THE OKLAHOMA BAR
Journal
Volume 90 — No. 24 — 12/28/2019

Court Issue


DESTINATION CLEs
Destination CLE 2020
Big Island
Cosposnored by
oba cle
continuing legal education
DestinationCLEs.com
MARCH 23-27, 2020
FAIRMONT ORCHID
1 NORTH KANIKU DRIVE KOHALA COAST,
WAIMEA, HI 96743
LIMITED ROOMS. ACT NOW!
18.5 CLE Hours, incl. 6 Ethics

BAR CENTER STAFF

John Morris Williams, *Executive Director*; Gina L. Hendryx, *General Counsel*; Richard Stevens, *Ethics Counsel;* Jim Calloway, *Director of Management Assistance Program*; Craig D. Combs, *Director of Administration*; Susan Damron, *Director of Educational Programs*; Beverly Petry Lewis, *Administrator MCLE Commission*; Carol A. Manning, *Director of Communications*; Robbin Watson, *Director of Information Technology*; Loraine Dillinder Farabow, Peter Haddock, Tracy Pierce Nester, Katherine Ogden, Steve Sullins, *Assistant General Counsels*

Les Arnold, Julie A. Bays, Gary Berger, Debbie Brink, Melody Claridge, Cheryl Corey, Ben Douglas, Dieadra Florence, Johnny Marie Floyd, Matt Gayle, Suzi Hendrix, Debra Jenkins, Rhonda Langley, Jamie Lane, Durrel Lattimore, Edward Maguire, Renee Montgomery, Whitney Mosby, Tracy Sanders, Mackenzie Scheer, Mark Schneidewent, Laura Stone, Krystal Willis, Laura Willis, Laura Wolf & Roberta Yarbrough

Oklahoma Bar Association 405-416-7000
Toll Free 800-522-8065
FAX 405-416-7001
Continuing Legal Education 405-416-7029
Ethics Counsel 405-416-7055
General Counsel 405-416-7007
Lawyers Helping Lawyers 800-364-7886
Mgmt. Assistance Program 405-416-7008
Mandatory CLE 405-416-7009
Board of Bar Examiners 405-416-7075
Oklahoma Bar Foundation 405-416-7070

www.okbar.org

THE OKLAHOMA BAR Journal

Volume 90 – No. 24 – 12/28/2019

The Oklahoma Bar Journal Court Issue is published twice monthly and delivered electronically by the Oklahoma Bar Association, 1901 N. Lincoln Boulevard, Oklahoma City, Oklahoma 73105.

Subscriptions $60 per year that includes the Oklahoma Bar Journal magazine published monthly, except June and July. Law students registered with the OBA and senior members may subscribe for $30; all active members included in dues.

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**.

Oklahoma Bar Association

table of contents

Dec. 28, 2019 • Vol. 90 • No. 24

page

1524 Index to Court Opinions

1525 Opinions of Supreme Court

1557 Calendar of Events

1558 Opinions of Court of Criminal Appeals

1563 Opinions of Court of Civil Appeals

1588 Disposition of Cases Other Than by Publication

Index to Opinions of Supreme Court

2019 OK 72 IN RE: Oklahoma Rules of Professional Conduct (Rule 5.5) SCBD-3490 1525

2019 OK 73 IN RE: Rules Creating and Controlling the Oklahoma Bar Association (Article II, Sec. 5) SCBD 4483 1526

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 1531

2019 OK 80 RYAN WILLIAMS, individually, and as Personal Representative of the Estate of Lorri Williams Plaintiff/Appellant, v. MEEKER NORTH DAWSON NURSING, LLC, d/b/a Meeker Nursing Center, Defendant/Appellee. No. 115,360 1533

2019 OK 81 STATE OF OKLAHOMA, ex rel. OKLAHOMA BAR ASSOCIATION, Complainant, v. JACKIE DALE ELSEY, Respondent. SCBD 6553 1540

2019 OK 82 RE: Disposition of Surplus Property, Rules for Management of the Court Fund, 20 O.S., Chap 18, App 1, Rule 10 No. SCAD-2019-97 1544

2019 OK 83 VIDEO GAMING TECHNOLOGIES, INC., Plaintiff/Appellant, v. ROGERS COUNTY BOARD OF TAX ROLL CORRECTIONS, a Political Subdivision; CATHY PINKERTON BAKER, ROGERS COUNTY TREASURER, in Her Official Capacity; and SCOTT MARSH, ROGERS COUNTY ASSESSOR, in HIS Official Capacity, Defendants/Appellees. Case No. 117,491 1545

2019 OK 84 VIDEO GAMING TECHNOLOGIES, INC., Appellant, v. TULSA COUNTY BOARD OF TAX ROLL CORRECTIONS, a Political Subdivision; DENNIS SEMLER, Tulsa County Treasurer, in His Official Capacity; and JOHN A. WRIGHT, Tulsa County Assessor, in His Official Capacity, Appellees. Case No. 118,241 1553

Index to Opinions of Court of Criminal Appeals

2019 OK CR 28 IN RE ADOPTION OF THE 2019 REVISIONS TO THE OKLAHOMA UNIFORM JURY INSTRUCTIONS –CRIMINAL (2D) Case No. CCAD-2019-1 1558

2019 OK CR 30 ANDREW JOSEPH REVILLA, Appellant, vs. THE STATE OF OKLAHOMA, Appellee No. F-2018-929 1559

Index to Opinions of Court of Civil Appeals

COCA-ADM-2019-1 IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOM OKLAHOMA CITY AND TULSA DIVISIONS JUDICIAL DIVISION ASSIGNMENTS and ELECTION OF PRESIDING JUDGES 1563

COCA-ADM-2019-2 IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA OKLAHOMA CITY AND TULSA DIVISIONS 1563

2019 OK CIV APP 76 STATE OF OKLAHOMA ex rel. OKLAHOMA STATE BOARD OF BEHAVIORAL HEALTH LICENSURE, Petitioner/Appellee, vs. VANITA MAT THEWS-GLOVER, LPC, Respondent/Appellant. Case No. 116,081 1563

2019 OK CIV APP 77 FOUNTAIN VIEW MANOR, INC., an Oklahoma Corporation, Plaintiff/Appellant, vs. HOWARD SHEWARD, Jr., Defendant/Appellee. Case No. 116,693 1577

2019 OK CIV APP 78 IN THE MATTER OF Z.M.Z. and Z.C.Z., Deprived Children. STATE OF OKLAHOMA, Petitioner/Appellee, vs. JOSHUA ZUEHL, Respondent/Appellant Case No. 117,046 1581

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 <u>that has reciprocity with the State of Oklahoma</u>, and not disbarred or suspended from practice in any jurisdiction, <u>and is in compliance with Rule 2, Section 5 of the Rules Governing Admission to the Practice of Law in the State of Oklahoma,</u> 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.

A. Definitions - The following definitions govern this Article:

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

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

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

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

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

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

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

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

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

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

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

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

2019 OK 80

RYAN WILLIAMS, individually, and as Personal Representative of the Estate of Lorri Williams Plaintiff/Appellant, v. MEEKER NORTH DAWSON NURSING, LLC, d/b/a Meeker Nursing Center, Defendant/Appellee.

No. 115,360. December 17, 2019

APPEAL FROM DISTRICT COURT OF LINCOLN COUNTY

Honorable Cindy F. Ashwood

¶0 The estate of an individual that died as a result of an injury incurred while being a patient of a nursing home sued the nursing home facility in a wrongful death action. The District Court entered default judgment for Plaintiff after Defendant failed to file a response or appear in court multiple times. Over 200 days later, Defendant filed a petition to vacate default judgment and the petition was granted. Plaintiff appealed the ruling, and the Court of Civil Appeals (COCA), Division II, affirmed the trial court's decision. Plaintiff then filed a Petition for Certiorari to this Court and we retained the appeal.

COURT OF CIVIL APPEALS OPINION VACATED; TRIAL COURT JUDGMENT REVERSED IN PART AND REMANDED FOR TRIAL ON DAMAGES.

ATTORNEYS and LAW FIRMS

Deligans, R. Ryan (Bar # 19793), Gerald E. Durbin II (Bar # 2552), Lane R. Neal (Bar # 22246), DURBIN, LARIMORE & BIALICK, 920 North Harvey, Oklahoma City, OK 73102, for Plaintiff/Appellant

Craig L. Box (Bar # 10212), P.O. Box 1549, Enid, OK 73702, for Defendant/Appellee

Michael E. Smith (Bar # 8391), Money, Eric (Bar # 22654), GUNGOLL & JACKSON, 101 Park Ave Suite 1400, Oklahoma City, OK 73102, for Defendant/Appellee

COLBERT, J.

¶1 This is an interlocutory appeal arising from a wrongful death action over the decision to vacate a default judgment. Plaintiff/Appellant, Ryan Williams, individually and as Personal Representative of the Estate of Lorri Williams (Williams), appeals from the decision below to grant a Petition to Vacate Judgment of default judgments placed against Defendant/Appellee, Meeker North Dawson Nursing, LLC (Meeker). Both lower courts agreed with Meeker's contentions that Meeker correctly filed the Petition to Vacate Judgment, never had "actual knowledge" of the litigation that led to the default judgment, and that the damages awarded after the default judgment were in excess of damages allowed by statute.[1] Williams contends that the Petition to Vacate Judgment should be denied, as Meeker failed to provide evidence of an unavoidable casualty or misfortune as required by statute to justify the vacation of a default judgment under Okla. Stat. tit. 12, § 1031.[2] Having retained the appeal, this Court now considers the validity

of the decision to vacate the default judgment by examining the trial court proceedings below. The COCA opinion is vacated, and the trial court's opinion is reversed in part and remanded for further proceedings.

I. BACKGROUND

¶2 Williams is the son of Lorri Williams (Decedent). Prior to her death, Decedent was an elderly and disabled patient at the Meeker Nursing Center. The Meeker Nursing Center is located in Meeker, Oklahoma, and is operated by Meeker North Dawson Nursing, LLC, an entity domiciled in the State of Georgia. Meeker Nursing Center is the principal place of business of Meeker North Dawson Nursing, LLC. Meeker's registered agent, the Corporation Company, is listed with the Oklahoma Secretary of State.

¶3 On November 1, 2013, while under the care of Meeker, Decedent was wheeled outside of the nursing facility for fresh air by a Meeker employee and left unattended. Meeker's employees failed to check on or retrieve her from outside. Decedent, blind and wheelchair bound, got cold and tried to push herself back inside the center. In doing so, she fell out of her wheelchair onto the concrete and was injured. Eventually, an individual passing by in a vehicle saw Decedent lying on the ground, got out of his vehicle, and helped her into her chair and back into the facility, at which point she was transported by ambulance to the hospital.

¶4 Following the incident, Decedent allegedly began to have health issues relating to a leg injury that resulted from the incident, including her leg becoming infected and developing sepsis, which eventually caused Decedent's organs to shut down, thereby causing her death on March 9, 2015. Prior to Decedent's death and the commencement of this lawsuit, Decedent's former counsel sent a letter directly to the Meeker Nursing Center in September of 2014, communicating the intent to file a suit for the negligent care received by Decedent, asking Meeker to contact their insurance company, and requesting a response from Meeker. Neither Decedent nor her attorney received a response from Meeker.

¶5 On October 27, 2015, following the death of Decedent, Williams filed suit in Lincoln County against Meeker, claiming that Decedent suffered an injury to her left leg while under the care of Meeker in November 2013. Williams alleged that this injury ultimately led, in part, to Decedent's death. Williams contended that Meeker violated the Federal Omnibus Budget Reconciliation Act of 1987, the Oklahoma Nursing Home Care Act, Okla. Stat. tit. 63, §§ 1-1901 et seq., and 48 C.F.R. § 3. Williams finally alleged that Meeker was negligent in its care of Decedent, and that Meeker was negligent in the hiring, training, and supervision of its employees. Williams served the Petition and Summons on Meeker's registered agent, the Corporation Company,[3] on November 3, 2015, by certified mail in accordance with service of process on an Oklahoma corporation. Okla. Stat. tit. 12, § 2004(C)(1)(c)(3).[4]

¶6 After Meeker failed to respond to the Petition and Summons, Williams filed a motion for default judgment on December 21, 2015. The trial judge denied the motion, ordering Williams to serve Meeker again. On January 5, 2016, Williams hired a process server who successfully served Meeker's registered agent by delivering a copy of the Summons, Petition, and Entry of Appearance to the registered agent at the Corporation Company. After failing a second time to make an appearance or file a response to service of process, on January 26, 2016, the trial court granted Williams' second motion for default judgment.

¶7 On January 28, 2016, following an order for default judgment, Williams next proceeded to file for a hearing on damages. Williams properly served Meeker by certified mail to Meeker's registered agent, the Corporation Company, but again received no response from Meeker or their registered agent. On March 9, 2016, the hearing on damages was held, where Meeker failed to appear, although being properly served. The trial court allowed Williams to present evidence of both the Proof of Service and damages. The trial court awarded Williams damages in the amount of $3,020,055.42.

¶8 In total, Meeker failed to respond to Decedent's former attorney's notification of imminent lawsuit while Decedent was still living in September 2014, the initial Petition and Summons from Williams on November 3, 2015, the second service of process from Williams on January 5, 2016, the service of process for the hearing on damages on January 28, 2016, and finally did not appear at the hearing on damages on March 9, 2016.

¶9 On June 30, 2016, the trial court issued an Order to Appear and Answer as to Assets and Forbidding Transfer or Other Disposition of

Property to the Defendant. Williams served a copy of the Order to Appear to multiple addresses of Meeker between July 8, 2016, and July 11, 2016. An attorney for Meeker finally responded by personal email on July 13, 2016, 253 days after the initial service of process, asking for a copy of the Petition. On August 2, 2016, 280 days after the initial service of process, the attorney for Meeker filed an Entry of Appearance and Verified Petition to Vacate Judgment and for Temporary Restraining Order and Temporary Injunction. On August 17, 2016, the trial court granted Meeker's Petition to Vacate Judgment over Williams's objection. Thereafter, Williams appealed. The COCA affirmed the trial court's ruling on July 14, 2017. Plaintiff then filed a Petition for Certiorari, which was granted by this Court on November 6, 2017.

II. STANDARD OF REVIEW

¶10 A trial court's decision to vacate a judgment is reviewed for abuse of discretion. Ferguson Enters., Inc. v. H. Webb Enters., Inc., 2000 OK 78, ¶ 5, 13 P.3d 480, 482. An abuse of discretion occurs "when the decision is based on an erroneous interpretation of the law, on factual findings that are unsupported by proof, or represents an unreasonable judgment in weighing relevant factors." Okla. City Zoological Tr. v. State ex rel. Pub. Emps. Relations Bd., 2007 OK 21, ¶ 5, 158 P.3d 461, 464. An order vacating a default judgment will not be disturbed on appeal unless it clearly appears that the trial court has abused its sound legal discretion. Midkiff v. Luckey, 1966 OK 49, ¶ 6, 412 P.2d 175, 176 (quoting State Life Ins. Co. v. Liddell et al., 1936 OK 662, ¶ 14 61 P.2d 1075, 1078). A much stronger showing of abuse of discretion must be made where a judgment has been set aside than where it has been refused. Id.

III. DISCUSSION

A. Petition to Vacate Judgment

¶11 Title 12 of the Oklahoma Statutes clearly specifies the procedure for a trial court to vacate or modify judgments. If more than thirty (30) days have passed since the filing of a judgment, proceedings to vacate or modify a judgment must be done in conformance with Okla. Stat. tit. 12, § 1033,[5] unless all parties approve the proceedings. See, Okla. Stat. tit. 12, § 1031.1. Under § 1033, proceedings to vacate judgments pursuant to situations listed in § 1031 must be made by verified petition, setting forth a defense to the action, and served with duly issued summons. Meeker's Petition to Vacate Judgment adheres to the statutory provisions provided by § 1033.

B. Vacation of Judgment

¶12 This Court has consistently viewed default judgments with disfavor, preferring, "whenever possible, that litigating parties be allowed their day in court so that a decision on the merits may be reached." Feely v. Davis, 1989 OK 163, ¶ 16, 784 P.2d 1066, 1070. However, this general disfavor of default judgments does not eliminate default judgments altogether, as a party petitioning for a vacation of judgment must prove more than just a general disfavor of default judgments. By statute, default judgments may be vacated or modified in nine circumstances, as listed in Okla. Stat. tit. 12, § 1031. To vacate a default judgment, the petitioning party must present evidence to prove the elements of the § 1031 subsection, rather than testifying to the merits of the case itself. In the Petition to Vacate Judgment, Meeker claimed only two of the nine circumstances. In support of the Petition to Vacate Judgment, Meeker presented testimony of a registered nurse and Meeker's in-house counsel. After hearing the witnesses, the trial court granted Meeker's Petition to Vacate Judgment.

¶13 Meeker claimed two subsections of § 1031 applied when addressing Plaintiff's lawsuit: § 1031(2) Defendant had no actual notice of the pendency of the action at the time of the filing of the judgment or order, and § 1031(7) that there was some unavoidable casualty or misfortune which prevented Meeker from defending the action. Okla. Stat. tit. 12, §§ 1031(2),(7). Meeker presented testimony from Barnett, a nurse for Meeker, and Scates, Meeker's in-house counsel. Barnett did not testify to either notice of the lawsuit or the unavoidable casualty or misfortune, but rather testified regarding damages relating to the merits of the case. While Barnett's testimony may show there to be some defense as to the merits of the case, her testimony established no grounds to vacate or modify the judgment. Instead, Barnett focused on hearsay statements as to how the incident occurred in the eyes of Meeker. Meeker presented Barnett as a witness, despite Barnett never having treated Williams at any point after the incident, to testify to the merits of the case as to whether or not Williams ever suffered an injury. Since Barnett's testimony provided no evidence of actual notice or unavoidable casualty or misfortune, the testimony is irrelevant and

should not be considered in a decision as to whether the trial court should vacate the default judgments.

¶14 The district court erred by allowing Barnett to testify to facts surrounding anything other than notice of the litigation or casualties or misfortunes that surrounded the litigation. The trial court abused its discretion by vacating the default judgments against Meeker based on evidence concerning the merits of the case, rather than whether or not § 1031 gave the trial court a valid reason to grant the Petition to Vacate Judgment.

i. Actual Notice

¶15 The testimony presented by attorney Scates attempted to address the two rationales Meeker claimed under § 1031 – actual notice and unavoidable casualty or misfortune. Scates testified that Meeker never received "actual notice" of the lawsuit, and that this lack of actual knowledge was the unavoidable casualty or misfortune, thereby requiring the court to vacate the default judgment. Scates explained Meeker's process for receiving notice for lawsuits, and then stated that there was no record that Meeker received any of the three instances of proper service. Scates further acknowledged that the Corporation Company is Meeker's registered agent; however, despite stating that Meeker had no record of proper service, Scates admitted that the Registered Agent did indeed receive proper service. Scates claimed there had been a breakdown in communications between Meeker and its agent, so there was never "actual notice."

¶16 Scates then described the procedure for receiving notice of legal actions from the Corporation Company, and identified Meeker's employee, Kathryn Branigan, who was responsible for receiving such notice. Scates was unable to pinpoint where or how a lapse in communication occurred; asserting that Meeker would never have ignored the service of process and would have answered and defended the lawsuit if it had "actual notice." Branigan, despite being the point of contact between Meeker and the Corporation Company, was unavailable for the hearing, as she was too busy to assist Meeker by testifying in a case with a $3,000,000 default judgment in place. Scates testified that Branigan was prevented from testifying because of, "[h]er job. She's responsible for a myriad of – I mean, there's nothing that she would testify to that I couldn't testify to – in regards to this matter."

¶17 Proper service of process can be made to an authorized registered agent of a foreign or domestic corporation or partnership. Okla. Stat. tit. 12, § 2004. To ensure the service of process upon the registered agent was completed before filing a default judgment for failure to respond to the first service of process, the trial court ordered Williams to re-serve Meeker's registered agent. Williams complied with this request, sending a process server to the Corporation Company to serve process on Meeker's registered agent. Williams also filed the Return of Service to Meeker with a stamped green card, showing that the service of process on Meeker was successfully completed as required under § 2004. By making the Corporation Company the registered agent, Meeker authorized the Corporation Company to act as an agent of the company for the specific purpose of receiving service of process.

¶18 While testifying, Scates admitted that the Corporation Company received the service of process from Williams. This admission alone displays that Meeker had actual notice of the litigation, since notice to an agent imputes the agent's actual knowledge to the principal. Restatement (Third) of Agency §§ 5.01-.03 (2006). "A notification given to an agent is effective as notice to the principal if the agent has actual or apparent authority to receive the notification, unless the person who gives the notification knows or has reason to know that the agent is acting adversely to the principal as stated in § 5.04." Restatement (Third) of Agency § 5.02(1) (2006). There is no reason to believe, and it is not asserted, that the Corporation Company was acting adversely to Meeker. Therefore, the actual notice of proper service of process given to the Corporation Company is imputed to Meeker, and thereby effective as actual notice.

¶19 Under Oklahoma case law, "corporate directors and officers are presumed to know that which it is their duty to know and about which they have the means of knowing . . . . Or to state it another way the officials are bound to know what they ought to know and would have known by proper attention to their business. Bank of Okla., N.A. v. Krown Sys., 2002 OK CIV APP 82, ¶12, 53 P.3d 924, 927 (quoting Preston-Thomas Constr., Inc. v. Cent. Leasing Corp., 1973 OK CIV APP 10, ¶ 8, 518 P.2d 1125, 1127). Any claim made by Meeker that Wil-

liams should have sent service of process directly to Meeker's operating address is flawed for two reasons: first, because Oklahoma doesn't require this type of service under Okla. Stat. tit. 12, § 2004, and second, because Meeker was made aware of imminent litigation at Meeker's operating address when Decedent's former attorney sent the September 2014 letter directly to Meeker's operating address. Meeker was made more than aware of Decedent's intent to file a lawsuit before her death, but Meeker decided not to respond. Even after a lawsuit was filed following Decedent's death, Meeker still failed to respond. Meeker's claim of a lack of actual knowledge is legally and factually preposterous, as it is their duty to give proper attention to their business, including litigation served on their registered agent.

¶20 Meeker's claimed lack of actual notice, even though its registered agent received notice of pending action, is incorrect. Meeker blurs the legal definition of actual notice and the layman's definition of actual notice. There is no question that Meeker's registered agent received actual notice of the litigation in the form of service of process, as attorney Scates testified as to the fact. Further, there is no question that knowledge of the agent is imputed onto the principal. Am. Bank of Commerce v. Chavis, 1982 OK 66, ¶ 11, 651 P.2d 1321, 1323-24; Restatement (Third) of Agency § 5.03 (2006). Therefore, Meeker had actual knowledge of the suit. This Court will not allow corporations or other entities operating in Oklahoma to take advantage of Oklahoma citizens by allowing them to avoid litigation by claiming lack of actual notice when their registered agents have been properly served as required by Oklahoma law. Since Meeker had actual knowledge of the lawsuit, as imputed to them through their registered agent, the trial court's finding of lack of actual notice under Okla. Stat. tit.12, § 1031(2) is without merit.

ii. Unavoidable Casualty or Misfortune

¶21 Meeker alleges that the breakdown in communication between Meeker and its registered agent constituted an "unavoidable casualty or misfortune" that resulted in Meeker's lack of actual notice of the action. Meeker's in-house counsel testified that this breakdown in communication was the only reason that Defendant made no defense to Plaintiff's filings and did not make a timely entry of appearance. Despite this claim, Meeker's complaint of a breakdown in communications with its registered agent does not amount to an unavoidable casualty or misfortune. If this Court accepted Meeker's argument, the most egregious result for Williams and all Oklahoma litigants would occur, because the argument forces Williams to be penalized for Meeker's lack of diligence and Meeker's failure to communicate with its own agent.

¶22 This Court has stated that to be categorized as an unavoidable casualty or misfortune, the circumstance must be an event "which human prudence, foresight, and sagacity, could not prevent, such as sickness and death, miscarriage of the mails, mistake in working of a telegram, etc." Chavis, 1982 OK 66, ¶ 13, 651 P.2d at 1324 (quoting Wagner v. Lucas, 1920 OK 315, ¶ 5, 193 P. 421, 423). In Chavis, the defendant delivered the petition and summons to an attorney that agreed to represent the defendant, who marked the pleadings as "calendared," but were not placed on the docket book of the firm. After the attorney was made aware that the answer date had passed, the attorney called the deputy court clerk, who erroneously stated that no action to take judgment had been initiated, while the plaintiff had in fact obtained a default judgment three days earlier.

¶23 After a Petition to Vacate Judgment was granted by the trial court, the Chavis Court held that "the negligence of an attorney while representing his client is imputed to the client and constitutes negligence of the client, and accordingly does not constitute unavoidable casualty and misfortune, justifying the vacation of a judgment." Id. ¶ 9, 651 P.2d at 1323. However, this Court concluded that breakdown in office procedure, when combined with reliance on incorrect information received from a deputy court clerk, created a valid ground for a trial court to grant a Petition to Vacate Judgment.

¶24 When a party has been given multiple opportunities to respond to litigation but fails to respond or appear, the refusal to vacate a default judgment is correct. Ross v. Pace, 2004 OK 13, ¶ 12, 87 P.3d 593, 595. In Ross, the plaintiff's failure to respond to two separate discovery requests, failure to respond to a motion for summary judgment, and failure to appear for the hearing on the summary judgment motion led to the trial court granting summary judgment for the defendant. The plaintiff was later denied a Petition to Vacate Judgment by the trial court, and the COCA reversed. The plaintiff's

attorneys stated the failure to respond was caused by a breakdown in office procedure when referring the file to an outside attorney, and all filings were placed in an unmonitored referral file. The plaintiff's attorneys were unaware of the breakdown until summary judgment was granted.

¶25 The Ross Court ruled that the failure to file responses to discovery requests for more than 90 days after the discovery requests were filed was sufficient to show that a trial court should refuse to vacate the default judgment. The Court concluded, saying "[g]iven the number of opportunities [plaintiff's] attorneys were afforded to respond to the requests for admission from [defendant], and the notice of motion for summary judgment and the hearing set in the matter, we do not find this to be a close case." Id. We ruled that multiple failures to respond or appear when properly served process, especially when combined with the negligence of an attorney to respond, is sufficient to show that a petition to vacate judgment should be denied.

¶26 The case law of Oklahoma on "unavoidable casualty or misfortune" is best shown in Coulsen v. Owens, where the COCA held that no unavoidable casualty or misfortune occurred. 2005 OK CIV APP 93, ¶ 28, 125 P.3d 1233, 1240. Plaintiffs in Coulsen obtained a default judgment against defendant for injuries suffered due to a motorcycle accident after defendant's attorney failed to timely file an answer to the plaintiff's petition. Plaintiff was a passenger on a motorcycle operated by defendant when the latter lost control and crashed, ejecting plaintiff, who suffered extensive injuries. Plaintiff served process by certified mail. The court held that the defendant had timely sent the summons and petition to his insurance company which forwarded it to local counsel, who reviewed the petition and "discerned flaws therein," and directed an associate to prepare a motion to dismiss. Local counsel did not timely file either an answer or motion to dismiss, believing that the associate had filed the pleading, while the associate believed local counsel had filed the pleading. To defend this lack of filing, local counsel stated that the office was expanding, but admitted that the expansion was essentially completed before the summons and petition were found lying on his desk.

¶27 After defendant failed to answer or appear in Coulsen, the plaintiffs appeared before the trial court, gave testimony, and were awarded damages against the defendant. Following judgment, Plaintiffs attempted to collect the judgment against defendant's insurance carrier. The insurance company contacted local counsel, who discovered the responsive pleading on his desk. More than three months after the entry of default judgment, local counsel filed a petition to vacate the entry of default judgment, alleging, among other things, that the judgment should be vacated for unavoidable casualty or misfortune. The trial court vacated the default judgment and plaintiffs appealed.

¶28 The COCA held that the trial court had abused its discretion by vacating the default judgment, since the negligence of an attorney, by itself, is not an unavoidable casualty or misfortune. Coulsen also concluded that there were no extenuating circumstances present to show an unavoidable casualty or misfortune, by distinguishing Oklahoma case law from the facts of the case at hand:

> There was no reliance on erroneous docket information supplied by a court clerk (Chavis[6]), illness (Tedford[7]), or misdocketing (Heitman[8]). Nor were the parties in the middle of a hearing when the default occurred (Branch[9]). The parties were not proceeding pro se (Nelson[10]) but were each represented by counsel. . . . We further find that, unlike the attorneys in Ross,[11] Defendant did not ignore repeated requests to comply with a deadline. This is simply a case wherein an attorney failed to timely file an answer to a petition. As set out earlier, that alone is not sufficient under Chavis, the case relied on by the trial court, to support a finding of unavoidable casualty.

Id. ¶ 27 (footnotes added). The instant case is synonymous with Ross and Coulsen. Just as in Ross and Coulsen, Meeker was properly served multiple times, and the default judgment was granted solely due to the negligence of the party. Meeker was properly served not only once, but three separate times, and each time wholly failed to respond. The only factor that Meeker can claim as being an unavoidable casualty or misfortune is the negligence of the company and its registered agent, which Coulsen has expressly declared not to be an unavoidable casualty or misfortune.

¶29 Meeker's failure to respond to multiple services of process is far more egregious and arbitrary than that ruled upon by the Ross or Coulsen court. Meeker did not testify or allege

illness, misdocketing, confusion over multiple litigation in multiple forums, pro se representation, statutory provisions concerning obscure filing periods, a breakdown in office procedure in combination with misinformation from a deputy court clerk, or a lawyer's misdocketing followed by a motion to vacate filed the next day. Here, the only defense was based on a theory that Meeker would have responded to the lawsuit had they received "actual notice," and that this lack of "actual notice" was the unavoidable casualty or misfortune. This theory is not sufficient to grant the Petition to Vacate Default Judgment, as it is not enough to meet the standard set by Chavis and Ross in analyzing Okla. Stat. tit. 12, § 1031. Further, as stated above, Meeker did indeed receive actual notice, meaning that the trial court's finding of an unavoidable casualty or misfortune is in error.

¶30 This Court will not allow a domestic or foreign Corporation operating in the State of Oklahoma to avoid lawsuits until they are convenient for the Corporation to answer, just because they do not understand the legal definition of "actual notice." Even though Meeker is correct in the vague notion that default judgments are disfavored among courts, when the Corporation Company properly received service of process not only once, but multiple times, the trial court was incorrect in vacating the default judgment against Meeker due to the lack of "actual notice" because of a breakdown in communication between Meeker and its agent, which is an not an unavoidable casualty or misfortune. Because knowledge of an agent is imputed to the principal, the trial court abused its discretion by vacating the default judgment as to liability against Meeker after Meeker provided no evidence of unavoidable casualty or misfortune as required to justify the vacation of default judgment under Okla. Stat. tit. 12, § 1031.

IV. CONCLUSION

¶31 It is patently clear that Meeker's arguments for the Petition to Vacate Judgment as to liability is without merit. Meeker was given a multitude of opportunities to respond to the litigation, but failed to respond to a single instance for 280 days after the initial service of process. Meeker failed to respond to any service of process or appear at any hearing, and did not have an argument with merit to support the inability to respond to the litigation. Accordingly we vacate the opinion of the Court of Civil Appeals, reverse the trial court's judgment granting the Petition To Vacate Judgment as to liability, and remand this matter for a trial on damages.

COURT OF CIVIL APPEALS OPINION VACATED; TRIAL COURT JUDGMENT REVERSED IN PART AND REMANDED FOR TRIAL ON DAMAGES.

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

DISSENT: Kane, J.

Kane, J., dissenting

I dissent. I would find that the trial court did not abuse its discretion;

NOT PARTICIPATING: Kauger, J.

COLBERT, J.

1. 42 C.F.R. § 447.15 and Okla. Stat. tit. 12, § 3009.1.
2. Okla. Stat. tit. 12, § 1031 reads in the entirety:
   The district court shall have power to vacate or modify its own judgments or orders within the times prescribed hereafter:
   1. By granting a new trial for the cause, within the time and in the manner prescribed in Sections 651 through 655 of this title;
   2. As authorized in subsection C of Section 2004 of this title where the defendant had no actual notice of the pendency of the action at the time of the filing of the judgment or order;
   3. For mistake, neglect, or omission of the clerk or irregularity in obtaining a judgment or order;
   4. For fraud, practiced by the successful party, in obtaining a judgment or order;
   5. For erroneous proceedings against an infant, or a person of unsound mind, where the condition of such defendant does not appear in the record, nor the error in the proceedings;
   6. For the death of one of the parties before the judgment in the action;
   7. For unavoidable casualty or misfortune, preventing the party from prosecuting or defending;
   8. For errors in a judgment, shown by an infant in twelve (12) months after arriving at full age, as prescribed in Section 700 of this title; or
   9. For taking judgments upon warrants of attorney for more than was due to the plaintiff, when the defendant was not summoned or otherwise legally notified of the time and place of taking such judgment.

(emphasis added).

3. The Corporation Company provides Registered Agent Services. The Corporation Company is Oklahoma's location for CT Corporation (Corporation Trust Company), a wholly owned subsidiary of Wolters Kluwer.
4. Okla. Stat. tit. 12, § 2004(C)(1)(c)(3) states:
   (3) upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the petition to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.
5. Okla. Stat. tit. 12, § 1033 states in the entirety:
   If more than thirty (30) days after a judgment, decree, or appealable order has been filed, proceedings to vacate or modify the judgment, decree, or appealable order, on the grounds mentioned in paragraphs 2, 4, 5, 6, 7, 8 and 9 of section 1031 of this title, shall be by petition, verified by affidavit, setting forth the judgment, decree, or appealable order, the grounds to vacate or modify it, and the defense to the action, if the party applying was defendant. On this petition, a summons shall issue and be served as in the commencement of a civil action.

6. Am. Bank of Commerce v. Chavis, 1982 OK 66, 651 P.2d 1321.
7. Tedford v. Divine, 1987 OK 18, 734 P.2d 283.
8. Heitman v. Brown, 1996 OK CIV APP 148, 933 P.2d 948.
9. Branch v. Ameriresource Grp., Inc., 2001 OK CIV APP 86, 29 P.3d 605.
10. Nelson v. Nelson, 1998 OK 10, 954 P.2d 1219.
11. Ross v. Pace, 2004 OK 13, 87 P.3d 593.

2019 OK 81

STATE OF OKLAHOMA, ex rel. OKLAHOMA BAR ASSOCIATION, Complainant, v. JACKIE DALE ELSEY, Respondent.

SCBD 6553. December 17, 2019

BAR DISCIPLINARY PROCEEDING

¶0 Pursuant to Rule 7 of the Rules Governing Disciplinary Proceedings, this summary disciplinary proceeding arises from Respondent's pleas of guilty and no contest to two felony charges for driving under the influence of alcohol and multiple misdemeanor charges. This Court issued an Order of Immediate Interim Suspension of Respondent's license to practice law. After a hearing before the Professional Responsibility Tribunal, it recommended that this Court lift Respondent's interim suspension and place him on a deferred suspension of two years, subject to certain probationary rules.

RESPONDENT'S INTERIM SUSPENSION IS LIFTED, AND A DEFERRED SUSPENSION OF TWO YEARS IS IMPOSED; DEFERRAL OF SUSPENSION IS SUBJECT TO COMPLIANCE WITH THE TERMS OF PROBATION, AND THIS COURT ORDERS RESPONDENT TO PAY COSTS.

Katherine M. Ogden, Assistant General Counsel of the Oklahoma Bar Association, Oklahoma City, Oklahoma, for Complainant.

Vernon D. Ellis, Adair, Oklahoma, for Respondent.

Winchester, J.

¶1 On August 26, 2015, the Oklahoma Highway Patrol arrested Respondent Jackie Dale Elsey in Cherokee County, Oklahoma for driving a vehicle under the influence of alcohol (DUI) and driving with a revoked license. The Cherokee County District Attorney charged Elsey with a felony DUI and a misdemeanor for driving with a revoked license, and Elsey entered a plea of no contest to both charges. As a result, this Court entered an Order of Immediate Interim Suspension on September 18, 2017, ordering Elsey to show cause why the Court should set aside the interim suspension. Elsey submitted his answer and notified the Court that on August 4, 2017, the Mayes County District Attorney charged Elsey with another felony DUI and a misdemeanor for driving with a revoked license. This Court stayed these disciplinary proceedings pending the resolution of the 2017 criminal charges.

¶2 On January 7, 2019, the Oklahoma Bar Association (OBA) notified the Court of Elsey's plea of guilty to the 2017 Mayes County DUI and revoked license charges. On March 12, 2019, this Court assigned the matter to the Professional Responsibility Tribunal (Trial Panel) to hold a hearing on the limited scope of mitigation. On June 26, 2019, the Trial Panel held a Rule 7 hearing and requested that the OBA submit findings of fact and conclusions of law for consideration. Elsey did not object to the proposed findings and conclusions submitted by the OBA. On August 26, 2019, the Trial Panel filed its report, recommending that this Court lift Elsey's interim suspension and place him on a deferred suspension of two years, subject to stated conditions.

I. FINDINGS

¶3 In 2003, Elsey received his license to practice law in Oklahoma. He practiced law, in good standing, until the date of his interim suspension. Elsey has pled guilty or no contest to five alcohol-related driving offenses since his admission to the OBA. Elsey's history of alcohol-related offenses is as follows:

Cherokee County Case No. CF-2015-548

¶4 The current disciplinary proceedings commenced as a result of this case. On September 17, 2015, the Cherokee County District Attorney charged Elsey with a felony DUI and a misdemeanor for driving with a revoked license, after being involved in a single-vehicle accident. Elsey admitted to the trooper at the scene of the accident that he had a few drinks that day. Elsey was serving a deferred sentence from a 2014 Mayes County alcohol-related offense at the time of the accident. Elsey pled no contest to the 2015 Cherokee County criminal charges and received a five-year deferred sentence. The district court ordered Elsey to complete a victim impact panel, a drug and alcohol assessment, DUI School, community service, and six sessions of counseling. On February 14, 2019, the district court accelerated Elsey's deferred sentence and dismissed the

case. Elsey is not currently serving any part of his Cherokee County sentence.

Mayes County Case No. CF-2017-253

¶5 Elsey self-reported this case to the OBA as part of his answer to this Court's show cause order on his immediate interim suspension from his 2015 Cherokee County criminal charges. On August 4, 2017, the Mayes County District Attorney charged Elsey with a felony DUI and misdemeanors for driving with a revoked license, driving left of center, failure to carry insurance, and failure to wear a seatbelt. These charges resulted from Elsey turning right into oncoming traffic, causing another vehicle to stop to avoid an accident. Elsey pled guilty and served a 30-day term in the Mayes County Detention Center. The district court also ordered Elsey to complete inpatient and outpatient treatment and a victim impact panel and ordered him to pay fines and costs. Elsey has not yet paid the fines and costs associated with this case.

Other Alcohol-Related Offenses

¶6 In 2014, the Mayes County District Attorney charged Elsey with a felony DUI and a misdemeanor for driving with a revoked license (Case No. CF-2014-67). Elsey pled guilty and received a deferred two-year sentence. The district court ordered Elsey to complete community service, district attorney supervision, and a victim impact panel. The OBA brought a Rule 7 proceeding against Elsey due to these criminal charges. This Court dismissed the matter, finding the crime did not demonstrate Elsey's unfitness to practice law.

¶7 In 2009, the Mayes County District Attorney charged Elsey with a misdemeanor DUI and a misdemeanor for driving with a revoked license (Case No. CM-2009-293). Elsey pled guilty and received a one-year suspended sentence to run consecutive to a 2008 Mayes County sentence. The district court ordered Elsey to complete community service, a drug and alcohol assessment, and a victim impact panel.

¶8 In 2008, the Mayes County District Attorney charged Elsey with a misdemeanor DUI and misdemeanors for violation of driver's license restrictions, failure to yield from a private drive, failure to wear a seatbelt, and a defective vehicle (Case No. CM-2008-480). Elsey pled guilty to several of the misdemeanors, including the DUI, and received a one-year deferred sentence. The district court ordered Elsey to pay fines and costs.

¶9 Elsey was also charged with transporting an open container in 2000 and driving with a revoked license in 2010. Prior to his admission to the OBA, Elsey had four additional alcohol-related offenses in 1997, 1989, 1986, and 1982. The OBA was unable to find disposition information for these arrests. He self-reported that he had two additional DUI arrests while he served in the Navy.

Mitigation

¶10 After his arrest in 2017, Elsey sought treatment and completed a 28-day residential treatment program at Harbor Recovery Center. Elsey then entered an outpatient treatment program at the U.S. Department of Veterans Affairs (VA) Behavioral Medicine Clinic and resided at 12&12, an addiction recovery center. Elsey tested positive for alcohol upon his admission to 12&12, but he successfully completed the eight-week program. Elsey had monthly appointments with Dr. Elise Taylor at the VA for substance use disorder until October 2018.

¶11 Elsey completed an assessment with Dr. Curtis Grundy, a licensed psychologist, in connection with these proceedings. Dr. Grundy recommended that Elsey continues his involvement with services provided by the VA and resume regular appointments with Dr. Taylor if he transitions back into his legal profession. Dr. Grundy also suggested that Elsey regularly attend Alcoholics Anonymous meetings and obtain a sponsor.

¶12 Elsey testified that he has attended Alcoholics Anonymous meetings and is "talking" about obtaining a sponsorship with another Alcoholics Anonymous member. Elsey also expressed awareness of potential concerns about his sobriety and admitted that he must change his social behavior. Elsey recognized that a probation period would be helpful if this Court lifts his interim suspension and further testified that his family is his support system.

II. STANDARD OF REVIEW

¶13 In disciplinary proceedings, this Court acts as a licensing court in the exercise of our exclusive jurisdiction. *State ex rel. Okla. Bar Ass'n v. Garrett*, 2005 OK 91, ¶ 3, 127 P.3d 600, 602. Our review of the evidence is *de novo*, and the Trial Panel's recommendations are neither

binding nor persuasive. *State ex rel. Okla. Bar Ass'n v. Anderson*, 2005 OK 9, ¶ 15, 109 P.3d 326, 330. This Court's responsibility is not to punish an attorney, but to assess the continued fitness to practice law and to safeguard the interests of the public, the courts, and the legal profession. *State ex rel. Okla. Bar Ass'n v. Wilburn*, 2006 OK 50, ¶ 3, 142 P.3d 420, 422.

III. DISCUSSION

¶14 Elsey's plea of no contest to the 2015 criminal charges and plea of guilty to the 2017 criminal charges serve as the basis for this summary disciplinary proceeding. Rule 7.1 of the Rules Governing Disciplinary Proceedings (RGDP) provides:

> A lawyer who has been convicted or has tendered a plea of guilty or nolo contendere pursuant to a deferred sentence plea agreement in any jurisdiction of a crime which demonstrates such lawyer's unfitness to practice law, regardless of whether the conviction resulted from a plea of guilty or nolo contendere or from a verdict after trial, shall be subject to discipline as herein provided, regardless of the pendency of an appeal.

Rule 7, Rules Governing Disciplinary Proceedings, 5 O.S.2011, ch. 1, app. 1-A.

¶15 Not every criminal conviction facially demonstrates a lawyer's unfitness to practice law. *State ex rel. Okla. Bar Ass'n v. Armstrong*, 1990 OK 9, ¶ 8, 791 P.2d 815, 818. In fact, a lawyer should answer only for offenses that indicate lack of characteristics relevant to the practice of law. Rule 8.4, Cmt. 2, Oklahoma Rules of Professional Conduct (ORPC), 5 O.S. 2011, ch.1, app. 3-A.[1] Answerable offenses typically in-volve violence, dishonesty, breach of trust, or serious interference with the administration of justice. *Id*.

¶16 This Court addressed an attorney's discipline for misconduct involving alcohol in a handful of cases. We previously found that a DUI felony conviction does not facially demonstrate unfitness to practice law. *State ex rel. Okla. Bar Ass'n v. Cooley*, 2013 OK 42, ¶ 13, 304 P.3d 453, 456. However, a pattern of repeated offenses can indicate indifference to an attorney's legal obligation and warrant discipline. ORPC 8.4, Cmt. 2. In cases involving substance abuse, this Court may mitigate the discipline warranted when an attorney recognizes the adverse effect of his substance abuse and cooperates in the treatment for it. *State ex rel. Okla. Bar Ass'n v. Giger,* 2001 OK 96, ¶ 16, 37 P.3d 856, 863.

¶17 In *State ex rel. Oklahoma Bar Association v. Bernhardt*, 2014 OK 20, 323 P.3d 222, a non-practicing attorney had multiple alcohol-related offenses, including two felony DUI convictions and six misdemeanor convictions. Bernhardt had not practiced law in more than 15 years, and therefore, no clients were adversely affected by his conduct. However, Bernhardt wanted to keep his license to practice law. *Id*. ¶ 6, 323 P.3d at 224. The trial panel found that Bernhardt was of good moral character, other than his problems with alcoholism, and well-respected by attorneys, writers, and members of the community. The Court lifted Bernhardt's interim suspension and placed him on a deferred suspension of two years and a day along with certain probationary conditions similar to those recommended by the Trial Panel for Elsey. *Id.* ¶¶ 17-18, 323 P.3d at 226.

¶18 In another alcohol-related disciplinary case, *State ex rel. Oklahoma Bar Association v. McBride*, 2007 OK 91, 175 P.3d 379, an attorney was charged with a felony DUI. The attorney, McBride, had several other alcohol-related convictions dating back to 1997. McBride admitted he was an alcoholic and sought support from Lawyers Helping Lawyers, who referred him for treatment to a psychologist. He also participated in an outpatient treatment program. The Court found no evidence of client neglect and credited McBride for embracing sobriety. *Id.* ¶ 22, 175 P.3d at 387. This Court followed the trial panel's recommended discipline of public censure coupled with a deferred suspension of two years and one day, along with certain conditions similar to those recommended by the Trial Panel for Elsey. *Id.* ¶ 33, 175 P.3d at 390.

¶19 Finally, in *Garrett*, an attorney pled guilty to two counts of misdemeanor sexual battery of two women on two different occasions, both of which occurred while intoxicated. 2005 OK 91, ¶¶ 5, 7, 127 P.3d at 603. The attorney, Garrett, had previous alcohol-related charges and allegations, but none of his misconduct involved clients. Garrett contacted Lawyers Helping Lawyers and entered an inpatient treatment facility where he remained for 72 days until he completed his program. *Id.* ¶ 7, 127 P.3d at 603. He subsequently attended four to five Alcoholics Anonymous meetings per week. *Id*. ¶ 14, 127 P.3d at 605. The Court im-

posed public censure, one-year probation with conditions, and payment of costs. *Id.* ¶ 30, 127 P.3d at 609.

¶20 Here, the Trial Panel found that no clients were adversely affected by Elsey's conduct. The Trial Panel further found that Elsey took positive actions to treat his alcoholism. The Panel recommends that this Court lift Elsey's interim suspension and place him on a deferred suspension of two years, subject to stated conditions.

¶21 The repetition of Elsey's alcohol-related driving offenses provides clear and convincing evidence of his indifference to legal obligations and engaging in conduct that reflects adversely on the legal profession in violation of his professional duties pursuant to ORPC Rule 8.4(b)[2] and RGDP Rule 1.3.[3] The conduct serves as a basis for the imposition of discipline, which we must determine. We appreciate Elsey's honesty regarding his alcoholism and his efforts to remain sober for over 18 months. Elsey has taken steps to avoid such behavior in the future and has already served a two-year interim suspension. Considering the *Bernhardt, McBride,* and *Garrett* cases, we conclude the Trial Panel's recommendation is appropriate.

IV. CONCLUSION

¶22 Considering the forms of discipline bestowed in earlier cases before this Court involving repetitive alcohol-related incidents, we conclude that the Trial Panel's recommended discipline is appropriate. We hereby lift Elsey's interim suspension and impose a two-year deferred suspension. During the term of deferment, Elsey must: (1) sign a contract with Lawyers Helping Lawyers and waive all questions of confidentiality and permit his sponsor at Lawyers Helping Lawyers to notify the OBA in the event of any default; (2) be supervised by a designated member of the Lawyers Helping Lawyers committee for the duration of the probationary term; (3) submit to random drug screens or urinalysis to be determined by his sponsor with Lawyers Helping Lawyers; (4) participate in the Alcoholics Anonymous program or similarly recognized program; (5) abide by the ORPC; and (6) refrain from use or possession of intoxicants. The two-year probation shall begin on the date of this opinion.

¶23 The OBA filed an application to assess the costs of the disciplinary proceedings in the amount of $5,324.47. These costs include investigation expenses and costs associated with the record, and each is permissible. *See* RGDP Rule 6.16. In response, Elsey requested an extension of time to pay the costs associated with these proceedings and proposed the length of the deferred suspension. This Court orders Elsey to pay costs in the amount of $5,324.47 within two years of the effective date of this opinion.

RESPONDENT'S INTERIM SUSPENSION IS LIFTED, AND A DEFERRED SUSPENSION OF TWO YEARS IS IMPOSED; DEFERRAL OF SUSPENSION IS SUBJECT TO COMPLIANCE WITH THE TERMS OF PROBATION, AND THIS COURT ORDERS RESPONDENT TO PAY COSTS.

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

Darby, V.C.J. and Combs, J. (by separate writing), dissent.

COMBS, J., with whom DARBY, V.C.J., joins, dissenting

¶1 The majority opinion places the Respondent on a two year "deferred suspension" with limited supervision. Although this Court has previously entered a "deferred suspension" in some past opinions, I cannot support this suspension without significant supervision to monitor compliance. The terms imposed by the majority opinion do not adequately address the needs of this Respondent or this Court.

¶2 Respondent has pled guilty to felony alcohol related traffic offenses at least three times on this record alone in the last five years.[1] Two of these criminal charges resulted in deferred sentences.[2] In the other case, he was sentenced to thirty days in the county jail.[3] I find his treatment to have been very lenient. The Respondent's history shows a clear pattern of indifference to the laws of this State and his legal obligations as an attorney. Previous court ordered supervision has had little success in altering the behavior of the Respondent.

¶3 The PRT and the majority determined that Respondent's criminal conduct and endangerment of the public, while licensed as an attorney in the State of Oklahoma, violated his professional duties under Rule 8.4 (b), ORPC, and Rule 1.3, RGDP. His misconduct warrants final discipline. I do not believe the imposition of a "deferred suspension" under the facts of this case constitutes final discipline.

¶4 I further dissent to the lack of certainty in the event the Respondent should fail to comply with this "deferred suspension." Specifically, the majority should clearly and succinctly ad-vise the Respondent that a finding of a violation of this "deferred suspension" would allow the Complainant to pursue all avenues of discipline, including but not limited to disbarment.

¶5 Under the facts presented, I would suspend the Respondent for two years and one day upon the effective date of this opinion.

Winchester, J.

1. Comment 2, ORPC 8.4 provides:
Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.
2. **ORPC 8.4(b)** provides in pertinent part:
It is professional misconduct for a lawyer to:
….
(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects ….
3. **RGDP 1.3** provides:
The commission by any lawyer of any act contrary to prescribed standards of conduct, whether in the course of his professional capacity, or otherwise, which act would reasonably be found to bring discredit upon the legal profession, shall be grounds for disciplinary action, whether or not the act is a felony or misdemeanor, or a crime at all. Conviction in a criminal proceeding is not a condition precedent to the imposition of discipline.

COMBS, J., with whom DARBY, V.C.J., joins, dissenting

1. CF-2017-253, Mayes County, OK; CF-2015-548, Cherokee County, OK and CF-2014-67, Mayes County, OK.
2. CF-2015-548, Cherokee County, OK and CF-2014-67, Mayes County, OK.
3. CF-2017-253, Mayes County, OK.

2019 OK 82

RE: Disposition of Surplus Property, Rules for Management of the Court Fund, 20 O.S., Chap 18, App 1, Rule 10

No. SCAD-2019-97. December 16, 2019

ORDER

The following new Rule 10 of the Rules for Management of the Court Fund, is hereby adopted and codified at Appendix 1 of the Title 20, Chapter 18, and is attached as Exhibit "A" to this order.

Rule 10 shall become effective on January 1, 2020, and shall supersede any Supreme Court Rules or Administrative Directives which were previously issued by this Court related to disposition of surplus property acquired or purchased by the local court fund.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 16th 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 ---

Title 20
Chapter 18 – Court Fund
Appendix 1 - Rules for Management of the Court Fund
Rule 10 – Disposition of Surplus Property

As authorized by 20 O.S. §1314, the following provisions shall govern the disposition of surplus property acquired or purchased by the local court fund.

A. Any worn out, outmoded, inoperable or obsolete equipment, furniture or other property purchased with local court funds for a district court or court clerk may be declared surplus by the Court Fund Board by written resolution of the Board describing the property and manner of disposal.

B. Such property may be disposed of by any of the following methods;

1. By trade-in to cover part of the cost of equipment or furniture to be acquired by purchase;
2. By separate cash sale where it appears that a greater amount can be recovered than could be realized by exchange or trade-in;
3. By transfer to another court clerk or district court;
4. By transfer to another county office in the same county; or
5. By junking, if the property has no value.

C. Except as provided in paragraph D below, before surplus items may be sold,

a list of the items must be submitted to the Administrative Office of the Courts for distribution to the other district courts and court clerks. The Court Fund Board of any county may request such surplus property be transferred by a written resolution of the Court Fund Board having the surplus property. If no request for transfer to another court clerk or district court is received within 30 days from the notification to the Administrative Office of the Courts, the surplus items may be sold in accordance with this rule.

D. Property with a current value which is less than the amount required for inclusion in the county inventory as set forth in 19 O.S. Supp. 2012 §178.1, or as hereafter may be amended, may be junked or disposed of in any manner deemed appropriate by the Court Fund Board without first being offered to the other district courts and court clerks.

E. The cash sale of property by the Court Fund Board may be by any of the following methods or combinations of methods:

1. At public auction or internet auction after public advertisement;

2. By inclusion in the sale of surplus county property by county commissioners;

or

3. Sale after securing one or more bids in writing.

F. At any auction, the Court Fund Board shall reserve the right to reject any and all bids and remove the item from sale.

1. All proceeds of a sale of surplus property shall be deposited in the court fund.

2. The records of all sales, including all bids received, shall be retained for a period of not less than three (3) years.

3. All costs incurred in any sale shall be paid from the proceeds of the sale.

G. Within 30 days after the disposition of any surplus property, the Court Fund Board shall provide documentation of the date and manner of disposal to the Board of County Commissioners. The Board of County Commissioners shall record the disposal information and shall remove the disposed items from any county inventory lists.

2019 OK 83

VIDEO GAMING TECHNOLOGIES, INC., Plaintiff/Appellant, v. ROGERS COUNTY BOARD OF TAX ROLL CORRECTIONS, a Political Subdivision; CATHY PINKERTON BAKER, ROGERS COUNTY TREASURER, in Her Official Capacity; and SCOTT MARSH, ROGERS COUNTY ASSESSOR, in HIS Official Capacity, Defendants/ Appellees.

Case No. 117,491. December 17, 2019

ON APPEAL FROM THE DISTRICT COURT OF ROGERS COUNTY, STATE OF OKLAHOMA

HONORABLE SHEILA A. CONDREN, DISTRICT JUDGE

¶0 Plaintiff brought claims for relief from assessment of *ad valorem* taxes on electronic gaming equipment owned by Plaintiff and leased to the Cherokee Nation through its business entity. Both parties sought summary judgment. The district court rendered summary judgment in Defendant's favor, finding that *ad valorem* taxes were not preempted. We retained Plaintiff's appeal.

ORDER OF THE DISTRICT COURT IS REVERSED, CAUSE REMANDED.

Elizabeth A. Price and Kurt M. Rupert, Hartzog Conger Cason & Neville, and Kevin B. Ratliff, Ratliff Law Firm, Oklahoma City, OK for Appellant.

Matthew J. Ballard, District Attorney, Rogers County District Attorney's Office, Claremore, OK, for Appellee.

OPINION

DARBY, V.C.J.,

¶1 On appeal, Video Gaming Technologies, Inc. ("VGT"), Plaintiff/Appellant, contends that the district court improperly granted summary judgment to Rogers County Board of Tax Roll Collections ("Board"), the Rogers County Treasurer, and the Rogers County Assessor, Defendants/Appellees (together "County"). The questions before this Court are whether the district court properly denied VGT's motion

for summary judgment and properly granted County's counter-motion for summary judgment. We answer both in the negative.

I. STANDARD OF REVIEW

¶2 Summary judgment settles only questions of law, therefore, we review *de novo* the grant thereof. *Am. Biomedical Grp. v. Techtrol, Inc.*, 2016 OK 55, ¶ 2, 374 P.3d 820, 822. "Summary judgment will be affirmed only if the appellate court determines that there is no dispute as to any material fact and that the moving party is entitled to judgment as a matter of law." *Horton v. Hamilton*, 2015 OK 6, ¶ 8, 345 P.3d 357, 360; *see also* 12 O.S.2011, § 2056(C). Under this standard, we confine our review to the limited, undisputed, material facts. *Techtrol,* 2016 OK 55, ¶ 3, 374 P.3d at 823. We do not consider County's factual allegations included in its paperwork that County failed to designate as disputed or undisputed material facts or support with evidentiary materials in the district court. *See id.; see also Frey v. Independence Fire and Cas. Co.*, 1985 OK 25, ¶ 6, 698 P.2d 17, 20

II. PROCEDURAL HISTORY

¶3 In December 2012, VGT filed a complaint with Board protesting the 2011 and 2012 assessment of *ad valorem* taxes. VGT claimed the electronic gaming equipment it leased exclusively to Cherokee Nation (Nation) for gaming was preempted from taxation under federal law. At that time, VGT submitted a copy of *Mashantucket Pequot Tribe v. Town of Ledyard (Mashantucket I)*, No. 3:06CV1212(WWE), 2012 WL 1069342 (D. Conn. Mar. 27, 2012) (finding preemption of imposition of *ad valorem* tax on gaming equipment), *rev'd*, 722 F.3d 457 (2d Cir. 2013). In December 2013, VGT timely filed a complaint with Board protesting the 2013 *ad valorem* tax assessments for the same reason. In April 2014, Board denied VGT's complaints by letter.

¶4 VGT timely appealed Board's decision, filing a petition for review in Rogers County District Court. VGT sought summary judgment claiming federal preemption of *ad valorem* taxes under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721 (2018), Indian Trader Statutes, and federal case law. VGT set forth a list of undisputed material facts which it supported with declarations[1] from VGT's Assistant General Counsel and an attorney for Nation; it also attached copies of its 2012 and 2013 complaints and Board's 2014 denial letter.

¶5 County filed a response and counter-motion for summary judgment, urging that *ad valorem* taxation of the property was not preempted or barred. County declared that "the relevant facts in this case are not in dispute," making summary judgment appropriate. County then set out its own statement of undisputed material facts. Later in its counter-motion for summary judgment and response, County argued:

> VGT has not alleged or provided evidence that it actually passes off the costs of its taxes onto the Tribe, but merely asserts a vague notion that its lease agreements are "based upon a variety of competing economic factors" and include costs that are "balanced to arrive at the lease terms." This bald assertion supposedly supports VGT's contention that the economic burden caused by the taxes would ultimately fall on the Tribe, but VGT has advanced no evidence that this is actually the case.

Def't's Resp. to VGT's Mot. for S.J., Counter-Mot. for S.J., and Br. in Supp., filed May 31, 2018, at 10. County, however, failed to support this assertion with any evidence to dispute the evidence put forth by VGT. County attached a copy of *Mashantucket Pequot Tribe v. Town of Ledyard (Mashantucket II)*, 722 F.3d 457 (2d Cir. Jul. 15, 2013) (reversing *Mashantucket I* and finding no preemption), an affidavit from the Rogers County Assessor, copies of the complaints and denial, and a statement of the taxes currently assessed against VGT.

¶6 On September 27, 2018, the district court denied VGT's motion and sustained County's counter-motion for summary judgment. The district court found the rationale in *Mashantucket II* persuasive and held that the "State of Oklahoma's *ad valorem* tax statutes are not preempted or barred by the Indian Trader Statutes, the Indian Gaming Regulatory Act, or pursuant to the balancing test set forth by the United States Supreme Court in *White Mountain Apache Tribe v. Bracker*," 448 U.S. 136, 100 S. Ct. 2578, 65 L. Ed. 2d 665 (1980). VGT timely appealed under Oklahoma Supreme Court Rule 1.36 and filed a motion that we retain the appeal, which we granted. On appeal, VGT argues that the district court erred in (1) relying on *Mashantucket II* to grant County's counter-motion for summary judgment and (2) failing to grant VGT's motion for summary judgment because imposition of *ad valorem* taxes is preempted by IGRA and the *Bracker* balancing test.

III. UNDISPUTED MATERIAL FACTS

¶7 VGT is a non-Indian Tennessee corporation authorized to do business in Oklahoma. VGT owns and leases electronic gaming equipment to Cherokee Nation Entertainment, LLC (CNE), a business entity of Nation. Nation is a federally-recognized Indian tribe headquartered in Tahlequah, Oklahoma. CNE owns and operates ten gaming facilities on behalf of Nation.

¶8 CNE and VGT negotiated and executed their initial lease agreement, and all subsequent amendments, on tribal trust land. The lease agreements are based on a variety of competing economic factors and include consideration of several costs that are balanced to arrive at the lease terms. The equipment lease agreement states that VGT supplies the gaming equipment, software, and related services to CNE. The gaming equipment that VGT leases to CNE is located on tribal trust land in Rogers County and is essential to Nation's gaming operations.

¶9 The Rogers County Assessor assesses *ad valorem* tax on business personal property located in the county on the first of the year, pursuant to title 68, section 2831 of the Oklahoma Statutes.[2] In 2011, 2012, and 2013, County assessed *ad valorem* taxes on the gaming equipment owned by VGT.[3] County based its assessment on the value of the property and did not take into consideration use, possession, or specific location of the property.

¶10 Tax revenue from *ad valorem* assessments, like those imposed on VGT's gaming equipment, help fund the operation of Rogers County government, schools, law enforcement, health services, roads, and other government services within Rogers County. The economic burden caused by the assessment of *ad valorem* taxes, however, would ultimately fall on Nation because it would impact the overall costs of providing the gaming machines to Nation and therefore the price for which VGT would agree to lease them.

IV. ANALYSIS

¶11 VGT argues that taxation of its gaming equipment is preempted by IGRA and *Bracker* because the property is located on tribal trust land under a lease to Nation for use in its gaming operations.

A. Federal Preemption of Taxation of Non-Indians on Indian Land

¶12 The location of property on tribal trust land is not a per se bar to taxation because the legal incidence of the *ad valorem* tax falls on the non-Indian lessor, not on *Nation. Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 453, 459, 115 S. Ct. 2214, 132 L. Ed. 2d 400 (1995); *State ex rel. Edmondson v. Native Wholesale Supply*, 2010 OK 58, ¶ 39, 237 P.3d 199, 212-213. When a state or county seeks to impose a nondiscriminatory tax on non-Indians on tribal land, there is no rigid preemption rule, rather we must apply a flexible analysis to determine if taxation is proper. *See Bracker,* 448 U.S. 136; *see also Ramah Navajo Sch. Bd. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 102 S. Ct. 3394, 73 L. Ed. 2d 1174 (1982); *see also Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 109 S. Ct. 1698, 104 L. Ed. 2d 209 (1989). Courts must perform a "particularized examination of the relevant state, federal, and tribal interests" which is not controlled by standards of preemption from other areas of law. *Ramah Navajo School Bd.*, 458 U.S. at 838; *see also Bracker*, 448 U.S. at 142, 144-45.

¶13 In examining federal treaties and statutes, we must look to congressional intent to preempt state taxation of non-Indians on tribal land, while considering the broad underlying policies and history of tribal sovereignty as a "backdrop." *Cotton Petroleum,* 490 U.S. at 176; *see also Bracker,* 448 U.S. at 142, 144-45. Preemption is not limited to cases in which Congress has expressly preempted the state tax. *Cotton Petroleum*, 490 U.S. at 176-77. The county seeking to impose a tax on non-Indians on tribal land must be able to identify regulatory functions or services the county performs to justify the assessment – interest in raising revenues is not enough. *Bracker,* 448 U.S. at 148-49, 150. Courts must follow the guiding principle to construe "federal statutes and regulations relating to tribes and tribal activities" generously in order to comport with "traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *Ramah Navajo Sch. Bd.*, 458 U.S. at 846; *Bracker,* 448 U.S. at 143-44.

¶14 In *Bracker,* the U.S. Supreme Court looked to the comprehensive and pervasive nature of the federal regulation of harvesting timber, the number of policies underlying the federal scheme which were threatened by state regulation, the tribe's sovereignty over their land, the

fact that it was undisputed that the economic burden would ultimately fall on the tribe, and the state's inability to identify any regulatory function or service the state performed that would justify the taxes except a generalized interest in raising revenue. *Id.* at 145-51. Ultimately, the Court found preemption of state motor carrier license and use fuel taxes on a non-Indian logging company's activities on Indian land. *Id.* at 151.

¶15 Two years later, the U.S. Supreme Court applied that analysis before finding preemption of a state gross-receipts tax imposed on a non-Indian contracting firm constructing school facilities on tribal land. *Ramah Navajo Sch. Bd*., 458 U.S. 832. The Court determined federal regulations regarding construction of Indian schools were both comprehensive and pervasive. *Id.* at 839-42. The Court noted that while the burden nominally fell on the non-Indian contractor, it impeded the clearly expressed federal interests by depleting the funds available for construction. *Id.* at 842. The Court again found the state's ultimate justification was a desire to increase revenue, without showing a specific, legitimate regulatory interest to justify the imposition of the tax. *Id.* at 843-845.

¶16 In 1989, the U.S. Supreme Court found a non-Indian lessee oil and gas company was subject to severance taxes from both the tribe and the state for minerals extracted from their leases on Indian land. *Cotton Petroleum*, 490 U.S. at 168-69. The Court considered the history of the State's ability to tax non-Indian lessee's on-reservation oil production as well as one of the purposes of the act being to provide tribes with "badly needed revenue, but [found] no evidence . . . that Congress intended to remove all barriers to profit maximization." *Id.* at 173, 180. The Court determined that the state also regulated the field, the state provided substantial services to the tribe and the company in question, and there was no economic burden on the tribe from the company's payment of taxes. *Id.* at 185-86.

¶17 The Court distinguished the case from *Bracker* and *Ramah Navajo School Board* because the other cases "involved complete abdication or noninvolvement of the State in the on-reservation activity." *Id.* at 185. The Court determined that there is no proportionality requirement to the justification of taxes for States compared to the services provided. *Id.* The Court acknowledged that the taxes had a "marginal effect on the demand for on-reservation leases, the value to the Tribe of those leases, and the ability of the Tribe to increase its tax rate," but found that any impairment to the federal policies in play was too indirect and insubstantial to support claims of preemption. *Id.* at 187

B. Federal IGRA Case Law

¶18 In 2001, the Eighth Circuit analyzed IGRA's preemption of state law claims in a dispute between a non-Indian general contractor and non-Indian sub-contractor. *Casino Res. Corp. v. Harrah's Entm't, Inc*., 243 F.3d 435, 439 (8th Cir. 2001). Resolution of the dispute required review of a contract terminating a gaming management arrangement between one of the parties and a tribal entity. *Id.* at 438. The Eighth Circuit noted that "[n]ot every contract that is merely peripherally associated with tribal gaming is subject to IGRA's constraints." *Id.* at 439. The court held that "[i]t is a stretch to say that Congress intended to preempt state law when there is no valid management contract for a federal court to interpret, when the Nation's broad discretion to terminate management contracts is not impeded, and when there is no threat to the Nation's sovereign immunity or interests." *Id.* at 440.

¶19 In 2008, the Ninth Circuit addressed whether IGRA preempted state sales tax on construction materials purchased by a non-Indian sub-contractor from a non-Indian vendor and delivered to Indian land for casino construction. *Barona Band of Mission Indians v. Yee,* 528 F.3d 1184, 1186 (9th Cir. 2008). The court weighed heavily the parties' attempt to manipulate tax laws and noted that the taxed materials "could be used for a multitude of purposes unrelated to gaming." *Id.* at 1191-93. The court found that "IGRA's comprehensive regulation of Indian gaming does not occupy the field with respect to sales taxes imposed on third-party purchases of equipment used to construct gaming facilities." *Id.* at 1193.

¶20 In 2013, the Second Circuit determined *ad valorem* taxation on gaming equipment was not preempted by IGRA. *Mashantucket II,* 722 F.3d at 470. The court compared the *ad valorem* tax on gaming equipment to *Barona Band* and *Casino Resource,* where the generally-applicable laws were not preempted by IGRA's occupation of the governance of the gaming field, but were merely peripherally associated. 722 F.3d at 470. The court found that "*mere ownership* of slot machines by the vendors does not qualify as gaming, and taxing such ownership there-

fore does not interfere with the 'governance of gaming.'" *Id.* (emphasis original).

¶21 In its *Bracker* analysis, the *Mashantucket II* court stated that "[n]othing within IGRA reveals congressional intent to exempt non-Indian suppliers of gaming equipment from generally applicable state taxes that would apply in the absence of the legislation." 722 F.3d at 473. The court determined that "IGRA presented an opportunity for Congress to preempt taxes exactly like this one; Congress chose to limit the scope of IGRA's preemptive effect to the 'governance of gaming.'" *Id.* (quoting *Gaming Corp. of Am. v. Dorsey*, 88 F.3d 536, 550 (8th Cir. 1996)). The court concluded:

> We recognize that this is arguably a close case. However, the Tribe's generalized interests in sovereignty and economic development are not significantly impeded by the State's generally-applicable tax; neither are the federal interests protected in IGRA. The Town has moderate economic and administrative interests at stake, and the affront to the State's sovereignty on one hand approximates the affront to the Tribe's sovereignty on the other. The balance of equities here favors the Town and State.

Mashantucket II, 722 F.3d at 476-77.

¶22 In 2014, the United States Supreme Court considered whether a tribe's off-reservation gaming activities were covered under IGRA. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 134 S. Ct. 2024, 188 L. Ed. 2d 1071 (2014). The Court noted that "numerous provisions of IGRA show that 'class III gaming activity' means just what it sounds like – the stuff involved in playing class III games." *Bay Mills,* 572 U.S. at 792. The Court noted multiple phrases in IGRA that "make perfect sense if 'class III gaming activity' is what goes on in a casino – each roll of the dice and spin of the wheel" – and together signify that the "gaming activity is the gambling in the poker hall not the proceedings of the off-site administrative authority." *Id.* The Court explained that two sections of IGRA describe the "power to 'clos[e] a gaming activity' for 'substantial violation[s]' of law – *e.g.*, to shut down crooked blackjack tables, not the tribal regulatory body meant to oversee them." *Id.*

¶23 Since *Bay Mills*, the Tenth Circuit addressed the question of jurisdiction over tort claims arising out of IGRA. *Navajo Nation v. Dalley*, 896 F.3d 1196, 1200 (10th Cir. 2018), *cert. denied sub nom. McNeal v. Navajo Nation,* 139 S. Ct. 1600, 203 L. Ed. 2d 755 (2019). The court concluded that "Class III gaming activity relates only to activities actually involved in the playing of the game, and not activities occurring in proximity to, but not inextricably intertwined with, the betting of chips, the folding of a hand, or suchlike." 896 F.3d at 1207. The court found that actions arising in tort are not "directly related to, and necessary for, the licensing and regulation of [gaming] activity." *Id.* at 1207, 1209. The court clarified that the licensing or regulation of gaming activity "does not relate to claims arising out of occurrences that happen in proximity to – but not as a result of – the hypothetical card being dealt or chip being bet." *Id.* at 1209 (citation omitted).[4]

¶24 Recently, the Eighth Circuit again addressed IGRA in two cases issued the same day. *Flandreau Santee Sioux Tribe v. Noem,* 938 F.3d 928 (8th Cir. 2019); *Flandreau Santee Sioux Tribe v. Haeder*, 938 F.3d 941(8th Cir. 2019). The court determined in *Noem* that IGRA preempted the state's imposition of a use tax on non-Indian purchases of amenities at a casino. *Noem,* 938 F.3d at 937. In *Haeder,* the court determined that IGRA did not preempt an excise tax on gross receipts of a non-Indian contractor for services performed in renovating and expanding a casino. *Haeder*, 938 F.3d at 942, 947.

¶25 The Eighth Circuit stated that the phrase "[d]irectly related to the operation of gaming activity" is narrower than "directly related to the operation of the Casino." *Noem,* 938 F.3d at 935. The court thus determined that sale of amenities is not "directly related to the operation of gaming activities" in order to be expressly preempted. *Id.* But the court found that while the amenities are not directly related to the operation of gaming activities, they do contribute significantly to the economic success of the tribe's class III gaming operation. *Id.* at 936. The court noted that the state's taxation of amenities would raise the cost – potentially reducing tribal revenues and detrimentally impacting IGRA's policies. *Id.* In affirming the preemption of state use tax on non-Indian purchases of amenities at the casino, the court found:

> [t]he State's interest in raising revenues to provide government services . . . does not outweigh the federal and tribal interests in Class III gaming reflected in IGRA and the history of tribal independence in gaming recognized in *Cabazon*. As in *Bracker,* "this

> is not a case in which the State seeks to assess taxes in return for governmental functions it performs for those on whom the taxes fall."

Id. at 937.

¶26 In *Haeder,* the court considered a provision in IGRA requiring National Indian Gaming Commission (NIGC) approval of a tribal ordinance stating that casino construction would adequately protect the environment, public health, and safety – but noted that the NIGC does not regulate construction activity or prescribe what adequate protection requires. *Haeder,* 938 F.3d at 945. The court concluded that the provision did not preempt the state contractor excise tax, "a tax which does not regulate or interfere with the Tribe's design and completion of the construction project, or its conduct of Class III gaming." *Id.* The court further noted that, unlike the ongoing casino amenities tax in *Noem*, the contractor excise tax is a one-time tax which "hardly implicates the relevant federal and tribal interests." *Haeder,* 938 F.3d at 946. The court also found that because the tax did not regulate casino construction or gaming activities, there were no implications to the federal and tribal interests in IGRA. *Id.* Regarding the state's interests, the court noted that the relevant services provided included those available to the contractor and the members of the tribe on and off-reservation. *Id.* at 947.

C. *Bracker* Analysis of *Ad Valorem* Tax on Gaming Equipment

¶27 In the present case, we must (1) look to the comprehensiveness of the federal regulations in place, in light of the broad underlying policies and notions of sovereignty in the area; (2) consider the number of policies underlying the federal scheme which are threatened; and (3) determine if the state is able to justify the tax other than as a generalized interest in raising revenue. *See Bracker,* 448 U.S. at 142, 144-45.

1) Comprehensive Legislation

¶28 IGRA was "intended to expressly preempt the field in the governance of gaming activities on Indian lands." S.Rep.100-446 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3076. In creating IGRA, Congress recognized that the extension of State jurisdiction to Indian lands has traditionally been inimical to Indian interests and attempted to balance the need for sound enforcement of gaming laws and regulations with the strong federal interest in preserving sovereign rights of tribal governments to regulate activities and enforce laws on Indian lands. *Id.* at 3075. Congress found:

> (1) numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue;
>
> (2) Federal courts have held that section 81 of this title requires Secretarial review of management contracts dealing with Indian gaming, but does not provide standards for approval of such contracts;
>
> (3) existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands;
>
> (4) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and
>
> (5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

25 U.S.C. § 2701.

¶29 Congress adopted IGRA in 1988 to provide for the operation and regulation of gaming by Indian tribes. *Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 48, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996). IGRA divides gaming on Indian lands into three classes, and it provides a different regulatory scheme for each one. *Id.* Class II gaming is bingo, electronic or otherwise, and card games that are either explicitly authorized by the State or not explicitly prohibited and are played elsewhere in the State. 25 U.S.C. § 2703(7). Class III gaming is heavily regulated and is defined as all gaming which is not included in class I or II; it includes slot machines, electronic games of chance, casino games, banking card games – such as baccarat, chemin de fer, or blackjack – and others. *Seminole Tribe*, 517 U.S. at 48; 25 U.S.C. § 2703(7)(B),(8).

¶30 Congress declared IGRA's purpose included providing regulation from corrupting influences, ensuring the tribe is the primary beneficiary of the operation, and assuring that gaming is conducted fairly and honestly, by both operator and players. 25 U.S.C. § 2702.[5] In

accordance with that, IGRA provided comprehensive guidance on gaming. IGRA mandates that tribes may only conduct Class III gaming when the tribe adopts an ordinance or resolution that satisfies certain statutorily prescribed requirements and it is conducted in accordance with a negotiated Tribal-State compact. *Seminole Tribe,* 517 U.S. at 49; 25 U.S.C. § 2710(d)(1).[6] The State is able to assess necessary amounts under the compact in order to defray associated regulation costs for Class III gaming. *Id.* § 2710(d)(3). Although Nation's compact with the State is not part of the record, the model state compact provides extensive regulation requiring inspection of gaming equipment to ensure the gaming is conducted fairly and honestly. 3A O.S.2011, § 281 Part 4(B), 5(C),(M), 8 (A). It also mandates that companies that lease over twenty-five thousand dollars a year of equipment to a tribe must be licensed by the tribal compliance agency, and requires payment of annual assessments for oversight of the gaming equipment. *Id.* Part 10(B)(1), 11(B).

¶31 IGRA also established the NIGC and gave it power to close gaming activities; adopt regulations for, levy, and collect civil fines; establish the rate of fees; approve tribal ordinances or resolutions regulating class II and III gaming; and approve management contracts. 25 U.S.C. §§ 2703-06, 2710-11, 2713. The NIGC also has power to establish fees to be paid by each "gaming operation that conducts . . . a class III gaming activity that is regulated by this chapter." *Id.* § 2717(a). IGRA allows a tribe to adopt a resolution and submit it to the Commission to "authorize any person or entity to engage in, a class III gaming activity on Indian lands of the Indian tribe." *Id.* § 2710(d)(2)(A). IGRA further requires independent audits for contracts related to Class II or III gaming for supplies, services, or concessions in contracted amounts in excess of $25,000 annually. *Id.* § 2710(b)(2)(D),(d)(1)(A)(ii).

i) Gaming Equipment versus Gaming Activity

¶32 We find IGRA's regulations governing gaming are comprehensive and pervasive. Before we go further in the analysis, however, we must first address whether for purposes of IGRA there is a difference in *owning gaming equipment* used exclusively for tribal gaming versus *engaging in gaming activity.* IGRA itself does not expressly distinguish the game from the equipment on which it is played. Nor has the U.S. Supreme Court. While *Bay Mills* focused on the action rather than the equipment – describing gaming as the "act of throwing the dice" – it is clear that regulation of gaming equipment is encompassed under IGRA in order to prevent corruption. If regulation of traditional gaming equipment, such as preventing crooked blackjack tables, is necessary – regulation of electronic gaming equipment, which has much greater potential for abuse, seems that much more important.

¶33 IGRA was clearly intended to provide oversight of gaming equipment to prevent corruption. But, the Second Circuit determined that gaming equipment is somehow peripheral or tangential to gaming and thus distinguished gaming equipment from gaming in order to find taxation of its ownership was not governed by IGRA's express preemption of the field of "governance of gaming." The Second Circuit also confused the *Bracker* analysis when it stated that "[w]hile IGRA seeks to limit criminal activity at the casinos, nothing in Connecticut's tax makes it likely that Michael Corleone will arrive to take over the Tribe's operations." *Mashantucket II*, 722 F.3d at 473. The fact that the specific tax in question does not infringe on a purpose of IGRA, does not remove the applicable stated purpose of IGRA or its importance.

¶34 Unlike *Barona Band*, the gaming equipment in this location cannot be used for anything but gaming. *Barona Band*, 528 F.3d at 1191-93. The *ad valorem* tax would not apply to this gaming equipment in the absence of IGRA, because the gaming equipment is only located in Rogers County due to its use in Indian gaming activities. And prior to IGRA, mere possession of the gaming equipment on tribal trust land would have been illegal. *See* 15 U.S.C. § 1175(a) (2018).

¶35 *Mashantucket II* held that "this is arguably a close case," 722 F.3d at 476, however, we disagree. Here, the *ad valorem* tax is assessed against the owner of property located in the county. Focusing only on the *ownership* of the property separate from the property itself – especially in this case where the property would not be located in the county but for its possession by Nation for its exclusive leased use in Indian gaming – would be incongruous with *Bracker* and its progeny. While ownership of gaming equipment does not automatically subject it to IGRA, when the gaming equipment is used exclusively in a tribal gaming operation, such as with Nation, we find it is inextricably intertwined with IGRA gaming

activities such that it is absolutely directly related to and necessary for the licensing and regulation of gaming activity. *See Dalley,* 896 F.3d at 1207.

¶36 *Mashantucket II* also ignored the U.S. Supreme Court's guidance that courts should err toward Indians on questions of preemption. *Ramah Navajo Sch. Bd.*, 458 U.S. at 846; *Bracker,* 448 U.S. at 143-44. Unlike the situations in *Casino Resource* and *Barona Band*, gaming equipment is not tangential to gaming. Rather, it is a *sine qua non* of gaming. Due to the United States Supreme Court's clear comments about the nature of gaming activities, and the Court's clear guidance to construe federal statutes relating to tribal activity generously, we find *Mashantucket II* unpersuasive.

2) Federal Policies Threatened by Ad Valorem Taxation of Gaming Equipment

¶37 It is an undisputed fact that the burden of the *ad valorem* taxes will ultimately fall on Nation. Due to the success of Nation's gaming enterprise, the passed on cost will not threaten the purpose of Nation being the primary beneficiary of the gaming operation. Title 68, section 3104 of the Oklahoma statutes, however, allows County to seize property when *ad valorem* taxes are not paid. 68 O.S.2011, § 3104. Thus, County's remedy for collection of delinquent taxes would directly affect the tribe, impact its gaming operation, and severely threaten the policies behind IGRA – including Nation's sovereignty over its land. *See Wyandotte Nation v. Sebelius*, 443 F.3d 1247 (10th Cir. 2006) (tribal sovereignty outweighs a state's interest in enforcing its laws to the extent of intruding onto tribal land and seizing casino equipment, files, and proceeds).

3) County's Justification for Taxation

¶38 County argues that *ad valorem* taxation is justified to ensure integrity and uniform application of tax law. County also justifies the tax by claiming, without additional supporting evidence, that the money is vital to them. County further states that the disputed taxes fund services it provides to the county at large.

¶39 County does not regulate gaming or gaming equipment in any way. Unlike *Cotton Petroleum*, County has not shown it provides any regulatory functions or services to VGT, the out-of-state company, to justify its taxation of equipment which is only located in Rogers County for use in Nation's gaming enterprise. *See Cotton Petroleum*, 490 U.S. at 185-186; *see also Bracker,* 448 U.S. at 148-49. Like *Ramah Navajo School Board*, it appears that County's interest is primarily raising revenue without providing specific regulatory functions or services to justify it. *Ramah Navajo Sch. Bd.*, 458 U.S. at 843-45. The U.S. Supreme Court has said that desire for increased revenue is not enough, instead basing justification on what the state or county provides to the entity in exchange for taxation. *Bracker,* 448 U.S. at 150. County has not shown any nexus between the services it provides through *ad valorem* taxation and services that VGT receives on-or-off tribal land. County's provision of services to other members of the county does not justify imposition of the tax which burdens the federal interests in IGRA. *See Ramah Navajo Sch. Bd.*, 458 U.S. at 844. Like *Bracker,* "this is not a case in which the [County] seeks to assess taxes in return for governmental functions it performs for those on whom the taxes fall." *Bracker,* 448 U.S. at 150.

¶40 County's argument regarding uniform application of the law also fails; Oklahoma also already has use exemptions for *ad valorem* taxation that require County to consider property use in certain circumstances. Okla. Const. art. 10, § 6; 68 O.S.2011, §§ 2887, 2889; *State ex rel. Cartwright v. Dunbar,* 1980 OK 15, ¶10, 618 P.2d 900, 904-905 (use is the determinative factor for questions of exemption from *ad valorem* taxes for religious or charitable question use) (quoting *State ex rel. City of Tulsa v. Mayes Cty. Treasurer*, 1935 OK 1027, ¶ 36, 51 P.2d 266); *Okla. Indus. Auth. v. Barnes,* 1988 OK 98, ¶ 16, 769 P.2d 115, 120. Further, there are other statutory considerations of use for determination of fair market value for taxation. See 68 O.S.2011, § 2817. Requiring County to consider use in this situation is not an unfair burden on its enforcement of tax laws.

¶41 Gaming equipment is not peripheral to gaming. Based off the U.S. Supreme Court's interpretation of gaming in IGRA and its further admonishment to interpret federal statutes regarding tribes generously, we find that gaming equipment is a *sine qua non* for gaming and thus under IGRA. The comprehensive regulations of IGRA occupy the field with respect to *ad valorem* taxes imposed on gaming equipment used exclusively in tribal gaming. The state remedy for non-payment also acts as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress. *See Gade v. Nat'l Solid Wastes Mgmt.*

Ass'n, 505 U.S. 88, 98, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992). Due to the comprehensive and pervasive nature of IGRA, the number of federal policies threatened, Nation's sovereignty, and County's lack of justification other than as a generalized interest in raising revenue, we find that taxation of gaming equipment used exclusively in tribal gaming is preempted.

V. CONCLUSION

¶42 Summary judgment is only affirmed if there is no dispute as to any material fact and the party is entitled to judgment as a matter of law. The district court erred in relying on *Mashantucket II* and not considering the more recent guidance of the U.S. Supreme Court in *Bay Mills*. Based on this erroneous conclusion of law, we find summary judgment against VGT was improper.

¶43 Due to the comprehensive nature of IGRA's regulations on gaming, the federal policies which would be threatened, and County's failure to justify the tax other than as a generalized interest in raising revenue, we find that *ad valorem* taxation of gaming equipment here is preempted. We reverse the order of summary judgment and we remand the matter to the district court to enter an appropriate order of summary judgment for VGT.

ORDER OF THE DISTRICT COURT IS REVERSED, CAUSE REMANDED.

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

Kane, J. – not voting

DARBY, V.C.J.,

1. An unsworn declaration, signed under penalty of perjury, may be used in place of an affidavit. 12 O.S.2011, § 426.

2. A. All property, both real and personal, having an actual, constructive or taxable situs in this state, shall, except as hereinafter provided, be listed and assessed and taxable in the county, school districts, and municipal subdivision thereof, where actually located on the first day of January of each year . . . .
68 O.S.2011, § 2831(A).

3. VGT was assessed and paid *ad valorem* taxes on the gaming equipment from 2005-2010. The Rogers County Assessor has continued to assess *ad valorem* tax on VGT's gaming equipment since 2013 and VGT has continued to file complaints for all further *ad valorem* taxes. Board has not taken any action on the further complaints while awaiting the outcome of this matter.

4. In a footnote, the court noted that someone *could* potentially incur an injury from the gaming activity itself. *Navajo Nation v. Dalley*, 896 F.3d 1196, 1210 n.7 (10th Cir. 2018).

> Consider, for example, a casino patron at a roulette table: during the course of the game, an errant ball flies and hits the patron in the eye, causing damage to the patron. Or, in a different situation, a patron is playing on a dysfunctional slot machine that electrocutes the patron, again resulting in some harm. In both of those instances, it is at least arguable that the patron's injuries resulted directly from gaming activity, within the meaning of *Bay Mills, i.e.*, "what goes on in a casino – each roll of the dice and spin of a wheel."

Id. (quoting *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 792, 134 S. Ct. 2024, 188 L. Ed. 2d 1071 (2014).

5. IGRA's purpose is:

> (1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;
> (2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and
> (3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

25 U.S.C. § 2702 (2018).

6. Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the *conduct of gaming activities*.
25 U.S.C. § 2710 (2018) (emphasis added).

2019 OK 84

VIDEO GAMING TECHNOLOGIES, INC., Appellant, v. TULSA COUNTY BOARD OF TAX ROLL CORRECTIONS, a Political Subdivision; DENNIS SEMLER, Tulsa County Treasurer, in His Official Capacity; and JOHN A. WRIGHT, Tulsa County Assessor, in His Official Capacity, Appellees.

Case No. 118,241. December 17, 2019

ON APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, STATE OF OKLAHOMA

HONORABLE LINDA G. MORRISSEY, DISTRICT JUDGE

¶0 Appellant brought a claim for relief from assessment of ad valorem taxes. Tulsa County Assessor moved to dismiss for lack of subject matter jurisdiction as Appellant had not paid the past-due taxes pursuant to 68 O.S.2011, § 2884. The district court granted the motion to dismiss.

ORDER OF THE DISTRICT COURT IS REVERSED; CAUSE REMANDED.

Elizabeth A. Price and Kurt M. Rupert, Hartzog Conger Cason & Neville, and

Kevin B. Ratliff, Ratliff Law Firm, Oklahoma City, OK, for Appellant.

Leisa S. Weintraub, General Counsel, Tulsa County Assessor's Office, Tulsa, OK, for John A. Wright, Appellee.

OPINION

DARBY, V.C.J.,

¶1 Video Gaming Technologies, Inc. (VGT), appeals from the district court's grant of Tulsa County Assessor's motion to dismiss for lack of subject matter jurisdiction. The underlying question is whether title 68, section 2884 applies to appeals from the Board of Tax Roll Corrections pursuant to title 68, section 2871. We answer in the negative.

I. STANDARD OF REVIEW

¶2 When reviewing a district court's dismissal of an action, we examine the issues *de novo. Rogers v. Quiktrip Corp.,* 2010 OK 3, ¶ 4, 230 P.3d 853, 855-56. "A petition can generally be dismissed only for absence of any cognizable legal theory to support the claim or for insufficient facts under a cognizable legal theory." *Id.* ¶ 4, 230 P.3d at 856. If the court finds that it is without jurisdiction, it is its duty to dismiss the cause. 12 O.S.2011, § 2012(F)(3); *Bomford v. Socony Mobil Oil Co.*, 1968 OK 43, ¶ 15, 440 P.2d 713, 719.

II. PROCEDURAL HISTORY

¶3 On December 6, 2018, VGT filed a complaint with the Tulsa County Board of Tax Roll Corrections protesting the 2018 assessment of *ad valorem* taxes on electronic gaming equipment that VGT owns and exclusively leases to the Creek Nation for gaming, claiming federal preemption. VGT again submitted their protest on April 5, 2019. On May 14, 2019, the Tulsa County Board of Tax Roll Corrections dismissed VGT's complaint with prejudice. On May 29, 2019, VGT filed a petition for review of that determination in Tulsa County District Court in accordance with title 68, section 2871.

¶4 On June 26, 2019, Assessor filed a motion to dismiss for lack of subject matter jurisdiction pursuant to title 12, section 2012(B)(1). Assessor argued that title 68, section 2884 of the Oklahoma Statutes required timely payment of taxes, and notice thereof, in order to maintain the appeal. Assessor submitted evidence that VGT had not paid the 2018 taxes and argued that VGT's failure to pay the 2018 taxes within thirty days of the Board of Tax Roll Correction's ruling was a jurisdictional bar under sections 2884(A) and 2871(B). On August 19, 2019, the Tulsa County District Court dismissed the matter for lack of subject matter jurisdiction.

¶5 VGT timely appealed under Oklahoma Supreme Court Rule 1.36 and requested that we retain the appeal. On September 26, 2019, we granted the motion to retain. On appeal, VGT argues that the district court erred in dismissing the case for lack of subject matter jurisdiction because section 2871 does not require payment of disputed taxes in order for the court to retain jurisdiction over the appeal. VGT also argues that section 2884 does not apply to appeals from the Board of Tax Roll Corrections, but only to appeals from the Board of Equalization.

III. ANALYSIS

¶6 In relevant part, section 2871 provides:

> The board [of tax roll corrections] is hereby authorized to hear and determine allegations of error, mistake or difference as to any item or items so contained in the tax rolls, in any instances hereinafter enumerated, on application of any person or persons whose interest may in any manner be affected thereby . . . . When a complaint is pending before the board of tax roll corrections, *such taxes as may be owed by the protesting taxpayer shall not become due until thirty (30) days after the decision of the board of tax roll corrections.* When a complaint is filed on a tax account which has been delinquent for more than one (1) year, and upon showing that the tax is delinquent, the complaint shall be dismissed, with prejudice.

68 O.S.Supp. 2014, § 2871(B) (emphasis added). The enumerated provisions include assessment of property that is exempt from taxation. 68 O.S.Supp. 2014, § 2871(C)(2). Section 2871 goes on to provide:

> Both the taxpayer and the county assessor shall have the right of appeal from any order of the board of tax roll corrections to the district court of the same county. In case of appeal the trial in the district court shall be *de novo.*

68 O.S.Supp.2014, § 2871(H).

¶7 Assessor argues that section 2884 applies to appeals pursuant to section 2871. Section 2884(A) requires:

> The full amount of the taxes assessed against the property of any taxpayer who has appealed from a decision affecting the value or taxable status of such property as provided by law shall be paid at the time

> and in the manner provided by law. If at the time such taxes or any part thereof become delinquent and any such appeal is pending, it shall abate and be dismissed upon a showing that the taxes have not been paid.

68 O.S.Supp. 2015, §2884(A). VGT argues that footnote 16 of *Presbyterian Hospital, Inc. v. Board of Tax-Roll Corrections of Oklahoma County,* 1984 OK 93, 693 P.2d 611, is controlling in stating section 2884 only applies to appeals from the board of equalization. That conclusion, however, ignores the fact that the legislature has since amended the statute numerous times.

¶8 Prior to 1988, then title 68, section 2467(a) (now renumbered as section 2884) limited itself to appeals from the Board of Equalization.[1] In 1988, the Oklahoma Legislature repealed section 2467 and created the *almost* identical section 2884. 1988 Okla. Sess. Laws 577, 637, 672. The new statute removed the language in subsection (a) limiting applicability to appeals from the board of equalization. Amendment of a plain, unambiguous statute indicates the legislature's intention "to change or alter the law rather than to clarify it." *Darby v. Okla. Tax Comm'n,* 1949 OK 9, ¶ 12, 202 P.2d 978, 981.

¶9 VGT also argues that section 2884(E)(1) and (2) mandate that section 2884 is limited to appeals from boards of equalization.

> In cases involving taxpayers other than railroads, air carriers, or public service corporations, if upon the final determination of any such appeal, the court shall find that the property was assessed at too great an amount, the *board of equalization from whose order the appeal was taken* shall certify the corrected valuation of the property of such taxpayers to the county assessor, in accordance with the decision of the court, and shall send a copy of such certificate to the county treasurer. Upon receipt of the corrected certificate of valuation, the county assessor shall compute and certify to the county treasurer the correct amount of taxes payable by the taxpayer. The difference between the amount paid and the correct amount payable, with accrued interest, shall be refunded by the treasurer to the taxpayer upon the taxpayer filing a proper verified claim therefor, and the remainder paid under protest, with accrued interest, shall be apportioned as provided by law.
>
> If upon the final determination of any appeal, the court shall find that the property of the railroad, air carrier, or public service corporation was assessed at too great an amount, *the State Board of Equalization from whose order the appeal was taken* shall certify the corrected valuation of the property of the railroads, air carriers, and public service corporations to the State Auditor and Inspector in accordance with the decision of the court. Upon receipt of the corrected certificate of valuation, the State Auditor and Inspector shall certify to the county treasurer the correct valuation of the railroad, air carrier, or public service corporation and shall send a copy of the certificate to the county assessor, who shall make the correction *as specified in Section 2871* of this title. The difference between the amount paid and the correct amount payable with accrued interest shall be refunded by the treasurer upon the taxpayer filing a proper verified claim, and the remainder paid under protest with accrued interest shall be apportioned according to law.

68 O.S.Supp. 2015, § 2884(E)(1),(2) (all emphasis added). The district court found that nothing in this sub-section suggests it counter-acts the general applicability of subsection (A). We disagree.

¶10 At a minimum, section 2884 is ambiguous in light of the 1988 amendments to subsection (A) and the 1997 addition of subsection (E)(2), which specifically mentions section 2871. 1997 Okla. Sess. Laws 2024, 2026-28. Section 2884(E) provides instructions for correcting the valuation of property after a final determination by the court. If subsection (E) is limited to appeals from boards of equalization, but the statute is construed to apply to appeals from the board of tax roll corrections, then section 2884 fails to provide for correcting the valuation of property from orders of the board of tax roll corrections.

¶11 In the absence of ambiguity or conflict with another enactment, we simply apply the statute according to the plain meaning. *Broadway Clinic v. Liberty Mut. Ins. Co.*, 2006 OK 29, ¶ 15, 139 P.3d 873, 877. Terms are given their plain and ordinary meaning unless a contrary intention plainly appears. *Neer v. Okla. Tax Comm'n,* 1999 OK 41, ¶ 16, 982 P.2d 1071, 1078. To construe the language, "board of equalization from whose order the appeal was taken"

as including appeals from orders of the Board of Tax Roll Corrections is contrary to the plain and ordinary meaning. To interpret section 2884 as including appeals from orders of the Board of Tax Roll Corrections and still apply subsection (E) according to its plain language, leaves no provision in the statute for correcting the valuation of property or obtaining a refund of previously paid taxes when the appeal to the district court arose out of section 2871. Any doubts concerning tax laws are to be resolved in favor of the taxpayer, absent discriminatory effect on other taxpayers. *Neer*, 1999 OK 41, ¶ 16, 982 P.2d at 1078; *Neumann v. Tax Comm'n of the State of Okla.*, 1979 OK 64, ¶ X, 596 P.2d 530, 532. Therefore, we resolve the statutory confusion in favor of taxpayers and find that section 2884 only applies to appeals from orders from boards of equalization.

¶12 In this matter, the Tulsa County Board of Tax Roll Collections dismissed VGT's complaint on May 14, 2019. Under section 2871(B), the 2018 taxes became due 30 days later, on June 13, 2019. Appeals pursuant to section 2871, however, are not included within section 2884 and thus non-payment of the disputed tax is not a jurisdictional bar to review. The district court erred in dismissing the case for lack of subject matter jurisdiction when VGT failed to timely pay the disputed 2018 taxes.

IV. CONCLUSION

¶13 We find that title 68, section 2884 does not apply to appeals pursuant to title 68, section 2871. Timely payment of taxes is not a jurisdictional prerequisite for appeals from orders of the Board of Tax Roll Corrections. The district court erred in finding it did not have jurisdiction. Therefore, we reverse the order of dismissal and remand for further proceedings.

ORDER OF THE DISTRICT COURT IS REVERSED; CAUSE REMANDED.

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

Kane, J. – not voting

DARBY, V.C.J.,

1. The full amount of the taxes assessed against the property of any taxpayer who has appealed from the State Board of Equalization or any county board of equalization shall be paid at the time and in the manner provided by law; and if at the time such taxes or any part thereof become delinquent, any such appeal is pending, it shall abate and be dismissed upon a showing that such taxes have not been paid.

68 O.S. Supp.1987, § 2467(a); 1987 Okla. Sess. Laws 134, c.15, § 1.

Calendar of Events

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

7 **OBA Solo and Small Firm Conference Planning Committee meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Charles R. Hogshead 918-708-1746

OBA Government and Administrative Law Section meeting; 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Richard A. Mildren 405-650-5100

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

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

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

4 **OBA Government and Administrative Law Section meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Richard A. Mildren 405-650-5100

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

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

17 **OBA Closed** – Presidents Day

2019 OK CR 28

IN RE ADOPTION OF THE 2019 REVISIONS TO THE OKLAHOMA UNIFORM JURY INSTRUCTIONS – CRIMINAL (2D)

Case No. CCAD-2019-1. December 20, 2019

ORDER ADOPTING AMENDMENTS TO OKLAHOMA UNIFORM JURY INSTRUCTIONS – CRIMINAL (SECOND EDITION)

¶1 On August 30, 2019, the Oklahoma Court of Criminal Appeals Committee for Preparation of Uniform Jury Instructions submitted its report and recommendations to the Court for adoption of amendments to Oklahoma Uniform Jury Instructions – Criminal (Second Edition). The Court has reviewed the report by the committee and recommendations for the adoption of the 2019 proposed revisions to the Uniform Jury Instructions. Pursuant to 12 O.S.2011, § 577.2, the Court accepts that report and finds the revisions should be ordered adopted.

¶2 **IT IS THEREFORE ORDERED ADJUDGED AND DECREED** that the report of The Oklahoma Court of Criminal Appeals Committee for Preparation of Uniform Jury Instructions shall be accepted, and its revisions adopted. The revisions shall be available for access via the internet from this Court's web site at www.okcca.net on the date of this order and provided to West Publishing Company for publication. The Administrative Office of the Courts is requested to duplicate and provide copies of the revisions to the judges of the District Courts and the District Courts of the State of Oklahoma are directed to implement the utilization of these revisions effective on the date of this order.

¶3 **IT IS THEREFORE ORDERED ADJUDGED AND DECREED** the amendments to existing OUJI-CR 2d instructions, and the adoption of new instructions, as set out in the following designated instructions and attached to this order, are adopted, to wit:

1-11; 4-11; 4-37; 4-56A; 4-58; 4-58A; 4-58A-1; 4-58B; 4-58B-1; 4-58C; 4-58C-1; 4-58D; 4-58E; 4-58F-1; 4-58F-2; 4-58G; 4-58H; 4-58H-1; 4-87C; 4-87C-1; 4-87D; 4-113; 4-124; 4-125; 4-127; 4-128; 4-147; 4-148; 5-13; 5-14; 5-14A; 5-20; 5-21; 5-38; 5-39; 5-40; 5-41; 5-42; 5-50; 5-69; 5-72; 5-78; 5-79; 5-90A; 5-93; 5-100; 5-103; 5-104; 5-105A; 5-111; 5-116; 5-116A; 5-117; 5-117A; 8-32; 8-33; 8-33B; 8-33C; 8-33D; 10-13A; 10-13B;10-17; 10-19.

¶4 The Court also accepts and authorizes the updated committee comments to be published, together with the above styled revisions and each amended page in the revisions to be noted at the bottom as follows "(2019 Supp.)".

¶5 **IT IS THE FURTHER ORDER OF THIS COURT** that the members of The Oklahoma Court of Criminal Appeals Committee for Preparation of Uniform Criminal Jury Instructions be commended for their ongoing efforts to provide up-to-date Uniform Jury Instructions to the bench and the bar of the State of Oklahoma.

¶6 **IT IS SO ORDERED**.

¶7 **WITNESS OUR HANDS AND THE SEAL OF THIS COURT** this 20th day of December, 2019.

/s/ DAVID B. LEWIS,
Presiding Judge
Concur in Part, Dissent in Part,
Writing Attached

/s/ DANA KUEHN,
Vice Presiding Judge
CIP/DIP attached and also I join
Presiding Judge Lewis

/s/ GARY L. LUMPKIN, Judge

/s/ ROBERT L. HUDSON, Judge

/s/ SCOTT ROWLAND, Judge

ATTEST:
John D. Hadden
Clerk

LEWIS, P.J., CONCURRING IN PART AND DISSENTING IN PART:

¶1 I concur in adoption of most the 2019 Supplement to the Oklahoma Uniform Jury Instructions-Criminal (2d) and commend the Committee for its work. I respectfully dissent from the adoption of the proposed text of Instruction No. 1-11. At almost 250 words, the

proposed instruction is lengthy and academic, with references to the Sixth Amendment and waiver jargon that is likely to confuse jurors.

¶2 I would substitute the following eighty-three word jury instruction on the subject of self-representation and standby counsel:

> **[Name of Defendant]** has the right to act as **[his/her]** own attorney. This is a proper part of the trial, and you are instructed not to let the defendant's decision to represent **[himself/herself]** influence your verdict. You must base your verdict on these instructions and the evidence admitted by the court. **[Name of Standby Counsel]** is not acting as the defendant's attorney in this case, but is standing by at the court's request to answer the defendant's questions about law and court procedures.

¶3 I am authorized to state that Vice Presiding Judge Kuehn joins in this separate writing.

KUEHN, V.P.J., CONCURRING IN PART/ DISSENTING IN PART:

¶1 I concur in adopting most of the 2019 Supplement to the Oklahoma Uniform Jury Instructions – Criminal (2d). I join Presiding Judge Lewis's separate writing concerning Instruction No. 1-11. In addition, I respectfully dissent from the adoption of the definition of Antisocial Personality Disorder contained in proposed Instruction No. 8-33D. Including this definition is potentially confusing to jurors, who are not charged with determining whether a defendant has such a disorder, but merely with determining if a defendant *has already been diagnosed with* such a disorder.

¶2 I also dissent to publication of the updated committee comments, insofar as they may advise or require a particular interpretation of the law. The Notes on Use and Comments are not themselves law; they are intended as useful guides for judges and practitioners in applying the Instructions. They are neither binding nor persuasive authority.

2019 OK CR 30

ANDREW JOSEPH REVILLA, Appellant, vs. THE STATE OF OKLAHOMA, Appellee

No. F-2018-929. December 19, 2019

SUMMARY OPINION

KUEHN, VICE PRESIDING JUDGE:

¶1 Appellant, Andrew Joseph Revilla, was convicted by a jury in Jackson County District Court, Case No. CF-2017-62, of two counts of Lewd Molestation of a Minor, and one count of Forcible Sodomy. On August 29, 2018, the Honorable Clark E. Huey, Associate District Judge, sentenced him in accordance with the jury's recommendation to twenty years imprisonment on each count, and ordered the sentences to be served consecutively. Appellant must serve 85% of these sentences before parole consideration. 21 O.S.Supp.2015, § 13.1(15), (18).

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

PROPOSITION I. APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL, AS TRIAL COUNSEL NEGLECTED TO FILE A MOTION TO QUASH AFTER THE STATE FAILED TO PRESENT SUFFICIENT COMPETENT EVIDENCE AT THE PRELIMINARY HEARING.

PROPOSITION II. IMPROPER EVIDENCE OF OTHER CRIMES AND BAD ACTS RENDERED APPELLANT'S TRIAL FUNDAMENTALLY UNFAIR.

PROPOSITION III. AN OVERLY BROAD LIMITING INSTRUCTION ON IMPEACHMENT EVIDENCE RENDERED APPELLANT'S TRIAL FUNDAMENTALLY UNFAIR.

PROPOSITION IV. PROSECUTORIAL MISCONDUCT PREVENTED A FAIR TRIAL.

PROPOSITION V. CUMULATIVE ERRORS PREVENTED A FAIR TRIAL.

¶3 After thorough consideration of these propositions, the briefs of the parties, and the record on appeal, we affirm. Appellant and his girlfriend, Stephanie Garcia, were jointly tried and convicted of sexually abusing Appellant's minor relative. The child testified at preliminary hearing and at trial. Appellant does not challenge the sufficiency of the evidence to support his convictions, but claims various errors require relief.

¶4 In Proposition I, Appellant claims his trial counsel was deficient for failing to seek dismissal of the case after preliminary hearing, via a motion to quash for insufficient evidence. 22 O.S.2011, § 504.1. A claim that counsel did not provide reasonably effective assistance, grounded in the Sixth Amendment right to counsel, requires the defendant to show (1) professionally unreasonable performance and (2) a reason-

able likelihood that the conduct affected the outcome of the proceeding. *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *Sanchez v. State,* 2009 OK CR 31, ¶ 98, 223 P.3d 980, 1012. In this situation, Appellant must show that if counsel had filed a motion to quash for insufficient evidence, it would have been granted, *and* that the State would have been unable to refile the prosecution and proceed to trial with additional evidence. *See* 22 O.S.2011, § 504.1(D) (granting a motion to quash for insufficient evidence does not bar further prosecution for the same offense).

¶5 Appellant's contention is that at preliminary hearing, the child victim was "unavailable" under 12 O.S.Supp.2014, § 2804(A)(3) because she testified to a lack of memory about some things. Because the witness was unavailable, he claims, her hearsay statements describing sexual abuse (her drawings and forensic interview) were insufficient to support bindover because they were not corroborated by other evidence, as required by 12 O.S.Supp.2013, § 2803.1(A)(2)(b).

¶6 We disagree. First, while the reliability of the witness's statement is always a concern, the requirements of § 2803.1 are not strictly applicable to preliminary hearings, where the goal is simply to determine if there is probable cause to hold the accused for trial. *State v. Juarez,* 2013 OK CR 6, ¶ 8, 299 P.3d 870, 872; *Kennedy v. State*, 1992 OK CR 67, ¶ 13, 839 P.2d 667, 670-71. Second, the parties *stipulated* that the examining magistrate could fully consider the hearsay evidence in question for purposes of preliminary hearing. Third, Appellant's claim that the child witness was "unavailable" under 12 O.S. Supp.2014, § 2804(A)(3) because she "[t]estifie[d] to a lack of memory of the subject matter of [her] statement," *id.*, is not supported by the record.

¶7 A witness is "available" if she can be cross-examined about the matter for which she has been called. This Court has not previously addressed the issue of witness availability, under § 2804, in cases involving child witnesses. We agree with the conclusion of the Court of Civil Appeals in *Matter of A.D.B.*, 1989 OK CIV APP 55, 778 P.2d 945, that witness availability is related to competency. In assessing the availability of a child witness under § 2804, the issue is simply whether the questioner is able to obtain confrontable testimony from the child. *Id.* at ¶ 8, 778 P.2d at 947. The availability of a child witness, particularly an alleged victim of abuse, may be affected not only by fading memory, but by guilt, fear, or the simple inability to appreciate the nature of judicial proceedings. *See id.* at ¶ 10, 778 P.2d at 948.

¶8 Being available means being able to answer questions. However, it does not guarantee that the answers will be particularly helpful to the questioner, and a witness is not necessarily unavailable just because she testifies to a lack of memory as to some facts. *See United States v. Owens*, 484 U.S. 554, 561-62 (1988); *see also Omalza v. State*, 1995 OK CR 80, ¶ 41, 911 P.2d 286, 301. A trial court's determination of whether a witness is unavailable as contemplated by § 2804 is reviewed for an abuse of discretion. *Mathis v. State,* 2012 OK CR 1, ¶ 20, 71 P.3d 67, 75. That determination may depend on the witness's age, the kind of the information she is being asked to relate, and any other relevant factor.

¶9 The child witness in this case testified at length, and was cross-examined by both Appellant's counsel and counsel for his co-defendant. Given her young age, the nature of the subject matter, the intimidating atmosphere of a court proceeding, and the fact that the events in question allegedly took place some two years before, it is not surprising that her answers to some of the questions put to her (such as the color of the defendants' pubic hair) were along the lines of "I don't know" or "I don't remember."[1] Nevertheless, the child positively and repeatedly described Appellant and his co-defendant intentionally engaging in sexual activity in her presence, and forcing her to view their private parts. After the parties questioned the child, the magistrate asked her about her prior forensic interview, where her answers were somewhat more detailed; she confirmed that what she had told the interviewer was the truth. Trial counsel was not deficient; given the applicable law, the stipulations by the parties, and the magistrate's expert handling of the hearing, there was no reasonable probability that a motion to quash for insufficient evidence would have led to dismissal of the charges. Proposition I is denied.

¶10 In Proposition II, Appellant claims the State introduced evidence that he had committed other crimes or bad acts, and that this evidence unfairly prejudiced him. First, we note that the State was not required to give pretrial notice of this evidence, because it was not offered in the State's case in chief, but only during cross-examination of Appellant's character witnesses. *Smith v. State*, 1985 OK CR 17, ¶ 14,

695 P.2d 864, 868. Appellant presented his mother, who testified that the victim was a liar with behavioral problems, and that her son was not capable of molesting a child. When cross-examining this defense witness, the prosecutor elicited the fact that Appellant and his co-defendant were methamphetamine addicts, that their own children were in State custody for this reason, and that Appellant had stolen his parents' property to fund his drug habit.[2] The prosecutor appeared to be attempting to impeach the credibility of Appellant's mother, who essentially testified as a character witness for her son. We need not decide if Appellant's drug habit and thievery were relevant to this end, or if any relevance was substantially outweighed by unfairly prejudicial effect (*see* 12 O.S.2011, §§ 2401-04), because defense counsel permitted the prosecutor to develop this line of inquiry quite substantially before lodging an objection. *Woods v. State,* 1977 OK CR 171, ¶ 12, 564 P.2d 249, 251. He also failed to object when counsel for Appellant's co-defendant asked the same witness about the couple's drug habit. When questionable evidence is not met with a timely objection, we review only for plain error, which requires the defendant to show an actual error that is plain or obvious, which affects the defendant's substantial rights and the outcome of the trial. *Thompson v. State,* 2018 OK CR 5, ¶ 7, 419 P.3d 261, 263. The victim's accusations were consistent, detailed, and credible, and we find no error here which might have unfairly tipped the scales toward conviction. Proposition II is denied.

¶11 In Proposition III, Appellant complains that the trial court omitted a portion of Oklahoma Uniform Jury Instruction 9-20, which explains how jurors are to treat any prior inconsistent statements made by witnesses. Appellant did not object to the instruction below, so we review only for plain error. *Postelle v. State,* 2011 OK CR 30, ¶ 86, 267 P.3d 114, 144-45. The trial court instructed the jury that prior inconsistent statements made by the victim could not be treated as substantive evidence, but only to impeach the credibility of her trial testimony. Appellant claims that because the victim's prior inconsistent statements were made under oath at preliminary hearing, they were not hearsay, and could indeed be considered as substantive evidence. He is correct, but we fail to see how the omitted second paragraph from OUJI-CR 9-20 would have advanced his defense or altered the outcome of the trial. Had it been given, the omitted text would have permitted the jury to consider the victim's accusations at preliminary hearing as substantive evidence of guilt. While the victim's testimony at preliminary hearing was not as detailed as her trial testimony, standing on its own it certainly did not exonerate Appellant and his co-defendant. We find no prejudice.[3] Proposition III is denied.

¶12 In Proposition IV, Appellant lists various instances of alleged prosecutor misconduct. For the most part, he did not object to this conduct below, and we review the comments he did not object to for plain error; relief is only granted if misconduct so infected the trial as to render it fundamentally unfair. *Bramlett v. State,* 2018 OK CR 19, ¶ 36, 422 P.3d 788, 799-800. As to Appellant's four complaints, we find as follows: (1) Although the prosecutor did elicit testimony about other bad acts committed by Appellant, we found in Proposition II that most of that testimony was not met with a timely objection, and that counsel for Appellant's co-defendant elicited similar evidence without complaint; hence, we found no grounds for relief. (2) The prosecutor did not comment on facts not in evidence by merely asking a defense witness a question that did not even suggest a particular answer. *Williams v. State*, 2008 OK CR 19, ¶ 108, 188 P.3d 208, 228. (3) The prosecutor did not personally vouch for the victim's credibility by saying that her allegations had the ring of truth. *Pickens v. State,* 2001 OK CR 3, ¶ 42, 19 P.3d 866, 880. (4) The prosecutor did not plainly err by mentioning the possible lifetime effects of sexual abuse on a child. Carol v. State, 1988 OK CR 114, ¶ 10, 756 P.2d 614, 617. The cumulative effect of the prosecutor's questions and comments did not deny Appellant a fair trial. Proposition IV is denied.

¶13 In Proposition V, Appellant claims the cumulative effect of all errors identified above denied him a fair trial. We have already found that any possible error in Propositions II and III did not unfairly prejudice Appellant or affect the outcome of the trial. We find no cumulative effect regarding these claims which might mandate a different result. *Baird v. State*, 2017 OK CR 16, ¶ 42, 400 P.3d 875, 886. Proposition V is therefore denied.

DECISION

¶14 The Judgment and Sentence of the District Court of Jackson County is **AFFIRMED.** Pursuant to Rule 3.15, *Rules of the Oklahoma*

Court of Criminal Appeals, Title 22, Ch.18, App. (2019), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT
OF JACKSON COUNTY
THE HONORABLE CLARK E. HUEY,
ASSOCIATE DISTRICT JUDGE

ATTORNEYS AT TRIAL

Kenny Goza, 123 W. Commerce, Ste. 224, Altus, OK 73521, Counsel for Defendant

David Thomas, Sommer Robbins, First Asst. and Asst. District Attorneys, 101 N. Main, Room 104, Altus, OK 73521, Counsel for the State

ATTORNEYS ON APPEAL

Chad Johnson, P.O. Box 926, Norman, OK 73070, Counsel for Appellant

Mike Hunter, Attorney General of Okla., Keeley L. Miller, Asst. Attorney General, 313 N.E. 21st St., Oklahoma City, OK 73105, Counsel for Appellee

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

1. Oklahoma law permits a child witness to testify by methods other than in open court, if the court finds that the traditional courtroom environment would cause serious emotional trauma which would substantially impair the child's ability to communicate with the finder of fact. 12 O.S.2011, § 2611.3 *et seq.* The goal of this statutory scheme is, in effect, to encourage the "availability" of child witnesses by creating an environment conducive to effective examination and cross-examination. In this case, the prosecutor asked that the child witness be questioned by the attorneys in an adjacent room, with a video feed to the courtroom where the defendants and the magistrate would remain. The court made the required statutory findings to permit that arrangement, and defense counsel expressed unqualified agreement with the procedure.

2. During the State's case in chief, the prosecutor elicited testimony that Appellant and Garcia were barred from caring for other children, including the victim, because their own children were in the custody of the Department of Human Services. However, the prosecutor did not delve into why the couple's children were in State custody, so there was no reference to any other crime at that point. *See Howell v. State*, 1994 OK CR 62, ¶ 21, 882 P.2d 1086, 1091 (no reversible error where evidence of another crime was apparent only to defense counsel).

3. Appellant points out that the second paragraph of this instruction was also omitted in *Mitchell v. State*, 2011 OK CR 26, 270 P.3d 160, *overruled on other grounds in Nicholson v. State*, 2018 OK CR 10, 421 P.3d 890. This Court found no plain error in *Mitchell*. Appellant tries to distinguish his case from *Mitchell* to warrant a different result. However, he overlooks a key fact. In *Mitchell*, the defense actually wanted the jury to believe the prior testimony, because it fit better with its alibi defense. *Mitchell*, 2011 OK CR 26, ¶¶ 100-04, 270 P.3d at 183-84. In other words, when viewed substantively and in isolation, the prior testimony in *Mitchell* arguably tended to exonerate the defendant.

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

Opinions of Court of Civil Appeals

COCA-ADM-2019-1

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA OKLAHOMA CITY AND TULSA DIVISIONS
JUDICIAL DIVISION ASSIGNMENTS
and
ELECTION OF PRESIDING JUDGES

December 11, 2019

TO THE CLERK OF THE APPELLATE COURTS:

You are hereby requested to cause the following notice to be published twice in the Journal of the Oklahoma Bar Association.

NOTICE

For the calendar year 2020, the Honorable Robert D. Bell has been elected to serve as Presiding Judge for **Division One** of the Court of Civil Appeals, Oklahoma City Division. **Division One** will consist of Robert D. Bell, Presiding Judge; Kenneth L. Buettner, Judge; and Brian Jack Goree, Chief Judge.

For the Calendar year 2020, the Honorable Deborah B. Barnes has been elected to serve as Presiding Judge of **Division Two** of the Court of Civil Appeals, Tulsa Division. **Division Two** will consist of Deborah B. Barnes, Presiding Judge; Keith Rapp, Judge, and John F. Fischer, Judge.

For the Calendar year 2020, the Honorable E. Bay Mitchell, III, has been elected to serve as Presiding Judge of **Division Three** of the Court of Civil Appeals, Oklahoma City Division. **Division Three** will consist of E. Bay Mitchell, III, Presiding Judge; Barbara G. Swinton, Vice-Chief Judge; and a judge to sit by special designation in the absence of retired Judge Larry Joplin.

For the Calendar year 2020, the Honorable P. Thomas Thornbrugh has been elected to serve as Presiding Judge of **Division Four** of the Court of Civil Appeals, Tulsa Division. **Division Four** will consist of P. Thomas Thornbrugh, Presiding Judge; Jane P. Wiseman, Chief Judge; and a judge to sit by special designation in the absence of retired Judge Jerry Goodman.

DONE BY ORDER OF THE COURT OF CIVIL APPEALS this 11th day of December, 2019.

/s/ Brian Jack Goree
Chief Judge

COCA-ADM-2019-2

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA OKLAHOMA CITY AND TULSA DIVISIONS

ORDER

December 11, 2019

The Clerk of the Appellate Courts is directed to cause the following notice to be published twice in the Oklahoma Bar Journal.

NOTICE

Jane P. Wiseman has been elected to serve as Chief Judge of the Court of Civil Appeals of the State of Oklahoma for the year 2020. Judge Barbara G. Swinton has been elected to serve as Vice-Chief Judge of the Court of Civil Appeals of the State of Oklahoma for the year 2020.

Dated this 11th day of December, 2019.

/s/ Brian Jack Goree
Chief Judge

2019 OK CIV APP 76

STATE OF OKLAHOMA ex rel. OKLAHOMA STATE BOARD OF BEHAVIORAL HEALTH LICENSURE, Petitioner/Appellee, vs. VANITA MATTHEWS-GLOVER, LPC, Respondent/ Appellant.

Case No. 116,081. March 6, 2019

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE PATRICIA G. PARRISH, TRIAL JUDGE

AFFIRMED

R. Mitchell McGrew, ASSISTANT ATTORNEY GENERAL, STATE OF OKLAHOMA, Oklahoma City, Oklahoma, for Petitioner/Appellee

Malinda S. Matlock, Jacqueline M. McCormick, PIERCE, COUCH, HENDRICKSON, BAYSINGER & GREEN, L.L.P., Oklahoma City, Oklahoma, for Respondent/Appellant

DEBORAH B. BARNES, PRESIDING JUDGE:

¶1 In November 2015, the Oklahoma State Board of Behavioral Health Licensure (the Board) issued an order finding Vanita Matthews-Glover (Ms. Glover, or Appellant) "has violated 59 O.S. § 1912(A)(5) and OAC 86:11-3-3(e) by engaging in a romantic relationship with a client within five years after the end of the counselor/client professional relationship." The order states,

> Section 1912(A)(5) provides that [the Board] may deny, revoke, suspend or place on probation any license or specialty designation issued pursuant to the provisions of the Licensed Professional Counselors Act (59 O.S. §§ 1901-1920) to a licensed professional counselor [(LPC)], if the person has engaged in unprofessional conduct as defined by the rules established by the Board.

The order further provides: "The Oklahoma Administrative Code 86:[11]-3-3(e) states that [LPCs] shall not engage in any activity that is or may be sexual in nature with a former client for at least five (5) years after the termination of the counseling relationship." In its order, the Board determined that Ms. Glover's "license as [an LPC] is hereby REVOKED effective thirty (30) days after she is notified of this final agency order … ."

¶2 Ms. Glover sought judicial review of the Board's order by filing a petition in the district court. She requested that the district court set aside the Board's order, modify the order "to a lesser punishment," or reverse and remand the case to the Board for further proceedings. Ms. Glover asserted, among other things, that the Board's conclusions are "arbitrary and capricious," and that the Board violated her "constitutional rights of substantive due process under the United States and Oklahoma Constitutions."[1]

¶3 A hearing was held before the district court in April 2017. Prior to this hearing, Ms. Glover filed a brief in which she clarified that she admits she violated "OAC 86-11-3-3(e) by having a romantic relationship with … a former client[] more than 2 years but less than 5 years after the therapy relationship with [the former client] ended." Ms. Glover asserted, however, that the five-year rule found in § 86:11-3-3(e) of the Administrative Code "violates substantive due process and is an unequal exercise of power by the Board." In addition, Ms. Glover asserted the remedy of license revocation "under these facts is excessive, arbitrary and capricious[.]"

¶4 Following the hearing, the district court entered its order finding, in part, as follows:

> 2. There was clear and convincing evidence that [Ms. Glover] violated the Oklahoma State Board of Behavioral Health License rules 59 O.S. § 1912(A)(5) and OAC 86:[11]-3-3(e) by engaging in a romantic relationship with a client within five years after the end of the counselor/client professional relationship, which was the basis for the decision by the Board to revoke [her] LPC license.
>
> 3. The decision of [the Board] is neither arbitrary nor capricious.
>
> 4. [Ms. Glover's] substantive due process claim is denied.
>
> 5. [Ms. Glover] failed to show [the Board's] five year ban on any activity that is or may be sexual in nature between [LPCs] and their former clients is arbitrary and unreasonable, having no rational relationship to public health, safety, or welfare.
>
> 6. [The Board's] rule banning for five years sexual relationships between [LPCs] and their former clients is rationally related to protection of public health, safety, or welfare.
>
> 7. [Ms. Glover's] equal protection claim is denied as [the Board] has articulated a potential reason to support the finding of a rational basis for the difference in the time frame of the ban on sexual relationships with former clients for [LPCs] and Licensed Marriage and Family Therapists… .

¶5 From the district court's order upholding the Board's order, Ms. Glover appeals.

STANDARD OF REVIEW

¶6 The Licensed Professional Counselors Act[2] provides that "[t]he hearings provided for by the Licensed Professional Counselors Act shall be conducted in conformity with, and records made thereof as provided by, the provisions of" the Oklahoma Administrative Procedures Act.[3] 59 O.S. 2011 § 1914. The Oklahoma

Administrative Procedures Act provides, in pertinent part, as follows:

> (1) In any proceeding for the review of an agency order, the Supreme Court or the district or superior court, as the case may be, in the exercise of proper judicial discretion or authority, may set aside or modify the order, or reverse it and remand it to the agency for further proceedings, if it determines that the substantial rights of the appellant or petitioner for review have been prejudiced because the agency findings, inferences, conclusions or decisions, are:
>
> (a) in violation of constitutional provisions; or
>
> (b) in excess of the statutory authority or jurisdiction of the agency; or
>
> (c) made upon unlawful procedure; or
>
> (d) affected by other error of law; or
>
> (e) clearly erroneous in view of the reliable, material, probative and substantial competent evidence, as defined in Section 10 of this act, including matters properly noticed by the agency upon examination and consideration of the entire record as submitted; but without otherwise substituting its judgment as to the weight of the evidence for that of the agency on question of fact; or
>
> (f) arbitrary or capricious; or
>
> (g) because findings of fact, upon issues essential to the decision were not made although requested.
>
> (2) The reviewing court, also in the exercise of proper judicial discretion or authority, may remand the case to the agency for the taking and consideration of further evidence, if it is deemed essential to a proper disposition of the issue.
>
> (3) The reviewing court shall affirm the order and decision of the agency, if it is found to be valid and the proceedings are free from prejudicial error to the appellant.

75 O.S. 2011 § 322 (footnotes omitted).

ANALYSIS

I. Equal Protection

¶7 Appellant argues the five-year restriction on sexual relationships with former clients applicable to LPCs in Oklahoma violates the Equal Protection Clause[4] because this Clause, according to Appellant, "does not allow classification based on unreal or feigned differences." Appellant asserts, "Other similarly situated behavioral health professionals, governed by the same Board, do not have the same time restrictions as LPCs; the restrictions are shorter." Appellant singles out "specifically LMFTs" – referring to marital and family therapists. Appellant asserts LPCs and marital and family therapists – two "counseling professions overseen by the Board" – "are simply too similarly situated" to justify the stricter treatment of LPCs. She asserts, "The Board must show that the differences in the rules' respective timeframes" – i.e., a two-year restriction on sexual relationships with former clients applicable to marital and family therapists, and a five-year restriction applicable to LPCs[5] – "has a rational basis which connects to the difference between LPCs and other behavioral health professions it governs; it has not and cannot." Appellant similarly asserts there is a "lack of rational explanation for the five year ban, especially in light of the significantly differing standards," and argues the Board has unconstitutionally promulgated and applied "a different rule for the same behavior by a therapist[.]"

¶8 The Oklahoma Supreme Court has explained:

> An "equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right [such as the right to vote, the right of interstate travel, rights guaranteed by the First Amendment, or the right to procreate] or operates to the peculiar disadvantage of a suspect class [such as a class based on race, alienage or ancestry]." Although not an absolute guarantee of equality of operation or application of state legislation, the Equal Protection Clause is intended to safeguard the quality of governmental treatment against arbitrary discrimination.

Gladstone v. Bartlesville Indep. Sch. Dist. No. 30 (I-30), 2003 OK 30, ¶ 9, 66 P.3d 442 (footnote omitted). "The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." *Romer v. Evans,* 517 U.S. 620, 631 (1996) (citations

omitted). Thus, "if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end." *Id.* (citation omitted) That is, "[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (citations omitted).

¶9 Appellant does not assert that the separate classification of LPCs targets a suspect class, or that the five-year rule in question burdens a fundamental right. Instead, she frames her argument under a rational basis review standard, asserting "[t]here is no rational basis for the 5 year rule[.]"[6]

¶10 As indicated above, LPCs in Oklahoma are governed by the Licensed Professional Counselors Act, 59 O.S. 2011 & Supp. 2018 §§ 1901-1920 (the LPCA). Marital and family therapists are governed by a separate act – the Marital and Family Therapist Licensure Act, 59 O.S. 2011 & Supp. 2015 §§ 1925.1-1925.18 (the MFTLA). The responsibilities and powers granted to LPCs in the LPCA differ in significant ways from the responsibilities and powers granted to marital and family therapists in the MFTLA. The LPCA provides that "'Licensed professional counselor' or 'LPC' means any person who offers professional counseling services for compensation to any person and is licensed pursuant to the provisions of the [LPCA]. The term shall not include those professions exempted by Section 1903 of this title[.]" 59 O.S. Supp. 2013 § 1902. Section 1903 states, in pertinent part, that "[t]he [LPCA] shall not be construed to include" marital and family therapists, among other professionals. 59 O.S. 2011 § 1903(A)(1). In addition, § 1902 of the LPCA states as follows:

> For the purpose of the [LPCA]:
>
> … ;
>
> 3. "Counseling" means the application of mental health and developmental principles in order to:
>
> a. facilitate human development and adjustment throughout the life span,
>
> b. prevent, diagnose or treat mental, emotional or behavioral disorders or associated distress which interfere with mental health,
>
> c. conduct assessments or diagnoses for the purpose of establishing treatment goals and objectives, and
>
> d. plan, implement or evaluate treatment plans using counseling treatment interventions;
>
> 4. "Counseling treatment interventions" means the application of cognitive, affective, behavioral and systemic counseling strategies which include principles of development, wellness, and pathology that reflect a pluralistic society. Such interventions are specifically implemented in the context of a professional counseling relationship[.]

¶11 By contrast, the MFTLA provides, in part, as follows:

> For purposes of the [MFTLA]:
>
> … ;
>
> 3. "Licensed marital and family therapist" means a person holding a current license issued pursuant to the provisions of the [MFTLA];
>
> 4. "Marital and family therapy" means the assessment, diagnosis and treatment of disorders, whether cognitive, affective, or behavioral, within the context of marital and family systems. Marital and family therapy involves the professional application of family systems theories and techniques in the delivery of services to individuals, marital pairs, and families for the purpose of treating such disorders;
>
> … ;
>
> 6. "Practice of marital and family therapy" means the rendering of professional marital and family therapy services to individuals, family groups and marital pairs, singly or in groups, whether such services are offered directly to the general public or through organizations either public or private, for a fee, monetary or otherwise[.]

59 O.S. Supp. 2013 § 1925.2. The MFTLA further states it "shall not be construed to apply to" LPCs, among other professionals. 59 O.S. 2011 § 1925.3(A)(2).

¶12 As explained by the United States Supreme Court,

> The Equal Protection Clause directs that all persons similarly circumstanced shall be

> treated alike. But so too, the Constitution *does not require things which are different in fact or opinion to be treated in law as though they were the same.* The initial discretion to determine what is different and what is the same resides in the legislatures of the States. A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill. In applying the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose.

Plyler v. Doe, 457 U.S. 202, 216 (1982) (emphasis added) (internal quotation marks omitted) (citations omitted).

¶13 While a licensed marital and family therapist has the power to assess, diagnose and treat "disorders, whether cognitive, affective, or behavioral, within the context of marital and family systems," LPCs plainly have greater powers and responsibilities relating, for example, to "human development and adjustment throughout the life span," and the prevention, diagnosis and treatment of "mental, emotional or behavioral disorders or associated distress which interfere with mental health," without the specific limitations found in the MFTLA. Evidence of the in-depth and long-term role which LPCs are authorized and likely to play in the lives of at least some of their patients is found in Appellant's own affidavit, where she states: "I have patients that have seen me for more than 10 years and their continued improvement requires continuity of care."

¶14 Furthermore, the Board asserts the five-year restriction is appropriate because "LPCs present unique and more severe concerns than similar post-therapeutic relationships between," for example, marital and family therapists and their former clients. The Board asserts that, "[w]hen treating clients, the LPC approaches problems with the client's *individual* development in mind, examining and discussing the client's psychological and social development. [Family and marital therapists] do not focus on these factors in therapy. Rather, [they] look to identify and craft solutions for problems within a relationship."[7]

¶15 We conclude the five-year restriction is not inconsistent with the roles and responsibilities of LPCs set forth in the governing statutory language. As explained by the Oklahoma Supreme Court,

> we must apply … legislative definition[s] as written because it is the duty of a court to give effect to legislative acts, not to amend, repeal or circumvent them. This Court has no power to rewrite legislation simply because the legislative definition may not comport with our conception of prudent public policy.

City of Tulsa v. State ex rel. Pub. Employees Relations Bd., 1998 OK 92, ¶ 18, 967 P.2d 1214 (citations omitted). In the MFTLA and the LPCA, the Legislature has created two different classes of professionals with readily distinguishable powers and, as stated by the Board on appeal, "[t]he fact that [these and other professionals] all practice professions in the broad field of counseling and are all governed by the same State agency is insufficient to consider them a single class." The Board further states, "Although they may not be as distinguishable from the lay perspective as is a dentist from a podiatrist, these … distinct professions all differ in approaches to treatment, number of clients seen at one time, clinical techniques, length of the counseling relationship, and more."

> The [United States] Supreme Court has held that a state legislature addressing health and safety reform "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others.

Nat'l Ass'n for Advancement of Psychoanalysis, 228 F.3d at 1052 (internal quotation marks omitted) (citation omitted). In a context comparable to the present case, the Ninth Circuit explained:

> The question is not whether we would choose to implement the same scheme, but whether it was rational for the [state legislature] to implement different licensing schemes for psychologists, and for social workers and family counselors. It is not irrational for [a law-making body] to progress one step, or one profession, at a time.

Id. at 1053 (citation omitted).

¶16 Returning to the general protections afforded by the Equal Protection Clause where there is no suspect class or fundamental right at issue, "[i]n the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." *Romer,* 517 U.S. at 632. As noted by the Ninth Circuit, "The day is gone" when the Fourteenth Amendment could be utilized "to strike down state laws" merely "because they may be unwise, improvident, or out of harmony with a particular school of thought." *Nat'l Ass'n for Advancement of Psychoanalysis,* 228 F.3d at 1051 (citation omitted). In the absence of a targeted suspect class or an implicated fundamental right, we must start with the presumption "that even improvident [legislative] decisions will eventually be rectified by the democratic processes." *City of Cleburne, Tex.*, 473 U.S. at 440.

¶17 As explained by the Oklahoma Supreme Court in *Gladstone,*

> Because we are dealing here neither with a suspect classification nor with an infringement upon a fundamental right, the rational-basis standard of review governs this dispute. Rational-basis scrutiny is a highly deferential standard that proscribes only that which clearly lies beyond the outer limit of a legislature's power. A statutory classification is constitutional under rational-basis scrutiny so long as "there is any reasonably conceivable state of facts that could provide a rational basis for the classification." The rational-basis review in equal protection analysis "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." For these reasons, legislative bodies are generally "presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality."

2003 OK 30, ¶ 12 (footnotes omitted).

¶18 Even assuming *arguendo* that a shorter time bar might constitute a wiser or more perfect rule (and Appellant does not suggest that a time bar of some duration is inappropriate for sexual relationships between LPCs and their clients) the five-year restriction is, nevertheless, rationally related to a legitimate state interest. The relatively strict five-year rule protects clients of LPCs from the potentially harmful effects of engaging in a sexual relationship with the person entrusted with their psychological care. Clients of LPCs may be particularly vulnerable[8] emotionally and psychologically, and the greater protection afforded the more in-depth, individualized and potentially long-term care provided by LPCs to their clients is not irrational. Consequently, we reject Appellant's Equal Protection argument.

II. Substantive Due Process

¶19 For reasons similar to those set forth above for rejecting Appellant's Equal Protection argument, we must also reject Appellant's substantive due process argument.

> Substantive due process of law is the general requirement that all governmental actions have a fair and reasonable impact on the life, liberty, or property of the person affected. Arbitrary action is thus proscribed… . [T]he analysis requires an adjudication of whether the legislation is rationally related to a legitimate government interest and if the challenged legislation reasonably advances that interest.

Braitsch v. City of Tulsa, 2018 OK 100, ¶ 7, _ P.3d _ (citations omitted). The Oklahoma Supreme Court has similarly explained that "substantive due process … bars *certain* governmental action despite the adequacy of procedural protections where the regulatory action is so arbitrary and irrational as to violate due process. Substantive due process does not protect from erroneous regulatory action, but *arbitrary and irrational actions." CompSource Mut. Ins. Co. v. State ex rel. Okla. Tax Comm'n*, 2018 OK 54, ¶ 47, _ P.3d _ (footnotes omitted).

¶20 As explained in our preceding analysis of Appellant's Equal Protection argument, the five-year restriction is rationally related to a legitimate state interest, and the restriction does not constitute an arbitrary legislative action that fails to advance any legitimate government interest. However arguably unwise or imperfect the regulatory action, according to Appellant, it is neither arbitrary nor irrational. Consequently, we must reject Appellant's substantive due process argument.

III. Revocation of LPC License

¶21 Finally, Appellant argues "[t]he Board's decision to exercise its harshest punishment is excessive, arbitrary, and capricious." The legal basis of this argument is not further specified

in Appellant's Brief-in-chief, and Appellant has not filed a Reply Brief on appeal. Furthermore, Appellant has not provided any citation to legal authority in this section of her appellate brief. "Argument without supporting authority will not be considered." Okla. Sup. Ct. R. 1.11(k), 12 O.S. Supp. 2013, ch. 15, app. 1.

¶22 Nevertheless, in this section of her appellate brief, Appellant does refer to her brief filed below in the district court. In that brief, which is contained in the appellate record, Appellant cites to some authority in support of her argument attacking the Board's decision to revoke her license. She first cites to Fisher v. State Insurance Board, 1929 OK 432, 281 P. 300, in which the Oklahoma Supreme Court stated:

> We think that it must be conceded that where a statute authorizes the cancellation of a license, the causes for revocation must be reasonably definite and certain, and that the character of the acts constituting the necessary elements that would justify revocation must be stated and charged with reasonable certainty.

Id. ¶ 15. However, in *Fisher*, the insurance board revoked the petitioner's license based on statutory language providing authority to do so for "other bad practices." This language was challenged by the petitioner on the basis that it constituted "entirely indefinite and uncertain" language. *Id.* ¶ 16.

¶23 In the present case, by contrast, the definiteness and certainty of the rule in question are not challenged. The LPCA, together with the pertinent regulations promulgated by the Board,[9] set forth reasonably definite and certain causes for the revocation. Indeed, Appellant has stipulated to the fact that she violated the five-year rule discussed above, and one of the remedies available to the Board for such a violation is license revocation. For these reasons, we are not persuaded that *Fisher* lends any support to Appellant's argument.

¶24 Appellant also cites to *Massengale v. Oklahoma Board of Examiners in Optometry,* 2001 OK 55, 29 P.3d 558, in which the Oklahoma Supreme Court stated that "in determining whether administrative findings and conclusions are supported by substantial evidence, the reviewing court considers all the evidence – including that which fairly detracts from its weight." *Id.* ¶ 20 (footnote omitted). The *Massengale* Court further stated, however, that "[g]reat weight is accorded an administrative entity in the exercise of its expertise." *Id.*[10]

¶25 With *Fisher* and *Massengale* as her only cited authority, Appellant asserts the following facts constitute mitigating factors which reveal that "[t]he Board's indefinite revocation arbitrarily and capriciously exceeds the severity of the violation": that the client in question "was not the complainant, was not pursued by Ms. Glover, was not abused by Ms. Glover, and was not harmed by Ms. Glover."

¶26 However, although these asserted facts are supported by portions of the former client's testimony elicited at the administrative hearing, the former client, who testified he suffers from "anxieties," also revealed that he was suffering from substantial guilt as a result of the sexual relationship with Appellant and its consequences. The client testified, "I feel like the problems that she's facing right now – being accused of – was my fault." He testified he feels "very bad" and "very guilty[.]" At the least, one reasonable interpretation of portions of the former client's testimony reveal he is an already psychologically vulnerable individual who has been negatively impacted by the sexual relationship with his former LPC. As stated above, the five-year rule is meant to protect LPC clients and former clients who may be particularly vulnerable emotionally and psychologically. Thus, we disagree with Appellant that there is not "one single violation of the purpose of the [five-year] rule" in this case.

¶27 As indicated above, it is difficult to discern the precise legal nature of Appellant's argument in this section of her appellate brief, a section which contains no citation to legal authority. Nevertheless, a review of the record and the stipulations – including the undisputed violation of the five-year rule within approximately two-years of the end of the counseling relationship in question – reveals substantial evidence in support of the Board's determination. Moreover, the Board's decision to revoke Appellant's license is neither in excess of its statutory authority, nor arbitrary or capricious, given the facts and applicable law.

¶28 The concurring in part and dissenting in part Opinion states that "the Board must enact administrative rules" which "include … Rules setting forth guidelines relating to the appropriateness of the penalty imposed" in order to avoid the imposition of arbitrary and capricious penalties, i.e., penalties imposed "with-

out determining principle." The concurring in part and dissenting in part Opinion states that the Board's decision to revoke Appellant's license was *per se* arbitrary and capricious because the Board has failed to promulgate, in advance, such guidelines or "objective criteria applicable to the selection of the appropriate penalty from the range of permitted penalties," and states that such "determining criteria" are necessary for the Board to properly select from the range of penalties for particular unprofessional conduct.

¶29 The position articulated in the concurring in part and dissenting in part Opinion is similar to that taken, at least in part, by the trial court in *Behavioral Health & Human Services Licensing Board v. Williams*, 5 N.E.3d 452 (Ind. Ct. App. 2014). In *Williams*, the Court of Appeals of Indiana explained as follows:

> The Behavioral Health and Human Services Licensing Board [of Indiana] ("Board") revoked a mental health counselor's license when she developed a personal attachment to a patient, continued to see the patient after their professional relationship had ended, and ignored the patient's requests to leave her alone. Upon judicial review, the trial court found substantial evidence supporting the Board's findings and affirmed the revocation. On the licensee's motion to correct error, however, the court changed course. This time, it faulted the manner in which the Board conducted its proceedings, *disapproved of the lack of a standard for disciplining licensees*, and thus reversed and remanded with instructions to either impose a lesser sanction or hold a new hearing.

Id. at 453-54 (emphasis added). The *Williams* Court stated, "We conclude the Board afforded the licensee fair proceedings and acted within its authority in imposing the sanction of revocation. Further concluding the trial court impermissibly reweighed the credibility of the witnesses and substituted its judgment for that of the Board, we affirm the revocation." *Id.* The *Williams* Court explained: "Upon finding that [the mental health counselor] was subject to discipline, … the Board could impose any sanction authorized by Section 25-1-9-9, one of which includes '[p]ermanently revok[ing the] practitioner's license.'" 5 N.E.3d at 459. The *Williams* Court also stated: "[W]e find nothing in our statutes or caselaw that requires a system of progressive discipline. Indeed, a recent decision of this Court affirmed the revocation of a nursing license even though the licensee had no prior disciplinary incidents in her twenty-two years of practice." *Id.* at 460 (citation omitted). Finally, while acknowledging that a choice of discipline can nevertheless be attacked on the ground that it is arbitrary or capricious, the *Williams* Court explained:

> An arbitrary and capricious decision is one that is patently unreasonable. *A.B. v. State*, 949 N.E.2d 1204, 1217 (Ind. 2011). Such a decision is made without consideration of the facts and in total disregard of the circumstances and lacks any basis that might lead a reasonable person to the same conclusion.

Id. at 459-60.

¶30 The concurring in part and dissenting in part Opinion also appears to be at odds with the reasoning of the Supreme Court of North Dakota in *Larsen v. Commission on Medical Competency*, 585 N.W.2d 801 (N.D. 1998), in which the court stated:

> Revocation of license is one of nine available disciplinary actions under N.D.C.C. § 43-17-30.1(1). The statute leaves the choice of disciplinary action within the discretion of the Board "as it may find appropriate." Here, the Board adopted the recommendation of the ALJ revoking Larsen's license.
>
> Larsen does not dispute that revocation of his license to practice medicine was one of the sanctions available to the Board. There is nothing in the plain language of the statute or its legislative history to suggest this Court should second-guess a decision clearly within the parameters of the Board's authority.

585 N.W.2d at 809.

¶31 Similarly, in *Dresser v. Board of Medical Quality Assurance*, 181 Cal. Rptr. 797 (Cal. Ct. App. 1982), the California Court of Appeal determined the Board in question did not abuse its discretion when it revoked a psychologist's license for engaging in sexual relations with his patients. The *Dresser* Court explained:

> The propriety of a penalty imposed by an administrative agency is a matter within its discretion and, absent a manifest abuse thereof, it will not be disturbed upon review by a trial or appellate court. Even if the penalty were to appear to be too harsh

> according to the court's evaluation, the court is not free to substitute its own discretion for that exercised by the administrative agency. Even were the penalty to appear harsh to us, still we would not be free to substitute our discretion for that of the administrative body. The fact[] that reasonable minds might differ as to the propriety of the penalty imposed fortifies the conclusion that the administrative body acted within its discretion.

Id. at 804 (internal quotation marks omitted) (citations omitted). *See also Palmer v. Board of Registration in Medicine*, 612 N.E.2d 635 (Mass. 1993), in which the Supreme Judicial Court of Massachusetts determined revocation was within the Board's discretion and affirmed the decision of the Board to revoke a psychiatrist's license with leave to petition for reinstatement after two years. The *Palmer* Court cited to *Keigan v. Board of Registration in Medicine,* 506 N.E.2d 866 (Mass. 1987), in which the Supreme Judicial Court of Massachusetts stated:

> It is well settled that in reviewing the penalty imposed by an administrative body which is duly constituted to announce and enforce such penalties, neither a trial court nor an appellate court is free to substitute its own discretion as to the matter; nor can the reviewing court interfere with the imposition of a penalty by an administrative tribunal because in the court's own evaluation of the circumstances the penalty appears to be too harsh.

Id. at 869 (internal quotation marks omitted) (citation omitted). The *Palmer* Court also cited to *Levy v. Board of Registration & Discipline in Medicine*, 392 N.E.2d 1036 (Mass. 1979), in which the Supreme Judicial Court of Massachusetts stated:

> The revocation of a physician's license … is designed not to punish the physician for his crimes but to protect the public health, welfare, and safety. The revocation or suspension of a license is not penal, but rather, the Legislature has provided for such to protect the life, health and welfare of the people at large … .

Id. at 1041 (internal quotation marks omitted) (citations omitted). *Cf. Robinson v. United States*, 718 F.2d 336, 339 (10th Cir. 1983) ("[W]e must be mindful that once the agency determines that a violation has been committed, the sanctions to be imposed are a matter of agency policy and discretion."); *State ex rel. Okla. Bar Ass'n v. Denton*, 1979 OK 116, ¶ 6, 598 P.2d 663 ("In Oklahoma, the primary purpose of discipline is not punishment, but purification of the bar and protection of the courts and the public generally"; it also "acts as a restraining influence on other attorneys." (footnote omitted)).

¶32 As indicated above, 59 O.S. Supp. 2015 § 1905(B) of the LPCA provides that "[t]he Board shall have the authority to: … 4. Issue, renew, revoke, deny, suspend and place on probation licenses to practice professional counseling," and 59 O.S. Supp. 2015 § 1912(A) of the LPCA provides that "[the Board] may deny, revoke, suspend or place on probation any license or specialty designation issued pursuant to the provisions of the [LPCA] to a licensed professional counselor, if the person has: … 5. Engaged in unprofessional conduct as defined by the rules established by the Board[.]" Pertinent to this case, the Board has promulgated § 86:11-3-3 of the Oklahoma Administrative Code which sets forth Rules of Professional Conduct for LPCs related to "Client welfare." Section 86:11-3-3(e) provides, in pertinent part, that "LPCs shall not engage in any activity that is or may be sexual in nature with a former client for at least five (5) years after the termination of the counseling relationship." The position set forth in the concurring in part and dissenting in part Opinion would appear to limit the Board's discretion and authority in a manner inconsistent with the plain language, quoted above, of the LPCA. "Legislative intent governs statutory interpretation and this intent is generally ascertained from a statute's plain language." *State ex rel. Okla. State Dep't of Health v. Robertson*, 2006 OK 99, ¶ 6, 152 P.3d 875 (citation omitted).

> When a court is called on to interpret a statute, the court has no authority to rewrite the enactment merely because it does not comport with the court's view of prudent public policy. Also, the wisdom of choices made within the Legislature's law-making sphere are not our concern, because those choices – absent constitutional or other recognized infirmity – rightly lie within the legislative domain.

Head v. McCracken, 2004 OK 84, ¶ 13, 102 P.3d 670 (citations omitted).

¶33 In § 1912 of the LPCA, the Legislature has deliberately granted broad powers to the Board to choose either to "deny, revoke, sus-

pend or place on probation any license" upon determining an LPC has, among other things, engaged in unprofessional conduct as defined by the Board. Clearly, revocation of a license is one of the available disciplinary actions under the LPCA, which states that the Board "shall have the authority to … revoke … licenses to practice professional counseling[.]" The statute also leaves the choice of disciplinary action within the discretion of the Board, stating that the Board "may … revoke … any license" for the reasons listed in § 1912. As stated by the *Larsen* Court, quoted above, "There is nothing in the plain language of the statute … to suggest this Court should second-guess a decision clearly within the parameters of the Board's authority."[11]

¶34 The Board's choice of a remedy will nevertheless be reversed if it is arbitrary or capricious. However, we disagree that the Board must promulgate, in advance, criteria and guidelines more limiting than, and therefore inconsistent with, the broad language of § 1912 pertaining to the choice of a sanction. Such criteria or guidelines would prevent the Board from exercising the wide discretion granted to it by the Legislature in the selection of sanctions appropriate for the unique facts and circumstances which may arise – sanctions appropriate not merely for the punishment of particular LPCs, but also for the integrity of the license in question and, perhaps most importantly, for the protection of that portion of the public requiring mental health services.

¶35 It is nevertheless this Court's view that the revocation of Appellant's license is harsh. It is worth noting, however, that OAC § 86:11-7-6(a) provides that Appellant may re-apply for a license after a period of five years following the revocation.[12] Also, this Court is unable to simply substitute its discretion for that of the Board, especially when the Board is acting in an area of expertise which it supervises.[13] While the Board's choice of penalty in this case has given this Court pause, we conclude it is not without reason and justification, and we are unable to conclude it is arbitrary or capricious. As stated above, one reasonable interpretation of portions of the former client's testimony reveal he is an already psychologically vulnerable individual who has been negatively impacted by the circumstances. Appellant chose not to testify. The Board, in revoking Appellant's license, was not simply penalizing Appellant, but was fulfilling its important roles, however strictly, of protecting the public and the integrity of the license in question.

¶36 For all these reasons, we must reject Appellant's argument attacking the Board's decision to revoke her license.

CONCLUSION

¶37 Based on our review, we affirm the Board's order.

¶38 A**FFIRMED**.

WISEMAN, V.C.J., concurs, and RAPP, J., concurs in part and dissents in part.

RAPP, J., concurring in part and dissenting in part:

¶ 1 I respectfully concur in part and dissent, in part. There are two issues in this case.

¶2 The first issue is whether Glover violated the Rules of Professional Practice. I recognize that the Board has the statutory authority to implement and enforce the Oklahoma Licensed Professional Counselors Act (OLPCA). 59 O.S. Supp. 2018, § 1905(A)(1). This authority includes the authority and direction to establish Rules of Professional Conduct. 59 O.S. Supp. 2018, § 1905(A)(2).

¶3 Next, I recognize that the Board has, by administrative rule, promulgated Rules of Professional Conduct. Okla. Admin. Code, § 86:10-3 (2016). Included in those Rules is the Rule prohibiting sexual contact with former clients for a five year period after final treatment. Okla. Admin. Code, § 86:3-3(e) (2016). Moreover, Glover has admitted her conduct, initiated by her former client, and that her conduct violated this Rule. Therefore, the Majority Opinion correctly affirmed the Board's ruling that Glover violated the Rule of Professional Conduct relating to sexual contact with former clients.

¶4 The second issue concerns whether the Board has undertaken the requisite rulemaking before it may impose the license termination penalty and, if so, whether that penalty is appropriate here. *In this regard, the issue is not whether license revocation is within the range of authorized penalties – it is by statute*. 59 O.S. Supp. 2018, § 1912(A).

¶5 The indisputable fact here, and overlooked by the Majority, is that the Board has failed to take administrative action to implement its authority to impose license penalties

and to establish criteria for imposition of license penalties. The Legislature's delegation of authority to enforce licensure standards *includes a mandate to "promulgate rules governing any licensure action*." 59 O.S. Supp. 2018, § 1913. 1(A).[1] Therefore, I dissent to that part of the Opinion which affirms the penalty of termination of Glover's professional license.

¶6 I would have this Court vacate and reverse the imposition of the license termination penalty. This is based upon the ground that the Board has failed completely to promulgate any Rule for implementation of enforcement of the OLPCA with respect to action which affects the professional license. This failure has three consequences.

¶7 First, the Board is precluded from imposing a penalty affecting the license.

¶8 In *Oklahoma Water Resources Bd. v. Texas County Irrigation and Water Resources Ass'n, Inc.*, 1984 OK 96, ¶ 24, 711 P.2d 38, 47-48, the Court ruled that the Water Resources Board could not issue a permanent ground water permit until the Board made yield determination rules as required by statute. *Oklahoma Water Resources Bd.*, 1984 OK 96 ¶ 23, 711 P.2d at 47. "Further, the Board before issuing permits for use of fresh ground water for tertiary recovery should do so only with the benefit of rules and regulations tailored to focus inquiry upon the pertinent issues peculiar to the tertiary process." *Id.* ¶ 23, at 47.

¶9 Driver's license revocation decisions provide an additional example. *Sample v. State ex rel. Dep't of Public Safety*, 2016 OK CIV APP 62, 382 P.3d 505 (The breath test for alcohol must be based upon approved administrative rules). A failure to adopt rules governing hearings resulted in the agency having no authority to conduct hearings. *Adams v. Professional Practices Comm'n,* 1974 OK 88, 524 P.2d 932.

¶10 Second, the Board's termination of Glover's license is *per se* arbitrary and capricious for lack of determining criteria.

¶11 The statute involved here permits a range of license disciplinary actions from probation to termination. Clearly, this provision brings into play factors for the Board's consideration and decision. These factors range from severity and seriousness of the violation to mitigation. However, the Board has nothing in its set of Rules providing objective criteria applicable to the selection of the appropriate penalty from the range of permitted penalties. This is the case even though the Legislature directed the Board, in mandatory terms, to promulgate Rules. 59 O.S. Supp. 2018, §§ 1905, 1913.1.

¶12 The Wyoming Supreme Court has succinctly stated the law. "In the absence of the appropriate criteria or factors adopted by administrative rulemaking, classifications made on an *ad hoc* basis are inherently arbitrary and capricious." *In re Bessemer Mt.*, 856 P.2d 450, 451 (Wyo. 1993). In addition, the Texas Court of Civil Appeals stated:

> Whether an action is arbitrary focuses on whether an agency had a rational basis for its decision. *Capriciousness concerns whether the agency's action was whimsical, impulsive, or unpredictable.* To meet basic standards of due process and to avoid being arbitrary, unreasonable, or capricious, an agency's decision must be made using some[thing other] than mere surmise, guesswork, or "gut feeling." An agency must not act in a totally subjective manner *without any guidelines or criteria.*

Stacy v. Dep't of Social Services, Division of Medical Services, 147 S.W.3d 846, 852 (Tex. App. 2004) (emphasis added) (quoting *Missouri Nat'l Educ. Ass'n v. Missouri State Bd. of Educ.*, 34 S.W. 3d 266, 281 (Mo. Ct. App. 2000)).

¶13 Oklahoma decisions have used the phrase "without determining principle" when defining arbitrary and capricious. *Oklahoma Employment Security Comm'n v. Oklahoma Merit Protection Comm'n,* 1995 OK CIV APP 76, ¶ 6, 900 P.2d 470, 473 ("An administrative agency's determination is arbitrary and capricious when it is 'willful and unreasonable without consideration or in disregard of facts or without determining principle, or unreasonable … in disregard of facts and circumstances.'") (citation omitted).

¶14 In Glover's case, the Board had no determining or objective principle to guide its decision regarding the appropriate penalty.

¶15 Third, due to the absence of administrative rules and objective criteria, the reviewing Court is unable to review the penalty decision to ascertain whether the decision is supported by the evidence and is not contrary to law.

¶16 Administrative agencies are not vested with personal or arbitrary power. The agencies

are subject to the control of the courts when it appears they have acted arbitrarily. *City of Wewoka v. Rose Lawn Dairy,* 1949 OK 279, ¶¶ 11-13, 212 P.2d 1056, 1058. However, when, as here, an agency acts in the absence of legislatively required administrative rules, or without criteria and determining principle, the reviewing court cannot determine whether the agency decision is supported by evidence or contrary to law. A perfect analogy is found in cases concerning awards of attorney fees where the fee must be documented and the trial court's finding is set out with specificity to enable the reviewing court to review the reasonableness of the fee awarded. *Burk v. City of Oklahoma City,* 1979 OK 115, ¶ 22, 598 P.2d 659, 663. Here, the absence of any rules, determining principle, or objective criteria makes it impossible to conduct a meaningful review of the Board's decision to terminate Glover's license.

THE ANALYSIS OF THE DISSENT IN THE MAJORITY OPINION

¶17 The Majority Opinion apparently concludes that the Board may act in a totally subjective manner without any objective guidelines or criteria governing its selection of a penalty so long as the penalty imposed is within the authorized range of penalties. First, and foremost, this overlooks the mandate of the statute to enact rules. Also, in my view, that conclusion is contrary to controlling, applicable Oklahoma Supreme Court decisions and decisions from other jurisdictions cited above, in addition to the rulemaking mandate of 59 O.S. Supp. 2018, § 1913.1(A).

¶18 The Majority Opinion cites *Behavioral Health and Human Services Licensing Board v. Williams,* 5 N.E.3d 452 (Ind. Ct. App. 2014). There, the trial court had reversed the revocation. One reason assigned by the trial court for the ruling was that the Indiana Board had lacked a standard for determining the penalty. The *Williams* decision rejected that reasoning as contrary to the "general bar against probing the mental processes of administrative decisionmakers in their private deliberations." *Williams*, 5 N.E.3d at 462. This rationale is nothing more than saying that the appellate court will not retry the case and that is the principle holding in the case.

¶19 The foregoing assessment is confirmed by the *Williams* Court's citation to *Med. Licensing Bd. of Ind. v. Provisor*, 669 N.E.2d 406, 410 (Ind. 1996). The *Provisor* case is a review and application of the principle that an appellate court does not retry administrative proceedings. The principle is embodied in the Oklahoma Administrative Code. 75 O.S.2011, § 322.

¶20 Next, the *Williams* Court recognized that the Indiana Board does not have "unbridled discretion" and it is statutorily required to be consistent in imposing penalties. Significantly, the *Williams* Court did not reference any Indiana Code provision similar to Oklahoma's rulemaking mandate set out in Section 1913.1(A).[2] Thus, the facts and ruling in *Williams* pertaining to the administrative proceeding there are materially different from the facts in Glover's situation.

¶21 The Majority Opinion next cites *Larsen v. Commission of Medical Competency,* 585 N.W.2d 801 (N.D. 1998). First, examination of this case shows that it is also a case which is fundamentally a restatement and application of the principle that the appellate court does not retry the case.

¶22 The North Dakota statute provides for a range of penalties and for the North Dakota Board to impose the one it finds appropriate. The facts there show that the Board did discuss and apply criteria for its action. *Larsen*, 585 N.W.2d at 807-08. The appellate issue was whether the appellate court would substitute its judgment.[3] Thus, the North Dakota Board did employ criteria on the record to support its decision regarding an appropriate penalty and the appellate court did not retry the case.[4]

¶23 The Massachusetts cases cited by the Majority are likewise cases standing for the general rule that the appellate court does not retry the case decided by the agency. *See, for example, Levy v. Board of Registration and Discipline in Medicine*, 392 N.E.2d 1036, 1042 (Mass. 1979) (Reviewing court does not substitute its judgment even though it might disagree with the agency outcome).

¶24 The Majority Opinion's critique of this dissent does not misstate any legal principles. I do not advocate substitution of the judgment of the Reviewing Court or a retrial of the cause. However, I respectfully state that those legal principles depend upon the premise that the agency has in place determining criteria and administrative rules for the exercise of its discretion regarding imposition of an appropriate penalty.

¶25 Therefore, I emphasize the following points:

1. The Oklahoma statute *mandates that the Board promulgate rules to implement the imposition of penalties. The Board has not done so.*

2. This case is not about whether the Board has discretion to select from a range of penalties. This case is about having determining criteria so that the agency's decision avoids unreasonable harm. Criteria and determining principles serve to make an agency's decision "some[thing other] than mere surmise, guesswork, or 'gut feeling'" or, in other words, not capricious.

3. The Majority Opinion views the penalty imposed as "harsh." The Majority Opinion correctly continues with the observation that this Court will not substitute its judgment for that of the Board. The Majority Opinion continues with an apparent justification for the license revocation. In doing so, the Majority Opinion actually "retries" this part of the case by providing its judgment as to the appropriateness of the license revocation penalty. However, on this point, the issue is not whether this Court will retry the matter, but whether this Court can perform its judicial role of review in the absence of a record showing that the agency acted to impose the license revocation penalty in accord with published rules, criteria and determining principle. As the matter stands, this Court cannot perform the judicial review.

CONCLUSION

¶26 This is a unique case, both from a legal and a human viewpoint. The Record establishes that Glover violated a Rule of Professional Conduct. The law authorizes the Board to impose a penalty from a range of penalties. The Board selected license termination, a penalty characterized by the Majority Opinion as "harsh". I agree. However, the Record and the absence of the required administrative rules makes it impossible to ascertain what, if any, criteria the Board used to decide upon the most severe penalty.

¶27 The Record also shows that there were extenuating circumstances leading to Glover's violation of the Rule. At the time of the violation, Glover was in the process of a divorce with its attendant emotions and concerns for herself and her children. Glover experienced periods of stress and emotional instability. Also, during this period, Glover accidently met her former client at a hardware store. They met approximately two plus years after the client relationship terminated.

¶28 For some unknown reason, the client decided to pursue Glover. This ultimately resulted in a relationship and sexual contact. They ultimately parted company, but not without emotional reaction by both parties. In this light, it could be said that both Glover and the client were victims of their accidental meeting at the hardware store.

¶29 Cicero's statement, "The foundations of law are such that no man shall suffer a wrong," serves as an introduction to the premise of this dissent. The foundation has been laid by the enactment of OLPCA. However, this statutory foundation fails, like an unsupported glass structure that collapses under pressure. The statutory structure setting up a licensing Board and directing that provision be made for professional conduct with penalties for violations collapses when, as the Board responsible for establishing rules to support the structure, fails to act as directed.

¶30 The Legislature has authorized the Board to "revoke, deny, suspend and place on probation" a license pursuant to the OLPCA. 59 O.S. Supp. 2018, § 1905(B)(4). Thus, this case *is not* about whether the Board has authority to assess a specific penalty from a range of penalties. However, the Board must enact administrative rules governing how it carries out its authority before it can impose a penalty. 59 O.S. Supp. 2018, § 1905(A) (The Board "*shall* … (1) prescribe, adopt and promulgate rules to implement *and enforce*" the OLPCA (emphasis added)). Section 1913.1 directs that the Board "shall promulgate rules governing action to be taken pursuant to" the OLPCA. Such Rules must include not only procedural Rules, but also Rules setting forth guidelines relating to the appropriateness of the penalty imposed.

¶31 The Board has not promulgated Rules to implement the license actions provision of enforcement with respect to criteria for the appropriateness of the imposition of a penalty affecting the license.[5] The Board's failure to promulgate applicable Rules has the consequences stated above.

¶32 Thus, the issue here is *not* whether the Board has the authority to revoke a license. The issue is whether the Board has taken the proper

and necessary administrative steps to enable it to exercise this authority *and* to provide a set of criteria to guide its selection of a penalty from the authorized range of penalties.[6] Promulgation of such Rules will also provide a basis for judicial review when the Board does exercise this authority.

¶33 The Board has not promulgated appropriate Rules. Therefore, its decision to terminate Glover's license is arbitrary and capricious.

¶34 I would have this Court hold that the Board has not taken the necessary and proper steps that it must do before exercising the authority given by the Legislature to appropriately select from a range of penalties regarding a person's professional license. I would further have this Court vacate and reverse the termination of Glover's license and reinstate it immediately. Finally, in recognition of the admitted violation of the Rules of Professional Conduct, I would have this Court remand the matter to the Board for consideration of an Administrative Penalty *only*.

DEBORAH B. BARNES, PRESIDING JUDGE:

1. Ms. Glover also filed a motion to stay enforcement of the Board's order, and this motion, which was not opposed by the Board, was granted by the district court in an order filed in December 2015.

2. Title 59 O.S. 2011 & Supp. 2018 §§ 1901-1920.

3. Title 75 O.S. 2011 & Supp. 2016 §§ 250-323.

4. Appellant is referring to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, which mandates that no state "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, 1. We note, as the Oklahoma Supreme Court has noted, that "[a]lthough the Oklahoma Constitution does not contain an equal protection provision like or similar to that found in its federal counterpart, [the Oklahoma Supreme Court] has identified a functional equivalent of that clause in the anti-discrimination component of our state constitution's due process section[.]" *Gladstone v. Bartlesville Indep. Sch. Dist. No. 30 (I-30),* 2003 OK 30, ¶ 6 n.15, 66 P.3d 442.

> Of course, "[t]he Oklahoma Constitution does not merely project a mirror image of the federal constitution." However, the minimum level of protection … is determined by federal law: "The state of Oklahoma in the exercise of its sovereign power may provide more expansive individual liberties than those conferred by the United States Constitution – it is only when state law provides less protection that the question must be determined by federal law."

Deal v. Brooks, 2016 OK CIV APP 81, ¶ 28 n.7, 389 P.3d 375 (released for publication by order of the Oklahoma Supreme Court) (citations omitted). However, Appellant has not attempted to fashion an argument under the Oklahoma Constitution.

5. According to the affidavit of Thom Balmer, PhD, an Associate Professor in the Psychology Department of Cameron University and a member of the Board who has "served on the Board since the inception of the Board,"

> The Board's rules establish a five (5) year ban on sexual relationships between LPCs and former clients and a two (2) year ban on sexual relationships between LMFTs and former clients. The rules in place mirror [a rule of] the 2005 and 2015 American Counseling Association … Code of Ethics … and [a rule of] the 2012 American Association for Marriage and Family Therapists [AAMFT] … .

Balmer further states in his affidavit that, "[i]n 2015, the AAMFT amended its rule banning sexual relationships between LMFTs and former clients from a 2-year ban to a ban in perpetuity. As a result, the Board will consider at an upcoming meeting a change in its rules to increase the ban for LMFTs."

6. Indeed, LPCs are not a suspect class entitled to heightened scrutiny. As noted by the Oklahoma Supreme Court, "a suspect class [is] one that is saddled with such disabilities, or subjected to such history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Gladstone,* 2003 OK 30, ¶ 9 n.23 (internal quotation marks omitted) (citation omitted). *Cf. Nat'l Ass'n for Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1049 (9th Cir. 2000) ("[P]sychoanalysts are not a suspect class entitled to heightened scrutiny[.]"). Nor is a fundamental right implicated in the restriction on sexual relationships with former clients. "It is true that the Fourteenth Amendment protects some personal relationships, such as those that attend the creation and sustenance of a family and other highly personal relationships." *Id.* at 1050 (internal quotation marks omitted) (citation omitted). However, as explained by the Ninth Circuit in a context comparable to the present case,

> The relationship between a client and a psychoanalyst lasts "only as long as the client is willing to pay the fee." [*IDK, Inc. v. Clark Cnty.*, 836 F.2d 1185, 1193 (9th Cir. 1988).] Even if analysts and clients meet regularly and clients reveal secrets and emotional thoughts to their analysts, these relationships simply do not rise to the level of a fundamental right. *See Zablocki v. Redhail,* 434 U.S. 374, 383-86 … (1978) (right to marry); *Moore v. City of East Cleveland*, 431 U.S. 494, 503-06 … (1977) (right to live with family); *Griswold v. Connecticut*, 381 U.S. 479, 482-86 … (1965) (right to marital privacy); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 … (1925) (right of parents to direct children's upbringing and education). "These are not the ties that 'have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs.'" *IDK*, 836 F.2d at 1193 (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 618-19 … (1984)).

Nat'l Ass'n for Advancement of Psychoanalysis, 228 F.3d at 1050. Once again, Appellant does not argue otherwise.

7. (Emphasis added.)

8. Appellant admits that "[t]he rule against sexual relationships between a client and a counselor is designed to protect the client from harm that can result from being taken advantage of or abused in a counselor/client relationship when the client is vulnerable."

9. "Pursuant to the Administrative Procedures Act … , the Legislature may delegate rulemaking authority to agencies, boards, and commissions to facilitate the administration of legislative policy. Administrative rules are valid expressions of lawmaking powers having the force and effect of law." *Estes v. ConocoPhillips Co.*, 2008 OK 21, ¶ 10, 184 P.3d 518 (footnotes omitted). The LPCA states, inter alia, as follows: "The State Board of Behavioral Health Licensure shall: 1. Prescribe, adopt and promulgate rules to implement and enforce the provisions of the [LPCA] … ." 59 O.S. Supp. 2015 § 1905(A).

10. The Oklahoma Supreme Court similarly stated in *City of Hugo v. State ex rel. Public Employees Relations Board,* 1994 OK 134, 886 P.2d 485, as follows:

> In determining whether an administrative agency's findings and conclusions are supported by substantial evidence, the reviewing court will consider all the evidence including that which fairly detracts from its weight. However, great weight is accorded the expertise of an administrative agency. On review, a presumption of validity attaches to the exercise of expertise. An appellate court may not substitute its judgment for that of an agency, particularly in the area of expertise which the agency supervises.

Id. ¶ 10 (footnotes omitted).

11. The concurring in part and dissenting in part Opinion cites, inter alia, *Matter of Bessemer Mountain*, 856 P.2d 450 (Wyo. 1993), in which the Supreme Court of Wyoming stated: "In the absence of the appropriate criteria or factors adopted by administrative rulemaking, classifications made on an *ad hoc* basis are inherently arbitrary and capricious." *Id.* at 451 (footnote omitted). However, the issue presented in that case was whether the state agency in question could, under the state statute in question, "classify lands within the state [of Wyoming] as 'very rare or uncommon' without adopting by regulation the criteria or factors that will establish a standard for such a classification." *Id.* The Court described the phrase "very rare or uncommon" as "too amorphous to permit judicial review of the action of the [agency in question], *as required by statute.*" *Id.* (emphasis added). In other words, the issue presented was one of statutory construction. The court explained: "[T]he intent of the legislature was to invoke the expertise of the [state agency] to establish by regulation the factors and criteria that will serve as a standard for making the classification of 'very rare or uncommon.'" *Id.* at 454. The court was careful to distinguish statutory language that "particularly provides for the promulgation of rules

and regulations," from statutory language that "anticipate[s] an ad hoc approach[.]" *Id.* at 455. The court further explained that a

> clear statutory direction is enforceable by an agency in accordance with its plain meaning without promulgation of the rule. [However,] [i]n this instance, there does not seem to be any plain meaning without promulgation of a rule that sets the statutory standards for arriving at a classification of lands as "very rare or uncommon." In such an instance, it is appropriate to require the implementation of standards pursuant to the rulemaking power, particularly when that authority is expressly and explicitly delegated in the statute.

Id. at 455 (internal quotation marks omitted) (citation omitted). The analogy to be drawn between *Matter of Bessemer Mountain* and the present case is that the Oklahoma Legislature clearly intended that the Board promulgate rules defining "unprofessional conduct." *See* 59 O.S. Supp. 2015 § 1912(A)(5) ("[e]ngaged in unprofessional conduct as defined by the rules established by the Board"). However, the LPCA also plainly grants the Board the discretion to choose to either "deny, revoke, suspend or place on probation any license" once such a violation has been found to have occurred (so long as the penalty is not imposed arbitrarily or capriciously).

12. "No re-application for a revoked license will be considered for a period of 5 years following the revocation." OAC § 86:11-7-6(a).

13. For example, this Court is not privy to any information likely available to experts in this area – such as statistics or studies on the possible negative outcomes of LPC and former client sexual relationships – which might render a layman's impression inaccurate.

RAPP, J., concurring in part and dissenting in part:

1. This statute provides:

> A. *The State Board of Behavioral Health Licensure shall promulgate rules governing any licensure action to be taken pursuant to the Licensed Professional Counselors Act* which shall be consistent with the requirements of notice and hearing under the Administrative Procedures Act. No action shall be taken without prior notice unless the Board determines that there exists a threat to the health and safety of the residents of Oklahoma. (Emphasis added.)

2. See n.1.

3. "There is nothing in the plain language of the statute or its legislative history to suggest this Court should second-guess a decision clearly within the parameters of the Board's authority. Therefore, because this sanction is authorized by law and *justified in fact*, we hold the Board's decision to revoke Larsen's license was not an abuse of discretion." *Larsen*, 585 N.W.2d at 809 (emphasis added).

4. Moreover, the *Larsen* case supports the "Third Consequence" listed above. The administrative agency's findings "must be adequate to enable a reviewing court to ascertain the basis of the agency's decision." *Larsen*, 585 N.W.2d at 805.

5. The Board's enforcement authority includes imposition of an "Administrative Penalty." 59 O.S. Supp. 2018, § 1913.1(B). The penalty is essentially a fine. The Board has enacted an administrative rule for imposition of the Administrative Penalty. Okla. Admin. Code § 86:10-29-14 (2016). This Rule is not under review in this appeal.

6. The Board has a Rule stating that, at the close of the hearing, the "Board shall recommend the most appropriate penalty" from the list permitted by statute. Nevertheless, the Rule provides no criteria for determining factors for selection of an "appropriate penalty." Okla. Admin. Code. § 86:10-29-7 (2016). In the absence of criteria, the Board is unable to recommend an appropriate penalty in a reasoned, objective manner. The purpose of this Rule is to direct the use of an Individual Proceeding.

2019 OK CIV APP 77

FOUNTAIN VIEW MANOR, INC., an Oklahoma Corporation, Plaintiff/Appellant, vs. HOWARD SHEWARD, Jr., Defendant/Appellee.

Case No. 116,693. April 5, 2019

APPEAL FROM THE DISTRICT COURT OF OKMULGEE COUNTY, OKLAHOMA

HONORABLE KEN ADAIR, JUDGE

AFFIRMED

Joel L. Wohlgemuth, Barrett L. Powers, Tulsa, Oklahoma, for Appellant,

Thomas Mortensen, James Sicking and Katrina Lucas, Tulsa, Oklahoma, for Appellee.

Larry Joplin, Presiding Judge:

¶1 Appellant/Plaintiff, Fountain View Manor, Inc. (FVM), seeks review of the district court's order granting summary judgment in favor of the Appellee/Defendant, Howard Sheward, Jr., upon Appellant/Plaintiff's remaining claims for defamation relating to written materials Sheward disseminated about alleged improper use of city resources to correct sewage issues at Fountain View Manor, a private property in Henryetta, Oklahoma.

¶2 Appellant/FVM filed a motion for partial summary judgment on March 3, 2017. Appellee/Sheward filed a motion for summary judgment on July 24, 2017. A hearing on the competing motions was held on November 29, 2017, at the conclusion of which the district court ruled in favor of Sheward's motion for summary judgment on the remaining libel and damages claims of FVM/Appellant.[1] FVM/Appellant's partial motion for summary judgment was denied.

¶3 In December 2014, after becoming concerned with raw sewage leaking into the street from under a manhole cover and observing the continued presence of city trucks at FVM's property, Sheward sent an open records request to the city clerk in an effort to obtain information about the use of the city resources at FVM. Sheward said his open records request was ignored.

¶4 In 2015, FVM began work to repair a sewer main line under part of the FVM building facility. According to both parties the repair was costly, in excess of $100,000. Sheward, who lived across the street from FVM, testified the project took approximately a month to complete and city vehicles were constantly at the FVM site, using vacuum trucks to vacuum sewage during the course of the sewer line repair. Sheward believed FVM was wrongly taking advantage of city vacuum trucks and other resources in order to repair the sewer line on the private property. Sheward believed the Mayor of Henryetta, who was also the administrator of FVM, used her connections with the

city to improperly procure the use of city resources, costing the taxpayers significantly for work the public should not be responsible for, given that FVM is a privately owned entity on privately owned property.

¶5 FVM's petition[2] alleges Sheward went onto FVM property on a number of occasions, taking photos, speaking with FVM employees and with employees of the plumbing company hired to do the sewer line work. FVM was granted a Temporary Restraining Order (TRO) in October 2015, ordering Sheward to refrain from entering the FVM property, taking photos or videos or communicating with FVM employees. In late 2015 to early 2016, an agreement was reached between FVM and Sheward wherein Sheward would agree to cease his activities criticizing FVM and FVM would dismiss its then-pending action against Sheward and vacate the TRO. Sheward agreed and the action was dismissed without prejudice in January 2016. The TRO was vacated. FVM alleged Sheward violated the agreement when he continued his critical commentary and contacted the paper and distributed materials (flyers and emails) saying FVM had sued him for a million dollars in an effort to cover up the misuse of city resources. At the end of January 2016, FVM sent Sheward a letter demanding he cease his actions in violation of the agreement; no response from Sheward was forthcoming. FVM filed another libel and slander petition on February 10, 2016 and an amended petition on June 13, 2016.

¶6 FVM filed a notice of tort claim against the City of Henryetta stating that a "city sewer main running under part of our building...collapsed" and claimed $102,953.96 was spent to fix the sewer line issue. At a September 2015 city counsel meeting, FVM co-owner asked the city to pay $39,500 toward the cost of the repair. At the city counsel meeting, the co-owner described the damage as a "break" in the line, not a collapse. After the city counsel meeting, Sheward prepared a flyer addressed to the taxpayers and voters and called upon them to contact city hall and ask the city officials to vote against FVM's tort notice payment request.

¶7 On November 29, 2017, a summary judgment hearing was scheduled to address Sheward's request to dismiss the libel claims made by FVM, the slander claims having already been dismissed by FVM prior to the hearing.

> Libel is a false or malicious unprivileged publication by writing, printing, picture, or effigy or other fixed representation to the eye, which exposes any person to public hatred, contempt, ridicule or obloquy, or which tends to deprive him of public confidence, or to injure him in his occupation, or any malicious publication as aforesaid, designed to blacken or vilify the memory of one who is dead, and tending to scandalize his surviving relatives or friends.

12 O.S. 2011 §1441. "A writing is libelous *per se* 'when the language used therein is susceptible of but one meaning, and that an opprobrious one, and the publication on its face shows that the derogatory statements, taken as a whole, refer to the plaintiff.' *Fite v. Oklahoma Pub. Co.*, 146 Okla. 150, 293 P. 1073 (1930) (syllabus by the court)." *Sturgeon v. Retherford Publ'ns, Inc.*, 1999 OK CIV APP 78, 987 P.2d 1218, 1223.

¶8 Sheward's various attempts to distribute and gather information concerning FVM, the mayor and the misuse of city resources included the following. First, Sheward sent an open records request to the city clerk on December 23, 2014 asking for information regarding city services provided to address sewer and sanitation efforts at FVM. On March 1, 2015, Sheward sent an email to the city manager and others complaining that city services responding to FVM and assisting in the sewer repair or cleanup were improper; and Sheward indicated he had photos and other information regarding possible misuse of the city's resources. On May 11, 2015, Sheward sent an email to the mayor and others regarding the mayor's improper use of city resources in aid of FVM, and accusing the mayor of "struggling with censorship of your illegal activities." On August 2, 2015, Sheward made another open records act request, seeking information about the city services provided to assist FVM with its sewage cleanup issue. Shortly after a September 18, 2015 city counsel meeting at which FVM requested reimbursement from the city for part of the sewer repair costs, Sheward distributed a flyer among the "taxpayers and registered voters" of Henryetta, informing the public of the raw sewage problems, the use of city resources and the high cost of the repair. In the flyer, Sheward asked the citizens to contact their councilmen and stop FVM's effort to force the city to pay for any part of the repair and ask the city to instead file suit against FVM for recovery of funds used in the past to maintain

the line, as well as demand removal of the portion of the building that was improperly built over the city easement where the sewer line was located. On October 1, 2015, Sheward sent another email to the mayor, city manager and others regarding a complaint and EPA investigation of the sewage matter. Sheward also said FVM made improper threats against the city, Sheward represented that FVM claimed it would file a tort claim against the city if the city did not help pay for the repair. In the October 1, 2015 email, Sheward said the city attorney "should be filing a civil and criminal law suit against the owners of Fountain View Manor." On January 27, 2016, Sheward sent an email to the local paper asking to be given "an equal voice on a Free Lance editorial [ ] of a September 2015 city council topic." Sheward also said FVM had sought a million dollar suit against him in order to keep him quiet about his concerns with the mayor's abuse of city resources. Shortly thereafter, on February 10, 2016, FVM filed its petition marking a second suit against Sheward due to his failure to honor the earlier agreement to keep quiet about his allegations of misuse of city resources.

¶9 Sheward's motion for summary judgment was premised on his assertion that he had the right to seek and disseminate information regarding his allegations of misuse of city resources for the benefit of a private business with which the mayor had a close relationship.[3] Sheward asserted FVM engaged in a SLAPP litigation lawsuit in an effort to silence him from exposing the mayor's wrongdoing and the city's misuse of labor, trucks, supplies and other resources for the benefit of FVM, a facility for which the mayor was administrator.[4]

¶10 The appealed from order of the district court granted Sheward's summary judgment motion. First the court granted Sheward's summary judgment motion with respect to claims Nos. 1, 2, 6, and 8. In its findings of fact and conclusions of law the court stated Sheward,

> ...presented substantial evidence that Plaintiff [FVM] engaged in "Strategic Litigation Against Public Participation" – or "SLAPP" litigation – when it filed this lawsuit, which is prohibited under Oklahoma law, ... Plaintiff [FVM] filed the above-captioned matter primarily as its purpose to silence the Defendant [Sheward] from being critical of "public figures" about "matters of public concern." Plaintiff's alleged injuries, if any, were the result of Defendant's [Sheward] privileged communications involving the "right to petition" and/or "right to free speech" that are protected by the First Amendment to the United States Constitution[.]

The court further found Sheward's alleged defamatory remarks were directed at a "public figure" about a "matter of public concern" and were not actually directed at the corporate entity (FVM). The court found Sheward's statements were "core political speech" protected by the First Amendment and that the remarks were Sheward's "opinions," for which Sheward was not required to use the word "opinion" or provide a disclaimer in order to benefit from the protections of the First Amendment or the anti-SLAPP statute. The court also found the alleged defamatory remarks were "fair comments," immune from lawsuit.[5]

¶11 Summary judgment is proper where there is no issue of material fact in dispute and the party moving for summary judgment is entitled to judgment as a matter of law. *Wathor v. Mutual Assurance Adm'rs, Inc*., 2004 OK 2, ¶4, 87 P.3d 559, 561; *Trice v. Burress*, 2006 OK CIV APP 79, ¶9, 137 P.3d 1253, 1257. A summary judgment decision involves purely legal determinations by the court and the appellate court's standard of review is *de novo. Trice v. Burress,* 2006 OK CIV APP 79, ¶9, 137 P.3d at 1257.

¶12 The district court found FVM engaged in litigation primarily for the purpose of silencing Sheward from criticizing a "public figure" on a "matter of public concern." In considering whether Sheward's communications were privileged, 12 O.S. Supp.2014 §1431 provides definitions for several terms under the Oklahoma Citizens Participation Act.[6] *Krimbill*, 2018 OK CIV APP 37, ¶34, 417 P.3d at 1249. Using the statutory language as a guide, it is apparent Sheward's flyer and correspondence communications addressed a matter of public concern, for which he had a right to exercise free speech. Sheward's effort to gather information and provide information to the citizens and city taxpayers about the sewage leaking into the street, the use of city resources on the private property of FVM a business with which the mayor was closely related, FVM's request for reimbursement of its sewage repair from the city, and FVM's possible role in damaging the sewer line in the first place, having built part of its facility over the city easement that held the sewer line, are all matters of public concern about which Sheward was trying to inform the public. The raw sewage leaking into the street

could impact both public health and environmental well being; the mayor's possible role in securing city services to help with the sewer repair (requesting money and use of vacuum trucks) implicated economic and community well being, a public official and local government in general, including government finances. As a result, Sheward's communication endeavors were aimed at legitimate matters of public concern for which he had the right to petition in the exercise of his free speech, under the terms of 12 O.S. §1431 and the First Amendment, as stated in the appealed from order.

¶13 Sheward also successfully demonstrated FVM brought suit against him in an effort to keep him from publicly criticizing the mayor and questioning the use of city finances. This is evident in the January 2016 agreement between Sheward and FVM to drop the lawsuit if Sheward stopped his public campaign attempts to expose the mayor's influence and spending. The mayor's own deposition testimony indicates Sheward's silence was the objective of the lawsuit as well; the mayor said the following when asked about the agreement to drop the original suit against Sheward in early 2016:

> Q: Okay. And around November 2, 2015, were you aware that conversations about dismissing this lawsuit had already taken place?
>
> A: Yes.
>
> ...
>
> A: If he would stop his actions against Fountain View Manor, then we would drop the suit.
>
> Q: Okay. And his actions are communicating with other individuals, talking, oral statements and written statements; right?
>
> A: Yes.
>
> Q: Okay. So if Mr. Sheward were to just be silent about it, you would dismiss the lawsuit?
>
> A: Yes.

The original lawsuit was dismissed in January 2016 and a second was refiled shortly thereafter (February 10, 2016) when Sheward contacted the editor of the paper and the dismissal agreement was effectively abandoned.

¶14 The district court found Sheward's pleadings were such that he was able to demonstrate FVM "confessed" the alleged defamatory remarks in claims Nos. 10, 11, 12, 14, 15, and 16 were "substantially true," so that the statements were not false and were, in fact, privileged. The district court also found Sheward was not required to insert a "disclaimer" or use the word "opinion" in his texts in order to "avail himself of this qualified privilege[,]" because Sheward was a layperson not required to use such precise language.

> As a general rule, statements which are opinionative and not factual in nature, which cannot be verified as true or false, are not actionable as slander or libel under Oklahoma law. However, if an opinion is stated as or "is in the form of a factual imperative," or if an opinion is expressed without disclosing the underlying factual basis for the opinion, the opinion is actionable under Oklahoma law if the opinion implies or creates a reasonable inference that the opinion is justified by the existence of undisclosed defamatory and false facts.

Bird Constr. Co., Inc. v. Oklahoma City Housing Auth., 2005 OK CIV APP 12, ¶10, 110 P.3d 560, 564 (citing *Metcalf v. KFOR-TV, Inc.*, 828 F.Supp. 1515, 1529 (W.D.Okla.1992)). Sheward expressed his opinions and included the disclosure of the underlying factual basis on which he formed the opinions. As a result, Sheward's narratives were either confessed by FVM as true or were accompanied by the underlying explanations, neither kind of statement is actionable under the rationale of *Bird Construction* and anti-SLAPP legislation.

¶15 Based on the record provided, we do not find error in the district court's grant of Sheward's summary judgment motion. His communications were an effort to alert the public to a matter of public concern, about a public official, who had a close relationship to a private entity and Sheward believed the mayor was abusing her public office by funneling public resources and requests for reimbursement to the private entity. The summary judgment order of the district court is AFFIRMED.

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

Larry Joplin, Presiding Judge:

1. FVM had previously dismissed claims for slander and a requested injunction (First Amended Petition claims 5, 7, 9, 13 and 19). The remaining claims for which the hearing was held related to FVM's allegations of libel and claims for damages.

2. First Amended Petition filed June 13, 2016.

3. Sheward addressed FVM's libel claims in his motion for summary judgment as follows, the slander claims having been dismissed

prior to the November 29, 2017 hearing: a) FVM claim I libel *per se* for October 1, 2015 email to the mayor and others, alleging Sheward made a false statement accusing FVM owners of embezzlement of taxpayer funds; b) FVM claim II libel *per se* for the flyer distributed to third parties, "taxpayers and registered voters"; c) claim III libel *per se* FVM alleged was contained in the March 1, 2015 email in which FVM alleged Sheward made a false statement of embezzlement of taxpayer resources; d) claim IV libel *per se* for allegations Sheward made in the May 11, 2015 email in which FVM said Sheward made a false statement that FVM was guilty of felony embezzlement; e) claim VI libel *per se* for alleged false statements made in his October 8, 2015 letter to the city attorney; f) claim VIII libel *per se* regarding Sheward's October 1, 2015 email in which FVM claimed Sheward made a false statement regarding blackmail; g) claim X libel *per se* for statements made by Sheward in the flyer, in which Sheward explained the cause of the sewer trouble was due to the improper actions of FVM; h) claim XI libel *per se* for statements made in the October 8, 2015 letter to the city attorney regarding the cause of the sewer break, which Sheward alleged was the fault of FVM building over the sewer line; i) claim XII libel *per se* again for statements Sheward made in the October 8, 2015 letter to the city attorney about the cause of the sewer line issue, which Sheward said was the fault of FVM; j) claim XIV libel *per se* for Sheward making what FVM said were false statements about the first cause of action FVM brought against Sheward in statements Sheward made in his January 27, 2016 email to the journalist at the Free Lance, in which Sheward said FVM filed a "million dollar lawsuit" against him; k) claim XV libel *per se* for Sheward making false statements about a "cover up" in the same January 27, 2016 email to the journalist; l) claim XVI libel *per se* again for January 27, 2016 email in which FVM said Sheward made a statement indicating a "cover up" occurred with regard to the use of the city resources. Sheward addressed claim XVIII in his motion regarding FVM's requested damages.

4. SLAPP litigation (Strategic Lawsuit Against Public Participation) is "the result of an increasing tendency by parties with substantial resources to file meritless lawsuits against legitimate critics, with the intent to silence those critics by burdening them with the time, stress, and cost of a legal action." *Krimbill v. Talarico*, 2018 OK CIV APP 37, ¶7, 417 P.3d 1240, 1245. The Oklahoma Legislature enacted the Oklahoma Citizens Participation Act (OCPA) "to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of [persons] to file meritorious lawsuits for demonstrable injury." 12 O.S. Supp. 2014 § 1430." *Krimbill,* 2018 OK CIV APP 37, ¶6, 417 P.3d at 1245. The district court in this case commented that it agreed Sheward's motion for summary judgment was premised on the principles of anti-SLAPP protections for citizens, but noted the instant suit against Sheward was at the summary judgment stage and the anti-SLAPP statute, §1430, was intended to address these abusive suits earlier in the process, even before the summary judgment phase.

5. The district court adopted the reasoning provided for the grant of summary judgment as to claims Nos. 1, 2, 6 and 8 and incorporated the same reasoning and rationale for the grant of Sheward's summary judgment with respect to claims Nos. 3, 4, 10, 11, 12, 14, 15 and 16. The district court also found claims Nos. 3 and 4 were time-barred as being outside the statute of limitations. With regard to claims Nos. 10, 11, 12, 14, 15, and 16, the district court found Plaintiff/Appellee [FVM] confessed the alleged defamatory remarks were "substantially true." Plaintiff/Appellee claims Nos. 17 and 18 requested compensatory and punitive damages and were rendered moot.

6. 12 O.S. Supp.2014 §1431 (emphasis added):

As used in the Oklahoma Citizens Participation Act:

1. "Communication" means the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual or electronic;

2. "Exercise of the right of association" means a communication between individuals who join together to collectively express, promote, pursue or defend common interests;

3. "Exercise of the *right of free speech*" means a communication made in connection with a matter of public concern;

4. "Exercise of the *right to petition*" means any of the following:

a. a communication in or pertaining to:

(1) a judicial proceeding,

(2) an official proceeding, other than a judicial proceeding, to administer the law,

(3) an executive or other proceeding before a department or agency of the state or federal government or a political subdivision of the state or federal government,

(4) a legislative proceeding, including a proceeding of a legislative committee,

(5) a proceeding before an entity that requires by rule that public notice be given before proceedings of that entity,

(6) a proceeding in or before a managing board of an educational or eleemosynary institution supported directly or indirectly from public revenue,

(7) a proceeding of the governing body of any political subdivision of this state,

(8) a report of or debate and statements made in a proceeding described by division (3), (4), (5), (6) or (7) of this subparagraph, or

(9) a public meeting dealing with a public purpose, including statements and discussions at the meeting or other matters of public concern occurring at the meeting,

b. a communication in connection with an issue under consideration or review by a legislative, executive, judicial or other governmental body or in another governmental or official proceeding,

c. a communication that is reasonably likely to encourage consideration or review of an issue by a legislative, executive, judicial or other governmental body or in another governmental or official proceeding,

d. a communication reasonably likely to enlist public participation in an effort to effect consideration of an issue by a legislative, executive, judicial or other governmental body or in another governmental or official proceeding, and

e. any other communication that falls within the protection of the right to petition government under the Constitution of the United States or the Oklahoma Constitution;

5. "Governmental proceeding" means a proceeding, other than a judicial proceeding, by an officer, official or body of this state or a political subdivision of this state, including an agency, board or commission, or by an officer, official or body of the federal government;

6. "Legal action" means a lawsuit, cause of action, petition, complaint, cross-claim, counterclaim or any other judicial pleading or filing that requests legal or equitable relief;

7. "*Matter of public concern*" means an issue related to:

a. health or safety,

b. environmental, economic or community well-being,

c. the government,

d. a public official or public figure, or

e. a good, product or service in the marketplace;

8. "Official proceeding" means any type of administrative, executive, legislative or judicial proceeding that may be conducted before a public servant; and

9. "Public servant" means a person elected, selected, appointed, employed or otherwise designated as one of the following, even if the person has not yet qualified for office or assumed the person's duties:

a. an officer, employee or agent of government,

b. a juror,

c. an arbitrator, referee or other person who is authorized by law or private written agreement to hear or determine a cause or controversy,

d. an attorney or notary public when participating in the performance of a governmental function, or

e. a person who is performing a governmental function under a claim of right but is not legally qualified to do so.

2019 OK CIV APP 78

IN THE MATTER OF Z.M.Z. and Z.C.Z., Deprived Children. STATE OF OKLAHOMA, Petitioner/Appellee, vs. JOSHUA ZUEHL, Respondent/Appellant.

Case No. 117,046. April 29, 2019

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

HONORABLE RODNEY SPARKMAN, JUDGE

REVERSED

Stephen A. Kunzweiler, China Matlock, TULSA COUNTY DISTRICT ATTORNEY'S OFFICE, Tulsa, Oklahoma, for Petitioner/Appellee,

Isaiah Parsons, Matthew Day, Charles Graham, PARSONS, GRAHAM & DAY, LLC, Tulsa, Oklahoma, for Respondent/Appellant,

Timothy R. Michaels-Johnson, TULSA LAWYERS FOR CHILDREN, Tulsa, Oklahoma, for Z.M.Z. and Z.C.Z.

Kenneth L. Buettner, Judge:

¶1 Respondent/Appellant Joshua Zuehl (Father) appeals an order terminating his parental rights to Z.M.Z. and Z.C.Z. (Children). Children were removed from their parents' home because their mother, Veronica Zuehl (Mother), intentionally dropped three-week old Z.C.Z. Mother was charged with child abuse and was found not guilty by reason of insanity. Mother relinquished her parental rights and Petitioner/Appellee the State of Oklahoma (State or DHS) sought termination of Father's parental rights for failure to correct the condition of Mother being in the home, failure to pay child support, and length of time in foster care. The record indicates the State's sole concern was that Father allowed Mother to remain in the home; yet the State did not attempt reunification of Children and Father during the months that Mother was in jail or in the Oklahoma Forensic Center, and Mother had left Father's home by the time of trial. Following a bench trial, the court terminated Father's rights based on failure to correct conditions and on Children being in foster care for six of the most recent twelve months and not being able to safely return to Father's home. In its order, the trial court failed to specifically identify the conditions Father failed to correct; the record does not include clear and convincing evidence that Father failed to correct any of the conditions alleged and we reverse that finding. The State contributed to the length of time that Children were in foster care and by the time of trial, the foster home was essentially the only home Children had known. Nevertheless, the State failed to present clear and convincing evidence that Children could not be safely returned to Father's home, as required by statute, and we therefore reverse termination on that ground also. Finally, while the trial court announced in court that termination was in Children's best interests, the final order does not include the required finding on best interests. We reverse.

¶2 The State obtained an order for emergency custody of Children August 29, 2016. At that time, Z.M.Z. had just turned two years old and Z.C.Z. was four weeks old. The affidavit supporting the State's application alleged that Mother dropped Z.C.Z. on the kitchen floor and he hit his head. The affidavit further averred Mother tried to calm the baby then went to a neighbor who took Mother and the baby to a hospital, where the baby was found to have a brain bleed and skull fracture. Upon questioning by police and a DHS worker, Mother admitted she had "had it" and felt life would be easier without the baby and she dropped him. The affidavit stated Mother reported she had been struggling with depression and the day she dropped Z.C.Z. was the fourth anniversary of the birth of her first child, who had died of a genetic disorder when he was two weeks old. Mother also reported she had communicated to Father that she was unhappy about the pregnancy with Z.C.Z. and felt trapped as a stay at home mother. The affidavit further averred that Father was not home when Mother dropped the baby and when Father returned home, he found Z.M.Z. in the care of a neighbor. Father reported he did not immediately go to the hospital because Z.M.Z. had fallen asleep. The affidavit alleged Father reported he knew Mother did not want the pregnancy but Father was unaware of Mother's current mental health issues. Father reported he intended to keep his family together. Children were initially placed in the custody of church friends of Father and Mother.

¶3 The State filed its Petition seeking a deprived adjudication September 8, 2016. The State sought immediate termination of Mother's and Father's parental rights based on heinous and shocking abuse by Mother and on Father's failure to protect from heinous and shocking abuse.

¶4 Mother relinquished her parental rights January 9, 2017. At the same hearing, the State withdrew its request for immediate termination of Father's rights and Father stipulated to the State's allegations that Children were deprived. The disposition order noted the conditions to be corrected were neglect, failure to protect from shocking and heinous abuse, mental health of caretaker, threat of harm, and failure to provide a safe and stable home.

¶5 A disposition order entered following a February 1, 2017 review hearing indicated Father was working two jobs, DHS was directed

to increase Father's visitation, the case was set for a 90 day review May 3, 2017, and Father was informed that no trial reunification would happen while Mother lived in Father's home. The order further indicated the foster parents reported Children were doing well and their current placement was "potential adoptive." The ISP directed Father to maintain adequate housing, learn five appropriate development needs of children by attending parenting classes, contact Children's Therapeutic Strategies to schedule an initial counseling intake appointment to address Children's "history of trauma, behaviors, as well as, the recent removal of" Children and follow all recommendations of the service provider, undergo a psychological evaluation and provide the results to DHS, and contact Family and Children's Services for an intake assessment for individual counseling to address "his own history of trauma, as well as, the recent removal of" Children. A February 7, 2017 disposition hearing order indicated Father continued to live in Bixby and Children were in foster care in Copan.

¶6 The disposition order entered following the May 3, 2017 review hearing indicates Mother remained in Father's home despite the court's order for Mother to be out of the home by May 3, 2017, and the State announced its intent to file a motion to terminate Father's rights. The order indicated the permanency plan continued to be reunification or adoption.

¶7 The State filed its motion to terminate Father's parental rights May 12, 2017. The State alleged Father had failed to correct the conditions of neglect, failure to protect from abuse, mental health of caretaker, threat of harm, and failure to provide a safe and stable home. The State also sought termination for failure to support Children and for length of time in foster care. On the same day, Mother's criminal trial for child abuse ended in a jury verdict of not guilty by reason of insanity. Mother was ordered to be held at the Oklahoma Forensic Center in Vinita "until (the) Court has made a determination that she is not presently dangerous to the public peace and safety because (she) is a person requiring treatment . . . ."

¶8 An ISP progress report filed May 16, 2017 indicated Father had attended each visitation and CPP session except one when he was ill, and Father had completed the required intakes for PCC and FCS and had attended therapy sessions. The report indicated Father continued to live in Bixby and Wife lived with him (the record indicates Mother was at the Oklahoma Forensic Center at that time). The report stated Father had "yet to take responsibility for the position he's in, and blames DHS and the Court for making him choose between his wife and his children."

¶9 The July 21, 2017 ISP Progress Report indicated Father visited Children every other week as scheduled except for two times when he was sick or could not afford gas. Father completed the Circle of Security Parenting Group June 7, 2017, and he came to class prepared and on time. Father also was enrolled in a Nurturing Parenting Group. Father and DHS disputed whether he had signed releases for his information from FCS. The report indicated Children were doing well in their foster home. The report also indicated both that Mother lived with Father and that Mother was being held at the Oklahoma Forensic Center.

¶10 Jury trial on the State's motion to terminate was set for November 2017 but was continued at Father's counsel's request. Mother was released from the Oklahoma Forensic Center November 28, 2017 and returned to live with Father. Her conditional release plan provided that "appropriate residency for (Mother) shall be determined by the court" and that Mother agreed to have "no interaction whatsoever with her minor children." Wife left Father and his home in February 2018. Father filed a waiver of jury trial April 16, 2018. Bench trial was held April 16 and 18, 2018. In its order, the trial court stated:

> the State . . . has met its burden of proof and demonstrated by clear and convincing evidence that the parental rights of (Father) should be terminated pursuant to (10A O.S. Supp.2014 §1-4-904(B)(5)), in part, to wit: all conditions to correct as listed except the condition of "mental health of caretaker"; and (10A O.S.Supp.2014 §1-4-904(B)(17)). Legal ground (10A O.S.Supp.2014 §1-4-904(B)(7)) not found. The Court stated its complete findings of fact and conclusions of law in open court on April 18, 2018.

In its order, the trial court did not state the specific conditions Father failed to correct, nor did it find that Children cannot be safely returned to Father's home, or make a best interests finding; however, the trial court did announce these findings at the conclusion of the trial.[1] A final order terminating parental rights *must* identify the precise conditions the parent failed

to correct. *In re T.T.S.*, 2015 OK 36, ¶21, 373 P.3d 1022. A final order terminating parental rights also must include a finding that termination is in the child's best interests. *In re L.M.*, 2012 OK CIV APP 41, ¶85, 276 P.3d 1088.

¶11 A parent has a fundamental liberty interest in the care, custody, and management of his children. *Santosky v. Kramer,* 455 U.S. 745, 102 S.Ct. 1388, 1394-1403, 71 L.Ed.2d 599 (1982). In a termination proceeding, the State must prove the statutory grounds for termination by clear and convincing evidence. *In re C.D.P.F.,* 2010 OK 81, ¶5, 243 P.3d 21. This burden of proof "balances the parents' fundamental freedom from family disruption with the state's duty to protect children within its borders." *Id*. In an appeal of a termination of parental rights, we review the record to determine whether the State presented clear and convincing evidence at trial to support termination. *In re S.B.C.*, 2002 OK 83, ¶6, 64 P.3d 1080. The paramount consideration is the child's best interests. 10A O.S.Supp.2014 §1-1-102(E).

¶12 Father first argues the State failed to meet its burden of proving he failed to correct the conditions leading to the deprived adjudication. The record offers no reason for Father to be subject to DHS involvement except for Mother's single incident of dropping Z.C.Z. While we do not minimize the seriousness of that incident, it is undisputed that Father was not home at the time, Mother was found not guilty by reason of insanity, and Mother was later released after being found not presently dangerous or requiring treatment. The State urges that Father was aware Mother had "mental health concerns" but nothing in the record suggests Father should have known Mother would injure one of her children. Father insisted that the incident was an aberration by an otherwise good mother and the State presented no evidence that Mother had ever harmed her children any other time and certainly no evidence that Father had ever harmed them.

¶13 For the first year of this proceeding, Father attended all of the required intake and counseling sessions required by the ISP. Towards the end of the proceeding, Father missed some visitation and counseling sessions because he was unable to afford gas or find a ride. It was clear at trial that the one thing the State was concerned about was Mother's presence in the home. At the end of trial, the State argued "the ability to bring (Children) home was a function that (Father) could have accomplished very easily. But for (Mother's) presence initially I think this case would have been well on its way to reunification, but (Father) has wholly failed in all aspects of this case to acknowledge that (Mother) is, in fact, a safety threat to (Children)." And yet, no trial reunification or even unsupervised visitation was offered during the months that Mother was in jail (from the time Children were removed until she was bonded out at the end of December 2016)[2] or in the Oklahoma Forensic Center (from May 12, 2016 to November 28, 2016). Father testified that from the time Mother was bonded out of jail until the time of her criminal trial, he tried unsuccessfully to find alternative housing for Mother, but that he was unwilling to put her out on the street. Father explained:

> (Mother) and I had been married seven years at that time. . . . She'd always been a great mother to her kids, and, you know, I wasn't about ready to just make her homeless. At that time the DA was very gracious and he gave us 90 days for her to leave. That way she could still work a job and try to find someplace, though during those 90 days our best efforts to try to find a place for her to stay were unsuccessful. We tried many different like – like shelters for woman (*sic*) or just shelters in general, . . . And we just had no luck in actually having anyplace (*sic*) to live. And I'm not the kind of person who wants anybody to be homeless, because (Mother) doesn't have any family down here. She really doesn't have any friends down here. She would be left to her own devices.

Father testified he reached out to church friends to find someone to take Mother in, but those friends had children and no room for Mother. Father further testified that he had no reason to believe Mother would be a further threat to Children because while she was out of jail on bond, she went through testing to determine what caused the incident and the doctor who did the testing opined that Mother dropping the baby was an isolated incident caused by post-partum psychosis. While Father did not present documentary evidence supporting this statement, the State did not object to Father's testimony or offer any evidence countering it.

¶14 Father testified that in the spring of 2016 he did not put Mother out of his home because she was facing the criminal charge and he did not want her to be homeless. He testified he was then still holding out hope "that there

could be something that we could do to satisfy the State's requirements or just their conscious (*sic*) of being able to let her be a mother again or let her be around the kids." Father testified that Mother returned to his home after she was released from the Oklahoma Forensic Center at the end of November 2017, but Mother left Father in February 2018, apparently to go with someone she had met at the Oklahoma Forensic Center. Accordingly, by the time of trial, Mother had been out of the home for approximately two months, but the State argued that was not a correction of the one condition at issue because Mother left of her own volition rather than being evicted by Father. In announcing its decision, as quoted in note 1, *supra*, the trial court erroneously stated Mother had lived in Father's home throughout this proceeding and indicated it was terminating Father's parental rights because Father continued to trust Mother after the one incident for which she was found not guilty by reason of insanity. Father's opinion about Mother is not a condition to be corrected.

¶15 Jamie Craun testified she was a DHS planning supervisor and that the two workers assigned to this case were in her unit. Craun testified that Father knew from the beginning of the proceeding that getting Mother out of the home was the "primary" condition to be corrected but that Father failed to choose Children over Mother. When asked why she believed termination was in Children's best interests, Craun testified: "(t)he length of time out of home, the failure to maintain consistent visitation . . ., and, again, not complying with the main aspect of the treatment plan which was to separate from (Mother)." Craun testified there was no problem with Father's home other than Mother's presence there. Craun testified DHS did not allow unsupervised visitation "throughout the life of the case" because Mother was in the home, yet as noted, Mother was not in the home for at least nine months of the life of the case. Craun testified Father had not "taken responsibility for the reasons why (Children) have come into custody," yet there was no evidence that Father was present at the time Mother dropped Z.C.Z. or that Father could have foreseen Mother would injure the child.

¶16 The clear and convincing evidence in the record shows that Father had no reason to be subject to a DHS proceeding but for Mother dropping the baby, an unquestionably serious act but one which, on the record presented, can only be seen as a one-time event. Father participated in all the requirements of the treatment plan, despite the hardship of having to travel to another town to participate in some of the services and visit Children. The State has established that the only condition to be corrected was Mother's presence in the home and the State failed to show Father's home was unsafe for Children in any way other than Mother's presence. But the State failed to allow Father to care for Children during the months Mother was out of the home or acknowledge Father's belief that Mother would not be a threat after receiving treatment. We find the trial court erred in finding Father failed to correct the conditions leading to the deprived adjudication and we reverse that finding.

¶17 We next turn to the finding that termination was warranted for length of time in foster care. The relevant statute provides:

> A. A court shall not terminate the rights of a parent to a child unless:
>
> 1. The child has been adjudicated to be deprived either prior to or concurrently with a proceeding to terminate parental rights; and
>
> 2. Termination of parental rights is in the best interests of the child.
>
> B. The court may terminate the rights of a parent to a child based upon the following legal grounds:
>
> * * *
>
> 17. A finding that a child younger than four (4) years of age at the time of placement has been placed in foster care by the Department of Human Services for at least six (6) of the twelve (12) months preceding the filing of the petition or motion for termination of parental rights *and the child cannot be safely returned to the home of the parent.*
>
> a. For purposes of this paragraph, a child shall be considered to have entered foster care on the earlier of:
>
> (1) the adjudication date, or
>
> (2) the date that is sixty (60) days after the date on which the child is removed from the home.
>
> b. For purposes of this paragraph, the court may consider:

(1) circumstances of the failure of the parent to develop and maintain a parental bond with the child in a meaningful, supportive manner, and

(2) *whether allowing the parent to have custody would likely cause the child actual serious psychological harm or harm in the near future as a result of the removal of the child from the substitute caregiver due to the existence of a strong, positive bond between the child and caregiver.*

10A O.S.Supp.2015 §1-4-904 (emphasis added). It is undisputed Children had been in foster care, as defined by the statute, for eighteen months at the time of trial. The question at issue is whether the State presented clear and convincing evidence of the other statutory element of that ground for termination, that Children "cannot safely be returned home to the parent." The trial court announced its finding that Children could not be safely returned to Father's home because Father continued to believe Mother was not a threat to Children. Father's subjective belief about Mother is not on its own a threat to Children's safety and the State did not present evidence that Father or his home presented any other threat to Children other than Mother's presence there, which condition no longer existed at the time of trial.

¶18 Nevertheless, we are cognizant of §1-4-904(B)(17)(b)(2). At the time of trial, Z.C.Z. had been in the foster home for all his life and Z.M.Z. had been in the foster home half of her young life. It *may* be the case that Children have a bond with the foster parents such that separating them would result in serious psychological harm and that Children cannot not safely be returned to Father's home for that reason. The foster parents did not testify. Craun testified about the importance of permanence to young children. Counsel for Children asked Craun ". . . at this time would that method for permanency be best served by returning home to the natural father or remaining in an adoptive home" and Craun answered "(r)emaining in their current placement and being adopted by their current foster parents." Counsel for Children urged the trial court to terminate Father's rights so that Children could have permanence. The State did not present any witnesses other than Father and Craun. Counsel for the Children did not present any witnesses. This scant evidence is simply not clear and convincing evidence that Children cannot be safely returned to Father's home. Accordingly, we reverse termination on the ground of time in foster care.

¶19 Father's final assertion of error is that he was denied effective assistance of counsel. A parent is entitled to effective assistance of counsel in a deprived proceeding. *Matter of D.D.F.*, 1990 OK 89, ¶15, 801 P.2d 703, 707. To warrant reversal for ineffective assistance of counsel, a parent must show he was prejudiced by his counsel's deficient performance and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Matter of J.L.O.*, 2018 OK 77, ¶¶35-38, 428 P.3d 881. Father argues his counsel was ineffective because he did not make an opening statement, did not object to hearsay statements during Craun's testimony, did not object to Craun opining on Children's best interests when she had not observed Father interact with Children, did not cross-examine Father during the State's case, and called no witnesses. Father's counsel cross-examined the State's witness, demurred to the State's evidence, and presented a closing argument. We cannot therefore say Father's counsel did not act.[3] "The choice not to give an opening statement, call witnesses, object excessively, and even not to object to testimony of a witness via telephone, however, all 'might be considered sound trial strategy.'" *J.L.O., supra*, at ¶37. We find Father has not demonstrated that he was denied effective assistance of counsel.

¶20 The record in this case shows Father's parental rights were terminated solely because of Mother's mental illness. The State's only allegation against Father was that his home was unsafe so long as Mother lived there, but the evidence showed DHS did not allow Children to return to Father's home during the months Mother was out of the home and Father testified Mother was out of the home permanently by the time of trial. The State therefore failed to present clear and convincing evidence that Father failed to correct the condition of an unsafe home. Additionally, the State failed to present clear and convincing evidence that Children could not be safely returned to Father's home despite the length of time in foster care. Lastly, the trial court's order did not include the required finding that termination was in Children's best interests. REVERSED.

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

Kenneth L. Buettner, Judge:

1. In announcing its decision at the end of trial, the court explained that it found Father failed to correct the conditions because Father continued to believe Mother was not a threat to Children, explaining in part:

> He didn't get rid of the mother's presence for that 90 days the Court allowed him. He didn't get rid of the mother for almost a year after that fact. He didn't remove the mother after she was released from the criminal court with conditions not to be around her children whatsoever, …. As a parent stating that you want your children, you'd do anything for your children, I think that's pretty apparent from that report mother didn't need to be around these children and yet you refused to believe she was a threat to these children. You saw no reason why a one-time event should keep her from being around her children.

In explaining its findings terminating on the basis of time in foster care, the trial court explained: "… and again based on (Father's) attitude and belief in the mother, the Court finds the children cannot be safely returned to his care at this time, so the State has met their ground under (B)(17)."

2. As noted above, during the time Mother was in jail and up until Mother relinquished her parental rights in January 2017, the State was seeking immediate termination of Father's rights.

3. Compare, for example, *In re N.L.*, 2015 OK CIV APP 24, ¶19, 347 P.3d 301. In that case, the trial court allowed the parent and the State to waive the appearance of the child's counsel at trial, and the appellate court noted "(w)here a party has counsel and the counsel takes no action, the result is a constructive denial of effective assistance of counsel."

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

Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS
Thursday, December 5, 2019

F-2018-1083 — Bryan Lee Guy, Appellant, was tried by jury for the crime of Robbery with a Dangerous Weapon, After Former Conviction of Two or More Felonies in Case No. CF-2016-4792 in the District Court of Tulsa County. The jury returned a verdict of guilty and set as punishment thirty-seven years imprisonment. The trial court sentenced accordingly. From this judgment and sentence Bryan Lee Guy has perfected his appeal. AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs in results; Hudson, J., concurs.

F-2017-1261 — Carlos Santana Gunter, Appellant, was tried by jury for the crimes of Count 1: Robbery with a Dangerous Weapon; Counts 2 and 3: Assault and Battery with a Dangerous Weapon, all After Former Conviction of Two or More Felonies, in Case No. CF-2015-374, in the District Court of Canadian County. The jury returned a verdict of guilty and recommended as punishment thirty years imprisonment on each count. The Honorable Paul Hesse, District Judge, sentenced accordingly and ordered Counts 1 and 2 to run concurrently with each other, and Count 3 to run consecutively to Count 2. Judge Hesse also imposed various costs and fees. From this judgment and sentence Carlos Santana Gunter has perfected his appeal. AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concurs in Results; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs in Results; Rowland, J., Concurs.

F-2018-1160 — Rashaun Haastrop, Appellant, was tried by jury for First Degree Burglary, After Conviction of Two Felonies in the District Court of Oklahoma County. He was convicted of the lesser related offense of Attempted First Degree Burglary, After Conviction of Two Felonies. In accordance with the jury's recommendation, the trial court sentenced him to 20 years imprisonment. From this judgment and sentence Rashaun Haastrop 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-2018-1093 — Appellant, Austin Bill Moore, was tried by jury and convicted (in a trifurcated proceeding) of Count 3, Possession of a Firearm After Former Conviction of a Felony, and Count 4, Stalking, in the District Court of Grady County Case Number CF-2017-258. The jury recommended punishment of one year imprisonment and payment of a $100.00 fine on Count 4 and twenty-five years imprisonment and payment of a $100.00 fine on Count 3. The trial court sentenced Appellant accordingly and ordered the sentences to run consecutively. From this judgment and sentence, Appellant appeals. The Judgment and Sentence is AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur in Result; Hudson, J., Concur; Rowland, J., Concur.

F-2018-1137 — Appellant Parron Lavon Burrus was tried by jury and found guilty of Conspiracy to Distribute a Controlled Dangerous Substance – Methamphetamine (Count I) and Possession of a Controlled Dangerous Substance with Intent to Distribute (Count II) both counts After Former Conviction of Two or More Felonies, in the District Court of Caddo County, Case No. CF-2017-319. The jury recommended as punishment imprisonment for thirty (30) years and a $5,500.00 fine in Count I and twenty-five (25) years in prison and a $5,500.00 fine in Count II. The trial court sentenced accordingly, ordering the sentences to be served consecutively. It is from this judgment and sentence that Appellant appeals. The Judgment and Sentence is hereby AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur in Results; Hudson, J., Concur; Rowland, J., Concur.

F-2018-801 — Appellant Jeremy Tyson Irvin was tried by jury and convicted of First Degree Murder (21 O.S.Supp.2015, § 701.7(A)), Case No. CF-2016-256 in the District Court of Lincoln County. The jury recommended a sentence of life in prison with the possibility of parole and the trial court sentenced accordingly. It is from this judgment and sentence that Appellant appeals. The Judgment and Sentence is AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur; Hudson, J., Concur; Rowland, J., Concur.

F-2018-647 — David Martinez, Appellant, was tried in a bench trial for the crime of lewd or indecent acts to child under 16 in Case No. CF-2017-329 in the District Court of Beckham County. The Honorable Doug Haught, District Judge, found Martinez guilty, sentenced him to ten years imprisonment with all but the first six years suspended, and with credit for time served. From this judgment and sentence David Martinez has perfected his appeal. The Judgment and Sentence is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs in results; Lumpkin, J., concurs; Hudson, J., concurs; Rowland, J., concurs.

Thursday, December 12, 2019

RE-2018-645 — Antwoin Lee Walker, Appellant, appeals from the revocation in full of his six year suspended sentence in Case No. CF-2015-675 in the District Court of Canadian County, by the Honorable Paul Hesse, District Judge. AFFIRMED. Opinion by: Kuehn, V.P.J.; Lewis, P.J., concur; Lumpkin, J., concur; Hudson, J., concur; Rowland, J., concur.

F-2019-16 — Appellant Johnny W. Ward was tried by jury and found guilty of Assault and Battery with a Deadly Weapon (Count I) (21 O.S.2011, § 652) and Possession of a Firearm (Count II) (21 O.S.Supp.2014, § 1283), both counts After Former Conviction of A Felony, in the District Court of Muskogee County, Case No. CF-2017-1155. The jury recommended as punishment imprisonment for thirty (30) years in Count I and ten (10) years in Count II. The trial court sentenced accordingly, ordering the sentences to be served concurrently. It is from this judgment and sentence that Appellant appeals. The Judgment and Sentence is AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur; Hudson, J., Concur; Rowland, J., Concur.

F-2017-1293 — Appellant, Melissa D. Clark, was tried by jury and convicted of First Degree Murder-Child Abuse, in the District Court of Cleveland County Case Number CF-2016-1193. The jury recommended as punishment imprisonment for life.[1] The trial court sentenced Appellant accordingly. It is from this judgment and sentence that Appellant appeals. From this judgment and sentence Melissa D Clark has perfected her appeal. The judgment and sentence is hereby AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur in Result; Hudson, J., Concur; Rowland, J., Concur.

1. Appellant must serve 85% of her sentence before becoming eligible for consideration for parole. 21 O.S.2011, § 13.1.

RE-2018-1006 — Jose Adolfo Rios, Appellant, appeals from the revocation in full of his concurrent ten year suspended sentences in Case No. CF-2006-6132 in the District Court of Oklahoma County, by the Honorable Ray C. Elliott, District Judge. AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur; Hudson, J., Concur; Rowland, J., Concur.

F-2018-562 — Aaron Thomas Brock, Appellant, was tried by jury for the crimes of robbery with a dangerous weapon (Count 1) and conspiracy to commit a felony (Count 2) in Case No. CF-2015-8935 in the District Court of Oklahoma County. The jury returned a verdict of guilty and set punishment at thirty years imprisonment on Count 1 and five years imprisonment on Count 2. The trial court sentenced accordingly. From this judgment and sentence Aaron Thomas Brock has perfected his appeal. The Judgment and Sentence is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs in results; Lumpkin, J., concurs; Hudson, J., concurs; Rowland, J., concurs.

C-2019-25 — Conner E. Dover, Petitioner, pled guilty to unauthorized use of a motor vehicle (Count 1) and aggravated attempting to elude a police officer (Count 2) in Case No. CF-2018-610 in the District Court of Oklahoma County. The Honorable Ray C. Elliott accepted the plea and delayed sentencing pending Dover's completion of a Regimented Inmate Discipline program. Judge Elliott later sentenced Petitioner to five years imprisonment in each count to be served consecutively. Dover filed an application to withdraw the plea, which was denied. He now seeks the writ of certiorari. The Petition for Writ of Certiorari is DENIED. The Judgment and Sentence is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs in results; Lumpkin, J., concurs; Hudson, J., concurs; Rowland, J., concurs.

F-2017-1147 — Michael Andrew Nordbye, Appellant, was tried by jury for the crime of Count 1: Murder in the First Degree (Child Abuse), in Case No. CF-2015-444, in the District Court of Washington County. The jury returned a verdict of guilty and recommended as punishment life imprisonment without the possibility of parole. The Honorable Curtis DeLapp, District Judge, sentenced accordingly and imposed a fine of $1,000.00 along with various costs and fees. From this judgment and sentence Michael Andrew Nordbye has per-

fected his appeal. AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concur in Results; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs; Rowland, J., Concurs.

RE-2018-1236 — Richard James Nunes, Appellant, appeals from the revocation in full of his eight year suspended sentence in Case No. CF-2014-450 in the District Court of Seminole County, by the Honorable George Butner, District Judge. AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs in Results; Lumpkin, J., Concurs; Rowland, J., Concurs.

F-2018-481 — Derrick Lamont Garrett, Appellant, was tried by jury for the crimes of Count 2: Kidnapping; and Count 3: Burglary in the First Degree, in Case No. CF-2016-8850, in the District Court of Oklahoma County. The jury returned a verdict of guilty and recommended as punishment twenty years imprisonment on each count. The Honorable Ray C. Elliott, District Judge, sentenced accordingly and ordered both sentences to run consecutively to each other. From this judgment and sentence Derrick Lamont Garrett has perfected his appeal. AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs in Results; Lumpkin, J., Concurs in Results; Rowland, J., Recuses.

Thursday, December 19, 2019

F-2018-850 — Appellant, Johnny Aldric Samples, III, was tried by jury and convicted of four counts of Child Sexual Abuse, in violation of 21 O.S.Supp.2014, § 843.5(E) (Counts 1-4), after former conviction of two or more felonies, in the District Court of Oklahoma County, Case Number CF-2016-7860. The jury recommended as punishment life imprisonment on each count. The trial court sentenced Appellant accordingly and ordered the sentences to run consecutively to one another. From this judgment and sentence Appellant appeals. The Judgment and Sentence is AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur in Results; Hudson, J., Concur; Rowland, J., Concur.

RE-2018-1288 — Jose Santiago Hernandez, Appellant, entered a plea of guilty on January 4, 2017, to the amended charges of Counts 1 and 2, Robbery with a Firearm, and Count 5 – Conspiracy to Commit a Felony, in Oklahoma County District Court Case No. CF-2016-4761. He was sentenced to ten years on each count with all except the first five years suspended, with rules and conditions of probation. All counts were ordered to run concurrently with each other and with Oklahoma County Case Nos. CF-2013-6543 and CF-2013-6647. The State filed an application to revoke Appellant's suspended sentence on July 25, 2018. Following a revocation hearing on December 19, 2018, before the Honorable Bill Graves, District Judge, Appellant's suspended sentences were revoked in full. Appellant appeals the revocation of his suspended sentences. The revocation of Appellant's suspended sentences is AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J.: Concur; Kuehn, V.P.J.: Concur; Hudson, J.: Concur; Rowland, J.: Recused.

F-2018-691 — Appellant, Cinque Ahmad Gadson, was tried by jury for the crime of Possession of Marijuana with Intent to Distribute in the District Court of Okmulgee County in Case No. CF-2016-237B. The jury found him guilty and recommended 12 years imprisonment and a $20,000 fine. The trial court sentenced accordingly. From this judgment and sentence Cinque Ahmad Gadson has perfected his appeal. Judgment and Sentence AFFIRMED; Application for Evidentiary Hearing on Sixth Amendment Claim DENIED. Opinion by: Kuehn, V.P.J.; Lewis, P.J., Concur; Lumpkin, J., Concur in Results; Hudson, J., Concur; Rowland, J., Concur.

F-2018-1087 — Spencer Joe Cuccaro, Appellant, appeals from an order of the District Court of Kay County, entered by the Honorable David R. Bandy, Associate District Judge, terminating Appellant from Drug Court in Case Nos. CF-2016-561, CF-2011-74, and CF-2008-353. AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs.

RE-2018-1217 — On February 14, 2018, Appellant entered pleas of guilty, in Oklahoma County District Court Case No. CF-2017-3262, to aggravated eluding and possession of a controlled dangerous substance. Appellant was convicted and sentenced to five years imprisonment on the eluding charge and to one year of incarceration on the possession charge. On November 6, 2018, the State filed a motion to revoke the suspended sentences. Following a November 27, 2018, hearing on the motion, Judge Elliott revoked the suspended sentences in full. The revocation is AFFIRMED. Opinion by: Kuehn, V.P.J.: Lewis, P.J.: concur; Lumpkin, J.: concur; Hudson, J.: concur; Rowland, J.: concur.

F-2018-738 — Appellant Keith Lorenzo Sumpter was tried by jury and found guilty of Indecent or Lewd Acts with a Child Under Sixteen (16) Years (21 O.S.Supp.2015, § 1123), in the District Court of Oklahoma County, Case No. CF-2016-4057. The jury recommended as punishment imprisonment for thirty-five (35) years and the trial court sentenced accordingly. It is from this judgment and sentence that Appellant appeals. The Judgment and Sentence is AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur in Result; Hudson, J., Concur; Rowland, J., Concur in Result.

F-2018-451 — Jason Keith Estes, Appellant, was tried by jury for the crime of Child Sexual Abuse, in Case No. CF-2015-120, in the District Court of Latimer County. The jury returned a verdict of guilty and recommended as punishment fifteen years imprisonment. The Honorable Bill Welch, Associate District Judge, sentenced accordingly and imposed various fees. From this judgment and sentence Jason Keith Estes has perfected his appeal. AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concurs in Results; Kuehn, V.P.J., Concurs in Results; Lumpkin, J., Concurs; Rowland, J., Concurs.

COURT OF CIVIL APPEALS
(Division No. 2)
Wednesday, December 11, 2019

117,885 — Gaillardia Country Club, LLC, Plaintiff/Appellee, vs. Gaillardia Physicians Group, LLC, Defendant/Appellant. Appeal from an Order of the District Court of Oklahoma County, Hon. Richard C. Ogden, Trial Judge. Appellant/Defendant, Gaillardia Physicians Group, LLC (GPG or Defendant), appeals from a judgment entered by the trial court in favor of Gaillardia Country Club, LLC (GCC or Plaintiff), on both parties' motions for summary judgment. Although section-line disputes often involve highly contested fact patterns, in this case the parties agree, and the record reflects, a factual scenario that is undisputed. Among GPG's claims on appeal is that the trial court erred in finding GPG's evidence was insufficient to demonstrate "that [GPG's] proposed extension of Meridian [Avenue] will be accepted by the City and become a public road." It also claims the court erred in finding that the permit obtained by GPG is insufficient to allow it to construct the road as planned, and that GPG's proposed use of GCC's property under the purported authority of the city building permit would constitute a trespass. Regardless of whether GPG had a purported "building permit" for the proposed extension, the permit could not be a valid authorization by the City to build on the easement without the City's own, affirmative action prior thereto to formally open and accept the easement as a public road. The trial court was correct in its conclusion that GPG's entry on and construction of a road on the property prior to such action by the City would be a trespass. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Thornbrugh, J.; Reif, S.J. (sitting by designation), and Fischer, P.J., concur.

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

116,711 — In the Matter of The Harris 2002 Management Trust: St. Jude Children's Research Hospital, Appellant, vs. Dwight Kealiher, as Successor Trustee of The Harris 2002 Management Trust; Phyllis Meyer; Janet Holmes Thompson; Brent Nietzke and Douglas Holmes, Appellees. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Kurt G. Glassco, Trial Judge. Movant/Petitioner/Appellant St. Jude Children's Research Hospital (St. Jude) appeals from an order denying its motion to vacate and petition for new trial in an estate matter. St. Jude challenged the trial court's order and judgment directing the assets of The Harris 2002 Management Trust be distributed as provided in a restated trust executed near the time of death of J.D. Harris. Because the trial court did not abuse its discretion in denying the motion to vacate and petition for new trial, we AFFIRM. Opinion by Swinton, J.; Mitchell, P.J., and Bell, J., concur.

Friday, December 13, 2019

116,711 — (Comp. w/116,808) Lisa Gaye Loven, Plaintiff/Appellee, vs. Church Mutual Insurance Company and Jeffrey F. Hanes, Defendants/Appellants. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Thomas E. Prince, Judge. Defendants/ Appellants Church Mutual Insurance Company and Jeffrey F. Hanes appeal from the judgment denying their motions for sanctions and granting, in part, their motion to tax costs. We find the trial court did not abuse its discretion by denying the motion for sanctions. We further find the trial court did not err by denying Church Mutual and Hanes's request for travel and lodging expenses and costs associ-

ated with obtaining a copy of a trial transcript. We AFFIRM. Opinion by Mitchell, P.J.; Bell, J., and Swinton, J., concur.

116,985 — Multiple Injury Trust Fund, Petitioner, vs. George Thompson, Deceased, Cynthia Avalon Watkins, Claimant, and The Workers' Compensation Court of Existing Claims, Respondents. Proceeding to Review an Order of a Three-Judge Panel of The Workers' Compensation Court of Existing Claims. Petitioner Multiple Injury Trust Fund (the Fund or MITF) appeals from an order of the Workers' Compensation Court En Banc affirming an order of the trial court awarding revivor benefits to Claimant/Respondent Cynthia Avalon Watkins (Claimant) following the death of her husband, original claimant George Thompson (Thompson). The Fund argues that revivor benefits should not have been awarded because Thompson died from injuries unrelated to any previous work injury. Claimant asserts that there was competent evidence establishing that Thompson's death was a result of the injuries for which he was receiving MITF benefits. Because the order is supported by competent evidence, the order is SUSTAINED. Opinion by Swinton, J.; Mitchell, P.J., and Bell, J., concur.

117,502 — James Blake Wilson, Plaintiff/Appellant, vs. Steven C. Anagnost, M.D. and TOS d/b/a The Spine and Orthopedic Institute, Defendants/Appellees. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Rebecca B. Nightingale, Judge. In this re-filed medical negligence action, Plaintiff/Appellant, James Blake Wilson, appeals from the trial court's order granting the motion to dismiss filed by Defendants/Appellees, Steven C. Anagnost, M.D., and TOS d/b/a The Spine and Orthopedic Institute. In the original action, Plaintiff alleged a medical malpractice claim against Defendants, and he asserted that he sustained damages for Defendants' fraud and deceit relating to Plaintiff's medical treatment. The trial court granted summary judgment to Defendants on the fraud and deceit claims. Plaintiff dismissed the remaining claims and appealed the partial summary judgment. Division I of the Court of Civil Appeals affirmed the summary judgment in Case No. 116,033. Plaintiff sought certiorari. While the petition for certiorari was pending, Plaintiff re-filed the medical malpractice case against Defendants. The trial court dismissed Plaintiff's petition holding it is impermissible claim-splitting pursuant to *Patel v. Tulsa Pain Consultants, Inc.*, 2015 OK CIV APP 45, 348 P.3d 117. We affirm the dismissal. Plaintiff also appeals from the trial court's order denying Plaintiff's motion to stay proceeding. The order denying the motion to stay is also affirmed. AFFIRMED. Opinion by Bell, J.; Mitchell, P.J., and Swinton, J., concur.

(Division No. 4)
Wednesday, December 4, 2019

117,930 — Kathy Comstock, Petitioner, vs. Carefusion Corporation, Arch Insurance Company and the Oklahoma Workers' Compensation Court of Existing Claims, Respondents. Proceeding to review an order of a three-judge panel of the Workers' Compensation Court of Existing Claims, Hon. L. Brad Taylor, Trial Judge, affirming the trial court's order denying Claimant's motion to reopen her claim. Claimant contends the clear weight of the evidence establishes a change of condition for the worse. Having examined the entire record, this Court finds the panel correctly found the trial court's order was neither contrary to law nor against the clear weight of the evidence. Therefore, we sustain the panel's order affirming the trial court's order denying Claimant's motion to reopen for change of condition for the worse. SUSTAINED. Opinion from the Court of Civil Appeals, Division IV, by Rapp, J.; Wiseman, V.C.J., and Barnes, P.J., concur.

Thursday, December 5, 2019

117,239 — Boaldin Family LLC, Plaintiff/Appellant, v. Scott Shrauner and Lynette Shrauner, Defendants/Appellees. Appeal from the District Court of Texas County, Hon. Jon K. Parsley, Trial Judge. Boaldin Family LLC (Boaldins) appeal the trial court's order granting Scott and Lynette Shrauners' (Shrauners) motion for summary judgment. The Boaldins sought, *inter alia*, a declaration from the trial court that a pipeline and gas line remained on their property after the real property was sold to the Shrauners. Conversely, the Shrauners sought a declaration that their purchase of the real property included the lines and the Boaldins' only interest was a non-exclusive easement and right-of-way. Following a hearing, the trial court granted the Shrauners summary judgment, stating the Shrauners owned the lines and the Boaldins' only interest was a non-exclusive easement and right-of-way in the lines. On appeal, we affirm this portion of the trial court's order. However, the matter is reversed in part and remanded to the trial court to determine whether the Shrauners' use of the

pipeline unduly burdens the Boaldins' use of their easement. This determination is a question of fact for the trier of fact. Accordingly, the summary judgment under review is affirmed in part as to the Boaldins' non-exclusive easement and right-of-way and that the Shrauners purchased the pipeline and gas line, and reversed in part and remanded for the trial court to determine whether the Shrauners' use of the pipeline unduly burdens and interferes with the Boaldins' use and enjoyment of their non-exclusive easement and right-of-way. Upon *de novo* review of the summary judgment record, the trial court's order granting the Shrauners' motion for summary judgment is affirmed in part and reversed in part and remanded for further proceedings consistent with the opinion. AFFIRMED IN PART, REVERSED IN PART AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Wiseman, V.C.J., and Rapp, J., concur.

117,597 — In the Matter of N.S., A Deprived Child, Keri Shull, Appellant, vs. State of Oklahoma, Appellee. Appeal from an order of the District Court of Pittsburg County, Hon. Mindy Beare, Trial Judge, terminating Keri Shull's (Mother) parental rights to her minor child, NS, after a jury trial. We are asked to review whether the State of Oklahoma proved by clear and convincing evidence that Mother's parental rights should be terminated. We conclude State showed by clear and convincing evidence that termination was in NS's best interests and that Mother failed to correct the conditions leading to NS being adjudicated deprived, although she was given more than three months to correct the conditions. We affirm the trial court's order terminating Mother's parental rights to NS pursuant to 10A O.S. Supp. 2018 § 1-4-904(B)(5). AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, V.C.J.; Barnes, P.J., and Rapp, J., concur.

Friday, December 6, 2019

117,471 — Milliger Construction Co., Plaintiff/Appellant, vs. Tracy Downs and Darrell Downs, Defendants/Appellees. Appeal from the District Court of Oklahoma County, Hon. Linda Morrissey, Trial Judge. The plaintiff, Milliger Construction Co., (Milliger Construction), appeals an Order dismissing its third amended petition filed in an action against the defendants, Tracy Downs and Darrell Downs (collectively, Downs). The appeal was assigned to the accelerated docket pursuant to Okla.Sup. Ct.R.1.36, 12 O.S. Supp. 2018, Ch. 15, app. 1. Downs filed a petition for rehearing which is granted. This Opinion replaces the original Opinion filed April 16, 2019. This case involves a claim by Milliger Construction that Downs breached the parties' contract by complaints allegedly made after completion of the contract and performance by both parties. Milliger Construction claims that Downs violated a duty of good faith and that violation constituted the breach of contract. However, the acts alleged and the breach, if any, occurred after the parties performed their contract. There is no contractual provision shown that Downs breached. The entire basis for the breach of contract claim relies upon post-performance complaints allegedly made by Downs. The only known duty on the part of Downs was to pay the agreed contract price, when due. They did so. Subsequent complaints, if any, have no relationship to the duty to pay the contract price and, standing alone, these complaints do not constitute a breach of contract. The defamation allegations in the Amended Petition are insufficient to withstand a Section 2012(B)(6) motion to dismiss, and Milliger's defamation arguments on appeal provide no basis for appellate relief. The dismissal of the defamation claim is summarily affirmed pursuant to Rule 1.202(d). AFFIRMED. Opinion on Rehearing from Court of Civil Appeals, Division IV, by Rapp, J.; Wiseman, V.C.J., concurs, and Goodman, J. (sitting by designation), not participating.

116,791 — In the Matter of the Miskovsky Irrevocable Trust I, Dated December 29, 1995, Gary Miskovsky, Gerrod Miskovsky, Grover Miskovsky, Christopher Andrew Miskovsky and Gates Miskovsky, as Beneficiaries of The Miskovsky Irrevocable Trust I, Dated December 29, 1995, Petitioners/Appellees, vs. George J. Miskovsky, III, as Trustee of the Miskovsky Irrevocable Trust I, Dated December 29, 1995, Respondent/Appellant, and Economy Square, Inc., an Oklahoma Corporation, Respondent, vs. Gerrod Miskovsky, Gail Marie Miskovsky Trice, Ashley Stiner, Erin Gallagher, Gregory Miskovsky, Kristina Van Dyne, Anne Marie Lemieux, Grayson Trice, Christopher Andrew Miskovsky, Lieutenant Colonel Gary Miskovsky, Jr., Gates Miskovsky, and Raegan Scoggins, As Beneficiaries and Necessary Parties. Appeal from an order of the District Court of Oklahoma County, Hon. Patricia G. Parrish, Trial Judge, removing George J. Miskovsky, III, as Trustee of the Miskovsky Irrevocable Trust I,

Dated December 29, 1995, and denying him full recovery of the attorney fees and costs requested over the course of this litigation. After a review of the record, we find the trial transcript supports removal of Trustee based on mismanagement and/or abuse of Trustee's power. The trial court's decision removing Trustee is affirmed, as is the trial court's order regarding the appealed issues on attorney fees. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, V.C.J.; Barnes, P.J., and Rapp, J., concur.

Monday, December 9, 2019

117,387 — In the Matter of the Estate of Von Chita Jurine Allen, Deceased, Debbie Maloy, Appellant, vs. Diane Maloy, James Maloy and Austin Bond, Appellees. Appeal from an Order of the District Court of Tulsa County, Hon. Kurt G. Glassco, Trial Judge, denying Debbie Maloy's ("Debbie") challenge to an Agreed Order setting out a settlement of a dispute between Debbie and her siblings, Diane Maloy ("Diane") and James Maloy ("James"). Debbie, Diane, and James are their mother's heirs, devisees, and legatees. A dispute arose regarding Debbie's handling of some assets, and in particular three bank accounts. One aspect of the dispute was the appointment of an independent administrator of the estate. Debbie, as beneficiary of the three POD accounts, maintained that the accounts were not part of the estate. The other two children contested Debbie's handling of these POD accounts and other assets. After a period of time, the trial court held a status conference where the parties' counsel and the independent administrator announced a complete settlement including return of two of the POD accounts to the estate. However, Debbie balked and claimed that her attorney did not have authority to compromise the POD bank accounts. The trial court held a hearing where Debbie's new attorney argued lack of authority and absence of agreement on the part of Debbie. Attorney Bond, the independent administrator, explained in detail that he and Debbie, with her attorney, did in fact reach a settlement as set out to the court in a prior hearing. Debbie's attorney's argument did not refute Bond's recital of the facts and, instead, argued that Debbie's attorney did not have authority to settle the POD accounts. However, the recital of the facts by Bond was that Debbie, not her attorney, personally agreed to the settlement including the POD accounts. Also, the settlement included allowing Debbie to retain one of the three POD accounts in contention. The trial court found that a settlement had been reached and endorsed the agreement. On appeal Debbie argues that error occurred due to absence of fact findings and absence of an evidentiary hearing. However, she requested neither findings nor an evidentiary hearing. Moreover, there was a hearing and facts were elicited from attorneys involved directly in the settlement. Debbie does not demonstrate what sort of hearing would have produced any different information or outcome. The evidence supports the judgment of the trial court and there is no error of law. Therefore, the judgment is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Wiseman, V.C.J., and Barnes, P.J., concur.

Tuesday, December 10, 2019

116,568 — In the Matter of the Marriage of: Johnny Buell Hall, Petitioner/Appellee v. Melissa Ann Hall, Respondent/Appellant. Appeal from an Order of the District Court of Carter County, Hon. Thomas K. Baldwin, Trial Judge. The trial court respondent, Melissa Ann Hall (Wife) appeals the provision of a Decree of Dissolution of Marriage disposing of the residence of the parties. Johnny Buell Hall (Husband) is the trial court petitioner. In this dissolution of marriage action, the parties' residence is Husband's separate property. Wife claims that the value of the residence was enhanced during the marriage. Wife's argument fails for lack of evidence showing the value of the residence on the date of the marriage. In addition, Wife's evidence does not support a conclusion that any enhancement was due to her skills or efforts. Wife contends that the payment of the mortgages that existed on the property at the time of the parties' marriage created equity and enhanced the property value. However, Wife did not show the balances due on the date of the marriage so a factor in the calculation is absent. The trial court ruled correctly that Wife had failed to present evidence to show enhancement of the value of the residence which is attributed to her skills, efforts, or expenditure of funds. Therefore, the Decree of Dissolution of Marriage is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., and Wiseman, V.C.J., concur.

Wednesday, December 11, 2019

117,160 — In the Matter of the Adoption of K.J.B., Minor Child: Tiffani Jo Brokopp, Appellant v. Jamie Shae Rose, Appellee. The respon-

dent, Tiffani Jo Brokopp (Mother), appeals an Order Adjudicating Minor Child Eligible For Adoption Without Consent of Natural Mother. The trial court petitioner in the adoption without consent case is Jamie Shae Rose (Rose). The trial court entered the Order after a non-jury trial. There were two cases before the trial court. The first was Mother's petition to determine Father's paternity. Father's paternity was established by agreement. The second was Rose's petition to adopt without Mother's consent. Rose alleged two grounds: (1) failure to support; and, (2) failure to establish and maintain a relationship. The trial court expressly did not rule on the latter, so there is no issue for this Court to address on that ground. There is no order establishing an obligation of support. However, the evidence is clear and convincing that Mother did not contribute to the support of K.B. according to her ability and that such failure was willful. The judgment of the trial court is not contrary to law or against the clear and convincing standard of proof. Therefore, the judgment is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., and Wiseman, V.C.J., concur.

116,921 — In the Matter of the Estate of Mamie A. Boggs, deceased: Ezra Boggs, Appellant, vs. Sonya Boggs, Appellee. Appeal from an Order of the District Court of Cleveland County, Hon. Stephen W. Bonner, Trial Judge, admitting the Will of Mamie A. Boggs (Mamie), deceased, to probate. Appellant Ezra Boggs (Ezra) opposed admission of the Will to probate. Appellee Sonya Boggs sponsored the Will for probate. This is not a case calling for admission of a Will as a self-proven document. Proponent, Sonya Boggs, had to prove that the testator, Mamie A. Boggs, executed a document styled "Last Will and Testament of Mamie A. Boggs" (1998 Will) in accordance with the formalities set out in 84 O.S.2011, § 55(1)-(4). The evidence, independent of the deficient self-proving clause, establishes that the 1998 Will was executed in conformity to the statute and that it is the Will of Mamie A. Boggs. Ezra Boggs did not produce any evidence to refute Sonya Boggs' proof. The judgment of the trial court is not against the clear weight of the evidence or contrary to law. Therefore, the judgment of the trial court is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Wiseman, V.C.J., and Barnes, P.J., concur.

Thursday, December 12, 2019

117,610 — Elbert Kirby, Jr. and Kay Kirby, Plaintiffs/Appellants v. Legacy Roofing & Construction, LLC, Rana Montgomery, Martin Tyler, et al., Defendants/Appellees. Appeal from an Order of the District Court of Tulsa County, Hon. Deborah Ludi Leitch, Trial Judge. The plaintiffs, Elbert Kirby, Jr. and Kay Kirby (together "Kirbys"), appeal a small claims judgment for the defendants, Legacy Roofing & Construction, LLC ("Legacy"), Rana Montgomery ("Montgomery"), and Martin Tyler ("Tyler"). The appellees shall also be collectively referenced as "Defendants" when all of them are the subject. This is an appeal from a judgment for Defendants after a small claims trial. The trial record is in the form of a court prepared narrative statement. The Record shows that the judgment is supported by competent evidence and that no error of law occurred. Separate issues raised by Kirbys are unsupported by the Record or competent legal authority and no error has been shown in this regard. Kirbys' motion for oral argument is denied. The judgment is affirmed. Defendants' motion for appeal-related attorney fees is subject to separate consideration by this Court and a ruling will follow subsequent to the filing of this Opinion. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., concurs, and Thornbrugh, J. (sitting by designation), concurs specially.

116,627 — Mathew Musengezi, Plaintiff/Appellant, vs. Anna Trammell, Defendant/Appellee. Appeal from an Order of the District Court of Tulsa County, Hon. Martha Rupp Carter, Trial Judge. The plaintiff, Mathew W. Musengezi (Musengezi) appeals the trial court's denial of his petition for a protective order and the grant of a separate petition for a protective order filed by defendant, Anna Trammell (Trammell). The parties each filed a petition for a protective order. The trial court heard both petitions separately in an agreed upon single hearing. The trial court assessed the credibility of the evidence and denied Musengezi's petition and granted Trammell's petition. Musengezi's Brief fails to establish error. This Court examined the evidence in the Record and concludes that there is no basis for reversal. The trial court's decision is not clearly against the evidence nor is it contrary to a governing principle of law. The orders denying Musengezi's petition for a protective order and granting Trammell's petition for a protective order are affirmed.

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

ORDERS DENYING REHEARING
(Division No. 1)
Wednesday, December 4, 2019

116,806 — Allen Moore, Plaintiff/Appellee, vs. H&M Properties LLC and Mark Hodge, Defendants/Appellants. Appellee's Petition for Rehearing, filed November 21st, 2019, is *DENIED*.

(Division No. 4)
Monday, November 18, 2019

117,606 — Gary Holloway, Plaintiff/Appellant, vs. Debra Harris, Tony Riddles, and Keith Humphrey, Individuals and Employees of the City of Norman Police Department and The City of Norman, a municipal corporation, Defendants/Appellees. Appellant's Petition for Rehearing is hereby *DENIED*.

Classified Ads

SERVICES

OF COUNSEL LEGAL RESOURCES – SINCE 1992 – Exclusive research & writing. Highest quality: trial and appellate, state and federal, admitted and practiced U.S. Supreme Court. Over 25 published opinions with numerous reversals on certiorari. **MaryGaye LeBoeuf 405-728-9925, marygayelaw@cox.net.**

HANDWRITING IDENTIFICATION
POLYGRAPH EXAMINATIONS

Board Certified	State & Federal Courts
Diplomate - ABFE	Former OSBI Agent
Fellow - ACFEI	FBI National Academy

Arthur Linville 405-736-1925

INTERESTED IN PURCHASING PRODUCING & NONPRODUCING MINERALS; ORRi. Please contact Greg Winneke, CSW Corporation, P.O. Box 23087, Oklahoma City, OK 73123; 210-860-5325; email gregwinne@aol.com.

PERFECT LEGAL PLEADINGS. Automated Oklahoma Legal Pleadings. Save hours and errors by utilizing the most comprehensive Oklahoma legal pleading production system available – Perfect Legal Pleadings. Works with Microsoft Word. PerfectLegalPleadings.org.

DENTAL EXPERT
WITNESS/CONSULTANT

Since 2005
(405) 823-6434
Jim E. Cox, D.D.S.
Practicing dentistry for **35** years
4400 Brookfield Dr. Norman, OK 73072
JimCoxDental.com
jcoxdds@pldi.net.

WANT TO PURCHASE MINERALS AND OTHER OIL/GAS INTERESTS. Send details to: P.O. Box 13557, Denver, CO 80201.

JSLegalWritingServices.com: for small firms who need assistance. brief writing for federal and state courts. Discovery document and medical records review. Over 15 years of experience. Phone: 405-513-4005. Email: jennifer@jslegalwriting.com.

OFFICE SPACE

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

OFFICE SPACE

LUXURY OFFICE SPACE AVAILABLE - One fully furnished office available for $955/month and one smaller (unfurnished) office available for $670/month lease in the Esperanza Office Park near NW 150th and May Avenue. The Renegar Building offers a reception area, conference room, full kitchen, fax, high-speed internet, security, janitorial services, free parking and assistance of our receptionist to greet clients and answer telephone. No deposit required. Gregg Renegar 405-488-4543.

PREMIUM OFFICE SPACE FOR LEASE IN EDMOND. Three offices available in law firm building. Lease includes parking, conference room use, Wi-Fi. Located in SE Edmond with great access to Kilpatrick Turnpike, Broadway Extension and I-35. Contact us at 405-285-8588 for more information.

OFFICE WITH SECRETARIAL SPACE, USE OF CONFERENCE ROOMS, receptionist, high-speed internet, fax, copy machine and kitchen. Convenient to all courthouses. Located in Midtown. Twenty-five restaurants within ½ mile. Also the option of a private assistants office. $750 - $1,250/month. Contact Larry Spears or Jo at 405-235-5605.

POSITIONS AVAILABLE

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

MEDIUM AV RATED FIRM to add an experienced workers' compensation defense attorney who has existing business. Firm to add additional business for the attorney's practice. Send resumes to "Box Y," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

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

RUBENSTEIN & PITTS PLLC, EDMOND LAW FIRM, SEEKS an attorney with 2-5 years of experience to assist with business litigation matters in both state and federal court. Excellent writing, analytical skills and interpersonal skills are required. Full range of benefits and competitive compensation. Send cover letter, resume, references and writing sample to TheEdmondlawfirm@gmail.com.

POSITIONS AVAILABLE

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

GUNGOLL, JACKSON, BOX & DEVOLL, PC SEEKS EXPERIENCED EMPLOYMENT LAW ATTORNEY. Position available in Enid or Oklahoma City. Competitive pay and excellent benefits. Please send cover letter, résumé and writing sample to blanton@gungolljackson.com.

LARGE OKLAHOMA CITY LAW FIRM. Associate attorney. Experience in workers' compensation or insurance defense. Two-10 years' experience. Salary commensurate with experience. Inquiries will be held in the strictest confidence. Submit resume to OKCHR@outlook.com.

COFFEY, SENGER & MCDANIEL (TULSA, OK) IS SEEKING AN ATTORNEY with 5-7 years of experience. Must have research and writing skills. Our firm offers health insurance benefits, paid vacation, 401(k) and life insurance. Salary is based on experience. Send resumes to amy@csmlawgroup.com.

ASSOCIATE EMPLOYMENT ATTORNEY NEEDED FOR AN UP-AND COMING COMPLEX CIVIL LITIGATION and employment firm in The Plaza District/ Classen-Ten-Penn with four other attorneys. We office in a century-old house converted to fit our law firm and work in a collaborative environment. We need immediate help with our employment cases and someone that can jump in and run with us. We are looking for the right fit to help us grow our firm. We do not currently offer health insurance but do offer two weeks paid vacation, flexible schedules or work arrangements and a chance to do great work. Please send your resume to jstockton@stocktontalbert.com.

REGIONAL AV-RATED LAW FIRM BASED IN OKLAHOMA CITY SEEKS SEASONED HEALTHCARE transactional and regulatory attorney for its Oklahoma City office. 5+ years of experience desired. Practice requires significant knowledge of federal and state laws impacting the healthcare industry. Candidates should have experience with entity formation, acquisitions and mergers and contract development and negotiation. Firm offers competitive compensation and benefits. To apply, please send cover letter, resume and references to "Box S," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

OK INSURANCE DEPARTMENT. LEGAL SECRETARY. Salary $36,000. For a complete job description visit www.ok.gov/oid/Public_Information/About_OID/Employment.html.

POSITIONS AVAILABLE

CHILD SUPPORT SERVICES ATTORNEY IV - Announcement #19-BC048. Visit www.okdhs.org/careers to apply. The DHS Child Support Services has an opening for a full-time attorney (CSS Attorney IV, $5,463.16 monthly) with experience in child support enforcement. This position will be located at 1707 W. Frisco, Chickasha, OK 73018. The position involves preparation and filing of pleadings and trial of cases in child support related hearings in district and administrative courts. This position may be filled at an alternate hiring level as a Child Support Services attorney III (beginning salary $4,966.50 monthly), Child Support Services attorney II (beginning salary $4,620 monthly), or as a Child Support Services attorney I (beginning salary $4,400 monthly), dependent on child support or family law experience and minimum qualifications as per state policy.

SEEKING ASSOCIATE FOR GROWING CIVIL LITIGATION PRACTICE IN NW OKC. Candidates must be in good standing with the Oklahoma Bar Association, have excellent research and writing skills and be proficient with technology. Ideal candidate is an Oklahoma licensed attorney in good standing with 2-5 years in a complimentary practice area, comfortable in a court room, with former litigation and deposition experience, good interpersonal skills including a heart for social justice. Plus if candidate has ability to speak a foreign language, barred in federal court, multistate bar licenses. We are an equal opportunity employer, prohibiting job discrimination based on race, color, sex, national origin, religion, age, equal pay, disability or genetic information. Job Type: Full-time.

CLASSIFIED INFORMATION

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

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

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

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

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

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

DO NOT STAPLE BLIND BOX APPLICATIONS.

REGISTER NOW

oba cle
continuing legal education

3RD ANNUAL LEGAL TECHNOLOGY & LAW PRACTICE MANAGEMENT INSTITUTE

TOPICS INCLUDE:

60 Legal Tech Tips, Gadgets, Apps & Websites in 60 Minutes

Lawyer's Guide to PDF Files

Essentials of Task Management & Digital Detox

Document and Practice Management for Legal Professionals

Trial Presentation Technology

Microsoft Word Master Classes on Styles and Formatting Complex Pleadings

Mobile Apps for Lawyers

AND MUCH, MUCH MORE!

THURSDAY, MARCH 5, 2020

9 a.m. - 4 p.m.

Oklahoma Bar Center

A must for attorneys, paralegals, support staff and IT professionals

Featuring: Barron Henley and Paul Unger

ONE DAY ONLY

www.okbar.org/cle

THIS PROGRAM WILL NOT BE WEBCAST

oba cle
continuing legal education

DID YOU MISS THESE IN-PERSON PROGRAMS?

IF SO,

THEY ARE NOW AVAILABLE IN OUR **CLE ONLINE ANYTIME** CATALOG

REMEMBER...beginning with the 2019 compliance year, members may earn all of their required 12 hours of MCLE credit by viewing any In Person, Webcast, Audio Webcast or CLE Online Anytime program. There is no limitation on the number of CLE Online Anytime program hours for compliance. These programs can be viewed at any day or time and can be stopped and resumed at a later day or time.

Stay up-to-date and follow us on

TO REGISTER GO TO WWW.OKBAR.ORG/CLE

A FEW OF THE AMAZING SEMINARS AVAILABLE FROM FROM 2019

2019 WORKERS' COMPENSATION UPDATE
Original Program Date: Sept. 20, 2019 - MCLE 6/0

DIG INTO OIL AND GAS LAND TITLES
Original Program Date: Sept. 26, 2019 - MCLE 6/0

PROFESSIONALISM: THE TIMELESS APPROACH TO THE PRACTICE OF THE LAW
Original Program Date: Oct. 3, 2019 - MCLE 3/3

2019 LABOR AND EMPLOYMENT LAW UPDATE
Original Program Date: Oct. 4, 2019 - MCLE 6/1

STEP-UP YOUR IMMIGRATION LAW PRACTICE
Original Program Date: Oct. 10, 2019 - MCLE 6/1

INSURANCE LAW: NEW DEVELOPMENTS AND TRENDS FROM REGULATION TO LITIGATION
Original Program Date: Oct. 18, 2019 - MCLE 6.5/1

A COMEDIC DEBRIEFING OF THE LAW
Original Program Date: Oct. 31, 2019 - MCLE 6/3

2019 BANKING AND COMMERCIAL LAW UPDATE
Original Program Date: Nov. 1, 2019 - MCLE 6/1

CANNABIS POTPOURRI
Original Program Date: Nov. 6, 2019 - MCLE 7/0

34TH ANNUAL ADVANCED BANKRUPTCY "BANKRUPTCY UNREDACTED"
Original Program Date: Dec.. 5 & 6, 2019 - MCLE 12/1

2019 LEGAL UPDATES
Original Program Date: Dec.. 12 & 13, 2019 - MCLE 12/1

Not finding what you are looking for? Look at our End-of-the-Year Sale below
Sale includes all programs, except Fall 2019. **SALE ENDS DEC. 31, 2019**