. Further, the disputed provision's place in the regulations (located in Article V, "Non-Conforming Uses, Exceptions and Special Permits," Subsection 2, "Special Permits") suggests that the language contained therein would be germane to those headings. The process for obtaining a building permit of the type to which the Board and Stonetown refer – the type necessary to construct a structure – is addressed by an entirely different article (Article VIII, "Building Permits"). We conclude that the words "building permit" in Article V, Section 2(d) were intended to refer to a "special use permit" issued pursuant to Article V of the Prior Regulations.

¶26 Owners of real property have a particularized interest in ensuring that neighbors comply with relevant regulations and zoning ordinances. *See Mahoney,* 1940 OK 381, ¶ 9, 106 P.2d 267 (allowing continuation of a suit by a property owner seeking to enjoin her neighbors from continued use of the adjacent property in violation of zoning ordinances); *Bird v. Willis,* 1996 OK 116, ¶ 23, 927 P.2d 547 (stating that parents of children residing in a school district had standing to challenge the issuance of a license to a liquor store in the district, which had allegedly been issued in contravention of regulations). This particularized interest gives rise to a property owner's clear legal right to ensure that a regulating body enforces its own zoning regulations. The Association, on behalf of its members, has a clear legal right to ensure that the Board observed proper regulatory procedure in maintaining or revoking the Permit, which they did not do here.

¶27 In concluding that the Prior Regulations created a "clear legal right" for the Association to have the Permit recognized or declared void, we also conclude that the Board had a "plain legal duty" to declare the Permit void, where the voidance of the Permit was not discretionary. The disputed provision in the Prior Regulations stated that a special use permit that is unused within one year "shall become void." Generally, the use of the word "shall" indicates

a mandatory directive, leaving no room for discretion. *Keating v. Edmondson*, 2001 OK 110, ¶ 13, 37 P.3d 882. Further, because the Permit became void by operation of the statute, and not by an affirmative action of the Board, the Board had no authority to "take no action" and allow the Permit to continue. Instead, it was the Board's plain duty to take notice of the prior voidance of the Permit and require Stonetown to follow the necessary procedures to comply with current zoning regulations.

¶28 We lastly address the unavailability of an adequate legal remedy to the Association. A writ of mandamus may be issued only where it can be shown there is no adequate legal remedy available to the party seeking the writ. *Colclazier*, 1997 OK 161, ¶ 6, 951 P.2d 622. Stonetown argues that the Association had an available legal remedy by way of an appeal to a district court. Stonetown's argument hinges upon the classification of the Board's "take no action" vote as a quasi-judicial action. The Association asserts, however, that the vote was ministerial or administrative in nature.

¶29 Stonetown asserts that the Association has access to the legal remedy of an appeal of the Board's "take no action" vote under the procedure provided in Section 431 of Title 19 of the Oklahoma Statutes, which states: "From all decisions of the board of commissioners, upon matters properly before them, there shall be allowed an appeal to the district court by any persons aggrieved . . . ." 19 O.S. 2011 § 431. The Supreme Court has limited the availability of an appeal under this statute to include the appeal of only quasi-judicial decisions. *Groenewold v. Bd. of Comm'rs of Kingfisher Cty,* 1945 OK 165, ¶ 9, 159 P.2d 258. Direct appeals to a district court are not available for actions by a board of commissioners which are "administrative, legislative, or political in nature." *Id.*

¶30 The Oklahoma Supreme Court has stated that a board exercises a legislative function when zoning and rezoning. *Gregory v. Bd. of Cty Comm'rs of Rogers Cty,* 1973 OK 101, ¶ 8, 514 P.2d 667. The Supreme Court has further held that a board of adjustment's decision regarding an application for a zoning variance or conditional use is an exercise of a quasi-judicial power. *Osage Nation v. Bd. of Comm'rs of Osage Cty.*, 2017 OK 34, ¶ 49, 394 P.3d 1224; *Mustang Run Wind Project, LLC, v. Osage Cty Bd. Of Adjustment*, 2016 OK 113, ¶ 29, 387 P.3d 333.

¶31 The Association asserts that the Board's duty to declare the Permit void as a function of the Prior Regulations is either a ministerial or administrative function. The distinction between a ministerial and judicial function is that where the law describes the duty to be performed such that there is no exercise of discretion necessary, that action will be considered ministerial. *Bd. of Educ. of Town of Owasso v. Short*, 1923 OK 136, ¶ 26, 213 P. 857. The result of a ministerial act may not be appealed under 19 O.S. § 431. *Appeal of Trippet,* 1940 OK 207, ¶ 3, 101 P.2d 1058. A board's action is considered administrative where it exercises discretion granted by statute or regulation. *Groenewold,* 1945 OK 165, ¶ 10, 159 P.2d 258. Administrative actions are not appealable under 19 O.S. § 431 because, "under the Constitution, the courts cannot exercise purely administrative . . . powers." *Id.* ¶ 9.

¶32 For reasons previously discussed, the Board had no discretion in performing its duty to declare the permit void by operation of the Prior Regulations. The Board's refusal to recognize the previous automatic expiration of a special use permit is distinct from a board's decision to zone, rezone, or grant a zoning variance, where in this case the Board was not amending or construing regulations. As such, the Board's act was not legislative or quasi-judicial in nature. We hold that the Board's refusal to perform its duty was a refusal to exercise its proper ministerial function. Because an appeal under 19 O.S. § 431 will not lie from a ministerial act, we further hold that the Association had no adequate remedy at law.

¶33 There is no evidence in the record that the Board interpreted the disputed provision of the Prior Regulations. We therefore interpret the provision according to the plain text and traditional canons of statutory construction and hold that the provision provides that a special use permit will automatically expire after one year of non-use. Because property owners have a right to ensure neighbors adhere to relevant zoning regulations, we hold that the Association has a clear legal right to require the Board to declare the Permit void and require Stonetown to follow the proper regulatory procedures. Further, because the Prior Regulations did not allow the Board any discretion in voiding an expired special use permit, we hold that the Board had a plain legal duty to recognize the Permit as void. The Board's refusal to perform its plain legal duty was a ministerial act.

As such, the Association had no right to an appeal under 19 O.S. § 431 and therefore had no adequate legal remedy. For all these reasons, we hold that the trial court's denial of the Association's Motion for Writ of Mandamus was contrary to law and an abuse of discretion. We reverse the trial court's decision and order that a writ of mandamus issue requiring the Board to rescind its "take no action" vote and declare the Permit void.

¶34 REVERSED.

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

Kenneth L. Buettner, Judge:

1. At oral argument the Board asserted that internal comments made by staff regarding the meaning of the Prior Regulations constituted interpretation thereof. We disagree. Looking to instances in which deference was given to an enacting body for interpretation of its own rules, case law indicates that deference is given only to interpretations that are specific and bear the weight of authority. *See, e.g., Oral Roberts Univ. v. Okla. Tax Comm'n,* 1985 OK 97, ¶¶ 6-7, 20, 714 P.2d 1013 (giving deference to agency opinions expressed in a letter from the Director of the Sales Tax Division, Oklahoma Tax Commission, and in recorded proceedings before the Commission); *Tinker Inv. & Mortg. Corp. v. City of Midwest City,* 1994 OK 41, ¶ 14, 873 P.2d 1029 (finding that a City administrator interpreted ordinances enacting a "pay-back program" by repeatedly administering the policy in a uniform manner, but holding that the administrator's interpretation was absurd).

2019 OK CIV APP 73

JOHN LAY and CONNIE LAY, husband and wife, Plaintiffs, and CLIFFORD FARMS HOMEOWNERS' ASSOCIATION, INC., Intervenor, vs. CONOCOPHILLIPS COMPANY; and WATERLOO ROAD PUMP AND SUPPLY, LLC, Defendants, and PUMP & SUPPLY, LLC, Third-Party Plaintiff, vs. DENNIS MILLER, Third-Party Defendant, and CONOCOPHILLIPS COMPANY, Third-Party Plaintiff/Appellant, vs. CLIFFORD FARMS, LLC; GARY L. OLSON, individually and as Trustee of the Olson Family Trust, dated March 31, 1998; CLIFFORD'S SECOND ONE, LLC; BUILD ONE DEVELOPMENT, L.P.; and G2, LLC, Third-Party Defendants/Appellees, and JOHN NAIL; BRANDON BAKER a/k/a AQUA WELL DRILLING, INC.; DENNIS MILLER and Mr. Miller d/b/a KING DRILLING; JAMES A. NELSON d/b/a NELSON PUMP AND DRILLING a/k/a NELSON PUMP COMPANY; YUANSHUI ZHENG and FANG LIU; LARRY and DIANE BURCH; and DOUG and CARRIE DANNAWAY, Third-Party Defendants.

Case No. 117,257. May 10, 2019

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE THOMAS E. PRINCE, JUDGE

AFFIRMED

Amy M. Stipe, Rob F. Robertson, Ellen A. Adams, John M. "Jake" Krattiger, GABLEGOTWALS, Oklahoma City, Oklahoma,

and

Terry D. Ragsdale, GABLEGOTWALS, Tulsa, Oklahoma, for Third-Party Plaintiff/Appellant,

Dennis S. Boxeur, Rollin Nash, Jr., James L. Scott, NASH, COHENOUR, KELLEY, & GIESSMANN, P.C., Oklahoma City, Oklahoma, for Third-Party Defendants/Appellees.

Bay Mitchell, Presiding Judge:

¶1 Third-Party Plaintiff/Appellant ConocoPhillips Company (Conoco) appeals from the trial court's order granting summary judgment to Third-Party Defendants/Appellees Clifford Farms, LLC; Gary L. Olson, individually and as Trustee of the Olson Family Trust, Dated March 31, 1998; Clifford's Second One, LLC; Build One Development, LP; and G2, LLC (collectively, Olson Defendants). After *de novo* review, we find a third-party contribution claim pursuant to 12 O.S. §832 is subject to the 12 O.S. §109 statute of repose, and Conoco's claims against Olson Defendants are barred. Olson Defendants are entitled to judgment as a matter of law. We affirm.

¶2 Gary Olson and his wife owned an 80 acre tract of undeveloped land. The Olson family lived on and farmed the land. They transferred the property to the Olson Family Trust in 1998. The property was sold to Clifford Farms, LLC, a company then partially owned by Gary Olson, in 1999. Mr. Olson and Clifford Farms, LLC began developing the 80 acres into the Clifford Farms Addition. On June 2, 2000, they filed a Final Plat subdividing the property into 49 residential lots. On June 29, 2001, Clifford Farms, LLC sold a lot at 17736 Clifford Farms Road to home builder ZCT, LLC. That lot would later become Plaintiffs John and Connie Lays' residence and is the subject property in this lawsuit.[1] ZCT built a home on the lot. At the time, the Clifford Farms Addition was not on city water and each home required a water well. A water well was drilled in 2002 and then plugged in 2003, and a second well was drilled soon thereafter. ZCT sold the home in 2003. The Lays purchased the home in 2005.

¶3 In April 2013, the Lays filed a lawsuit against Conoco to recover for harm to their property from oilfield operations in the 1940s. The Lays claim when their water well was drilled, buried oil and salt pits were pierced and contaminated the aquifer and their potable water. On November 9, 2015, Conoco filed third-party claims for contribution against Olson Defendants[2] pursuant to 12 O.S. §832. Conoco asserts Olson Defendants are liable for the same injuries upon which the Lays base their claims against Conoco. Conoco alleges (1) Mr. Olson failed to disclose his knowledge of historic oil and gas activity on the subject property; (2) Mr. Olson and Clifford Farms, LLC failed to properly evaluate the environmental suitability of the property prior to developing the Clifford Farms Addition, specifically, whether there would be a fresh water supply for residential wells; (3) Olson Defendants had knowledge of "bad" water wells drilled on the subject property and failed to warn or disclose that information to buyers, builders, water well drillers, and/or homeowners; and (4) Mr. Olson, Build One, and G2, LLC failed to properly plug "bad" water wells on neighboring properties.[3]

¶4 Olson Defendants filed a motion for summary judgment based on the statute of repose, 12 O.S. §109. Olson Defendants contend it is undisputed their involvement with the subject property ended when Clifford Farms, LLC sold the property to ZCT in 2001, and Conoco filed its third-party contribution claims more than 10 years later. Conoco responds that the statute of repose does not apply to third-party contribution claims, because contribution is not a tort. Conoco contends that even if the statute of repose does apply to contribution claims, its allegations have nothing to do with the construction of an improvement to real property. Rather, their claims are based on Olson Defendants' role in the pre-construction development of the neighborhood and their "*lack* of improvement, *lack* of investigation, and *complete failure* to disclose pertinent information about the property to the Clifford Farms homebuilders and homeowners."

¶5 The trial court granted summary judgment to Olson Defendants. In its order, the trial court found "the act of subdividing the property in question constituted an 'improvement to real property' for purposes of the statute of repose." The trial court also determined the statute of repose applied to a claim for contribution. Conoco filed a motion to reconsider. After two hearings and supplemental briefing, the trial court determined the undisputed facts demonstrated that Olson Defendants did not perform any development activities within ten (10) years of the date Conoco filed its third-party claims against the Olson Defendants. The trial court entered an Order Denying Third-Party Plaintiff ConocoPhillips' Motion to Reconsider and Granting Third-Party Defendants Final Summary Judgment. The trial court certified its order for appeal, pursuant to 12 O.S. §994 and Oklahoma Supreme Court Rule 1.36(A).[4]

¶6 This Court reviews summary judgment *de novo*, viewing all facts and inferences presented by the evidence in the light most favorable to the nonmoving party. *See Miller v. David Grace, Inc.*, 2009 OK 49, ¶10, 212 P.3d 1223. Summary judgment is appropriate when there is no genuine controversy as to any material fact, and the moving party is entitled to judgment as a matter of law. *Id.* This appeal requires us to construe 12 O.S. §109 and 12 O.S. §832. Statutory construction also presents a question of law which we review *de novo*. *See Fanning v. Brown*, 2004 OK 7, ¶8, 85 P.3d 841. We have plenary, independent and nondeferential authority to determine whether the trial court erred in its legal rulings. *Id.*

¶7 Two questions of law are presented in this appeal. First, whether a third-party contribution claim pursuant to 12 O.S. §832 is subject to the 12 O.S. §109 statute of repose. Second, if it is, whether the statute of repose bars Conoco's action against Olson Defendants.

¶8 Conoco seeks contribution from Olson Defendants pursuant to 12 O.S. §832, which provides, in pertinent part:

> A. When two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them except as provided in this section.
>
> B. The right of contribution exists only in favor of a tort-feasor who has paid more than their pro rata share of the common liability, and the total recovery is limited to the amount paid by the tort-feasor in excess of their pro rata share. No tort-feasor is compelled to make contribution beyond their pro rata share of the entire liability.

12 O.S. 2011 §832(A)-(B). Olson Defendants argue the 12 O.S. §109 statute of repose bars Conoco's contribution claims against them. That statute provides:

> No action in tort to recover damages
>
> (i) for any deficiency in the design, planning, supervision or observation of construction or construction of an improvement to real property,
>
> (ii) for injury to property, real or personal, arising out of any such deficiency, or
>
> (iii) for injury to the person or for wrongful death arising out of any such deficiency,
>
> shall be brought against any person owning, leasing, or in possession of such an improvement or performing or furnishing the design, planning, supervision or observation of construction or construction of such an improvement more than ten (10) years after substantial completion of such an improvement.

12 O.S. 2011 §109. No reported decision in Oklahoma has examined the interplay between the right of contribution pursuant to 12 O.S. §832 and the 12 O.S. §109 statute of repose.

¶9 While many states expressly address in their statutes of repose whether they apply to contribution claims,[5] the Oklahoma Statutes do not. Only a few appellate courts in other states have considered whether a statute of repose applies to third-party contribution claims when such claims are not expressly addressed in the statute, and all of these courts have determined contribution claims are subject to the statute of repose. *See Hayes v. Mercy Hosp. & Med. Ctr.,* 557 N.E.2d 873, 875-77 (Ill. 1990) (finding the medical malpractice statute of repose applied to a third-party contribution claim and was not limited to only a direct action by the injured party); *Dighton v. Fed. Pac. Elec. Co.*, 506 N.E.2d 509, 512-13 (Mass. 1987) (finding the construction statute of repose applied to a third-party contribution claim); *Dep't of Transp. v. Echeverri,* 736 So. 2d 791, 791-92 (Fla. Dist. Ct. App. 1999) (finding the construction statute of repose applied to a cross-claim for joint-tortfeasor-type contribution); *Krasaeath v. Parker,* 441 S.E.2d 868, 869-70 (Ga. Ct. App. 1994) (finding the medical malpractice statute of repose applied because recovery on the contribution claim was dependent upon proof of professional negligence on the part of the joint tortfeasor). Additionally, Oklahoma's statute of repose specifically bars an "action in tort." 12 O.S. §109. Oklahoma's statute is most similar to Massachusetts'. *See* Mass. Gen. Laws ch. 260, §2B. Only Oklahoma and Massachusetts' statutes of repose (1) do not expressly address applicability to contribution claims; and (2) by their terms, are limited to tort actions.[6]

¶10 In *Dighton v. Federal Pacific Electric Co.*, 506 N.E.2d 509 (Mass. 1987), the Supreme Judicial Court of Massachusetts determined third-party contribution claims were subject to the statute of repose. At the time, Massachusetts' statute of repose provided:

> **Actions of tort** for damages arising out of any deficiency or neglect in the design, planning, construction or general administration of an improvement to real property shall be commenced only within three years next after the cause of action accrues; provided, however, that in no event shall such actions be commenced more than six years after the performance or furnishing of such design, planning, construction or general administration.

Mass. Gen. Laws ch. 260, §2B (1973) (emphasis added).[7] In *Dighton*, tenants sued Federal Pacific, the circuit breaker manufacturer, after an apartment fire. *See* 506 N.E.2d at 511. Federal Pacific impleaded the architecture firm that designed the apartment building and sought contribution. *Id.* at 511-12. The trial court dismissed Federal Pacific's third-party contribution claim reasoning that the architecture firm could be liable for contribution only if it could be directly liable to the tenants and any direct claims by the tenants against the architecture firm were barred by the statute of repose. *Id.* On appeal, third-party plaintiff Federal Pacific made the same argument advanced by Conoco: the statute of repose does not apply to its third-party claim for contribution because the statute of repose, by its terms, only bars actions in tort. *Id.* at 512. The Supreme Judicial Court of Massachusetts rejected this argument, affirmed dismissal of the third-party claim, and explained that "[c]ontribution is available, however, only where two or more persons become jointly liable in tort. The right to contribution is derivative of the joint liability in tort of the third-party plaintiff and the third-party defendant. Without liability in tort, there is no right to contribution." *Dighton,* 506 N.E.2d at 512 (citations, footnotes, and internal quotations omitted) (emphasis original).

¶11 We agree with the *Dighton* court's reasoning. Conoco has specifically sought contribution pursuant to 12 O.S. §832. Conoco's right to contribution depends upon Conoco and Olson Defendants' joint or common liability *in tort* for the same injury to the Lays. Conoco cannot recover contribution for damages without proving Olson Defendants' tort liability. Therefore, we find Conoco's third-party contribution claim pursuant to 12 O.S. §832 constitutes an "action in tort to recover damages" within the meaning of 12 O.S. §109 and is subject to the statute of repose.

¶12 Our decision is consistent with the Oklahoma Supreme Court's recognition that "an alleged tortfeasor defending against a contribution claim is not without defenses." *Barringer v. Baptist Healthcare of Okla.*, 2001 OK 29, ¶9, 22 P.3d 695. The statute of repose is an affirmative defense available to Olson Defendants. Our conclusion also aligns with the purpose of statutes of repose. A statute of repose "restricts potential liability by limiting the time during which a cause of action can arise. It thus serves to bar a cause of action before it accrues." *Smith v. Westinghouse Elec. Corp.*, 1987 OK 3, n.11, 732 P.2d 466, 468. Section 109 "sets an outer boundary in time beyond which no cause of action may arise for conduct that would otherwise have been actionable." *St. Paul Fire & Marine Ins. Co. v. Getty Oil Co.*, 1989 OK 139, ¶17, 782 P.2d 915, 919. A third-party claim for contribution to recover damages arising out of any deficiency in the design, planning, supervision or observation of construction or construction of an improvement to real property exposes Olson Defendants to the same liability as if the Lays brought an action directly against them.[8] Excluding third-party contribution claims from §109 statute of repose would extend the period of exposure.

¶13 Next, we turn to whether the injury to the Lays' property, *i.e.*, contamination of their groundwater and/or soil, arises out of "any deficiency in the design, planning, supervision or observation of construction or construction of an improvement to real property." 12 O.S. §109. Section 109 can be broken down into five elements. *See Olsen v. Okla. Gas & Elec. Co.*, 2012 OK CIV APP 97, ¶13, 288 P.3d 940. The elements applicable here are: (1) an action in tort; (2) for injury to property which arises from a described deficiency; (3) the described deficiency involves an improvement to real property; (4) the defendant is a member of a described class; and (5) more than ten years have passed since substantial completion.

¶14 We have already determined a third-party contribution claim pursuant to 12 O.S. §832 constitutes an action in tort for purposes of 12 O.S. §109. Therefore, the first element is present.

¶15 The second element of §109 is also present. Conoco claims the following acts and omissions caused injury to the Lays' property: (1) Mr. Olson's failure to disclose his knowledge of historic oil and gas activity on the subject property; (2) Mr. Olson and Clifford Farms, LLC's failure to properly evaluate the environmental suitability of the property prior to developing the Clifford Farms Addition, specifically, whether there would be a fresh water supply for residential wells; (3) Olson Defendants' failure to disclose or warn buyers, builders, water well drillers, and/or homeowners of "bad" water wells drilled on the Lays' property; and (4) Mr. Olson, Build One, and G2's failure to properly plug "bad" water wells on neighboring properties. Conoco alleges the injury to the Lays' property arises from these failures or deficiencies. We find the broad language of 12 O.S. §109 encompasses failure to do these things as part of the development of real property for residential use. Failure to disclose knowledge of historic oil and gas activity, failure to evaluate the environmental suitability of the property for residential development, and failure to disclose or warn of "bad" wells drilled on the Lays' property are alleged deficiencies in the design, planning, supervision or observation of construction of an improvement to real property. Failure to properly plug the "bad" wells is a deficiency in the supervision of the construction or construction of an improvement to real property. Therefore, Conoco's contribution claim is based on injury to the Lays' property which arises from a deficiency described in §109.

¶16 Third, we find Olson Defendants' development of the Clifford Farms Addition constitutes an improvement to real property. The Oklahoma Supreme Court has said the *ad valorem* tax code's definitions are to be used to determine whether an activity constitutes an improvement to real property. *See Kirby v. Jean's Plumbing Heat & Air,* 2009 OK 65, ¶12, 222 P.3d 21. According to the ad valorem tax code, an "improvement" means a valuable addition made to property amounting to more than normal repairs, replacement, maintenance or upkeep.

See 68 O.S. Supp. 2014 §2802.1(A)(3). The definition of "real property" includes the land itself. 68 O.S. Supp. 2006 §2806. Mr. Olson and Clifford Farms, LLC developed the land by subdividing the 80 acres into 49 residential lots and creating the Clifford Farms Addition. Olson Defendants installed a gate, planted trees at the entrance and around the swimming pool, and developed the common areas of the neighborhood, including a clubhouse and swimming pool.[9] Additionally, Conoco alleges Olson Defendants were involved in the drilling and/or plugging of residential water wells. These are all substantial, expensive, and permanent improvements that make the property more useful and valuable. *See Kirby,* 2009 OK 65, ¶13 (holding the replacement of a sewer pipeline was an improvement to real property within the meaning of 12 O.S. §109).

¶17 We find Olson Defendants were "performing or furnishing the design, planning, supervision or observation of construction or construction of an improvement to real property," and the fourth element of 12 O.S. §109 is present. Mr. Olson and Clifford Farms, LLC oversaw the entire development of the Clifford Farms Addition, hired an engineer, and filed the Final Plat.[10] Conoco also alleges Olson Defendants played a role in drilling water wells and/or plugging the "bad" wells on the Lays' property and neighboring properties either by contracting with parties to do the work or actually performing the work. Olson Defendants are members of the described class.

¶18 The final inquiry is whether 10 years have passed since substantial completion of the improvements to real property. As discussed above, the improvements are the development of the 80 acres into Clifford Farms Addition and the drilling and/or plugging of residential water wells. We find the development of the Clifford Farms Addition was substantially completed in 2003. Mr. Olson's deposition testimony that all his development activities in the Clifford Farms Addition were completed when they finished construction of the clubhouse and swimming pool in 2003 is undisputed. Conoco produced evidence that some of the Olson Defendants continued to own and sell other properties in Clifford Farms Addition between 2005 and 2014. However, that evidence does not create a question as to when development of the neighborhood was substantially completed.

¶19 The drilling and/or plugging of residential water wells are separate improvements to real property. As to Conoco's claim Olson Defendants had a duty to disclose or warn about "bad" water wells drilled on the Lays property, those improvements were substantially completed no later than 2003, when the second well was drilled. As for Conoco's claim some of the Olson Defendants were responsible for the water wells drilled and/or improperly plugged on neighboring properties, those improvements were substantially completed in 2003.[11]

¶20 Conoco filed its third-party claim for contribution on November 9, 2015, which was more than 10 years after substantial completion of these improvements to real property. Therefore, Conoco's action against Olson Defendants is barred by the statute of repose, 12 O.S. §109, and Olson Defendants are entitled to judgment as a matter of law.

¶21 AFFIRMED.

BELL, J., and JOPLIN, J. (sitting by designation), concur.

Bay Mitchell, Presiding Judge:

1. This case is one of eight related lawsuits filed in federal and state courts.

2. Mr. Olson had an ownership interest in and/or did business as Clifford Farms, LLC, Clifford's Second One, LLC, Build One Development, L.P., and G2, LLC, which were entities involved in the development of Clifford Farms Addition.

3. In its Second Amended Answer and Cross-Claims and Third Party Claims, Conoco contends Olson Defendants were involved in the drilling and/or plugging of "bad" water wells at the Dannaway, Burch, and Zheng properties.

4. The merits, or lack thereof, of Plaintiffs John and Connie Lay's claims against Defendant ConocoPhillips are not at issue in this appeal.

5. More than twenty states have statutes of repose that expressly apply to contribution and/or indemnity claims. *See* Edward H. Tricker, Erin L. Ebeler & Christopher R. Kortum, *Applicability of Statutes of Repose to Indemnity and Contribution Claims and 50 State Survey*, 7 J. Amer. College of Constr. Lawyers, no. 1, Jan. 2013, n.41 (since publication Minnesota amended Minn. Stat. §541.051 to apply to contribution and/or indemnity claims). Nevada's statute of repose, by its terms, does not apply to contribution and/or indemnity claims. Nev. Rev. Stat. §11.202.

6. Rhode Island's statute of repose is also limited to tort actions, but it expressly applies to claims for contribution. *See* R.I. Gen. Laws §9-1-29 (Westlaw, current through Chapter 19-6 of the 2019 Regular Session).

7. Massachusetts' construction statute of repose was amended in 1984 in ways not material to this issue and now provides:

> ***Action of tort*** for damages arising out of any deficiency or neglect in the design, planning, construction or general administration of an improvement to real property . . . shall be commenced only within three years next after the cause of action accrues; provided, however, that in no event shall such actions be commenced more than six years after the earlier of the dates of: (1) the opening of the improvement to use; or (2) substantial completion of the improvement and the taking of possession for occupancy by the owner.

Mass. Gen. Laws 260 §2B (Westlaw, current through the 2018 2nd Annual Session) (emphasis added).

8. If the injured party's tort claim made directly against the third-party defendant would be barred by 12 O.S. §109, it follows that the defendant/third-party plaintiff's contribution claim against the third-party defendant should also be barred. *See Montaup Elec. Co. v. Ohio*

Brass Corp., 561 F. Supp. 740, 747-48 (D.R.I. 1983) (applying Massachusetts' statute of repose).

9. Olson Defendants also assert they installed access roads, street signs, and lights and advertised the lots. However, they have failed to provide evidentiary support for these assertions.

10. Courts in other jurisdictions have applied the construction statute of repose to developers. *See Damon v. Vista Del Norte Dev., LLC*, 381 P.3d 679 (N.M. Ct. App. 2016); *McCulloch v. Fox & Jacobs, Inc.*, 696 S.W.2d 918 (Tex. Ct. App. 1985).

11. In its Second Amended Answer and Cross-Claims and Third Party Claims, Conoco asserts the Dannaways' home was constructed in 2001, the Burch wells were drilled in 2002 and 2003, and the Zheng well was drilled in 2003.

2019 OK CIV APP 74

KAST TRUST FARMS, Petitioner/Appellant, vs. CLAYTON TWYMAN, WASHITA COUNTY ASSESSOR, Respondent/ Appellee.

Case No. 116,882. September 27, 2019

APPEAL FROM THE DISTRICT COURT OF WASHITA COUNTY, OKLAHOMA

HONORABLE DOUG HAUGHT, JUDGE

REVERSED AND REMANDED

Donelle H. Ratheal, Jason Gresham, Eric P. Warner, RATHEAL, MAGGARD & FORTUNE, PLLC, Oklahoma City, Oklahoma, for Petitioner/Appellant,

Mart Tisdal, Luke Adams, Michael Housley, TISDAL & O'HARA, Clinton, Oklahoma, for Respondent/Appellee.

ROBERT D. BELL, JUDGE:

¶1 This is an appeal from the district court's *de novo* review and denial of the ad valorem tax protest filed by Petitioner/Appellant, Kast Trust Farms (Taxpayer). The district court upheld the determinations of Clayton Twyman, Washita County Assessor (Assessor) and the Washita County Board of Equalization (Board) to reclassify and assess ten (10) acres of Taxpayer's agricultural real property as commercial property. Assessor reclassified the property after Taxpayer granted a surface site easement on the 10-acre tract to Chesapeake Midstream Gas Services (Chesapeake) and Chesapeake built a gas compressor facility thereon. Having reviewed the record, we hold the district court erred when it denied Taxpayer's protest. The district court's judgment is reversed and this matter is remanded to the district court with instructions to grant Taxpayer's protest. The district court shall also order Assessor to correct the tax rolls in accord with this opinion and refund all excess ad valorem taxes paid by Taxpayer.

¶2 Taxpayer owns several farms in Washita County. In 2002, Taxpayer bought a 160-acre farm from the Janzen family. From 2002 through 2015, Janzen Farm was classified as agricultural land and the farm's assessed value was $44,213. In July of 2010, Petitioner granted a surface site easement to Chesapeake over 10 acres of the 160-acre tract. Taxpayer was paid a one-time $60,000.00 surface damages sum. The easement recites the consideration paid for the easement settles "any and all damages, temporary and/or permanent, to the Easement at any time" resulting from the taking and use of the 10 acres. Chesapeake built a gas compressor facility on the 10-acre tract, graveled the area, and placed a fence around the facility. The easement provides Chesapeake has the absolute right to remove any and all property placed or maintained on the easement. If Chesapeake abandons the site, the easement reverts to Taxpayer.

¶3 In 2016, Assessor sent notice to Taxpayer that the 10-acre tract of land was being reclassified as commercial property because it was the situs of the gas collection facility. The reclassification of the 10 acres increased the 160-acre Farm's assessed value to over double the previous value, from $44,213 to $96,333. Assessor claims he determined the fair cash value of the entirety of the 160-acres to be $96,333, the taxable value at $96,333, and the assessed value at $10,597. Prior to trial, Assessor admitted he erroneously failed to use the five percent (5%) cap as required by the Okla. Const. Art. X, §8(b) and he adjusted the taxable value of the 160 acres to $44,374 to follow the 5% Constitutional cap. The taxable value will increase each year by 5% until it matches the fair cash value assessed by Assessor.

¶4 According to Taxpayer, the 2016 reclassification increased the 10-acre's value from $2,763.00 to $55,000.00. Taxpayer timely protested the reclassification and increase in value. At the informal hearing, Assessor produced comparable land sales, by warranty or quit claim deed, to gas production companies as support for the reclassification and denied the protest.

¶5 Taxpayer appealed the assessment to the Board. The Board affirmed Assessor's decision. Taxpayer appealed the Board's decision to the district court. At a trial *de novo*, the district court heard testimony from Taxpayer's expert, Wes Cabaniss, a licensed Oklahoma general appraiser, Dr. Wollman, the trustee/represen-

tative of Kast Trust Farm, and Assessor. Assessor testified only the 10-acres was reclassified from agricultural to commercial. Based on the presence of a gas compressor station, gravel and the perimeter fence, Assessor testified that he categorized the actual use of the 10-acre tract as commercial property.

¶6 The court held the 10-acre tract upon which the facility was built is commercial real estate and upheld Assessor's reclassification of the 10-acre tract as commercial land. Because Taxpayer has a right of reversion in the easement, the court held Taxpayer is responsible for the commercial tax liability on the 10 acres. The district court's journal entry noted, "A distinction must be made between the ten acres used for the gas compressor facility and the remaining farmland." Taxpayer now appeals the district court's decision to this Court.

¶7 This is an appeal in a special statutory proceeding to ascertain whether Taxpayer is entitled to a refund of ad valorem taxes paid under protest. *See In the Matter of the Assessment of Pers. Prop. Taxes Against Mo. Gas Energy, Div. of S. Union Co., for Tax Years 1998, 1999 and 2000,* 2008 OK 94, ¶17, 234 P.3d 938. In such an appeal, the district court's judgment should be affirmed unless it is against the clear weight of the evidence or is contrary to law or equity. *Id.* The district court's statutory construction is reviewed *de novo*. *Id.*

¶8 While Taxpayer raises several assignments of error on appeal, we find the resolution of this appeal depends on the impact of Chesapeake's easement on the value of Taxpayer's property for ad valorem tax purposes. "An easement creates a legal relationship between two parties. The easement holder is referred to as the dominant estate; and the owner of land subject to an easement is known as the servient estate." *Logan Cty. Conservation Dist. v. Pleasant Oaks Homeowners Ass'n,* 2016 OK 65, ¶14, 374 P.3d 755 (citations omitted). Chesapeake, the easement holder, is the dominant estate and Taxpayer, the land owner, is the servient estate. An easement affords its titleholder a limited non-possessory right to use a parcel of land for a specific purpose. *Id.*

¶9 Oklahoma law recognizes that an easement burdens the servient estate. These burdens include, among other things: (1) decreased property value, (2) increased noise and traffic or interference with the servient owner's peace and enjoyment of the land, and (3) physical damage to the servient estate. *Burkhart v. Jacob,* 1999 OK 11, ¶12, 976 P.2d 1046. Indisputably, the evidence shows the facility on the 10 acres meaningfully impacts Taxpayer's use and enjoyment of the servient estate as farmland. We recognize there is a valuable commercial gas production facility situated upon the easement. However, the easement specifies that the facility belongs to and may be removed by Chesapeake. The facility is not an improvement to the 10-acre tract that benefits Taxpayer. In truth, the easement and the facility situated thereon benefit only Chesapeake, the owner of the dominant estate.[1]

¶10 This Court can find no Oklahoma authority directly addressing the reclassification and assessment of increased ad valorem taxes against the servient estate owner due to the dominant estate owner's placement of facilities on the real property. In *American Southwest Properties, Inc. v. Tulsa Cty. Bd. of Equalization,* 2014 OK CIV APP 90, ¶14, 338 P.3d 647, the appellate court mentioned the recent construction of a bridge and road on an easement across the subject property was relevant evidence in an assessor's decision to change the use from agricultural to commercial. However, *American Southwest Properties, Inc.* did not delve into the impact of an easement on the valuation of the servient estate owner's interest in real property.

¶11 Sister courts have addressed the issue in similar circumstances. These courts generally adhere to the principle that "When an easement is carved out of one property for the benefit of another the market value of the servient estate is thereby lessened, and that of the dominant increased practically by just the value of the easement; the respective tenements should therefore be assessed accordingly." *Lake Monticello Owners' Ass'n v. Ritter,* 229 Va. 205, 209, 327 S.E.2d 117, 119 (1985).

> An easement cannot be appurtenant to both the dominant and the servient tenement. The dominant tenement is taxed upon its value, and the easement appurtenant enhances that value. It cannot pass upon the tax sale of the servient tenement. The servient tenement is also taxed upon its value, which the easement has diminished. Taxes assessed against the servient tenement cover the property minus the easement which has been carved out of it and which has become attached to and is appurtenant to the adjoining property.

Alvin v. Johnson, 241 Minn. 257, 262-63, 63 N.W.2d 22, 26 (1954). "'[A] landowner whose property is subject to an easement [typically] is entitled to a reduced valuation,' and when a 'property is so encumbered with easements that no use can be made of it, the fee owner pays no tax.'" *Breezy Knoll Ass'n., Inc. v. Town of Morris*, 286 Conn. 766, 780, 946 A.2d 215 (2008) (citation omitted).

¶12 Based on the foregoing, we find the instant easement has a negative effect on Taxpayer's use value of the 10-acre tract for ad valorem tax purposes. Due to this negative effect, we hold the higher commercial use value imposed by Assessor on Taxpayer's real estate does not exist. We further reject the district court's holding that Taxpayer's reversionary interest in the easement makes Taxpayer liable for the increased ad valorem tax. Chesapeake has not abandoned the easement. Taxpayer's interest in the real property consists only of what is left after Chesapeake's taking of the easement.

¶13 We conclude the district court erred when it denied Taxpayer's protest of Assessor's reclassification and assessment of increased ad valorem taxes on the 10 acres. The fee owner's interest in the 10-acre tract should only be assessed for a nominal amount. The district court's order is reversed and this matter is remanded to the district court with instructions to enter judgment in favor of Taxpayer. On remand, the district court shall order Assessor to correct the tax rolls in accord with this opinion and refund all excess ad valorem taxes paid by Taxpayer.

¶14 Taxpayer also requests an award of attorney fees and costs. Rule 1.14(B), Oklahoma Supreme Court Rules, 12 O.S. Supp. 2013, Ch. 15, App. 1, provides, "A motion for an appeal related attorney's fee must be made by a separately filed and labeled motion in the appellate court prior to issuance of mandate." Taxpayer's request for appeal related attorney's fee is denied without prejudice to refiling pursuant to Rule 1.14.

¶15 REVERSED AND REMANDED.

MITCHELL, P.J. and SWINTON, J., concur.

ROBERT D. BELL, JUDGE:

1. Taxpayer argues Assessor has created a double tax because Assessor taxes the facility as Chesapeake's business personal property and Assessor also taxes the same facility as a commercial improvement to Taxpayer's real property.

2019 OK CIV APP 75

IN RE THE MARRIAGE OF: SHARON DUNLAP, Petitioner/Appellant, vs. DAVID DUNLAP, Respondent/Appellee.

Case No. 116,914. November 5, 2019

APPEAL FROM THE DISTRICT COURT OF OKFUSKEE COUNTY, OKLAHOMA

HONORABLE LAWRENCE W. PARISH, TRIAL JUDGE

AFFIRMED

Jason M. Lile, ALLEN & GARRETT, ATTORNEYS, Tulsa, Oklahoma, for Petitioner/Appellant

Rod W. Wiemer, ROD W. WIEMER P.C., Okmulgee, Oklahoma, for Respondent/Appellee

P. THOMAS THORNBRUGH, JUDGE:

Sharon Dunlap (Mother), appeals a decision denying her motion to modify custody of minor children, D.D.D, Jr., and D.D.D. On review we affirm the decision of the District Court.

FACTS AND PROCEDURAL BACKGROUND

The parties were divorced on March 3, 2011, and a Decree of Dissolution of Marriage was entered granting custody of the party's minor children, D.D.D. Jr., and D.D.D., to Petitioner, Sharon Dunlap (Mother), subject to Respondent David Dunlap's (Father) specific rights of visitation. On January 31, 2014, Father filed a motion to modify custody of both children alleging that Mother had hidden the children for an extended period of time.[1] The court granted Father emergency temporary custody which he maintained through a series of contentious court proceedings until November 28, 2016, at which time the court (with the agreement of Mother) placed sole custody of the minor children with Father subject to Mother's right of specified visitation.

On April 10, 2017 (about 5 months after the court awarded custody to Father), Mother moved to modify the Agreed Order to place custody with her for the sole reason that the children had expressed a preference to live with Mother. Father filed a Motion to Dismiss with supporting brief and a Motion to Settle Journal Entry and for Ancillary Relief on July 14, 2017.

On November 14, 2017, the court heard all pending motions; conducted an evidentiary hearing on Mother's motion to modify; and, at the specific request of Mother, conducted an *in camera* interview with the children as provided for by 43 O.S. 2011 § 113. At the time of hearing, DDD Jr. was 15 years of age and his younger brother, DDD, was 12. Following hearing, the court announced its decision in open court denying Mother's motion to modify.[2]

STANDARD OF REVIEW

A trial court is vested with discretion in matters involving custody. *Rowe v. Rowe*, 2009 OK 6, ¶ 3, 218 P.3d 887. The findings and decree of the trial court cannot be disturbed unless found to be against the clear weight of the evidence or an abuse of discretion. *Daniel v. Daniel,* 2001 OK 117. ¶ 21, 42 P.3d 863. "The burden is upon the party appealing from the custody and visitation award to show that the trial court's decision is erroneous and contrary to the child's best interests." *Id.* "An abuse of discretion occurs when a decision is based on an erroneous conclusion of law or where there is no rational basis in evidence for the ruling." *In re BTW,* 2008 OK 80, ¶ 20, 195 P.3d 896 (footnote omitted).

In order to review a change in custody based upon "a change in circumstances," we use the test established by *Gibbons v. Gibbons,* 1968 OK 77, 442 P.2d 482, to determine whether the parent asking for a change in custody has established a permanent, substantial and material change in condition such that the child would be substantially better off if the requested change in custody was ordered. A *well-founded* custody preference by a child is sufficient to evidence a change in condition that can trigger this "best interests" inquiry. *Nelson v. Nelson,* 2004 OK CIV APP 6, ¶ 4, 83 P.3d 911.

ANALYSIS

Mother briefs three propositions of error as follows:

1. The court's decision to interview the minor children, *in camera*, violated the mandates of 43 O.S. § 113 (B) and (C);

2. The court did not follow the guidance of the Oklahoma Supreme Court outlined in *Ynclan v. Woodward,* 2010 OK 29, 237 P.3d 145, when conducting the interviews of the children; and

3. The trial court's decision denying Mother's motion to modify custody constituted an abuse of discretion by failing to find a change of circumstances and award custody based upon the childrens' expressed preference.

I. THE COURT'S DECISION TO INTERVIEW THE MINOR CHILDREN

Mother first argues that the entire *in camera* process should not have taken place because the court "could have simply relied upon the parties' testimony that the children had expressed a preference to live with their Mother." Aside from the fact that the Oklahoma Legislature has specified an *in camera* hearing as a proper means to discover a child's preference, rather than forcing the court to rely on hearsay statements, it is difficult to understand Mother's objection since it was Mother, who, after testifying that the children had come to her multiple times expressing a desire to live with her, was insistent that the Court would, "have to talk to the boys. The boys are the ones that have told me things."

At close of her direct testimony, Mother's attorney made the following request of the court:

> MS MASTERS: Judge we would request that the court interview the children, just so that we can at least have their preference *in camera* away from any of this drama and on the record.

The record discloses that Father, while preferring to give testimony himself as to whether or not the children had expressed a preference to live with Mother, nevertheless acquiesced in the court's decision to interview the children, *in camera*.[3]

In the first impression case of *Ynclan v. Woodward,* 2010 OK 29, ¶ 16, 273 P.3d 145, which Mother relies on to support her argument, the court noted, "In most cases, if the parents' consent or agree to the interview, a trial court may hold an *in camera* preference interview without the parents. If a parent does not object to the procedure at the time of the interview then any objection is generally waived on appeal." This is in accord with our holding in *Mullendore v. Mullendore*, 2012 OK CIV APP 100, ¶ 4, 288 P.3d 948, where we declined to consider an argument first raised on appeal noting that, "Generally, this court does not reach issues the appealing party fails to raise in the district court, and we decline to do so here."

Before the trial judge made his decision to interview the children he reviewed the case of *Lowry v. Lewis,* 2014 OK CIV APP 9, 317 P.3d 230 proffered by Mother's attorney, and concluded, "I will talk to the two children, because I think the law requires that I do this. So I'll ask you all to leave the courtroom." We agree with the trial court's assessment since we have previously written that the testimony of a parent that the child requested the change in custody was, "proof that called for in-depth judicial assessment of the existing custodial arrangement and would be error for the trial court to dispose of the motion for change of custody without taking and considering evidence from the child and custodial mother, if she desired to present it." *Nazworth v. Nazworth*, 1996 OK CIV APP 134, ¶ 4, 931 P.2d 88.

The statutory framework which provides for the manner in which courts may consider the preference of the child in awarding custody is set forth at 43 O.S. § 113 which states:

> A. In any action or proceeding in which a court must determine custody or limits to or periods of visitation, the child may express a preference as to which of the parents the child wishes to have custody or limits to or periods of visitation.
>
> B. The court shall first determine whether the best interest of the child will be served by allowing the child to express a preference as to which parent should have custody or limits to or periods of visitation with either parent. If the court so finds, then the child may express such preference or give other testimony.
>
> C. There shall be a rebuttable presumption that a child who is twelve (12) years of age or older is of a sufficient age to form an intelligent preference.
>
> D. If the child is of sufficient age to form an intelligent preference, the court shall consider the expression of preference or other testimony of the child in determining custody or limits to or periods of visitation. Interviewing the child does not diminish the discretion of the court in determining the best interest of the child. The court shall not be bound by the child's choice or wishes and shall take all factors into consideration in awarding custody or limits of or period of visitation.
>
> E. If the child is allowed to express a preference or give testimony, the court may conduct a private interview with the child in chambers without the parents, attorneys or other parties present. . . .

At the time of the hearing, DDD Jr., was 15 years of age and his younger brother, DDD was 12. Mother testified that both of the children are "very intelligent, very good kids." Following the *in camera* interview the trial judge complimented each of the parents noting, "You have two really intelligent young men."

We find the court's determination to conduct an *in camera* interview of the minor children's custody preference was done in accordance with Mother's request, was without objection, and was well within the guidelines advanced by case law and the provisions of §113. We find no error in the court's decision to interview the children *in camera*.

II. THE GUIDANCE THE OKLAHOMA SUPREME COURT OUTLINED IN *YNCLAN V. WOODWARD*

Mother next argues that the *in camera* interview in this case violated the guidelines of *Ynclan v. Woodward*, 2010 OK 29, 237 P.3d 145, because during the interview, the judge eventually asked each of the brothers, "Where do you want to live?" Part of ¶ 13 of *Ynclan,* which includes a broad survey of the laws of several states regarding the procedure and purpose of a trial judge conducting a private *in camera* interview with a child, includes the statement:

> Nor should a child be directly asked where the child would rather live because specifically asking preference provides an opportunity for parental manipulation or intimidation of the child as well as an opportunity for the child to manipulate the parents.

In assessing Mother's claim we consider whether this statement in ¶ 13 of *Ynclan* is in the nature of a rule, a "guideline" or merely an observation of the law of another state? The final rule of *Ynclan* is stated at ¶ 19: "[W]e hereby adopt the following guidelines for trial courts to utilize when planning to conduct an *in camera* custodial or visitation child preference interview." We note that the statement that a child should not be directly asked where the child would rather live is not part of the guidelines stated in ¶ 19. We conclude that the absence of the "don't ask" rule in the *Ynclan*

court's final holding, and the context of ¶ 13 as a broad survey of general foreign law, does not promulgate a rule forbidding a trial judge from eliciting a statement of preference as suggested by Mother.

We also note the procedural difficulty, if not impossibility, of statutorily specifying a hearing for *the purpose of the child expressing a preference,* but prohibiting the judge from asking as to that preference. Interpreting ¶ 13 of *Ynclan* as setting additional rules to those actually stated in ¶ 19 would require a trial court to engage in some form of specious general conversation during a § 113 interview while constantly attempting to "maneuver" the child into a "spontaneous" expression of a preference. The difficulty of this process cannot be underestimated because even an indirectly elicited expression of a child's preference will be subject to criticism by the non-prevailing parent depending upon how far the court "hinted" that it would like the child to express a preference.

Mother's claim here is an example of this tendency. Disparaging the court's interview as "farcical" Mother shows a captious inclination to mischaracterize the court's effort to discharge its duty to ascertain and give "serious consideration" to the brothers' custody preference, while at the same time being sensitive to how the children are coping with the divorce, the pressures put on the children by the divorce, as well as trying to ascertain the motive of the children in stating a preference. *See, e.g., Foshee v. Foshee*, 2010 OK 85, ¶ 13, 247 P.3d 85.

While Mother claims in her brief in chief that the younger brother, D.D.D. (age 12), was rendered "emotionally unable to give reasons why he wanted to live with Mom and discouraged by the court from being allowed to continue," the transcript indicates that the child was in fact encouraged to "just take your time. Just tell me in your own words (long pause) or, if you can't think of anything right now, that's fine too."

Where Mother claims that the older brother, D.D.D. Jr., was "scolded" when he offered to answer for his younger brother we read in the transcript the simple and appropriate statement of the court, "No, you don't tell. Let him – ."

Trial judges have been given great latitude in the manner in which they are allowed to exercise their sound discretion in the interview of children permitted under § 113 and wisely so. Our review of the record discloses that the trial judge here made appropriate efforts to place the children at ease as the *in camera* interview began; that he appropriately acknowledged to D.D.D. Jr. that the situation the children found themselves in was difficult and even unfair, and that he offered the children a neutral place in which to state any preference they might want him to consider.

On balance, we find the court's interview was appropriate given the age, maturity, and other issues presented by the parties; and that the court fairly characterized and summarized the facts it took into consideration as a result of the interview as it related to the custody decision. We decline to find that the court abused its discretion it its interview of the children here and reject Mother's claim.

III. THE EXPRESSION OF PREFERENCE BY THE MINOR CHILDREN AND THE *GIBBONS* TEST REQUIRING A CHANGE OF CIRCUMSTANCES

In her last proposition of error, Mother asserts that the trial court abused its discretion by failing to award custody based upon the childrens' expressed preference as disclosed in this record. Mother's claim invites us to briefly review the evidentiary significance of the "rebuttable presumption" provided by § 113(C) that "There shall be a rebuttable presumption that a child who is twelve (12) years of age or older is of a sufficient age to form an intelligent preference," and the statement of § 113(D) that:

> If the child is of a sufficient age to form an intelligent preference, the court shall consider the expression of preference or other testimony of the child in determining custody or limits to or periods of visitation. Interviewing the child does not diminish the discretion of the court in determining the best interest of the child. The court shall not be bound by the child's choice or wishes and shall take all factors into consideration in awarding custody or limits of or period of visitation.

These statutes may impact the efficacy of the children's statement of preference both in establishing the change of condition under *Gibbons* when the expressed preference is the only change in condition relied on by the moving party, and the importance of other testimony and evidence considered by the court in mak-

ing its custody decision under the facts of this case.

A. The Rebuttable Presumption

Mother argues that the trial court must have abused its discretion in not awarding custody in line with the two brothers' stated preference, since by "definition of law" they were presumed to be able to express an intelligent preference with regard to the requested change of custody.

The presumption created by § 113(C), however, is exactly that stated by statute – that "a child who is twelve (12) years of age or older is of a sufficient age to **form** an intelligent preference." (Emphasis added). It does not establish that the preference is actually intelligently considered, or should be a controlling factor. The preference of the child is just that – a preference to be considered among many factors. The fact that a child is permitted to tell the court what he wants does not necessarily establish what he needs or what is in his best interest. As § 113(D) clearly states, "Interviewing the child does not diminish the discretion of the court in determining the best interest of the child. The court shall not be bound by the child's choice or wishes and shall take all factors into consideration in awarding custody or limits of or period of visitation." We noted in *Nazworth*, 1996 OK CIV APP 134, ¶ 6, that where a change in custody is sought because the child has asked for the change, "It may well turn out that the change in custody is not in the child's best interest . . . ."[4]

Mother's real complaint has very little to do with her claims concerning the court conducting the interview *in camera*, or even in the way in which the court conducted the interview. At the end of the day the court did interview the children, and they did express a recorded preference in favor of Mother. Nonetheless, the court found that a change of custody to live with Mother was not in the children's best interest. Section 113(D) is clear that "*Interviewing* the child does not diminish the discretion of the court in determining the best interest of the child. *The court shall not be bound by the child's choice or wishes and shall take all factors into consideration in awarding custody or limits of or period of visitation*." (Emphasis added).

We have considered the role of the child's preference in a line of cases originating from early opinions of the Supreme Court which held that the trial court was not bound by the child's opinion since, "[T]he whims, wants and desires of minor child are not the criteria for determining which parent should be granted custody of minor child." *Duncan v. Duncan,* 1969 OK 7, 449 P.2d 267, *Davis v. Davis,* 1960 OK 196, 335 P.2d 572. We concluded in *Nazworth* that, "where the preference is explained by the child and *good reasons for the preference are disclosed*, the preference and supporting reasons will justify a change of custody." (Emphasis added.) Although the "consideration of such wishes will aid the court in making a custodial [decision] which is for the best interests and welfare of the child" this is only "one factor which may be considered by the court in determining custody." *See Nazworth* at ¶ 4.

In *Coget v. Coget*, 1998 OK CIV APP 164, 966 P.2d 816, we considered the role of the expressed preference of a minor child who was nine years old at the time of the hearing and required that the child's preference be backed by good reasons and well supported facts. We noted that the stated expression of the child that she would "get to play with her half-brother and half-sister" was not sufficient to "constitute a permanent, material and substantial change in circumstances such as justifies a modification in the custody of this minor." *See Coget* at ¶ 5 and n.2.

In *Ynclan v. Woodward*, the Supreme Court opined, without discussion of the cases from the Court of Civil Appeals, that the child's preference (in an original custody proceeding) should never be the sole determinant in the custody decision; and in *Foshee v. Foshee*, 2010 OK 85, ¶ 13, 247 P.3d 1162 (in a case involving the modification of joint custody) the Court held that "the preference of the child is just that – a preference. We have never held that child preference is 'the' deciding factor when determining custody or modifying custody. Rather it is merely one of many facts which the trial court is required to consider."

B. The Statement of Preference Must Be Well-Reasoned to Support a Change of Circumstances under *Gibbons*

We note that Mother's argument appears to expand the presumption that a child *can* form an intelligent or well-reasoned preference into a presumption that the child's expressed preference *is* intelligent and well-reasoned. We disagree. The fact that a child may be *capable* of making an intelligent and well-reasoned preference does not equate to a finding that *any*

preference expressed by a child is intelligent and well-reasoned.

Most recently in the case of *Lowry v. Lewis*, 2014 OK CIV APP 9, ¶ 21, 317 P.3d 230, we considered a father's motion to modify custody based upon the expression of preference stated by a 12-year-old, and changed custody after an *in camera* interview with the child. We relied upon *Nazworth*, and found that the stated preference of the 12-year-old child was sufficient to establish a change in circumstances required by *Gibbons*, because her explanation, supporting reasons and factors that led to her preference were, "thoughtful, intelligent, and well-reasoned" and had been formed, "over a significant period of time [two years]."

In contrast to *Lowry*, there is no indication here that the children's stated preference was formed over any period of time greater than the relatively short period of five months since they had been placed in Father's custody by agreement of Mother. Nor did the stated preference seem to be particularly well reasoned. Both children expressed their love for their mother and father. Twelve-year-old D.D.D. was unable to think of any certain reason why he wanted to live with Mother, and we agree with the trial court that D.D.D. Jr.'s reasons tended to center on the fact that there seemed to be "a few more rules at dad's house than there is at mother's house."

It is fundamental that in a proceeding to modify provisions of an order relating to custody of a child, the burden of proof is upon the moving party to show a substantial change in conditions since the entry of the order sought to be modified. The change must bear directly upon the welfare and best interest of the child or show that material facts bearing upon the welfare of the child were unknown to the court at the time the order sought to be modified was entered. The fact that a well-reasoned preference and the reasons underlying it are to be considered and evaluated does not allow the court to bypass the requirements of *Gibbons. Mullendore,* 2012 OK CIV APP 100at ¶ 12.

The trial court did not err in finding that a change in custody was not in the best interests of the minor children in this case and, we find after close review that the statement of preference relied upon by the Mother was wholly insufficient to support the modification she requested. Moreover, the other evidence considered by the court clearly supported its decision denying Mother's motion to modify.

C. Other Factors Considered by the Court

While Mother primarily relied upon the "stated preference" of the children to live with her as the basis for her motion to modify, she also testified generally that she had concerns about the children going back and forth because D.D.D. Jr. cries and is very upset on Fridays when he comes to visit and does not want to go home to Father's on Monday. The interview with the children failed to substantiate this claim.

Mother also testified that she offers a nurturing environment for the children. On cross-examination, Mother testified that Father had provided additional visitation other than that which had been ordered and had been flexible with regard to visitation. Mother testified that she had no proof of anything detrimental happening to the boys while in Father's custody and that both children were outstanding students and that Father supported them in their extracurricular activities.

The trial court also considered testimony from Mother admitting she had made a bad decision to keep the boys from Father for approximately 8 months before custody was transferred to Father, and she had no explanation as to why she had paid "zero" in child support since November of 2016.

Father testified that he had minor concerns that the boys' hygiene needs were not being attended to adequately when they were with their Mother; and that D.D.D. Jr. had been reported as falling asleep in class and had not turned in some assignments after a weekend visitation with his Mother.[5] That aside, Father testified that D.D.D. Jr. was a straight A student and that D.D.D. had made a perfect score on the "gifted and talented test." Father testified that both boys excelled in sports and presented no unusual disciplinary problems.

CONCLUSION

Custody orders will not be disturbed on appeal unless found to be against the clear weight of the evidence. *Hoedenbeck v. Hoedenbeck*, 1997 OK CIV APP 69, ¶ 12, 948 P.2d 1240. In reviewing such custody orders, deference will be given to the trial court since the trial court is better able to determine controversial

evidence by its observation of the parties, the witness and their demeanor." *Id.*, at ¶ 10.

Mother's proof and, in particular, the stated preference of the minor children fails to satisfy her burden under *Gibbons.* We find the trial court did not abuse its discretion in denying Mother's motion to modify custody and we affirm the decision of the trial court.

AFFIRMED.

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

P. THOMAS THORNBRUGH, JUDGE:

1. At hearing Mother admitted that she had kept the boys from Father without him having visitation or knowing where the children were for 8 months.

2. The trial judge in his remarks, addressed to both of the parties in open court, verified that he had talked to both children; that everything they had said was put on the record; that they expressed a preference to live with mother which he had considered but that the court did not find it in their best interest to change custody of the children from where they are (with the father).

3. At the end of direct testimony and after the trial judge had ruled that he would talk to the children *in camera*, Father's attorney made no further objection or request to the court and simply noted: "Judge you've already said you are going to talk to the children so I'm just getting ready to clear out [leave the courtroom]."

4. It is worth noting that Mother's attorney advanced this proposition of law in his argument to the court concerning the role the child preference should be afforded in a modification of custody case: "[T]he court is not bound by a child preference . . . . But the factors exist that you can hear the preference and you can weight it. If you find it to be against the children's best interest, we can't do anything about that."

5. The child admitted in his *in camera* interview that he had "missed some papers . . . and got put on probation" but did not explain why.

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Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS
Thursday, November 21, 2019

F-2018-678 — Kenneth Oliver Ross, Appellant, was tried by jury for the crimes of Lewd Molestation of a Minor (Counts 1 and 3) Assault and Battery (Count 4), and Human Trafficking of a Minor for Commercial Sex (Count 6) in Case No. CF-2017-1413 in the District Court of Tulsa County. The jury returned a verdict of guilty and recommended as punishment 14 years imprisonment and a $10,000 fine in Count 1, 20 years and a $10,000 fine in Count 3; 90 days in jail and a $1000 fine in Count 4, and 50 years and a $50,000 fine in Count 6. The trial court sentenced accordingly and ordered the terms to be served consecutively. From this judgment and sentence Kenneth Oliver Ross has perfected his appeal. AFFIRMED. Opinion by: Kuehn, V.P.J.; Lewis, P.J., concur; Lumpkin, J., concur in results; Hudson, J., concur; Rowland, J., concur.

F-2017-171 — William Hunter Magness, Appellant, was tried by jury for the crime of First Degree Child-Abuse Murder in Case No. CF-2015-10 in the District Court of Okfuskee County. The jury returned a verdict of guilty and recommended as punishment life imprisonment. The trial court sentenced accordingly. From this judgment and sentence William Hunter Magness has perfected his appeal. AFFIRMED. Opinion by: Kuehn, V.P.J.; Lewis, P.J., concur; Lumpkin, J., concur; Hudson, J., concur; Rowland, J., concur.

F-2018-994 — Katesha Christine Childers, Appellant, was tried by jury for the crime of First Degree Murder (Count 1) and Unlawful Possession of a Firearm by a Convicted Felon (Count 2) in Case No. CF-2017-3783 in the District Court of Tulsa County. The jury returned verdicts of guilty and set as punishment life imprisonment on Count 1 and one year imprisonment on Count 2. The trial court sentenced accordingly and ordered the counts to run concurrently. From this judgment and sentence Katesha Christine Childers has perfected her appeal. AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs.

Thursday, December 5, 2019

C-2019-125 — Petitioner Cody Allen Blessing entered a negotiated plea of no contest in the District Court of Alfalfa County to three counts of Child Abuse by Injury, Case No. CF-2018-36. The Honorable Loren Angle, Associate District Judge, accepted Blessing's no contest plea and sentenced him in accordance with the plea agreement to twenty years imprisonment on each count with all but the first five years suspended. Judge Angle ordered the sentences to run concurrently. Blessing timely filed a motion to withdraw his plea that was denied following a hearing. Blessing appeals the denial of that motion. Petition for a Writ of Certiorari is DENIED. The district court's denial of Petitioner's motion to withdraw plea is AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs.

F-2018-882 — Amber Lee McAnerney, Appellant, was tried by jury for the crime of Child Abuse by Injury in Case No. CF-2017-518 in the District Court of Comanche County. The jury returned a verdict of guilty and set as punishment four years imprisonment. The trial court sentenced accordingly. From this judgment and sentence Amber Lee McAnerney has perfected her appeal. AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs in results; Kuehn, V.P.J., concurs in results; Lumpkin, J., concurs; Hudson, J., concurs.

F-2018-566 — Keenan Lynn Holcomb, Appellant, was tried by jury for the crimes of Count 1, first degree murder; Count 2, unlawful removal of a dead body; Count 3, kidnapping; and Count 4, forcible oral sodomy in Case No. CF-2016-990 in the District Court of Cleveland County. The jury returned a verdict of guilty and set punishment at life imprisonment without the possibility of parole on Count 1, five years imprisonment on Count 2, twenty years imprisonment on Count 3, and ten years imprisonment on Count 4. The trial court sentenced accordingly and ordered the sentences served consecutively. From this judgment and sentence Keenan Lynn Holcomb 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-2018-760 — Monte Dean Perry, Appellant, was tried by jury for the crimes of Count 1, assault and battery with a deadly weapon, and Count 2, endeavoring to perform an act of violence in Case No. CF-2016-3706 in the District Court of Oklahoma County. The jury returned a verdict of guilty and set punishment at thirty years imprisonment in Count 1 and five years imprisonment in Count 2. The trial court sentenced accordingly and ordered the sentences to be served concurrently. From this judgment and sentence Monte Dean Perry 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-2018-760 — Ganey Marques Fairley, Appellant, was tried by jury for the crimes of Count 1: Child Abuse by Injury and Count 2: Child Neglect, in Case No. CF-2017-1754, in the District Court of Tulsa County. The jury returned a verdict of guilty and recommended as punishment twenty-five years imprisonment on Count 1 and five years imprisonment on Count 2. The Honorable William J. Musseman, Jr., District Judge, sentenced accordingly, ordering credit for time served and imposed various costs and fees. Judge Musseman also ordered Fairley's sentences to run consecutively. From this judgment and sentence Ganey Marques Fairley has perfected his appeal. The judgments of the district court are AFFIRMED. Appellant's sentence are VACATED and the matter REMANDED FOR RESENTENCING. Opinion by: Hudson, J.; Lewis, P.J., Concurs in Results; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs in Part/Dissents in Part; Rowland, J., Concurs.

CIVIL APPEALS
(Division No. 1)
Friday, November 22, 2019

116,377 — State of Oklahoma ex rel. Oklahoma Department of Public Safety, Plaintiff/Appellant, v. Miscellaneous Property, Defendant, and Bobby Jo Benton, Appellee. Appellant, the Oklahoma Department of Public Safety, seeks review of the Oklahoma County District Court's order of July 10, 2017, granting the motion to dismiss of Appellee, Bobby Jo Benton, in the above styled cause. The district court ordered the DPS case dismissed, that DPS shall return "one 2000 Chevy Impala," and eleven thousand dollars ($11,000.00), plus interest earned if the funds were placed in an interest bearing account. We AFFIRM the order of the district court. Opinion by Joplin, P.J.; Goree, C.J., and Buettner, J., concur.

117,059 — Beverly Willingham, as Guardian of Terry D. Willingham, Plaintiff/Appellant, v. Triad Eye Medical Clinic, Defendant/Appellee, and Cleveland Area Hospital Trust Authority, dba Cleveland Area Hospital, Dr. Michael Chamberlain, John Doe Nurses 1-10, Jane Doe Nurses 1-10, John Doe Physicians, Defendants. Appeal from the District Court of Pawnee County, Oklahoma. Honorable Patarick Pickerill, Judge. This case arose from an eye surgery which occurred on November 3, 2014, at which time Plaintiff/Appellant, Terry Willingham, had an intraocular lens placed in his left eye. The lens was not consistent with Willingham's prescription and he was required to undergo a second surgery on December 4, 2014 in order to correct the lens transplant. Willingham filed a Petition in Pawnee County District Court on July 22, 2016, asserting claims against the Cleveland Area Hospital at which the first surgery was done, the doctor who performed the surgery, and various John/Jane Doe doctors and nurses. On December 13, 2017, Willingham filed an Amended Petition, adding Triad Eye Medical Clinic as a Defendant. The second correction surgery was performed at Triad's Tulsa location and Triad manufactured and fabricated the lenses that were used in both surgeries. On January 26, 2018, Triad filed a Motion to Dismiss, which was converted to a Motion for Summary Judgment, asserting Willingham's claims against it were time barred by the applicable statute of limitations. 12 O.S. Supp.2009 §95(3). We AFFIRM the district court's May 2, 2018 order granting Triad's Motion to Dismiss. Opinion by Joplin, P.J.; Goree, C.J., concurs and Buettner, J., dissents.

Monday, December 2, 2019

117,121 — YCO OKC, Inc. d/b/a Youthcare of Oklahoma, an Oklahoma Corporation, Plaintiff/Appellee, v. Oklahoma Employment Security Commission; Oklahoma Employment Security Commission Assessment Board, Defendant/Appellant. The Oklahoma Employment Security Commission and Oklahoma Employment Security Commission Assessment Board, collectively "OESC", appeal the district court's order vacating OESC's Order of Decision determining the employment status of PLC Candidates working for YCO OKC Inc.

d/b/a Youthcare of Oklahoma (YCO), Appellee. The agency held YCO failed to meet its burden to demonstrate Candidates were independent contractors, and as such, were employees according to the Employment Security Act, 40 O.S. §1-101 *et seq*. YCO appealed the agency order pursuant to 40 O.S. §3-401 *et seq*. The district court vacated the OESC order and entered its order determining Candidates were independent contractors. Opinion by Goree, C.J.; Joplin, P.J., and Buettner, J., concur.

(Division No. 2)
Friday, November 22, 2019

117,075 — In the Matter of the Adoption of M.D.W., a minor child. John Walker, Appellant, vs. Levi Arnold and Latesha Arnold, Appellees. Appeal from Order of the District Court of Bryan County, Hon. Mark Campbell, Trial Judge. Appellant John Walker (Father), the natural father of MDW, appeals the Order of the district court which held that Father's consent is not necessary for the adoption of MDW by Appellee Levi Arnold (Stepfather). This Court finds that the trial court properly determined that Mother and Stepfather showed, by clear and convincing evidence, that Father had willfully failed to support MDW and that adoption by Stepfather was in the child's best interests. Accordingly, the order allowing Stepfather's petition to adopt MDW without Father's consent is affirmed. Opinion from Court of Civil Appeals, Division II by Fischer, P.J.; Reif S.J. (sitting by designation), and Thornbrugh, J., concur.

Tuesday, November 26, 2019

117,544 — Christopher J. Alexis, Plaintiff/Appellee, vs. June M. Thompson, if living, and if deceased, her successors, if any; Spouse of June M. Thompson, if living, and if deceased, his successors, if any; Occupants of the Premises, Defendants/Appellants. Appeal from Order of the District Court of Tulsa County, Hon. Linda G. Morrissey, Trial Judge. Defendant June M. Thompson seeks review of the trial court's order denying her motion to reconsider and vacate the trial court's previous order granting summary judgment to Plaintiff Christopher J. Alexis. Plaintiff filed his petition alleging Defendant had breached loan and settlement agreements and a lease with option to purchase real property. In addition to seeking damages against Defendant, Plaintiff also sought a judgment quieting title to the property in him. Plaintiff filed a motion for summary judgment with supporting evidentiary materials attached. The fact that Defendant filed her response to Plaintiff's summary judgment motion without the assistance of counsel did not, in any way, relieve her of the responsibility to adhere to the requirements of 12 O.S.2011 § 2056 and Okla. Dist. Ct. R. 13. *Pro se* litigants are required to meet the same procedural standards, evidentiary rules and burdens of proof as represented parties. *Funnell v. Jones*, 1985 OK 73, ¶ 4, 737 P.2d 105. Defendant did not submit any evidentiary material to the trial court to support her claim that material facts remained in dispute. The "bald contentions" she relied on were insufficient to defeat Plaintiff's properly supported summary judgment motion and did not qualify as a request for further discovery as set forth in Rule 13(d). Defendant based her motion to reconsider on the erroneous assertion that judgment had been entered by default and on the bare allegation that "there is a substantial controversy as to the material facts." The trial court did not abuse its discretion in denying that motion. AFFIRMED. Opinion from Court of Civil Appeals, Division II by Fischer, P.J.; Reif, S.J. (sitting by designation), and Thornbrugh, J., concur.

(Division No. 3)
Tuesday, December 3, 2019

117,633 — Lamees Shawareb and Farouk Shawareb, Plaintiffs/Appellants, vs. SSM Health Care of Oklahoma, Inc., d/b/a Bone & Joint Hospital at Saint Anthony, and Savannah Petty, Defendants/Appellees, and JM Smucker, Inc., Defendant. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Trevor Pemberton, Judge. Plaintiffs/Appellants Lamees Shawareb and Farouk Shawareb appeal from the trial court's order granting summary judgment to Defendants/Appellees SSM Health Care of Oklahoma, Inc., d/b/a Bone & Joint Hospital at Saint Anthony (the Hospital), and Savannah Petty. We find Plaintiffs have failed to present evidence that creates a dispute of material fact as to nursing negligence or ordinary negligence. Therefore, Petty and the Hospital are entitled to judgment as a matter of law. We AFFIRM. Opinion by Mitchell, P.J.; Bell, J., and Swinton, J., concur.

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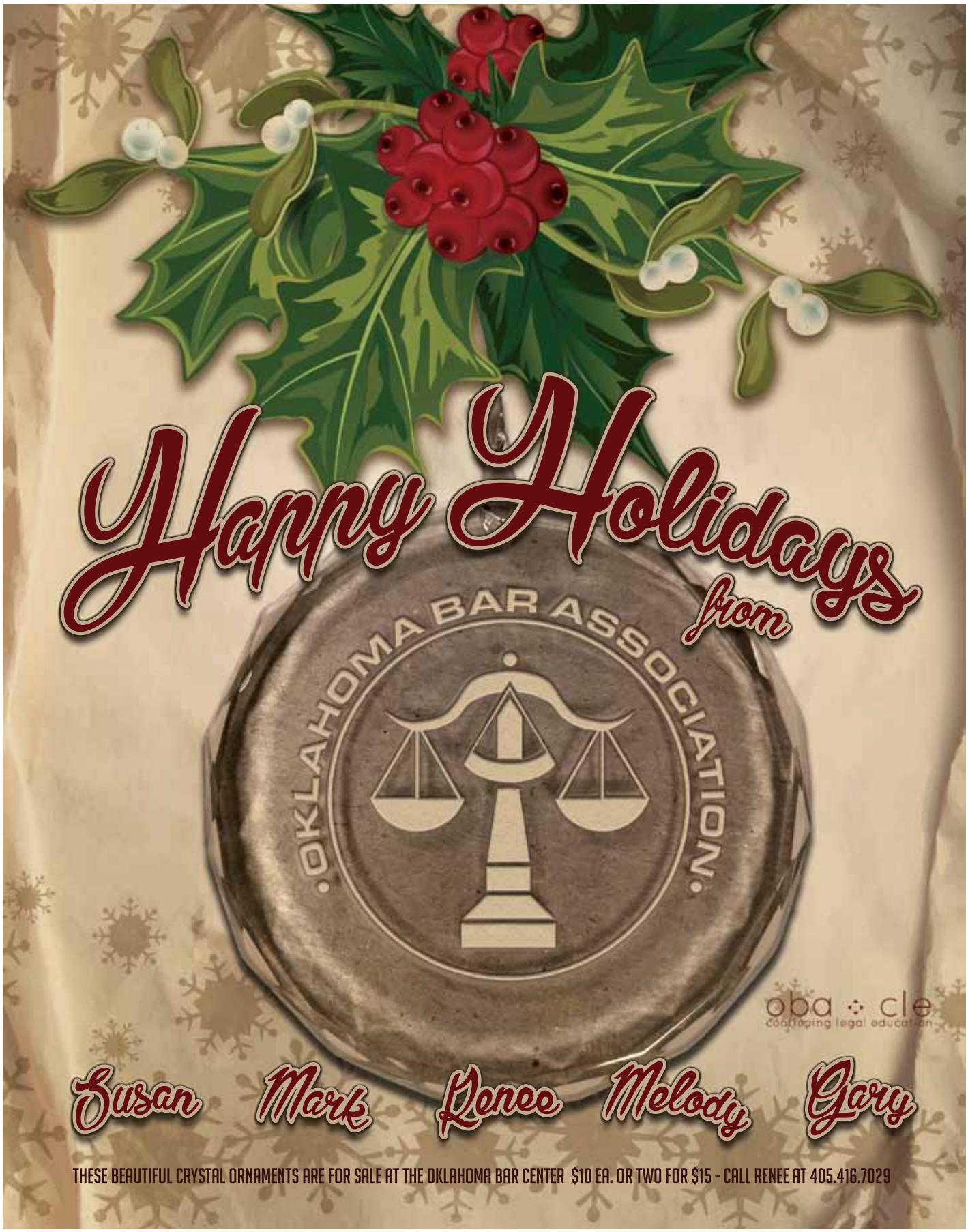
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