THE OKLAHOMA BAR
Journal
Volume 91 — No. 2 — 1/17/2020

Court Issue

oba cle
continuing legal education

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FRIDAY, APRIL 17, 2020
8:55 A.M. - 4:30 P.M.

Oklahoma City University School of Law,
McLaughlin Hall
800 N. Harvey Ave., OKC, OK

MCLE 7/0

THE CRIME, THE TRIAL, THE RESPONSE

OBA Remembers the Oklahoma City Bombing

PROGRAM PLANNERS:
Stephen Beam,
Melissa DeLacerda

MODERATOR:
Bob Burke,
Attorney, Author and Historian

Topics and Speakers include:

- The Crime: Jon Hersley and Larry Tongate, Retired FBI
- The Evidence: Bob Burke, Attorney, Author, Historian
- The Trial Proceedings: Brian Hermanson, District Attorney, District #8, Kay & Noble Counties, Defense attorney for Terry Nichols.
- The Trial Reflections: The Honorable Steven W. Taylor, Oklahoma Supreme Court Justice (Ret.) Presided over the Nichols' trial.
- A Unique Moment in History: Charlie Hanger, Sheriff, Noble County, Made historic traffic stop and arrest of Timothy McVeigh.
- The Response: A panel discussion featuring, a survivor, first and second responders and former Governor Frank Keating.
- The Memorial: Kari Watkins, Executive Director, Oklahoma City National Memorial & Museum

TOUR OKLAHOMA CITY NATIONAL MEMORIAL MUSEUM FOLLOWING THE SEMINAR

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THE OKLAHOMA BAR
Journal

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Oklahoma Bar Association

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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 ex-change 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 85

Establishment of the 2020 Uniform Mileage Reimbursement Rate for Expenses Paid from the Court Fund

No. SCAD-2019-101. January 2, 2020

CORRECTED ORDER

Pursuant to the State Travel Reimbursement Act, 74 O.S. Section 500.4, reimbursement for authorized use of privately owned motor vehicles shall not exceed the amount prescribed by the Internal Revenue Code of 1986, as amended (26 U.S.C.A. section 1 et. seq.) For 2020, the standard business mileage rate prescribed by the Internal Revenue Service is $.57.5 per mile.

Therefore, the 2020 mileage rate which is reimbursed by the court fund, including, but not limited to jurors, interpreters and witnesses, shall be computed at $.57.5 cents per mile.

DONE BY ORDER OF THE SUPREME COURT THIS 2ND DAY OF JANUARY, 2020.

/s/ James R. Winchester
ACTING CHIEF JUSTICE

2020 OK 1

IN RE: Rules of the Supreme Court for Mandatory Continuing Legal Education [Rule 7, Regulations 3.6 and 4.1.3]

SCBD 3319. January 6, 2020
As Corrected: January 7, 2020

ORDER

This matter comes on before this Court upon an Application to Amend Rule 7, Regulations 3.6 and 4.1.3 of the Rules of the Supreme Court for Mandatory Continuing Legal Education (hereafter "Rules"), 5 O.S. ch. 1, app. 1-B as proposed and set out in Exhibit A attached hereto.

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 January 1, 2021.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 6th day of January, 2020.

/s/ Noma D. Gurich
CHIEF JUSTICE

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

Rowe, J., dissents;

Darby, V.C.J., not voting.

Exhibit A

RULES OF THE SUPREME COURT OF OKLAHOMA FOR MANDATORY CONTINUING LEGAL EDUCATION

RULE 7. REGULATIONS

The following Regulations for Mandatory Continuing Legal Education are hereby adopted and shall remain in effect until revised or amended by the Mandatory Continuing Legal Education Commission with approval of the Board of Governors and the Oklahoma Supreme Court.

Regulation 1.

1.1 The Mandatory Continuing Legal Education Commission shall consist of eleven (11) members as provided by Supreme Court rule. The Executive Director of the Oklahoma Bar Association and the Director of Continuing Legal Education of the Oklahoma Bar Association shall be ex-officio members without vote. Nine (9) members of the Commission shall be

appointed by the President of the Oklahoma Bar Association with the consent of the Board of Governors. Initially three (3) appointed members shall serve one-year terms, three (3) appointed members shall serve two-year terms, and three (3) appointed members shall serve three-year terms. Thereafter, at the expiration of the stated terms, all members shall serve three-year terms. Members shall not serve more than two successive three-year terms.

1.2 The President of the Oklahoma Bar Association shall appoint the Chairman of the Commission on Mandatory Continuing Legal Education. The Commission on Mandatory Continuing Legal Education shall elect a Vice Chairman and Secretary from among its members.

1.3 The Commission may organize itself into committees of not fewer than four (4) voting members for the purpose of considering and deciding matters submitted to them, except five (5) affirmative votes shall be necessary for any action under Rule 6 of the Rules of the Supreme Court of the State of Oklahoma for Mandatory Continuing Legal Education.

1.4 Members of the Commission shall be reimbursed for their actual direct expenses incurred in travel when authorized by the Board of Governors or the President.

1.5 Support staff as may be required shall be employed by the Executive Director of the Oklahoma Bar Association in the same manner and according to the same procedure as other employees of the Oklahoma Bar Association within the funds available in the budget approved by the Supreme Court.

1.6 As used herein "MCLEC" and the "Commission" shall mean the Mandatory Continuing Legal Education Commission. "CLE" shall mean Continuing Legal Education. "MCLE" shall mean Mandatory Continuing Legal Education. "Rules" referred to shall mean and are the Rules of the Supreme Court of the State of Oklahoma for Mandatory Continuing Legal Education.

Regulation 2.

2.1 Nonresident attorneys from other jurisdictions who are temporarily admitted to practice for a case or proceeding shall not be subject to the rules or regulations governing MCLE.

2.2 An attorney who is exempt from the MCLE requirement under Rule 2 shall endorse and claim the exemption on the annual report required by Rule 5 of said rules.

Regulation 3.

3.1 Attorneys who have a permanent physical disability which makes attendance of CLE programs inordinately difficult may file a request for a permanent substitute program in lieu of attendance and shall therein set out continuing legal education plans tailored to their specific interest and physical ability. The Commission shall review and approve or disapprove such plans on an individual basis and without delay. Rejection of any requested substitute for attendance will be reviewed by the Board of Governors of the Oklahoma Bar Association prior to any sanction being imposed.

3.2 Other requests for substituted compliance, partial waivers, or other exemptions for hardship or extenuating circumstances may be granted by the Commission upon written application of the attorney and may likewise be reviewed by the Board of Governors of the Oklahoma Bar Association. Other substitute forms of compliance may be granted for members with permanent or temporary physical disabilities (based upon a written confirmation from his or her treating physician) which makes attendance at regular approved CLE programs difficult or impossible.

3.3 Credit may be earned through teaching in an approved continuing legal education program, or for a presentation substantially complying with the standards of Regulation 4 in a program which is presented to paralegals, legal assistants, and/or law clerks. Presentations accompanied by thorough, high quality, readable, and carefully prepared written materials will qualify for CLE credit on the basis of six (6) hours of credit for each hour of presentation.

3.4 Credit may also be earned through teaching a course in an ABA accredited law school or a course in a paralegal or legal assistant program accredited by the ABA. The Commission will award six (6) hours of CLE credit for each semester hour of academic credit awarded by the academic institution for the course.

3.5 Credit may also be earned through auditing of or regular enrollment in a college of law course at an ABA or AALS approved law school. The MCLE credit allowed shall equal a sum equal to three (3) times the number of credit hours granted by the college of law for the completion of the course.

3.6 Instructional Hour. Each attorney must complete 12 instructional hours of CLE per year, with no credit for meal breaks or business meetings. An instructional hour must contain at least 50 minutes of instruction.

Legal Ethics and Professionalism CLE. Effective January 1, 2021, of the 12 required instructional hours of CLE each year, at least two hours must be for programming on Legal Ethics and Professionalism, legal malpractice prevention and/or mental health and substance use disorders.

PROGRAM GUIDELINES FOR LEGAL ETHICS AND PROFESSIONALISM CLE.

Legal Ethics and Professionalism CLE programs will address the Oklahoma Rules of Professional Conduct and tenets of the legal profession by which a lawyer demonstrates civility, honesty, integrity, fairness, competence, ethical conduct, public service, and respect for the Rule of Law, the courts, clients, other lawyers, witnesses and unrepresented parties. Legal Ethics and Professionalism CLE may also address legal malpractice prevention and mental health and substance use disorders.

Legal Malpractice Prevention programs provide training and education designed to prevent attorney malpractice. These programs focus on developing systems, processes and habits that reduce or eliminate attorney errors. The programs may cover issues like ensuring timely filings within statutory limits, meeting court deadlines, properly protecting digital client information, appropriate client communications, avoiding and resolving conflicts of interest, proper handling of client trust accounts and proper ways to terminate or withdraw from client representation.

Mental Health and Substance Use Disorders programs will address issues such as attorney wellness and the prevention, detection and/or treatment of mental health disorders and/or substance use disorders which can affect a lawyer's ability to provide competent and ethical legal services.

Programs addressing the ethical tenets of other disciplines and not specifically pertaining to legal ethics are not eligible for Legal Ethics and Professionalism CLE credit but may meet the requirements for general CLE credit.

3.7 Hours of credit in excess of the minimum annual requirement may be carried forward for credit only in the succeeding calendar year. Such hours must, however, be reported in the annual report of compliance for the year in which they were completed and in the year for which they are being claimed and must be designated as hours being carried forward.

Regulation 4.

4.1.1 The following standards will govern the approval of continuing legal education programs by the Commission.

4.1.2 The program must have significant intellectual or practical content and its primary objective must be to increase the participant's professional competence as an attorney.

4.1.3 The program must deal primarily with matters related to the practice of law, professional responsibility, legal ethics, professionalism, mental health or substance use disorders related to attorneys. Programs that address law practice management and technology, as well as programs that cross academic lines, may be considered for approval.

4.1.4 The program must be offered by a sponsor having substantial, recent, experience in offering continuing legal education or demonstrated ability to organize and present effectively continuing legal education. Demonstrated ability arises partly from the extent to which individuals with legal training or educational experience are involved in the planning, instruction and supervision of the program.

{There are no further amendments to the remainder of Rule 7, Regulations.}

Exhibit A

RULES OF THE SUPREME COURT OF OKLAHOMA FOR MANDATORY CONTINUING LEGAL EDUCATION

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1.2 The President of the Oklahoma Bar Association shall appoint the Chairman of the Commission on Mandatory Continuing Legal Education. The Commission on Mandatory Continuing Legal Education shall elect a Vice Chairman and Secretary from among its members.

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3.2 Other requests for substituted compliance, partial waivers, or other exemptions for hardship or extenuating circumstances may be granted by the Commission upon written application of the attorney and may likewise be reviewed by the Board of Governors of the Oklahoma Bar Association. Other substitute forms of compliance may be granted for members with permanent or temporary physical disabilities (based upon a written confirmation from his or her treating physician) which makes attendance at regular approved CLE programs difficult or impossible.

3.3 Credit may be earned through teaching in an approved continuing legal education program, or for a presentation substantially complying with the standards of Regulation 4 in a program which is presented to paralegals, legal assistants, and/or law clerks. Presentations accompanied by thorough, high quality, readable, and carefully prepared written materials will qualify for CLE credit on the basis of six (6) hours of credit for each hour of presentation.

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3.5 Credit may also be earned through auditing of or regular enrollment in a college of law course at an ABA or AALS approved law school. The MCLE credit allowed shall equal a sum equal to three (3) times the number of

credit hours granted by the college of law for the completion of the course.

~~3.6 The number of hours required means that the attorney must actually attend twelve (12) instructional hours of CLE per year with no credit given for introductory remarks, meal breaks, or business meetings. Of the twelve (12) CLE hours required the attorney must attend and receive one (1) instructional hour of CLE per year covering the area of professional responsibility or legal ethics or legal malpractice prevention. An instructional hour will in all events contain at least fifty (50) minutes.~~

3.6 Instructional Hour. Each attorney must complete 12 instructional hours of CLE per year, with no credit for meal breaks or business meetings. An instructional hour must contain at least 50 minutes of instruction.

Legal Ethics and Professionalism CLE. Effective January 1, 2021, of the 12 required instructional hours of CLE each year, at least two hours must be for programming on Legal Ethics and Professionalism, legal malpractice prevention and/or mental health and substance use disorders.

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{There are no further amendments to the remainder of Rule 7, Regulations.}

2020 OK 2

RE: Rate for Transcripts Paid by the Court Fund

No. SCAD-2020-2. January 13, 2020

ORDER

This Order shall supersede SCAD Order No. 85-3, issued by the Chief Justice on February 27, 1985. In any criminal case in which the defendant is indigent and the transcript costs are paid from Court Fund monies, the applicable transcript fee shall be the then-current statutory amount set forth in 20 O.S. §106.4, as may be amended from time to time, for an original transcript and two copies. The transcript rate, as of the date of this Order, is $3.50 per page. If any additional copies of the transcript, beyond the original and two, are purchased from the court reporter at public expense (by the Court Fund, District Attorney, or other State of Oklahoma entity), the applicable fee shall not exceed ten cents ($0.10) per page. This directive shall take effect on the 31st day of January 2020.

DONE BY ORDER OF THE OKLAHOMA SUPREME COURT IN CONFERENCE this 13TH DAY OF JANUARY, 2020.

/s/ Noma D. Gurich
CHIEF JUSTICE

Gurich, C.J., Darby, V.C.J., Kauger, Winchester, Edmondson, Combs, Kane and Rowe, JJ., Concur;

Colbert, J., Absent.

2020 OK 3

IN RE: AMENDMENTS TO THE OKLAHOMA UNIFORM JURY INSTRUCTIONS - CIVIL

SCAD-20-5. January 13, 2020

ORDER ADOPTING AMENDMENTS AND NEW OKLAHOMA UNIFORM CIVIL JURY INSTRUCTIONS

¶1 The Court has reviewed the recommendations of the Oklahoma Supreme Court Committee for Uniform Civil Jury Instructions to adopt recommended amendments to existing instructions and proposed new instructions. The Court finds that the amendments and new instructions should be adopted.

¶2 It is therefore ordered, adjudged, and decreed that the attached instructions shall be available for access via internet from the Court website at www.oscn.net. The Administrative Office of the Courts is directed to notify the Judges of the District Courts of the State of Oklahoma regarding our approval of the instructions set forth herein. Further, the District Courts of the State of Oklahoma are charged with the responsibility of implementing these instructions within thirty (30) days of this Order. Notwithstanding, the district courts may implement these instructions immediately for any currently pending actions in which the judge determines the instructions are applicable.

¶3 It is therefore ordered that the proposed amendments to OUJI-CIV Nos. 6.4, 6.7–6.9, 6.11-6.12, 6.14, 7.5-7.6, 9.51, 11.10, 11.12, 20.1, 24.1-24.3, and 25.2, as set out and attached to this Order, are hereby approved. Additionally, it is ordered that the newly created instructions set out in OUJI-CIV Nos. 1.12A, 1.13A, 3.11A, 20.1A, 24.4-24.5, and 33.1–33.3, as set out and attached to this Order, are hereby adopted.

¶4 The Court declines to relinquish its constitutional and statutory authority to review the legal correctness of the above-referenced instructions or when it is called upon to afford corrective relief in any adjudicative context.

¶5 The amended OUJI-CIV instructions shall be effective thirty (30) days following entry of this Order.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THE 13th DAY OF January, 2020.

/s/ Noma D. Gurich
CHIEF JUSTICE

¶6 Gurich, C.J., Darby, V.C.J., Kauger, Edmondson, Colbert, Combs, Kane, Rowe, JJ., concur;

¶7 Winchester, J., not voting.

Instruction No. 1.12A

Instruction No. 1.12A
Directions for Verdict Form for One Plaintiff, One Defendant

If you find in favor of Plaintiff, [**name**], on the **[specify]** claim, then mark the **[specify]** Verdict Form for Plaintiff, [**name**], and against Defendant, [**name**]. If you so find, then determine the amount of damages that Plaintiff, [**name**], is entitled to recover and enter that amount on the [**specify**] Verdict Form.

If you find in favor of Defendant, [**name**], on the [**specify**] claim, then mark the [**specify**] Verdict Form for Defendant, [**name**], and against Plaintiff, [**name**].

Notes on Use

This Instruction should be given along with the Verdict Form in Instruction 1.12.

Instruction No. 1.13A

Instruction No. 1.13A
Directions for Verdict Form for Counterclaim

If you find in favor of Defendant, [**name**], on the [**specify**] counterclaim, then mark the Verdict Form for the [**Specify**] Counterclaim for Defendant, [**name**], and against Plaintiff, [**name**]. If you so find, then determine the amount of damages that Defendant, [**name**], is entitled to recover and enter that amount on the Verdict Form for the [**Specify**] Counterclaim.

If you find in favor of Plaintiff, [**name**], on the [**specify**] counterclaim, then mark the Verdict Form for the **[Specify]** Counterclaim for Plaintiff, [**name**], and against Defendant, [**name**].

Notes on Use

This Instruction should be given along with the Verdict Form in Instruction 1.13.

Instruction No. 3.11A

Inference from Spoliation of Evidence

[**Name of Party**] had a duty to preserve [**Specify Evidence**] in this case and [**Name of Party**] [**destroyed/hid/failed to preserve**] the evidence. You may therefore conclude that the evidence would have been unfavorable to [**Name of Party**].

Notes on Use

This Instruction may be used if the court has imposed a sanction for spoliation of evidence. In order to give this Instruction, the trial court must first find that there was a duty to preserve the evidence in issue and that a party negligently or willfully destroyed, withheld, or failed to preserve the evidence. *See Am. Honda Motor Co. v. Thygesen*, 2018 OK 14, ¶¶ 3–4, 416 P.3d 1059, 1060 (sanctions for spoliation were not authorized where there was no duty to preserve the evidence); *Barnett v. Simmons*, 2008 OK 100, ¶ 27, 197 P.3d 12, 21 (trial court must determine whether party violated a duty to preserve evidence before imposing sanctions). This Instruction should be modified appropriately if the evidence was materially altered, instead of destroyed or withheld.

Committee Comments

Spoliation of evidence may result in the imposition of sanctions as well as an adverse inference at trial. *See Barnett v. Simmons*, 2008 OK 100, ¶ 19, 197 P.3d 12, 19 ("This Court has also held that severe sanctions may be imposed for reasonably foreseeable destruction of evidence, even when there is no discovery order in place."); *Harrill v. Penn*, 1927 OK 492, ¶ 8, 273 P. 235, 237 ("The willful destruction, suppression, alteration or fabrication of documentary evidence properly gives rise to the presumption that the documents, if produced, would be injurious to the one who has thus hindered the investigation of the facts."). An adverse inference instruction may appropriately be given because a reasonable inference may be drawn from spoliation of evidence that the evidence was unfavorable to the person who caused the spoliation, if the spoliation was willful. Alternatively, an adverse inference instruction may be imposed as a sanction. Except in extraordinary circumstances, sanctions may not be imposed for the loss of electronically stored information on account of the routine, good-faith operation of an electronic information system. 12 O.S. Supp. 2017 § 3237(G); *Am. Honda Motor Co. v. Thygesen*, 2018 OK 14, ¶ 2, 416 P.3d 1059, 1060.

Instruction No. 6.4

Instruction No. 6.4
Employer and Employee — Defined

An employee is a person who, by agreement with another called the employer, acts for the employer and is subject to [**his/her/its**] control. The agreement may be oral or written or implied from the conduct of the parties.

Comments

~~*See Mistletoe Express Serv. v. Britt*, 405 P.2d 4, 7 (Okla. 1965) (distinguishing an employee from an independent contractor)~~. *Bouziden v. Alfalfa Elec. Coop., Inc.*, 2000 OK 50, ¶ 29, 16 P.3d 450, 459 ("The decisive test for determining whether one is an employee or an independent contractor is the right to control which the employer is entitled to exercise over the physical details of the work."); *Keith v. Mid-Cont. Petroleum Co.,*

1954 OK 196, ¶ 15, 272 P.2d 371, 377 ("[T]he decisive test for determining whether one party is a servant or an independent contractor is to ascertain whether the employer has the right to control or purports and attempts to control, the mode and manner of doing the work.").

Instruction No. 6.7

Instruction No. 6.7
Scope of [Agency/Employment]

An **[agent/employee]** is acting within the scope of **[his/her] [agency/employment]** if **[he/she]** is engaged in ~~the~~ work which has been assigned to **[him/her]** by **[his/her] [principal/employer],** or is doing that which is proper, usual and necessary to accomplish the work assigned to **[him/her]** by **[his/her] [principal/employer],** or is doing that which is customary within the particular trade or business in which the **[agent/employee]** is engaged. An **[agent/employee]** is acting within the scope of **[agency/employment]** if the **[agent/employee]** acted with a view to further the **[principal's/employer's]** business, or from some impulse or emotion which naturally grew out of or was related to an attempt to perform the [principal's/employer's] business, regardless of whether the **[agent/employee]** acted mistakenly or unwisely.]

Notes on Use

This instruction is to be used in cases in which the plaintiff is seeking to hold the defendant liable as an employer under the doctrine of respondeat superior. The last sentence should be included if there is evidence that the employee acted mistakenly or ill advisedly and was otherwise attempting to perform the employer's business. If there is evidence that the employee deviated from the employer's business for the employee's own purposes, the trial court should give Instruction No. 6.12 in addition to this instruction.

Comments

The Oklahoma Supreme Court summarized the theory of respondeat superior in *Nail v. City of Henryetta*, 1996 OK 12, ¶ 11, 911 P.2d 914, 917, as follows: "Under the theory of respondeat superior, one acts within the scope of employment if engaged in work assigned, or if doing that which is proper, necessary and usual to accomplish the work assigned, or doing that which is customary within the particular trade or business." ~~*Roring v. Hoggard*, 1958 OK 130, ¶ 0 (Syllabus by the Court), 326 P.2d 812, 815 (Okla. 1958); *Brayton v. Carter*, 1945 OK 289, ¶ 5, 196 Okla. 125, 127, 163 P.2d 960, 962, 196 Okla. 125, 127 (1945); and *Retail Merchs. Ass'n v. Peterman*, 1940 OK 49, ¶ 8, 186 Okla. 560, 561, 99 P.2d 130, 131, 186 Okla. 560, 561 (1940) .~~ An employee's actions may be within the scope of employment if they are "'fairly and naturally incident to the business', and [are] done 'while the servant was engaged upon the master's business and [are] done, although mistakenly or ill advisedly, with a view to further the master's interest, or from some impulse of emotion which naturally grew out of or was incident to the attempt to perform the master's business.'" *Rodebush v. Okla. Nursing Homes, Ltd.*, 1993 OK 160, ¶ 12, 867 P.2d 1241, 1245 (quoting *Russell–Locke Super-Service Inc. v. Vaughn*, 1935 OK 90, ¶ 18, 40 P.2d 1090, 1094).

Instruction No. 6.8

Instruction No. 6.8
Scope of Authority — Defined

An agent is acting within the scope of ~~**[his/her]**~~ authority if ~~**[he/she]**~~ the agent is engaged in the transaction of business that has been assigned ~~to **[him/her]**~~ by ~~**[his/her]**~~ the principal, or if ~~**[he/she]**~~ the agent is doing anything that may reasonably be said to have been contemplated as a part of ~~**[his/her]**~~ the agent's duties ~~agency.~~ It is not necessary that the principal expressly authorized an agent's act or failure to act ~~must have been expressly authorized by the principa~~l.

Comments

The scope and extent of the agent's authority are to be determined from all of the facts and circumstances in evidence. *Williams v. Leforce*, 1936 OK 666, ¶ 0, ~~177 Okla. 638, 642,~~ 61 P.2d 714, 714 ~~718~~ (Syllabus by the Court) ~~(1936)~~. The principal is not bound by any act of the agent outside the scope of authority. *Conti~~nenta~~'l Supply Co. v. Sinclair Oil & Gas Co.*, 1924 OK 1166, ¶ 4, ~~109 Okla. 178, 181,~~ 235 P. 471, 474 ~~(1925)~~. The Oklahoma Court of Civil Appeals summarized the agent's scope of authority in *Elam v. Town of Luther*, 1990 OK CIV APP 7, ¶ 6, 787 P.2d 1294, 1296, as follows: "[A]n agent acts within the scope of his authority, as determined by the facts and circumstances of

each case, if engaged in the transaction of business assigned, or if doing that which may reasonably be said to have been contemplated as a part of his duties."

Instruction No. 6.9

Instruction No. 6.9
Incidental or Implied Authority — Defined

In addition to the express authority conferred on ~~[him/her]~~ the agent by ~~[his/her]~~ the principal, an agent has the authority to do ~~such acts as~~ that are incidental to, or reasonably necessary to accomplish, the ~~intended result~~ purpose expressly delegated to the agent.

Comments

~~*American Nat'l Bank v. Bartlett*, 40 F.2d 21 (10th Cir. 1930);~~ *See Ivey v. Wood*, 1963 OK 281, ¶ 16, 387 P.2d 621, 625 ("An agent's authority will be implied, where necessary to carry out the purpose expressly delegated to him."). ~~(Okla. 1963); *Elliot v. Mutual Life Ins. Co.*, 185 Okla. 289, 291, 91 P.2d 746, 747 (1939); *R.V. Smith Supply Co. v. Stephens*, 169 Okla. 555, 557, 37 P.2d 926, 929 (1934).~~ Citing *Ivey v. Wood, supra*, the Oklahoma Court of Civil Appeals explained in *Elam v. Town of Luther*, 1990 OK CIV APP 7, ¶ 6, 787 P.2d 1294, 1296: "In addition to express authority granted by the principal, an agent has such implied authority to perform such acts as are incidental to, or reasonably necessary to accomplish the intended result."

Instruction No. 6.11

Instruction No. 6.11
Apparent Authority ~~[Agency by Estoppel]~~ — Definition and Effect

~~When a principal by~~ **~~[his/her/its]~~** If either the words or conduct of **[Name of Principal]** has caused ~~another~~ **[Name of Plaintiff]** reasonably to believe that ~~the principal~~ **[Name of Principal]** ~~has had~~ authorized **~~[his/her/its]~~** ~~agent~~ **[Name of Agent]** to take certain action on ~~the principal's~~ behalf of **[Name of Principal]**, though in fact ~~the principal~~ **[Name of Principal]** may not have actually done so, ~~such~~ the words or conduct ~~constitute~~ of **[Name of Principal]** constituted apparent authority, and as to **[Name of Plaintiff]** ~~the other person are~~ were the same as if ~~the principal~~ **[Name of Principal]** had authorized ~~such~~ **[Name** of Agent] to take the action. The apparent authority of **[Name of Agent]** may not be based solely on the words or conduct of **[Name of Agent]**. In addition, **[Name of Plaintiff]** must have changed position to **[his/her]** detriment in reliance on the apparent authority of **[Name of Agent]**.

Notes on Use

This instruction should not be used when the principal is undisclosed, since by the definition of apparent authority, it cannot exist when the principal is undisclosed. Such may not be true when the principal is partially disclosed, as in the case of a partnership where the third person is dealing with the partnership and knows some of its members but not all of them.

The rule of apparent authority should not be confused with the rules governing implied or incidental authority. See Instructions 6.9 and 6.10.

The trial court should substitute the name of a defendant or another person for **[Name of Plaintiff]** in this Instruction in appropriate circumstances.

Comments

The Oklahoma Supreme Court set out the requirements for apparent authority in *Sparks Brothers Drilling Co. v. Texas Moran Exploration Co.*, 1991 OK 129, ¶ 17, 829 P.2d 951, 954, as follows:

> "Apparent authority" of an agent is such authority as the principal knowingly permits the agent to assume or which he holds the agent out as possessing. Three elements must exist before a third party can hold a principal liable for the acts of another on an apparent-agency principal: (a) conduct of the principal [which would reasonably lead the third party to believe that the agent was authorized to act on behalf of the principal], (b) reliance thereon by [the] third person, and (c) change of position by the third party to his detriment. (Citations omitted).

See also Weldon v. Seminole Mun. Hosp., 1985 OK 94, ¶¶ 4, 7, 8, 709 P.2d 1058, 1059–1060 (designating the theory as either ostensible agency or agency by estoppel); *Ocean Accident & Guar. Corp. v. Denner*, ~~207 Okla. 416, 419,~~ 1952 OK 395, ¶ 14, 250 P.2d 217, 220-21 ~~(1952)~~ (describing the theory in estoppel terms).

Instruction No. 6.12

Instruction No. 6.12
SCOPE OF AUTHORITY OR EMPLOYMENT — DEPARTURE

An **[agent/employee]** is acting outside the scope of ~~**[his/her]**~~ [authority/employment] when ~~**[he/she]**~~ the **[agent/employee]** substantially departs from ~~**[his/her]** principal's **[or employer's]**~~ the **[principal's/employer's]** business by doing an act intended to accomplish an independent purpose ~~of **[his/her]** own~~ or for some other purpose ~~which~~ that is unrelated to the business of ~~**[his/her]** principal [or employer]~~ the **[principal/employer]** and not reasonably included within the scope of ~~**[his/her]**~~ the express or implied **[authority/employment]**. ~~Such~~ The departure may be ~~of~~ for a short ~~duration~~ time, but during ~~such~~ that time the **[agent/employee]** is not acting within the scope of ~~**[his/her]**~~ **[authority/employment].**

Notes on Use

~~Use~~ The trial court should use this instruction with the instructions defining scope of authority or employment.

Comments

~~*Chickasha Cotton Oil Co. v. Lamb & Tyner*, 28 Okla. 275, 290, 114 P. 333, 339 (1911); see *Independent Torpedo Co. v. Carder*, 165 Okla. 87, 88, 25 P.2d 62, 63 (1933); *Coon v. Boston Ins. Co.*, 79 Okla. 296, 296, 192 P. 1092, 1093 (1920).~~ In *Baker v. Saint Francis Hospital,* 2005 OK 36, ¶ 17, 126 P.3d 602, 607, the Oklahoma Supreme Court ruled that an employer should not be liable for the actions of an employee if the employee "had stepped aside from her employment at the time of the offending tortious act(s) on some mission or conduct to serve her own personal needs, motivations or purposes."

Instruction No. 6.14

Instruction No. 6.14
Knowledge of Agent Imputable to Principal

Knowledge, or notice possessed by an agent while acting within the scope of ~~**[his/her]**~~ the agent's authority, is the knowledge of, or notice to, ~~**[his/her]**~~ the principal.

Comments

The Oklahoma Supreme Court held in *Tiger v. Verdigris Valley Electric Cooperative,* 2016 OK 74, ¶ 16, 410 P.3d 1007, 1012, that "the knowledge or notice possessed by an agent while acting within the scope of authority is the knowledge of, or notice to the principal." In *Bailey v. Gulf Insurance Co.*, 389 F.2d 889, 891 (10th Cir. 1968), the general rule was stated that "knowledge of an agent obtained within the scope of his authority is ordinarily imputed to his principal." ~~*Motors Ins. Corp. v. Freeman*, 304 P.2d 328, 330 (Okla. 1956).~~

If the knowledge is acquired by the agent ~~,~~ ~~previous~~ prior to the agency, it will be imputed to ~~his~~ the principal if otherwise imputable. *First State Bank of Keota v. Bridges*, 1913 OK 553, ¶ 5, ~~39 Okla. 355, 359-60,~~ 135 P. 378, 380. A principal is not chargeable with notice received by an agent after termination of the agency. *Phillips v. Roper,* 1935 OK 329, ¶ 15, 42 P.2d 871, 874 ~~(1935)~~.

Instruction No. 7.5

Instruction No. 7.5
Principal and Agent or Employer and Employee — Both Parties Sued — Liability When Issue as to Relationship or Scope of Authority or Employment

If you find that **[name of agent or employee]** [was the agent/employee of **[name of principal or employer]**] [and] [was acting within the scope of **[his/her]** authority/employment] at the time of the occurrence, and if you find **[name of agent or employee]** is liable, then both are liable. If you find that **[name of agent or employee]** is not liable, then neither is liable.

If you find **[name of agent or employee]** is liable, but [was not an agent/employee of **[name of principal or employer]**] [or] [was not acting within the scope of **[his/her]** authority as an agent/employee of **[name of principal or employer]**] at the time of the occurrence, then **[name of principal or employer]** is not liable.

Notes on Use

Use whichever bracketed clauses are appropriate, depending on whether either or both, the relationship or the scope of authority or employment, has been denied.

When the scope of employment or scope of authority is in dispute, either Instruction 6.7 or 6.8, whichever is appropriate, should be given with this instruction.

While this instruction is primarily for use in tort cases, it may also be used in contract cases when, under the substantive law of

agency, both the principal and the agent would be bound by the contract.

This instruction should not be used when there is an independent basis of liability claimed against the principal apart from the agency, as for example, when it is alleged the principal has been personally negligent.

Comments

See Baker v. Saint Francis Hospital, 2005 OK 36, ¶ 10, 126 P.3d 602, 605 ("To hold an employer responsible for the tort of an employee, the tortious act must be committed in the course of the employment and within the scope of the employee's authority.") ~~*In re Brown*, 412 F. Supp. 1066, 1071 (W.D. Okla. 1975); *Hurt v. Garrison*, 192 Okla. 66, 67, 133 P.2d 547, 549 (1942); *Jenkins v. Helms*, 89 Okla. 77, 78, 213 P. 322, 323-24 (1922)~~

Instruction No. 7.6

Instruction No. 7.6
Joint Venturers — Imputing Negligence Between

If a joint venture is established, the negligence of one venturer within the general scope of the venture becomes the negligence of all venturers.

Notes on Use

This instruction ~~only~~ applies only when a third person is suing or being sued by a joint venturer. It does not apply when the suit is between the joint venturers themselves.

Comments

~~*Gragg v. James*, 452 P.2d 579, 587 (Okla. 1969)~~ *See Price v. Howard*, 2010 OK 26, ¶ 21, 236 P.3d 82, 91 ("An employee engaged in the activities of a joint venture is an employee of each of the joint venturers."); *Martin v. Chapel, Wilkinson, Riggs & Abney*, 1981 OK 134, ¶ 11, 637 P.2d 81, 85 ("Each member of a joint venture acts for himself as principal and as agent for the other members within the general scope of the enterprise."); 54 O.S. ~~1991 § 209~~ 2011 § 1-301 (partner is agent of partnership for acts in the ordinary course of the business of the partnership).

Instruction No. 9.51

Instruction No. 9.51
Willful and Wanton Conduct – Definition

~~Willful and wanton conduct means a course of action showing an actual or deliberate intention to injure or, if not intentional, shows an utter indifference to or conscious disregard for the safety of others~~ The conduct of **[Defendant]** was willful and wanton if **[Defendant]** was either aware, or did not care, that there was a substantial and unnecessary risk that the conduct would cause serious injury to others. In order for the conduct to be willful and wanton, it must have been unreasonable under the circumstances, and also there must have been a high probability that the conduct would cause serious harm to another person.

Comments

This definition is substantially the same as the definition of "willful and wanton" in Instruction No. 9.17, *supra*, and of "reckless disregard of another's rights" in Instruction 5.6, *supra*. The Oklahoma Supreme Court quoted the definition of "willful and wanton" from Instruction No. 9.17 with approval in *Parret v. UNICCO Service Co.*, 2005 OK 54, ¶ 14, 127 P.3d 572, 576. The Supreme Court held in *Graham v. Keuchel*, 1993 OK 6, ¶ 49, 847 P.2d 342, 362, as follows:

> The *intent* in *willful and wanton misconduct* is not *an intent to cause the injury*; it is an *intent to do an act* – or the failure to do an act – in reckless disregard of the consequences and *under such circumstances that a reasonable man would know,* or have reason to know, *that such conduct would be likely to result in substantial harm to another.* (Emphasis in original)

Instruction No. 11.10

Instruction No. 11.10
Duty to Invitee to Maintain Premises – Generally

It is the duty of the **[owner/occupant]** to use ordinary care to keep **[his/her/its]** premises in a reasonably safe condition for the use of **[his/her/its]** invitees. It is the duty of the **[owner/occupant]** either to remove or warn the invitee of any hidden danger on the premises that the **[owner/occupant]** either actually knows about, or that **[he/she/it]** should know about in the exercise of reasonable care, or that was created by **[him/her/it]** [or any of **[his/her/its]** employ-

ees who were acting within the scope of their employment]. This duty extends to all portions of the premises to which an invitee may reasonably be expected to go.

Notes on Use

This instruction should generally be used with Instruction Nos. 11.11 and 11.12, dealing with the definition of a hidden danger and the defense that a danger is open and obvious, and with Instruction Nos. 9.1, 9.2, and 9.6, dealing with negligence and causation.

The trial court is encouraged to modify this generally worded instruction to fit the facts of the particular case. For example, if the case arose out of a slip and fall on a banana peel in a grocery store, the instruction might read:

> A grocery store has a duty to keep its floor reasonably safe for its customers. A grocery store has a duty to either remove or warn its customers of any dangerous objects on the floor, such as banana peels, that store employees actually knew about, or should have known about in the exercise of reasonable care, that were put on the floor by a store employee. This duty covers all parts of the store where customers may reasonably be expected to go.

Some cases may involve additional issues, such as whether the invitee went outside the area of his invitation or remained on the premises beyond the time of his invitation, and the general instruction will need to be modified for these cases. In addition, the general instruction may need to be modified for a case where a ~~hidden~~ danger resulted from an intervening action by another person that the defendant should have reasonably anticipated. An example is *Lingerfelt v. Winn-Dixie Tex., Inc.*, 1982 OK 44, 645 P.2d 485, where the Oklahoma Supreme Court held that a grocery store could be found liable to a customer on account of a hidden danger created by other customers that the grocery store should have reasonably anticipated. The Supreme Court reversed a defense verdict and ordered a new trial on account of the denial of a requested jury instruction on a dangerous condition created by the means the grocery store used to display its products. *See also Cobb v. Skaggs Cos., Inc.*, 1982 OK CIV APP 46, ¶ 12, 661 P.2d 73, 76 ("Merchandising methods that involve unassisted customer selection create problems with dropped or spilled merchandise. The courts have come to recognize that self-service marketing methods necessarily create the dangerous condition.").

In a case where there is a duty for open and obvious dangers under *Wood v. Mercedes-Benz of Okla. City*, 2014 OK 68, ¶ 9, 336 P.3d 457, 460, the word "hidden" in the second sentence of the Instruction should be deleted.

Comments

The following statement of a property owner's duty to invitees is from *Williams v. Safeway Stores, Inc.*, 1973 OK 119, ¶ 3, 515 P.2d 223, 225:

> A storekeeper owes customers the duty to exercise ordinary care to keep aisles and other parts of the premises ordinarily used by customers in transacting business in a reasonably safe condition, and to warn customers of dangerous conditions upon the premises which are known, or which should reasonably be known to the storekeeper, but not to customers. [Citations omitted.]. Knowledge of the dangerous condition will be imputed to the storekeeper if he knew of the dangerous condition, or if it existed for such time it was his duty to know of it, or if the condition was created by him, or by his employees acting within the scope of the employment. [Citations omitted.].

Instruction No. 11.12

Instruction No. 11.12
Open and Obvious Danger

The **[owner/occupant]** has no duty to protect invitees **[licensees]** from or warn them of any dangerous condition that is open and obvious, ~~as such a~~ because an open and obvious danger is ordinarily readily observable by invitees **[licensees]**.

Notes on Use

Even if a dangerous condition is open and obvious, a ~~A~~ property owner may be liable for an injury to an invitee ~~caused by a dangerous condition that the invitee was aware of,~~ if the property owner had reason to know that the dangerous condition would cause harm to the invitee despite the invi-

tee's knowledge, the property owner caused or contributed to the dangerous condition, and the injured party was required to be on the premises. *Wood v. Mercedes–Benz of Okla. City*, 2014 OK 68, ¶ 9, 336 P.3d 457, 460. The general instruction above should ~~be modified accordingly~~ not be given where ~~a plaintiff claims~~ the court determines that ~~the property owner had a duty to protect him against a known danger~~ *Wood* applies.

Comments

This instruction is based on *Henryetta Construction Co. v. Harris*, 1965 OK 88, ¶ 7, 408 P.2d 522, 525-26 ~~(Okla. 1965)~~; and *Beatty v. Dixon*, 1965 OK 169, ¶ 13, 408 P.2d 339, 343-44 ~~(Okla. 1965)~~. A property owner's responsibility to protect invitees in some circumstances from known dangers is discussed in Restatement (Second) of Torts § 343A comment f (1965) and Restatement (Third) of Torts: Physical and Emotional Harm § 51 comment k. For example, the Oklahoma Supreme Court held in *Wood v. Mercedes–Benz of Okla. City*, 2014 OK 68, ¶ 9, 336 P.3d 457, 460, that a property owner had a duty to protect an invitee from hazardous conditions even though the invitee was aware of them because it was foreseeable that the invitee would be harmed. *See also Martinez v. Angel Expl., LLC*, 798 F.3d 968, 977 (10th Cir. 2016) ("A landowner's duty [under Oklahoma law] to keep the premises in a reasonably safe condition for invitees extends to both latent dangers and at least some obvious dangers with foreseeable harms to a class of visitors required to be on the premises."); *Jack Healey Linen Serv. Co. v. Travis*, 1967 OK 213, ¶ 9, 434 P.2d 924, 927 ~~(Okla. 1967)~~ ("Plaintiff's familiarity with the general physical condition which may be responsible for her injury does not of itself operate to transform the offending defect into an apparent and obvious hazard.").

CHAPTER TWENTY

EMOTIONAL DISTRESS

List of Contents

Instruction No. 20.1

ELEMENTS OF LIABILITY – INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

For **[Plaintiff]** to recover from **[Defendant]** on [his/her] claim for intentional infliction of emotional distress, **[he/she]** must prove by the greater weight of the evidence that:

1. **[Defendant's]** actions in the setting in which they occurred were so extreme and outrageous as to go beyond all possible bounds of decency and would be considered atrocious and utterly intolerable in a civilized society; and

2. **[Defendant]** intentionally or recklessly caused severe emotional distress to **[Plaintiff]** beyond that which a reasonable person could be expected to endure.

Notes on Use

The court should also give Instructions 20.2 through 20.4, and ordinarily also an Instruction (No. 5.5) on punitive damages.

~~The Oklahoma Supreme Court decided in *Kraszewski v. Baptist Ctr.*, 1996 OK 141, 916 P.2d 241, that a claim for intentional infliction of emotional distress could arise from a plaintiff's witnessing an accident, if 1) the plaintiff was directly physically involved in the accident, 2) the plaintiff was damaged from viewing the injury, rather than from learning of it later, and 3) the plaintiff had a familial or other close relationship with the person whose injury gave rise to the plaintiff's mental anguish. 1996 OK 141, ¶ 18, 916 P.2d at 250. If any of these matters are in controversy and need to be presented to the jury, the trial judge should draft an appropriate instruction.~~

Comments

The Oklahoma Supreme Court first recognized the tort of intentional infliction of emotional distress in *Breeden v. League Servs. Corp.*, 1978 OK 27, ¶ 7, 575 P.2d 1374, 1376. In the *Breeden* case, the Supreme Court adopted the standards in Restatement (Second) of Torts § 46 (1965), and these are incorporated into this instruction. A previous version of Instruction No. 20.1,

which required only that the defendant's actions were unreasonable, was held to be incorrect in *Floyd v. Dodson*, 1984 OK CIV APP 57, ¶¶ 8-12, 692 P.2d 77, 79-80.

Instruction No. 20.1A

ELEMENTS OF LIABILITY – NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

For **[Plaintiff]** to recover from **[Defendant]** on **[his/her]** claim for negligent infliction of emotional distress from witnessing an accident, [he/she] must prove by the greater weight of the evidence that:

1. **[Defendant]** was liable for an injury to **[Third Party]**;

2. **[Plaintiff]** was directly physically involved in the accident;

3. **[Plaintiff]** was injured from actually viewing the injury to **[Third Party]**, rather than from learning of it later, and

4. **[Plaintiff]** had a **[familial]/[close personal relationship]** with **[Third Party]**.

Comments

This Instruction is based on *Ridings v. Maze*, 2018 OK 18, ¶¶ 6–7, 414 P.3d 835, 837-838, and *Kraszewski v. Baptist Medical Center of Oklahoma, Inc.*, 1996 OK 141, ¶ 18, 916 P.2d 241, 250. While the Oklahoma Supreme Court identified the cause of action as intentional infliction of emotional distress in *Kraszewski*, the Supreme Court in *Ridings* characterized it as in effect the tort of negligence, rather than an independent tort. 2018 OK 18, ¶ 6, 414 P.3d at 837.

CHAPTER TWENTY FOUR

INTERFERENCE WITH CONTRACT

List of Contents

Instruction No. 24.1

Instruction No. 24.1

Interference with Contract — Elements

[Plaintiff] claims that **[he/she/it]** had a contract with **[Third Party]** in which they had agreed to [Describe the terms of the contract]. **[Plaintiff]** also claims that [Defendant] intentionally and wrongfully interfered with this contract, and that **[he/she/it]** suffered damages as a direct result. In order to win on the claim of intentional interference with a contract, **[Plaintiff]** must show by the weight of the evidence that:

1. **[Plaintiff]** had a contract with **[Third Party];**
2. **[Defendant]** knew [or under the circumstances reasonably should have known] about the contract;
3. **[Defendant]** interfered with the contract [or induced the Third Party to breach the contract, or made it impossible for the contract to be performed];
4. **[Defendant]'s** ~~actions were~~ conduct was intentional;
5. **[Defendant]** used improper or unfair means; and
6. **[Plaintiff]** suffered damages as a direct result of **[Defendant]'s** actions.

Notes on Use

This Instruction should be used ~~with the following Instructions in a case~~ where a plaintiff seeks recovery for intentional interference with a contract. ~~It may be adapted for a claim for interference with a business relationship by substituting "business relationship" for "contract" throughout. *See Waggoner v. Town & Country Mobile Homes, Inc.*, 808 P.2d 649, 654 (Okla. 1990).~~ For a definition of intent, see Instruction No. 24.4, *infra*. For an enumeration of factors to consider for improper or unfair means, see Instruction 24.3, *infra*. Instruction No. 24.2, *infra*, should be used where a plaintiff seeks recovery for intentional interference with a prospective business relationship that has not been reduced to a contract.

Comments

The Oklahoma Supreme Court set out the elements of a claim for malicious interference with contract or business relations in *Mac Adjustment, Inc. v. Property Loss Research Bureau*, 1979 OK 41, ¶ 5, 595 P.2d 427, 428 ~~(Okla. 1979)~~, as follows:

> In order to recover in [an action for malicious interference with contract or business relations], a plaintiff must show:
>
> 1. That he or she had a business or contractual right that was interfered with.
> 2. That the interference was malicious and wrongful, and that such interference was neither justified, privileged nor excusable.
> 3. That damage was proximately sustained as a result of the complained-of interference.

See also Del State Bank v. Salmon, 1976 OK 42, n.1, 548 P.2d 1024, 1026 n.1 ~~(Okla. 1976)~~ (setting out instructions that had been approved by both parties in a case involving ~~on~~ intentional interference with an employment contract ~~that both parties had approved~~). ~~For a reference to the related tort of interference with a prospective business advantage, *see Overbeck v. Quaker Life Ins. Co.*, 757 P.2d 846, 847-48 (Okla. Ct. App. 1984).~~

The Restatement (Second) of Torts 2d recognizes two types of interference with contractual relations. Section 766 involves interference with the performance of contract by causing a party to the contract other than the plaintiff not to perform. Section 766A involves interference of a contract by preventing the plaintiff's own performance of the contract or by making the plaintiff's performance more expensive or burdensome. ~~No Oklahoma court has ruled on the viability of a claim under § 766A, however, the Tenth Circuit has held that a claim under § 766A is viable in *Oklahoma. John A. Henry & Co., Ltd. v. T.G. & Y. Stores Co.*, 941 F.2d 1068 (10th Cir. 1991). Other jurisdictions have rejected claims under § 766A. *See, e.g., Price v. Sorrell*, 784 P.2d 614 (Wyo. 1989).~~ Both types of interference with contract are recognized in *Oklahoma. Wilspec Techs., Inc. v. DunAn Holding Grp. Co.*, 2009 OK 12, ¶ 11, 204 P.3d 69, 73. A claim for interference with a contract requires interference with a contract between the plaintiff and a third party, as opposed to breach of a contract between the plaintiff and the defendant. *Voiles v. Santa Fe Minerals, Inc.*, 1996 OK 13, ¶ 18, 911 P.2d 1205, 1209; *Navistar Int'l Transp. Corp. v. Vernon Klein Truck & Equip.*, 1994 OK CIV APP 168, ¶ 6, 919 P.2d 443, 446.

~~A Subcommittee on Jury Instructions of the Business Torts Litigation Committee of the Section of Litigation of the American Bar Association has prepared an extensive set of Model Jury Instructions for Business Tort Litigation. The trial court may consider adapting the following Instruction 1.05[2] for use in a case where there is an issue concerning whether the defendant's interference with contract was improper:~~

> ~~The determination of whether the defendant's conduct was or was not improper depends upon your consideration of all the facts and circumstances of the case, and a balancing of the following factors:~~
>
> ~~1. The nature of the defendant's conduct;~~
>
> ~~2. The defendant's motive;~~
>
> ~~3. The interests of the plaintiff with which the defendant's conduct interfered;~~
>
> ~~4. The interests sought to be advanced by the defendant;~~
>
> ~~5. The social interests in protecting the freedom of action of the defendant and the contractual interests of the plaintiff;~~
>
> ~~6. The proximity or remoteness of the defendant's conduct to the interference claimed by the plaintiff; and~~
>
> ~~7. The relationship among the plaintiff, _____ **[name of breaching party]**, and the defendant.~~

Instruction No. 24.2

~~Intent – Definition~~
Interference with Prospective Economic Advantage — Elements

~~[Defendant]'s~~ ~~actions were intentional if~~ **[he/she/it]** ~~either desired to interfere with~~ **~~[Plaintiff]'s~~** ~~contract with~~ **[Third Party]**, ~~or [he/she/it] was substantially certain that his actions would interfere with the contract.~~

[Plaintiff] claims that **[he/she/it]** had a [prospective] business relationship with **[Third Party]**. **[Plaintiff]** also claims that **[Defendant]** intentionally and wrongfully interfered with this [prospective] business relationship, and that **[he/she/it]** suffered damages as a direct result. In order to win on the claim of intentional interference with a [prospective] business relationship, **[Plaintiff]** must show by the weight of the evidence that:

1. **[Plaintiff]** had a [prospective] business relationship with **[Third Party]**;
2. **[Defendant]** knew [or under the circumstances reasonably should have known] about the [prospective] business relationship;
3. **[Defendant]** interfered with the [prospective] business relationship by:

   causing **[Third Party]** not to [enter into]/[continue] the [prospective] business relationship;

   OR

   preventing **[Plaintiff]** from [entering into]/[continuing] the [prospective] business relationship.
4. **[Defendant]'s** conduct was intentional;
5. **[Defendant]** used improper or unfair means; and
6. **[Plaintiff]** suffered damages as a direct result of **[Defendant]'s** actions.

Notes on Use

This Instruction should be used in a case where a plaintiff seeks recovery for intentional interference with a business relationship or prospective business relationship that has not been reduced to a contract. For an enumeration of factors to consider for improper or unfair means, see Instruction No. 24.3, *infra*. For a definition of intent, see Instruction No. 24.4, *infra*.

Comments

~~The Oklahoma Supreme Court stated in Del State Bank v. Salmon, 548 P.2d 1024, 1026 (Okla. 1976): "Intentional interference may be malice in the law without personal hatred, ill will, or spite."~~ Oklahoma courts have recognized claims for intentional interference with a prospective contractual relation under Restatement (Second) of Torts § 766B. *Wilspec Techs., Inc. v. DunAn Holding Grp. Co.*, 2009 OK 12, ¶ 7, 204 P.3d 69, 71. Section 766B provides:

One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of

(a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or

(b) preventing the other from acquiring or continuing the prospective relation.

Instruction No. 24.3

Instruction No. 24.3
Interference with Contract — ~~Damages~~ Improper or Unfair Means

~~If you decide for **[Plaintiff]**, you must then fix the amount of **[his/her/its]** damages. This is the amount of money that will reasonably and fairly compensate [him/her/its] for the losses [he/she/it] has sustained from the breach of the contract.~~

Whether the defendant's conduct was improper or unfair depends upon your consideration of all the facts and circumstances of the case, and a balancing of the following factors:

1. The nature of the defendant's conduct;
2. The defendant's motive;
3. The interests of the plaintiff with which the defendant's conduct interfered;
4. The interests sought to be advanced by the defendant;
5. The social interests in protecting the freedom of action of the defendant and the contractual interests of the plaintiff;
6. The proximity or remoteness of the defendant's conduct to the interference claimed by the plaintiff; and
7. The relationship among the plaintiff, _____ **[name of breaching party]**, and the defendant.

~~Notes on Use~~ Comments

~~In appropriate cases the court should also give Instruction No. 5.5 for punitive damages.~~ This Instruction is based on language

that the Oklahoma Supreme Court quoted with approval in *Wilspec Technologies, Inc. v. DunAn Holding Group Co.*, 2009 OK 12, n.6, 204 P.3d 69, 74 n.6.

Instruction No. 24.4

Instruction No. 24.4
Intent — Definition

[Defendant]'s actions were intentional if **[he/she/it]** either desired to interfere with [Plaintiff]'s contract with **[Third Party]**, or **[he/she/it]** was substantially certain that **[his/her/its]** actions would interfere with the contract.

Comments

The Oklahoma Supreme Court stated in *Del State Bank v. Salmon*, 1976 OK 42, ¶ 9, 548 P.2d 1024, 1026 ~~(Okla. 1976)~~: "Intentional interference may be malice in the law without personal hatred, ill will, or spite."

Instruction No. 24.5

Instruction No. 24.5
INTERFERENCE WITH CONTRACT — DAMAGES

If you decide for **[Plaintiff]**, you must then fix the amount of **[his/her/its]** damages. This is the amount of money that will reasonably and fairly compensate **[him/her/it]** for the losses **[he/she/it]** has sustained from the breach of the contract.

Notes on Use

In appropriate cases the court should also give Instruction No. 5.5 for punitive damages.

Instruction No. 25.2

Instruction No. 25.2
CONDEMNATION — JUST COMPENSATION — FULL TAKING

The term "just compensation" means the payment to **[Owner]** for the taking of **[his/her/its]** property by [Condemnor] of an amount of money that will make **[Owner]** whole. In this case this is the fair market value of the property on _____, the date of the taking, [plus reasonable and necessary moving expenses]. The property includes the land and any buildings or other things that are attached to the land.

Notes on Use

This Instruction should be used only when all of a particular property is condemned so that there are no problems involving the effect of the taking on the valuation of any remaining property. It should be given along with Instruction No. 25.5, "Fair Market Value-Definition," and other appropriate Instructions. The bracketed language in the second sentence that refers to moving expenses should be included if the plaintiff is seeking moving expenses. *See State ex rel. Dep't. of Transp. v. Little*, 2004 OK 74, ¶¶ 18, 25, 100 P.3d 707, 717, 720.

Comments

The 1990 amendment to Okla. Const. Art. 2, § 24 provides in pertinent part: "Just compensation shall mean the value of the property taken . . . ." Oklahoma cases decided prior to this amendment used fair market value as the standard for just compensation. *E.g., Grand Hydro v. Grand River Dam Auth.*, 1943 OK 158, ¶ 8, 139 P.2d 798, 800~~, 192 Okla. 693, 694~~ ("The measure of compensation in [a condemnation proceeding] is the fair market or cash value of the land condemned.").

CHAPTER THIRTY THREE

NUISANCE

List of Contents

Instruction No. 33.1

Nuisance — Introduction

This is an action to recover damages for a nuisance. **[Plaintiff]** claims that **[Defendant]** caused a nuisance by **[specify the actions or failure to act that the plaintiff alleges constituted a nuisance].**

Instruction No. 33.2

Nuisance — Elements

To find for **[Plaintiff]** on the claim for a nuisance, **[Plaintiff]** must prove by the greater weight of the evidence:

1. That **[Defendant]** has **[done any unlawful action]/[failed to perform a duty]** that: **[Select applicable alternative]:**

[Annoyed]/[Injured]/[Endangered] the **[comfort]/[repose]/[health]/[safety]** of others;

OR

Offended decency;

OR

Unlawfully **[interfered with]/[obstructed]/[tended to obstruct]/[made dangerous for passage] any [lake]/[navigable river/stream/canal/basin]/[public park/square/street/highway];**

OR

Made another person insecure in **[life]/[the use of property];**

AND

2. The nuisance caused damages to **[Plaintiff].**

Comments

This Instruction is based on 50 O.S. 2011 § 1. Agricultural activities do not constitute a nuisance unless they have a substantial adverse effect on the public health and safety. *Id*. § 1.1(B). An action for nuisance may not be brought against an agricultural activity that has lawfully been operating for more than two years. *Id.* § 1.1(C).

Instruction No. 33.3

Nuisance – Public Nuisance

A public nuisance is a nuisance that affects at the same time **[an entire community/neighborhood]/[large number of persons]**, even though the amount of the **[annoyance/damage]** may be different for different people. In order to bring an action for a public nuisance, **[Plaintiff]** must show by the greater weight of the evidence that **[Plaintiff]** has suffered a specific injury on account of the nuisance.

Notes on Use

This Instruction should be used if the plaintiff is seeking damages for a public nuisance.

Comments

This Instruction is based on the Oklahoma Supreme Court's interpretation of 50 O.S. § 10 in *Smicklas v. Spitz*, 1992 OK 145, ¶ 8 & n.16, 846 P.2d 362, 366–67 & 367 n.16.

2020 OK 4

STATE OF OKLAHOMA *ex rel.*, OKLAHOMA BAR ASSOCIATION, Complainant, v. LAURIE JEAN MILLER, Respondent.

SCBD 6687. January 14, 2020

ORIGINAL PROCEEDING FOR ATTORNEY DISCIPLINE

¶0 The Complainant, Oklahoma Bar Association, charged the Respondent, Laurie Jean Miller, with three counts of professional misconduct that included failure to competently represent her clients, failure to be diligent in her representation of her clients and failure to communicate effectively with her clients. In addition, the Complainant charged the Respondent with mishandling of client funds, violating rules of professional conduct and the commission of an act contrary to prescribed standards of conduct. Having found clear and convincing evidence to support all three counts, the Trial Panel recommended the Respondent be suspended for eighteen months. We hold there is clear and convincing evidence that the totality of the Respondent's conduct warrants disbarment. The Respondent is ordered to pay the costs as herein provided within ninety days after this opinion becomes final.

RESPONDENT DISBARRED. COSTS CHARGED TO RESPONDENT.

Peter Haddock, Assistant General Counsel, Oklahoma Bar Association, Oklahoma City, Oklahoma, for Complainant.

Travis A. Pickens, Edinger, Leonard & Blakley, PLLC, Oklahoma City, Oklahoma for Respondent.

COMBS, J.:

¶1 The Complainant, State of Oklahoma *ex rel.* Oklahoma Bar Association (Complainant), began proceedings pursuant to Rule 6, Rules Governing Disciplinary Proceedings (RGDP) 5 O.S. 2011, ch. 1, app. 1-A alleging three counts of professional misconduct against the Respondent, Laurie Jean Miller (Respondent). The Respondent is an active member of the Oklahoma Bar Association and is currently in good standing with the Association. For most of her career she has been a sole practitioner but has also shared offices with other attorneys. She left private practice in 2017 and took a position with an insurance company where she is currently employed.[1] The Complainant's allegations arise

from the Respondents conduct towards several of her clients she had while in private practice. The matters involved are related to three separate governmental tort claims actions. The Complainant alleges the Respondent's actions are in violation of the Oklahoma Rules of Professional Conduct (ORPC), 5 O.S. 2011, ch. 1, app. 3-A, and the RGDP and are cause for professional discipline.

I. Procedural History

¶2 Two of the Respondent's former clients filed grievances against her with the Complainant. Claudia Murcia filed her grievance on December 23, 2016 (Murcia grievance). Brian Sanders filed his grievance on November 16, 2017 (Sanders grievance). After receiving responses from the Respondent in both grievances, the Complainant opened a formal investigation into each one. The Complainant met with the Respondent several times to discuss the grievances. Thereafter, it filed its formal Complaint against the Respondent on September 17, 2018. The Respondent initially represented herself and entered an appearance and filed her Answer. Thereafter she hired an attorney to represent her. During the course of investigating the Sanders grievance the Complainant discovered information concerning another similar case. The Complainant then opened a grievance against the Respondent in this new matter concerning Respondent's former clients Cornel and Sharon Solis (Solis grievance). It also filed a Supplemental Complaint on December 21, 2018, containing these new allegations of misconduct. Respondent's attorney answered the Supplemental Complaint.

¶3 The Professional Responsibility Tribunal (PRT) held a hearing concerning these grievances pursuant to Rule 6, RGDP which occurred on two separate days; March 14, 2019 and March 25, 2019. In closing argument, the Complainant recommended the Respondent be suspended from the practice of law for one year. On June 13, 2019, the Trial Panel filed its report wherein it found the allegations of the Complaint and Supplemental Complaint had been established by clear and convincing evidence. Even after considering all the mitigating factors the Trial Panel unanimously recommended a longer suspension of eighteen months. This matter was assigned to this office on August 19, 2019.

II. Standard of Review

¶4 In Bar disciplinary proceedings, this Court possesses exclusive original jurisdiction. *State ex rel. Oklahoma Bar Ass'n v. Holden*, 1995 OK 25, ¶ 10, 895 P.2d 707. Our review of the evidence is de novo in determining if the Bar proved its allegations of misconduct by clear and convincing evidence. Rule 6.12(c), RGDP; *State ex rel. Oklahoma Bar Ass'n v. Bolusky,* 2001 OK 26, ¶ 7, 23 P.3d 268. Clear and convincing evidence is that measure or degree of proof which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. *State ex rel. Oklahoma Bar Ass'n v. Green,* 1997 OK 39, ¶5, 936 P.2d 947. Our goals in disciplinary proceedings are to protect the interests of the public and to preserve the integrity of the courts and the legal profession, not to punish the offending lawyers. *State ex rel. Oklahoma Bar Ass'n v. Kinsey*, 2009 OK 31, ¶15, 212 P.3d 1186. Discipline is administered to preserve the public confidence in the bar and to deter an attorney from similar future misconduct. *State ex rel. Oklahoma Bar Ass'n v. Phillips*, 2002 OK 86, ¶21, 60 P.3d 1030. Whether to impose discipline is a decision that rests solely with this Court and the recommendations of the PRT are neither binding nor persuasive. *State ex rel. Oklahoma Bar Ass'n v. Eakin*, 1995 OK 106, ¶ 8, 914 P.2d 644.

III. The Grievances

A. Count I. The Murcia Grievance

¶5 The first grievance was filed by Claudia Murcia (Murcia). Murcia is from El Salvador, and English is not her first language. The record reflects she uses a translator when communicating at all relevant times related to her grievance. In 2009, Murcia worked at a hotel in Norman, Oklahoma. In February of that year she was injured while riding a public bus to work. Her injuries required medical treatment and she incurred several medical bills. Murcia had health insurance at the time but chose not to file these tort-related claims with her insurance. She hired Michael Sherrod (Sherrod) to represent her in this personal injury matter. Sherrod filed a petition on February 11, 2011 against the State of Oklahoma *ex rel.* University of Oklahoma, Cleveland Area Rapid Transit, and the bus driver.[2] Since this tort claim involved a governmental entity the Oklahoma Governmental Tort Claims Act (OGTCA) applied. Sherrod, however, filed the petition within two years from the date of the accident

rather than under the provisions of the OGTCA.[3] Sherrod testified he realized he had missed the statute of limitations when the opposing side filed a motion to dismiss and thereafter he immediately informed Murcia he had missed the statute of limitations.[4] Murcia hired the Respondent in January 2012 hoping she could proceed with her case. Murcia testified that Sherrod had informed her that the statute of limitations had run prior to hiring the Respondent and that she informed the Respondent of this at their first meeting.[5] The Respondent testified Murcia had not informed her that the statute of limitations had run but told her only that her attorney could not prosecute her case any longer and was ill.[6] The Respondent testified she would not have taken Murcia's case had she known the statute of limitations had run.[7]

¶6 The Respondent reviewed the petition online and determined nothing on its face seemed out of order, so she proceeded with the representation. She first filed an application for leave to make service out of time which was quickly challenged by a motion to vacate. Not long afterwards, the opposing counsel filed a motion to dismiss. The opposing counsel also sent the Respondent a letter with an attached proposed motion for sanctions which she would file if the Respondent did not dismiss the action.[8] On September 10, 2012, the Respondent dismissed the action by filing a dismissal without prejudice.[9]

¶7 Following the dismissal, the Respondent helped negotiate a settlement between Murcia and Sherrod for any malpractice Sherrod may have made in her case. The goal was to see if Sherrod could compensate Murcia for his failure to timely file her petition, and any money received from him could be used to pay Murcia's medical bills. The Respondent agreed to help Murcia with these matters. Her contract with Murcia only concerned the tort action.[10] There is no evidence of a subsequent contract after the tort action was dismissed. In her January 17, 2017 response to the grievance, the Respondent wrote "at this point [after the case was dismissed], I realized this case is going to be done pro-bono and was in fact an attempt to help a colleague to keep from obtaining a bar complaint and a lawsuit against him."[11] She later testified that even though she realized there would be no recovery, she did not tell Murcia she would represent her pro-bono on these additional matters.[12]

¶8 On or about July 25, 2014, Sherrod settled with Murcia by providing her a quit claim deed thereby transferring land he owned in Pittsburgh County, Oklahoma.[13] Murcia authorized the Respondent to sell the land on her behalf and to apply the proceeds to her outstanding medical bills.[14] Sherrod gave the Respondent's name to a potential purchaser, Mr. Stuart, who was interested in buying Sherrod's land.[15] Mr. Stuart contacted the Respondent and they negotiated a sale of the land.[16] Murcia agreed and the property was sold on March 29, 2015 for $4,600.00 in cash.[17] On the same day, Murcia signed and presented a release of all claims to Sherrod which was prepared by the Respondent.[18] Murcia's total medical bills were $12,084.95 which exceeded the amount of the proceeds from the sale. The Respondent agreed to negotiate with the providers/collection agencies to reduce the bills.[19] The largest bill was to Therapy in Motion in the amount of $5,691.50 for physical therapy.[20] TekCollect, a collection agency, was authorized to collect this bill in December 2014 and began contacting Murcia around that time.[21] Other providers had been pursuing collection efforts as well.[22] These efforts, including Therapy in Motion's efforts to collect Murcia's debt, had begun prior to the sale of the land.[23]

¶9 After the March 29, 2015 sale took place, the Respondent took the $4,600.00 cash proceeds and placed them in a safe at her law office.[24] Murcia did not ask for the money because she wanted the Respondent to negotiate and reduce her bills to the amount of the sale proceeds and use that money to pay those bills.[25] This was their agreement and she trusted the Respondent to do this.[26] The Respondent had an Interest on Lawyers Trust Account (IOLTA) at the time she placed the money in her safe.[27] She testified she was confused as to what to do with cash.[28] She was not accustomed to getting cash, and she thought she would be safekeeping the money by just placing it in her safe.[29]

¶10 Murcia continued receiving calls from collection agencies regarding these medical bills.[30] In 2016, for approximately five months she tried to get proof from the Respondent that her bills had been paid.[31] Murcia's grievance alleged that the Respondent kept "putting off sending me them [proof of payment of her medical bills]."[32] The record reflects that in December 2016 Murcia and the Respondent corresponded over several days via a series of

text messages.[33] An excerpt of those messages is as follows:

Date unknown presumably early December 2016:

Murcia: Ms. Laurie sorry for bothering you it's just that I'm worried about my case. It has been more than 2 months since you told me the case was closed and I still haven't received any proof that the case was truly closed. Or is there something happening I don't know of in the case?

Respondent: It's over I just have been swamped!

Murcia: When will I receive the papers for sure? Or will I pick them up at your office?

Respondent: Next Monday.

Murcia: Okay I will be expecting them next Monday thank you. Sorry for bothering you.

Monday, December 12, 2:38 PM.

Murcia: Ms. Laurie please don't forget you were going to send me the papers today by email.

Respondent: All I have is the check that says paid in full-it's at my accountants office – she is going to send me a copy of it.

Monday, December 12, 4:25 PM.

Murcia: When will you send it to me?

Respondent: Yes as soon as I get it from her.

Murcia: Okay what is left to finish this case? I want to be done with all of this.

Respondent: It's done. The last bill to be paid was the PT bill and we settle for what was paid on the land – can't even remember the amount now.

Murcia: I just want proof that everything is paid for....

Friday, December 16, 8:41 AM and repeated again at 2:14 PM.

Murcia: Good morning. I am frustrated that I can't get concrete answers or proof of how my case is going and that is something I should be kept up to date in. If by Tuesday I haven't received anything from you I will go the OBA's.

Monday, December 19, 10:03 AM.

Murcia: Are you going to send the proofs today yes or no?

Respondent: Yes. I haven't been in the office since Thursday.

Murcia: Okay send it to me by email please.

Respondent: Ok – I will be in this afternoon.

Murcia: Ok thank you.

Monday, December 19, 4:05 PM.

Murcia: Please Ms Laurie don't forget the copies before you leave your office.

Respondent: It's a check to TekCollect on 7-22-16 – we are trying to find a copy of the check – the accountant has all my stuff. It was the amount of the check for the sale of the land – Still looking.

Murcia: Send it to me asap please.

¶11 In Murcia's May 2017 reply letter, she attaches additional text messages between her and the Respondent.[34] In those text messages Murcia asks about the other medical bills besides the one to Therapy in Motion. The Respondent unequivocally states "we already paid those." In another text message Murcia asks for "proof that all the places are paid and that the case is closed." The Respondent replied "[o]k ...I don't have any releases but I can give you copies of checks...I put paid in full on checks. Sorry I haven't sent them. I was crazy swamped before I left. I will email the checks to you." No checks were ever emailed to Murcia. The Respondent later testified she had never seen a check that said "paid in full."[35] These texts also include the Respondent telling Murcia she had filed a lawsuit against Therapy in Motion. The lawsuit was premised upon new case law that held a provider was prohibited from choosing not to file an insurance claim. No lawsuit was ever filed.

¶12 Murcia is desperately trying to receive proof that after over a year since the Respondent received the $4,600.00 her medical bills have been negotiated and paid. These text messages clearly show the Respondent is telling her that not only has the PT bill been paid, which is the bill from Therapy in Motion and being collected by TekCollect, but it was the last one and "[i]t's done." She is clearly indicating to her client that all her medical bills have been paid. She even tells Murcia on a specific date,

July 22, 2016, she paid the amount owed to TekCollect by check. The Respondent's later excuse for not sending her a copy of the check is that it is with her accountant. This is so even though she had previously indicated to Murcia that she had multiple checks and was going to email them to her. On December 23, 2016, without receiving any proof that her bills had been paid, Murcia filed a grievance with the Complainant.[36]

¶13 On January 17, 2017, the Respondent replied to the grievance.[37] In approximately one month from the date of these last text messages, the Respondent's story has changed from what she told Murcia. She tells the Complainant that she had to pay the Therapy in Motion bill with a credit card on her operating account and therefore she did not have a receipt. This assertion contradicts her story to Murcia that she paid it with a check on July 22, 2016. She further claims her bank account had been purged due to identity theft, and she could not get a copy of her bank statement. In addition and without providing any context, she mentions that a lien placed on Murcia's case by Therapy in Motion had been released. Her letter concludes that Murcia "never advised me she was going to file a bar complaint." However, Murcia clearly warned her in the text messages that she would file a grievance if she did not receive the information she needed; "I will go to OBA's."

¶14 On February 2, 2017, Debbie Maddox (Maddox), the OBA Assistant General Counsel, emailed the Respondent requesting a copy of the credit card receipt or statement showing the payment to Therapy in Motion. This was not provided so Maddox sent the Respondent a follow-up letter on March 31, 2017 warning her if she did not provide this information within five days she would upgrade this matter to a full disciplinary investigation.[38] In her response, the Respondent states the credit card payment was made in September 2015 and her account was closed due to identity theft during that period.[39] Additionally, she claims to have contacted Therapy in Motion but they had no record of the payment, and she claims TekCollect did not report the payment to Therapy in Motion. She also claims on numerous occasions she told Murcia there was not enough money from the sale to pay all the bills. She blames a language barrier as the reason for Murcia's misunderstanding and claims she tried to have an interpreter with her when they met but that was not always possible. This point was strongly contested by Murcia. Murcia had always brought either her daughter or her husband to any meeting she had with the Respondent, and they understand and speak English.[40] Her letter also curiously states that when the property was sold to Mr. Stuart he paid with a "money order" which was clearly not the case; it was paid in cash and the Respondent had actually signed the receipt and marked it as paid in cash.[41] Ex. 25.

¶15 On April 14, 2017, Maddox opened this matter for formal investigation.[42] In her May 3, 2017 response, the Respondent provided more detailed information.[43] She claims the sale of the property to Mr. Stuart occurred in September 2015, the same time frame she is claiming she paid Therapy in Motion with a credit card. However, all the evidence in the record, the receipt from the sale, the deeds conveyed, clearly indicate the sale occurred on March 29, 2015.[44] She explains that in 2016 she threatened suit against Therapy in Motion based upon new case law but later realized it was not applicable to Murcia so the lawsuit was not filed. Afterwards, she claims Murcia only wanted "some of her bills paid." The Respondent focused on Therapy in Motion because it was the only provider that had a lien on file. She alleged Therapy in Motion agreed to take $4,600.00 and the Respondent was required to pay this amount with a credit card; she did not have a credit card on her trust account so she deposited the money into her operating account and paid with the operating account's credit card. Following her statement about making this payment she writes "[t]he lien on her case was released." However, the lien she is referring to had nothing to do with any payment made on Murcia's behalf.[45] The lien filed by Therapy in Motion was originally made August 2, 2010.[46] It was later amended on December 12, 2011 and named the Department of Central Services as an insurance company.[47] On December 4, 2012, the lien was released and stated "payment was received by the undersigned [Therapy in Motion]." This lien release occurred over two years before the sale of the property (March 29, 2015). Therefore, it would be impossible for the Respondent to understand that the sale proceeds were somehow responsible for Therapy in Motion releasing its lien. But that is clearly her implication in her response to the Complainant.[48] At the PRT hearing a former employee of Therapy in Motion testified that the lien release was made due to the State informing them that no lien could be placed upon the

State.[49] The reason the lien release said payment had been received was due to the use of a standard form and that statement was in error.[50] Representatives from both Therapy in Motion and TekCollect testified that no payments of any kind had ever been received on behalf of Murcia.[51] The representative from TekCollect acknowledged the Respondent's efforts to reduce Murcia's bill, but TekCollect informed her it would not take less than eighty percent of the amount owed.[52] Still no payment was ever made.[53]

¶16 The Respondent further explained to the Complainant that her identity was stolen during August through October of 2015, the period she claims she paid TekCollect with a credit card.[54] She claims her account was closed and was purged from her bank's system. She also claims she advised Murcia of this and then attempted to contact her accountant but found out her accountant had died and there was no way to get these records. When she contacted Therapy in Motion they no longer had Murcia's file in their system. She again claims she informed Murcia numerous times there was not enough money to pay all of her bills and blames the language barrier for Murcia's misunderstanding. She then tells the Complainant that Murcia has not paid any of the attorney fees and costs they agreed to in the contract. However, her contract with Murcia was a contingency fee contract which states "[i]n the event of failure of recovery, the Attorney shall claim no compensation from Client."[55] It is clear the Respondent dismissed the original lawsuit due to the statute of limitations having already run. The record provides no evidence of any new contract being made after the lawsuit was dismissed.

¶17 The Respondent's brief states she voluntarily provided her bank records to the Complainant.[56] However, the Complainant was forced to issue a subpoena duces tecum on February 5, 2018 when they did not receive requested bank account records.[57] The subpoena covered all bank accounts of the Respondent including her IOLTA and operating account as well as personal accounts.[58] The records from the bank covered the period from January 1, 2014 to February 5, 2018.[59] The bank also wrote the OBA investigator explaining the Respondent's law firm business account was "charged off" from March 20, 2015 to March 14, 2016 and is currently active after that period.[60] The letter states the term "charged off" means the account was overdrawn for more than thirty days and was automatically closed. During this period, no activity could occur on that account. However, the Respondent told the Complainant she paid the Therapy in Motion bill with a credit card in September 2015 which was during this period.[61] The letter from the bank to the OBA investigator does not specify if identity theft was involved. Regardless of whichever account she could have paid from, the OBA investigator testified none of her accounts showed a deposit of $4,600.00 or any payments made to cover Murcia's bills.[62]

¶18 At the PRT hearing, the Respondent was questioned about her different explanations as to how Murcia's bills were paid. In one instance she told Murcia she paid by a check on a certain date but then told the Complainant she paid with a credit card on a different date. Her response was that those statements might be interpreted as inconsistencies but they were not anything that would require "that that is not the truth."[63] The assistant general counsel then asked her, "one of these statements, or both, are false, are they not" to which she replied "[t]hey were not false at the time I made them."[64] When asked about her communications to Murcia concerning the supposed July 22, 2016 check payment she responded "I was truthful in what I told her at the time I made the message."[65] The Respondent acknowledged there was no check or credit card payment.[66] Her testimony also reflected she was hoping the OBA could find evidence of a payment in one of her bank records.[67]

¶19 The Trial Panel members also questioned the Respondent about the $4,600.00 she put into her safe and why she did not just pay Murcia when she first met with the OBA. The Respondent testified, "[w]ell, obviously, I mean, there – there was no money in the safe. I mean I don't know what happened to the money during this period. I just don't know."[68] She could not even remember when she first discovered the money was missing.[69] She also testified she did not inform Murcia that the money was no longer in her safe.[70] The record does not reflect she reported the missing money as stolen.

B. Counts II and III. The Sanders and Solis Grievances

¶20 The Respondent was hired to represent the Sanders and Solis families in their actions against the Shawnee Public Schools. The OGTCA

was applicable to each case. In both cases Shawnee Public Schools did not respond to the tort claim letters. The petitions were filed on May 3, 2016. However, due to a leap year miscalculation, they were filed one day late.[71] The Respondent testified she had worked on these cases with another attorney, Steven Crow (Crow).[72] In her response to the Complainant she stated Crow was the lead counsel, however, she admitted at the hearing neither attorney was considered the lead counsel and she was equally responsible for whatever happened in those cases.[73] She and Crow shared responsibilities when working on education cases, and both met with the Sanders and Solis families together on the same day.[74] Crow testified that he believed he was the one who miscalculated the date to file the petitions.[75] However, the petitions were both prepared and signed by the Respondent and she was the one who had them filed.[76]

¶21 On July 3, 2017, Shawnee Public Schools filed a motion to dismiss in each case.[77] The grounds for dismissal were clearly specified in the motions and were based on the petitions being filed outside of the statute of limitations. On July 20, 2017, the Respondent signed and filed a dismissal without prejudice in each case.[78] She testified she did not learn the motions were based on a failure to meet the statute of limitations until the bar grievance was filed.[79] She claims she did not read the motions at the time she filed her dismissals; "I don't know what I was doing at the time, but I was too busy to stop and read the pleading."[80] The Respondent's explanation was she and Crow received motions to dismiss in about ninety percent of these education cases and Crow would be the one to review the pleadings then inform her of what to do, e.g., file a dismissal without prejudice because they needed more time to get additional information.[81] She testified that Crow told her to file a dismissal, and she did not question it or ask why.[82] Crow testified he believes he ultimately made the decision to file the dismissals without prejudice.[83]

¶22 After the dismissals were filed, neither attorney notified the Sanders or the Solis families of the dismissal. On September 21, 2017, the Respondent sent Mr. Sanders a letter informing him that she is closing her legal practice and "I leave your case in good hands."[84] The letter does not mention she had filed a dismissal without prejudice in his case. The letter also indicates that she was transferring his file to Crow. The record does not include a similar letter to the Solis family. Both clients testified that the Respondent never notified them of the dismissal of their cases.[85] The Respondent testified that if she had thought the dismissals had ended their cases permanently she would have notified them.[86] She and Crow were also looking at other possible theories of recovery under federal constitutional claims therefore she did not think it was important to provide information of the dismissal.[87] However, she admits that a failure to meet the statute of limitations would have been a critical error to the OGTCA claims.[88] She now believes that she should have notified her clients of the dismissals.[89] Mr. Sanders testified that a few months after he received the letter he decided to retain another attorney rather than proceed with Crow.[90] The new attorney is the one who informed him that his case had been dismissed for failing to meet the statute of limitations.[91] The first time the Solis family heard their case had been dismissed was when they were contacted by the OBA investigator.[92]

IV. The Rule Violations

¶23 The Trial Panel filed its report on June 13, 2019. The report found the Complainant had proven by clear and convincing evidence the Respondent violated Rules 1.3 (Diligence)[93], 1.4 (Communication)[94], 1.15 (Safekeeping Property)[95], 8.4(a) and (c) (Violating Rules of Professional Conduct/Engaging in Conduct Involving Dishonesty, Fraud, Deceit or Misrepresentation)[96] ORPC and Rule 1.3 (Discipline for Acts Contrary to Prescribed Standards of Conduct)[97] RGDP in the Murcia case. It also found the Respondent violated Rules 1.1 (Competence)[98], 1.3 (Diligence), 1.4 (Communication), and 8.4 (a) (Violating Rules of Professional Conduct) ORPC as well as Rule 1.3 (Discipline for Acts Contrary to Prescribed Standards of Conduct) RGDP in both the Sanders and Solis cases.

¶24 In the Murcia case the Respondent argues she did everything she could for Murcia and she communicated with her at all hours of the day without any restrictions. However, it cannot be said she acted diligently on behalf of her client. The Respondent testified she had even closed Murcia's file at one point as if the case was concluded when there were outstanding medical bills left to be paid.[99] For years the bills were left unpaid and Murcia's credit report reflected this fact.[100] She kept stringing Murcia along and never gave her the information she requested. Her communications with Murcia

may have been frequent but they were full of misrepresentations.

¶25 For conduct to constitute a Rule 8.4 (c) ORPC violation the misrepresentation must be shown by clear and convincing evidence that the declarant had an underlying motive, i.e., bad or evil intent, for making the statement. *State ex rel. Oklahoma Bar Assn' v. Johnston*, 1993 OK 91, ¶16, 863 P.2d 1136. An intent element is required and the OBA must adequately show the attorney had a purpose to deceive. *State ex rel. Oklahoma Bar Ass'n v. Besly*, 2006 OK 18, ¶43, 136 P.3d 590. Here, the evidence shows a clear purpose as to why the Respondent misrepresented she had paid the providers. The $4,600.00 sale proceeds were no longer in her safe, it just disappeared. She never communicated this fact to Murcia. We find clear and convincing evidence that she not only intentionally deceived her client about the bills being paid but she intended to deceive the Complainant as well by repeatedly telling them at least one provider had been fully paid. The evidence shows no provider had ever been paid and the sale proceeds were never deposited into any bank account. Her motive for the deception is that the money was no longer in the safe. She could not account for what happened to it nor could she even recall when she discovered it was no longer there. Nor did she claim it was stolen.

¶26 It is clear that the Respondent did not safeguard this money properly when she placed it into her safe rather than in her IOLTA account. Rule 1.15 (a) ORPC treats funds separately from other property. It provides that "funds shall be kept in a separate account.... Other property shall be identified as such and appropriately safeguarded." Comment 1 to the rule provides "[a]ll property that is the property of clients ... must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts." The money from the sale of the property was not deposited into any bank account let alone a client trust account.

¶27 The Complainant asserts in its brief that the Respondent's actions constitute misappropriation of Murcia's funds. Although the Trial Panel did not make a specific finding of misappropriation, this Court is not bound by the trial authority's findings or its assessments as to weight or credibility of the evidence. *State, ex rel. Oklahoma Bar Ass'n v. Raskin*, 1982 OK 39, ¶11, 642 P.2d 262. This Court has explained many times the three levels of culpability regarding the mishandling of client funds. The three levels are commingling, simple conversion, and misappropriation. *State ex rel. Oklahoma Bar Ass'n v. Combs*, 2007 OK 65, ¶13, 175 P.3d 340. Misappropriation is the most serious offense of the three. It is not merely simple conversion, i.e., the use of a client's funds for a purpose other than that for which they are intended, but additionally involves an element of deceit and fraud. *Id.*, ¶¶15-16. It occurs when a lawyer purposefully deprives a client of money through deceit and fraud. *Id.*, ¶16. In *State ex rel. Oklahoma Bar Ass'n v. Mayes*, we held an attorney who represented to the Court that he was holding monies intended for two minor children when those funds had actually been spent on him and his secretary constituted misappropriation. 2003 OK 23, ¶¶19-22, 66 P.3d 398. It was clear he committed simple conversion but his own actions of deceit propelled this Court to find he committed misappropriation. *Id.*, ¶22. This was so even though the Complainant did not allege misappropriation nor was there any evidence presented that the client suffered economic harm. *Id.*, ¶¶20-21.

¶28 The $4,600.00 proceeds from the sale of the property were not used for their intended purpose, i.e., to pay Murcia's medical bills. This fact alone constitutes simple conversion. However, the Respondent repeatedly explained to her client and to the Complainant that the money had been used to pay Murcia's medical bills, which was completely false. This was not mere carelessness or forgetfulness as the Respondent would like us to believe. These false statements happened over a period of time in which she could have corrected any errors in her statements. The disappearance of the sale proceeds combined with the Respondents many misrepresentations provide clear and convincing evidence that she purposefully deprived her client of money through deceit and fraud. We find her actions constitute misappropriation.

¶29 We hold the Complainant has proven by clear and convincing evidence the Respondent violated Rules 1.3, 1.4, 1.15, 8.4 (a) and (c), ORPC and Rule 1.3, RGDP.

¶30 Rule 1.1, ORPC, requires a lawyer to "provide competent representation to a client." In both the Sanders and Solis grievances, the Respondent failed to file their lawsuits timely under the OGTCA. This was due to a leap year miscalculation, and she did not check the filing

date calculated by Crow prior to filing the petitions. When her office received the motions to dismiss in each case she did not read them to determine the grounds for the motions. She instead just filed a dismissal without prejudice in both cases. She never informed her clients of the motions to dismiss nor of the dismissals without prejudice. Her clients had to find out from other attorneys that their cases were dismissed. She claims she would have told her clients of the dismissals had she known the petitions were actually filed out of time. If she had read the motions to dismiss she would have realized this, however, she testified she was too busy to do that. Her actions show a lack of diligence and failure to communicate with her clients. She did not provide competent representation in either matter.

¶31 We hold the Complainant has proven by clear and convincing evidence the Respondent violated Rules 1.1, 1.3, 1.4, 8.4 (a), ORPC and Rule 1.3, RGDP.

V. DISCIPLINE

¶32 Discipline is imposed to preserve public confidence in the Bar. *State ex rel. Oklahoma Bar Ass'n v. Phillips,* 2002 OK 86, ¶21, 60 P.3d 1030. In all three cases the Respondent's clients testified to having a negative experience with the legal profession due to the Respondent's conduct.[101] Our goal is not to punish but to gauge an attorney's continued fitness to practice law in order to safeguard the interest of the public, the courts and the legal profession. *Id.* This Court also administers discipline to deter an attorney from similar future conduct and to act as a restraining vehicle on others who might consider committing similar acts. *State ex rel. Oklahoma Bar Ass'n v. Townsend*, 2012 OK 44, ¶31, 277 P.3d 1269. Discipline is fashioned to coincide with the discipline imposed upon other attorneys for like acts of professional misconduct. *Id.* This Court strives to be even-handed and fair in disciplinary matters, yet discipline must be decided on a case-by-case basis taking into account the unique transgressions and mitigating factors. *State ex rel. Oklahoma Bar Ass'n v. Mayes,* 2003 OK 23, ¶25, 66 P.3d 398.

¶33 In *State ex. rel. Oklahoma Bar Ass'n v. Ferguson,* an attorney was suspended from the practice of law for ninety days for conduct that amounted to simple conversion of client funds. 1960 OK 229, 356 P.2d 734. The Bar had recommended a six month suspension, but the Court weighed Ferguson's actions. Ferguson testified he believed the $650.00 was spent by him, but due to his emotional state and inebriation during that period he was not sure how it was spent. *Id.*, ¶3, ¶8. Following a judgment against his client he made restitution by paying the $650.00 and court costs. *Id.*, ¶7. The opinion made no findings of dishonesty and noted his cooperation in answering questions many of which he could have refused to answer. *Id.*, ¶¶ 9, 26. In addition, this Court found he had no previous record or even "hint or breath of trouble or scandal against his name." *Id.*, ¶23.

¶34 In *State ex rel. Oklahoma Bar Ass'n v. Hensley,* this Court suspended an attorney for a period of two years for commingling client funds. 1977 OK 23, ¶12, 560 P.2d 567. Following judgment in a wrongful death case, Hensley deposited a draft from an insurance carrier into his trust account, but he used this account for personal and office expenses as well. *Id.*, ¶3. Hensley began withdrawing these funds from his account for personal and office use while lying to his clients that the draft would not be honored because the insurance company was filing an appeal. *Id.*, 4. He did eventually pay his clients the proceeds they were owed. *Id.*, 5. The Court noted Hensley was only being charged with commingling of funds under the 1971 disciplinary rules. *Id.*, ¶¶7-8. There was no discussion about misappropriation even though Hensley clearly lied to his clients in order to delay payment to them. The Court determined it would not follow the trial authority's recommendation to disbar him but instead chose to suspended him for two years. *Id.*, ¶12. The decision was strongly influenced by the fact Hensley, after a twenty-five year practice, had never been disciplined. *Id.*, ¶8.

¶35 A finding that an attorney misappropriated funds, however, mandates the imposition of harsh discipline regardless of exceptional mitigating factors. *State ex. rel. Oklahoma Bar Ass'n v. Mansfield*, 2015 OK 22, ¶18, 350 P.3d 108. In Mayes, this Court imposed disbarment as discipline. 2003 OK 23, ¶32. In addition to the fact that the attorney was found to have misappropriated his client's funds, we emphasized his failure to cooperate with the grievance process. *Id.* We noted the attorney attached misleading documents to his reply to the grievance. *Id.*, ¶22. The Complainant was also forced to subpoena his bank records after he failed to provide the requested documents. *Id.*

¶36 This Court has held disbarment was warranted in other cases involving misappropriation. *State ex rel. Oklahoma Bar Ass'n v. Doris,* 1999 OK 94, ¶¶40-43, 991 P.2d 1015 (Disbarring an attorney after finding he committed misappropriation of client funds by repeatedly telling his client he would pay the client but never did); *State ex rel. Oklahoma Bar Ass'n v. Gray,* 1997 OK 140, ¶¶30-33, 948 P.2d 1221 (Disbarring an attorney for misappropriating funds of his law firm for his own personal use even though he had an otherwise unblemished career and had suffered family and financial problems).

¶37 The offending conduct in *Mayes* is similar to that in the present matter. The Respondent repeatedly lied to the Complainant as well as her client concerning the payment of certain medical bills. She made further misrepresentations to the Complainant by referring to the lien release and attaching a copy of the same in her response to the grievance.[102] The record clearly shows this lien release could not possibly have been based on any payment made by the Respondent. These misrepresentations combined with the fact that the Complainant was forced to subpoena the Respondent's bank records show a failure to cooperate in the grievance process.

¶38 In addition to the Respondent's misappropriation of her client's funds, her other misconduct has been found to warrant discipline. In *State ex rel. Oklahoma Bar Ass'n v. Whitebook*, an attorney who failed to provide competent representation, failed to act with diligence, failed to keep clients reasonably informed, failed to comply with reasonable requests for information, and failed to charge a client a reasonable fee warranted a suspension of two years and one day. 2010 OK 72, ¶17, 242 P.3d 517. In *State ex rel. Oklahoma Bar Ass'n v. Beasley,* an attorney who failed to act with diligence, failed to communicate with clients, failed to refund unearned fees, and failed to provide information to the Bar was suspended for two years and one day. 2006 OK 49, ¶44, 142 P.3d 410.

¶39 The Respondent has offered evidence to mitigate her discipline. She ultimately paid the $4,600.00 to Murcia after the grievance was filed. She was the primary care giver to her ailing father prior to his death during the time she represented Murcia, Sanders and Solis. Her father-in-law also died sometime during this period. She testified to having physical and emotional problems during this period which included back surgery, anxiety and depression. The Trial Panel reviewed these mitigating factors but believed the one year suspension recommended by the Complainant was not enough. It recommended she be suspended for eighteen months.

¶40 We agree with the Trial Panel that the Complainant's recommendation does not provide adequate discipline. However, we disagree with its recommendation. Even considering the Respondent's mitigation evidence as well as the fact that the record is devoid of any previous discipline, the totality of her misconduct is disturbing. It is our difficult duty to withdraw a license to practice law but we shall if necessary to protect the interest of the public and the legal profession as a whole. The record is laden with inconsistent statements and unbelievable explanations. Most disturbing of which is the Respondent's difficulty in discerning the truth. Her testimony that the false statements she made to her client were somehow true at the time she made them is incredulous. A mistaken statement may be made; however, *truth* is not malleable. Honesty in the performance of a lawyer's professional activities is the foundation upon which his or her license stands. We hold the sum of the Respondent's misconduct warrants disbarment. Accordingly, it is ordered by this Court that the Respondent be disbarred and her name be stricken from the roll of attorneys licensed to practice law in this state.

VI. ASSESSMENT OF COSTS

¶41 The Complainant filed an application to assess costs on June 13, 2019. The total amount assessed was $6,669.19, the majority of which concerned the two transcripts covering 667 pages. The Complainant requests these costs be paid by a certain date. The Respondent objects to the application because: 1) the Trial Panel report did not recommend the payment of costs; and 2) she is unable to pay the costs. Rule 6.13, RGDP provides in pertinent part:

> Within thirty (30) days after the conclusion of the hearing, the Trial Panel shall file with the Clerk of the Supreme Court a written report which shall contain the Trial Panel's findings of fact on all pertinent issues and conclusions of law (including a recommendation as to discipline, if such is found to be indicated, and a recommendation as to whether the costs of the investigation, record

and proceedings should be imposed on the respondent). . . .

The Respondent is correct that the Trial Panel Report did not make a recommendation for the Respondent to pay the costs of the proceeding. However, the Trial Panel's recommendations are only advisory to this Court. *State ex rel. Oklahoma Bar Ass'n v. Townsend,* 2012 OK 44, ¶10, 277 P.3d 1269. Rule 6.15, RGDP provides: "(a) The Supreme Court may approve the Trial Panel's findings of fact or make its own independent findings, impose discipline, dismiss the proceedings or take such other action as it deems appropriate." We deem the payment of costs in this matter to be appropriate. Rule 6.16, RGDP requires a disciplined lawyer to pay the costs of the disciplinary proceeding within 90 days after the Supreme Court's order becomes effective unless the costs are remitted in whole or in part by the Court for good cause shown. The Respondent alleges in her June 20, 2019 objection that she is unable to pay the costs "at this time" and that alone is "good cause to not order her to pay same." The record established the Respondent is employed and her objection provides no evidence to support her claim. The Respondent is ordered to pay the cost of this proceeding in the amount of $6,669.19 within ninety (90) days after this opinion becomes final.

RESPONDENT DISBARRED. COSTS CHARGED TO RESPONDENT.

¶42 Darby, V.C.J., Winchester, Combs, and Kane, JJ., Rowland, S.J., concur.

¶43 Gurich, C.J. and Kauger **(by separate writing)**, J., concur in part; dissent in part.

¶44 Edmondson and Colbert, JJ., dissent.

KAUGER, J., with whom **GURICH, C.J.** and **EDMONSDON, J**., join, Concurring in Part and Dissenting in Part.

¶1 The respondent's actions warrant discipline. Her actions were clearly wrong and in violation of the Code of Professional Responsibility.

I would follow the recommendation of the PRT of an eighteen month suspension.

¶2 The respondent was licensed in 2003. The matters that brought the respondent into the disciplinary process began in 2012. The respondent was involved in three tort claim actions. Two of the matters involved a failure to timely file actions under the Oklahoma Governmental Tort Claims Act, (OGTCA) 51 O.S. 2011 §151 et seq. The second attorney testified, as noted in the majority opinion, that he believed he miscalculated the erroneous filing dates that caused the matter to be untimely filed. The petitions were prepared and signed by the respondent.

¶3 The third matter, the Murcia complaint, involved the representation of a client in another governmental tort claim after another attorney had failed to timely file a timely claim under OGTCA. In negotiating a settlement with this attorney, respondent received $4,600 in cash for the client, which was not placed in her client trust account, but was placed in her office safe and not accounted for. Respondent paid Murcia years later and only after the complaint was filed. Nevertheless, she did not acknowledge her responsibility for the failure to pay the complainant, and was dishonest during the investigation.

¶4 This court must impose discipline in a manner consistent with that imposed on other attorneys whose actions are similar to avoid disparate treatment.[1] Mitigating circumstances are also considered in assessing the appropriate discipline.[2] There are mitigating circumstances in the third and most extensive complaint, the Murcia complaint. The respondent moved her office three times, had major back surgery, was suffering from depression, and lost family members during the tenure of both the Murcia matter and during the investigation by the Bar of the complaints. She did not take a fee for her work in obtaining money from the original counsel in the matter who failed to timely file the original case. The monies received were in cash, and the respondent placed the monies in her office safe for safekeeping. There is no evidence of the conversion of funds by Miller. In the other two matters, there was another attorney involved who was involved in the legal work, with respondent involved in the administrative work of the cases. Avenues of legal redress remain for the complainants in these matters.

¶5 The PRT recommended an eighteen month suspension. In similar matters, attorney falsehoods have resulted in the imposition of disparate levels of discipline, including disbarment. The Court disbarred the respondent in State *ex rel.* Oklahoma Bar Ass'n v. Mayes, 2003 OK 23, ¶ 1, 66 P.3d 398. Mayes had complaints filed against him alleging two counts of professional misconduct involving the mishandling and misappropriation of settlement funds belonging to minors and the failure to cooperate

in the grievance process. The Court found that there was clear evidence of client fund misappropriation. The respondent was also a "multiple offender." Shortly before his disbarment proceeding, this Court had suspended him for six months. In that instance, for his failure to supervise his non-lawyer office manager. He had, because of this failure, unwittingly received, some of a client's personal injury settlement proceeds, which the office manager had converted or commingled. State *ex rel.* Oklahoma Bar Ass'n v. Mayes, 1999 OK 9, 977 P.2d 1073, as corrected (Feb. 23, 1999).

¶6 We disbarred the respondent in State *ex rel.* Oklahoma Bar Ass'n v. Moss, 1983 OK 104. 682 P.2d 205. There, the attorney asked a client to make a false affidavit and paid her to make an affidavit. Then, he submitted the false affidavit to the Bar Association and lied about the falsity of the affidavit.

¶7 Conversion of the funds of two clients for personal use, including the monies for a tax payment and untrue statements that he had made the tax payment also resulted in the attorney's disbarment in State *ex rel.* Oklahoma Bar Ass'n v. Raskin, 1982 OK 39, 642 P.2d 262, 264.

¶8 An attorney who received a second disciplinary complaint during the pendency of the first complaint, involving neglect of cases, misrepresentations to clients and misuse of client funds , submitted his resignation from the bar. State *ex rel.* Oklahoma Bar Ass'n v. Skof, 1989 OK 58, 772 P.2d 394. The attorney who was the subject of State *ex rel.* Oklahoma Bar Ass'n v. Hensley, 1983 OK 32, 661 P.2d 527, was disbarred, in part, for misrepresentations made to the court directly and in pleadings.

¶9 However, disbarment appears to be the exception rather than the rule in cases similar to this matter. In State *ex rel.* Oklahoma Bar Ass'n v. Dobbs, 2004 OK 46, 94 P.3d 31, the disciplined attorney had a history of falsehoods and concealments in responses to depositions, in the representation of facts to the Oklahoma Corporation Commission, and in matters before the Oklahoma Bar Association. He received a two year and one day suspension.

¶10 In State *ex rel.* Oklahoma Bar Ass'n v. Northrop, 1987 OK 96, ¶¶ 1-2, 746 P.2d 673, the respondent made bad faith representations to a tribunal and to opposing counsel with the intent to circumvent a settlement agreement. He was suspended for two years.

¶11 In State *ex rel.* Oklahoma Bar Ass'n v. Askins, 1993 OK 78, 882 P.2d 1054, the attorney made an "affirmative misrepresentation" to the court and filed misleading documents with the court. She received a two year suspension.

¶12 In State *ex rel.* Oklahoma Bar Ass'n v. Peveto, 1980 OK 182, 620 P.2d 392, an attorney found guilty of neglecting clients' affairs and knowingly making false statements to clients and to the courts received a one year suspension from the practice of law.

¶13 In State *ex rel.* Oklahoma Bar Ass'n v. Farrant, 1994 OK 13, ¶1, 867 P.2d 1279, the attorney converted client funds and lied to the Oklahoma Bar Association. He received a one-year suspension followed by a probationary period of one year accompanied by weekly attendance at AA meetings and monthly sessions with a professional counselor.

¶14 In State *ex rel.* Oklahoma Bar Ass'n v. Brown, 1989 OK 75, ¶10, 773 P.2d 751, the attorney falsely endorsed a check; failed to promptly notify his client of the receipt of his funds; mislead his client concerning the distribution of the funds; and lied under oath during a deposition. He received a six month suspension.

¶15 In State *ex rel.* Oklahoma Bar Ass'n v. Johnston, 1993 OK 91, 863 P.2d 1136, an attorney who commingled and converted funds, made a false statement to the court, exhibited professional incompetence, and both failed to act promptly while representing his clients, and failed to communicate with clients received a four month suspension from the practice of law.

¶16 In State *ex rel.* Oklahoma Bar Ass'n v. Ferguson, 1960 OK 229, 356 P.2d 734, 738, the subject of the disciplinary action was an attorney who became drunk and somehow lost the money his client gave him to settle an action against the client. The attorney also failed to notify the client that the case had been set for trial and that, as a result, there was a judgment against him. He was suspended for ninety days; the Court having noted that the attorney was having marital difficulty, and mislaid the money while drunk. The then disciplinary arm of the Oklahoma Bar Association had recommended to the Court a suspension of six months.

¶17 In State *ex rel.* Oklahoma Bar Ass'n v. Layton, 2014 OK 21, ¶¶ 0 - 1, 324 P.3d 1244,1245, the complainant charged the respondent with

one count of professional misconduct associated with her prosecution of three men in a rape trial. The Bar Association alleged that the respondent: 1) neglected to disclose to the court and opposing counsel that her witness was going to testify inconsistently with his previous police statement; and 2) falsely denied that she had spoken to the witness before and/or during the trial. The Bar Association sought the some term of suspension and the payment of costs. The Professional Responsibility Tribunal (PRT) recommended a public censure. This court imposed no discipline.

CONCLUSION

¶18 The Court's responsibility in an attorney discipline proceeding is not to punish, but to inquire into and gauge a lawyer's continued fitness to practice law, with a view to safeguarding the interest of the public, the courts, and the legal profession. Discipline is imposed to maintain these goals, rather than as punishment for the lawyer's misconduct.[3] Every disciplinary proceeding presents unique issues. However, based on the history of at least somewhat comparable matters, the discipline imposed by the majority appears erratic and inconsistent.

COMBS, J.:

1. She is currently employed as a field litigation counsel for the insurance company; Tr. Vol. 2 at 392.
2. CJ-2011-243, District Court of Cleveland County, Oklahoma; Ex. 30.
3. Tr. Vol. 2 at 547, 559.
4. *Id.* at 549.
5. Tr. Vol. 1 at 66-67.
6. Tr. Vol. 2 at 308.
7. *Id.* at 314; Ex. 9.
8. Ex. 37.
9. Tr. Vol. 2 at 320.
10. Ex. 1.
11. Tr. Vol. 2 at 446; Ex. 2.
12. Tr. Vol. 2 at 446.
13. Ex. 22.
14. Tr. Vol. 1 at 42; Ex. 1.
15. Tr. Vol. 2 at 554.
16. Ex. 2.
17. Exs. 23-25.
18. Tr. Vol. 2 at 507; Ex. 44.
19. Exs. 2 and 4.
20. Tr. Vol. 1 at 33.
21. Ex. 17.
22. Exs. 12, 13, and 15.
23. *Id.*; Ex. 16; Tr. Vol. 2, 369.
24. Tr. Vol. 2 at 330.
25. Tr. Vol. 1 at 73; Tr. Vol. 2 at 354-55, 448-49.
26. Tr. Vol. 1 at 42.
27. Tr. Vol. 2 at 355, 454.
28. *Id.* at 355-56, 395; When asked why she did not put the cash into her trust account, the Respondent testified: "This – money was different, than, like, trust money. And, I mean, I was used to, ... workers' comp cases coming in, and ... I'd put the money in my trust account and then distribute out the money. . . .in my head, it wasn't something that belonged in my trust account."
29. *Id.* at 355, 454.
30. Tr. Vol. 1 at 33.
31. *Id.* at 39; Ex. 1.
32. Ex. 1.
33. Ex. 4.
34. Ex. 11.
35. Tr. Vol. 2 at 521.
36. Ex. 1.
37. Ex. 2.
38. Ex. 5.
39. Ex. 6.
40. Ex. 8.
41. Ex. 25.
42. Ex. 7.
43. Ex. 9.
44. Exs. 23-25.
45. Tr. Vol. 1 at 104.
46. Ex. 20.
47. Ex. 21.
48. At the PRT hearing the Respondent unconvincingly argues she was not implying to the Complainant that her payment of the bill had caused the lien to be released, but just that the lien was released. Tr. Vol. 2 at 375. She explains what she was trying to convey was "[h]ey maybe Therapy in Motion doesn't even have a lien. Maybe that money doesn't need to be paid. Maybe because I already paid it, I don't know." *Id.* She claims, "[a]t that point in time, I still think I paid Therapy in Motion." *Id.*
49. Tr. Vol. 1 at 103.
50. *Id.* at 121-22.
51. *Id.* at 119, 133.
52. *Id.* at 132.
53. *Id.*
54. At the March 25, 2019, PRT hearing, the Respondent, however, testified that she experienced identity theft around January or February of 2015, and admitted she has no evidence of any identity theft. Tr. Vol. 2 at 527-28.
55. Ex. 1.
56. Respondent's Brief in Chief at 7.
57. Ex. 76.
58. Tr. Vol. 1 at 236.
59. *Id.* at 238-39.
60. Ex. 79.
61. Tr. Vol. 2 at 239.
62. *Id.* at 237-41.
63. *Id.* at 465.
64. *Id.*
65. *Id.* at 479.
66. *Id.* at 469, 479.
67. *Id.* at 460.
68. *Id.* at 523-24.
69. *Id.* at 525.
70. *Id.*
71. Ex. 60, 71; Tr. Vol. 2 at 417, 430.
72. Tr. Vol. 2 at 401.
73. *Id.* at 498.
74. *Id.* at 400-01, 571.
75. *Id.* at 573, 575.
76. *Id.* at 414.
77. Exs. 62, 74.
78. Exs. 63, 75.
79. Tr. Vol. 2, 511.
80. *Id.* at 499, 513.
81. *Id.* at 511-13.
82. *Id.* at 512.
83. *Id.* at 582.
84. Ex. 56.
85. Tr. Vol. 1 at 141-44; 198-99.
86. Tr. Vol. 2 at 488.
87. *Id.* at 489.
88. *Id.* at 488.
89. *Id.* at 418.
90. Tr. Vol. 1 at 154-55.
91. *Id.* at 160.
92. *Id.* at 198.
93. Rule 1.3, ORPC, 5 O.S. 2011, ch. 1, app. 3-A:
> A lawyer shall act with reasonable diligence and promptness in representing a client.

94. Rule 1.4, ORPC, 5 O.S. 2011, ch. 1, app. 3-A:
> (a) A lawyer shall:
>
> (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
>
> (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;
(4) promptly comply with reasonable requests for information; and
(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional conduct or other law.
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

95. Rule 1.15, ORPC, 5 O.S. 2011, ch. 1, app. 3-A:
(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the written consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.
. . . .
(h) A lawyer or law firm that holds funds of clients or third parties in connection with a representation shall create and maintain an interest-bearing demand trust account and shall deposit therein all such funds to the extent permitted by applicable banking laws . . . :

96. Rule 8.4 (a) and (c), ORPC, 5 O.S. 2011, ch. 1, app. 3-A:
It is professional misconduct for a lawyer to:
(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
....
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

97. Rule 1.3, RGDP, 5 O.s. 2011, ch. 1, app. 1-A:
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.

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

99. Tr. Vol. 2 at 433.

100. *Id*. at 470.

101. Murcia, Tr. Vol. 1 at 85; Sanders, Tr. Vol. 1 at 148; Solis, Tr. Vol. 1 at 200.

102. Ex. 9.

KAUGER, J., with whom **GURICH, C.J.** and **EDMONSDON, J.**, join, Concurring in Part and Dissenting in Part.

1. The appropriate measure of discipline is to be guided by: (1) what is consistent with the discipline imposed upon other lawyers who have committed similar acts of professional misconduct, and (2) what discipline avoids the vice of visiting disparate treatment on the respondent-lawyer. State *ex rel*. Oklahoma Bar Ass'n v. Taylor, 2000 OK 35,¶5, 4 P.3d 1242, State *ex rel*. Oklahoma Bar Ass'n v. Schraeder, 2002 OK 51, ¶6, 51 P.3d 570, State ex rel Okla. Bar Assoc. v. Eakin, 1995 OK 106, ¶9, 914 P.2d 644.

2. State *ex rel.* Oklahoma Bar Ass'n v. Schraeder, see note 1, supra at ¶32, State ex rel Okla. Bar Assoc. v. Eakin, see note 1, supra.

3. State *ex rel*. Oklahoma Bar Ass'n v. Layton, 2014 OK 21, 324 P.3d 1244.

Calendar of Events

January

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

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

31 **OBA Board of Editors meeting;** 3:30 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Melissa DeLacerda 405-624-8383

February

4 **OBA Solo & Small Firm Conference Planning Committee meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Charles 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

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

18 **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

19 **OBA Immigration Law Section meeting;** 11 a.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Lorena Rivas 918-585-1107

OBA Indian Law Section meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Jennifer Lamirand 405-235-7700

21 **OBA Board of Governors meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City; Contact John Morris Williams 405-416-7000

OBA Military and Veterans Law Section meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Ed Maguire 405-606-8621

OBA Family Law Section meeting; 3 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Brita Haugland-Cantrell 918-574-3077

24 **OBA Appellate Practice Section meeting;** 11:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Jana L. Knott 405-262-4040

Applicants for February 2020 Oklahoma Bar Exam

The Oklahoma Rules of Professional Conduct impose on each member of the bar the duty to aid in guarding against the admission of candidates unfit or unqualified because of deficiency in either moral character or education. To aid in that duty, the following is a list of applicants for the bar examination to be given Feb. 25-26, 2020.

The Board of Bar Examiners requests that members examine this list and bring to the board's attention in a signed letter any information which might influence the board in considering the moral character and fitness to practice of any applicant for admission. Send correspondence to Cheryl Beatty, Administrative Director, Oklahoma Board of Bar Examiners, P.O. Box 53036, Oklahoma City, OK 73152.

EDMOND

Talor Michelle Black
Brian Gary Bond
Charles Ellis Hart
Jonathan Lance Kurz
Nicholas Wesley Porter
Alina Ruth Carlile Sorrell
Marjon Jacqueline Creel Stephens
Clifford Allan Wright Jr.

NORMAN

Mian Umar Ali
Nelson Nzalli Anaback
Brian Todd Candelaria
Andrew Jonathan Chwick
Sawmon Yousefzadeh Davani
Tristan Lane Davis
Kchristopher Bonard Griffin
Macy Renay Griswold
Jayce Taylor Hudiburg
Amos Teah Kofa
Guillermo Mejia
Jaron Tyler Moore
Andrew John Rasbold
Elizabeth Nicole Stevens
Heather Shay Talley
Kyla Krystine Willingham

OKLAHOMA CITY

Shannon Rashelle Beesley
Sara Elizabeth Bobbitt
Joshua Itzaeh Castro
Shannon Cecilia Conner
Cameron Scott Farnsworth
Erica Lynn Grayson
Clarence Joe Hutchison
Taylor Nathan Kincanon
Lisa Leigh Lopez
Vanessa Oliva Martinez
Kaitlin Nicole McCorstin
Brittany Faithe McMillin
Bryan Ashton Don Muse
Hunter Christian Musser
Christie Ann Porter
Kristen Annette Prater
James Ryan Reynolds
Mylin Alexander Stripling
John Wilson Toal
Robert Austin Williams

TULSA

Alex Abraham Alabbasi
Erik Sven Anderson
Hunter Keith Bailey
James Linden Curtis
Zachary Andrew Enlow
Melissa Ann Ferguson
Matthew Allen George
Nicholas Lee Goodwin
Fareshteh Hamidi
Kaia Kathleen Kaasen Kennedy
Victoria Sue LeftHand
Caroline Grace Lindemuth
Natalie Joyce Marra
William Morgan Maxey
Laurie Ann Mehrwein
Margaret Louise Munkholm
Samantha Katlyn Oard

OTHER OKLAHOMA CITIES AND TOWNS

Hollie Dannette Alexander, Ochelata
Auziah Destinee Antwine, Spencer
Adam James Boutross, Owasso

William Bradley Brents, Jones

Krystal Brooke Browning, Duncan

Katherine Michelle Bushnell, Choctaw

Ismail Marzuk Calhoun, Spencer

Madison Danielle Cataudella, Owasso

Kayla Nicole Caudle, Blanchard

Christopher James Cavin, Guthrie

Laura Jessica Chesnut, Miami

Joseph Daniel Costa, Maud

Meagan Cherise Crockett-Edsall, Piedmont

Mark William Espenshade, Owasso

Matthew Joshua Flynn, Kansas

Stacy Nichole Fuller, Owasso

Cherlyn Rae Gelinas, Grove

Lindsay Ann Gray, Guthrie

Christopher Jay Hall, Yukon

Jill Ann Hall, Moore

Jacob Duane Heskett, Bartlesville

Nekanapeshe Peta James, Wagoner

William Ray Keene, Pawhuska

Kelsee Beth Kephart, Noble

Andrew Charles Knife Chief, Pawnee

Cannon Patrick McMahan, Nichols Hills

Kathleen Viola O'Donnell, Broken Arrow

Keri Denman Palacios, Glenpool

Paul Dillon Pratt, Eufaula

Susan E. Proctor-Dickenson, Tahlequah

Benjamin Gary Rose, Beggs

Dalton Bryant Rudd, Davis

Sarah Lynn Smith, Claremore

Adam Michael Trumbly, Bartlesville

Gregory Louis Van Ness, Yukon

Justin Thomas Vann, Del City

Jessica Ann Vice, Claremore

Houston Dillard Wells, Catoosa

Hannah Kacie White, Coyle

Larra Jane Williams, Wilson

OUT OF STATE

Jeremy Jay Bennett, Goodman, MO

Hester Anne Brown, Dallas, TX

Taylor Noel Brown, Grapevine, TX

Melissa Diane Cianci, San Clemente, CA

Joseph Carlson DeAngelis, Denver, CO

Kayla DeLaine Dupler, DeRidder, LA

Justin Mathew Ferris, Columbia, MO

Colin Wade Holthaus, Topeka, KS

Harold Blake Hoss, Beverly Hills, CA

Dallas Myrl Howell, Parks, AZ

Harriet Day Blackwell Jett, Atlanta, GA

Daniel Robert Jones, Rogers, AR

Kristin Michelle Josephs, Dallas, TX

Kyle Joseph Kertz, Dallas, TX

Michelle Kruse, Rowlett, TX

Beatrize Martinez, Ridgecrest, CA

Miranda Jade Moorman, Washington, DC

Molly Kathryn Newbury, Perry, MI

William Chancelor Rabon, Powderly, TX

Marcos Chavez Sierra, Desoto, TX

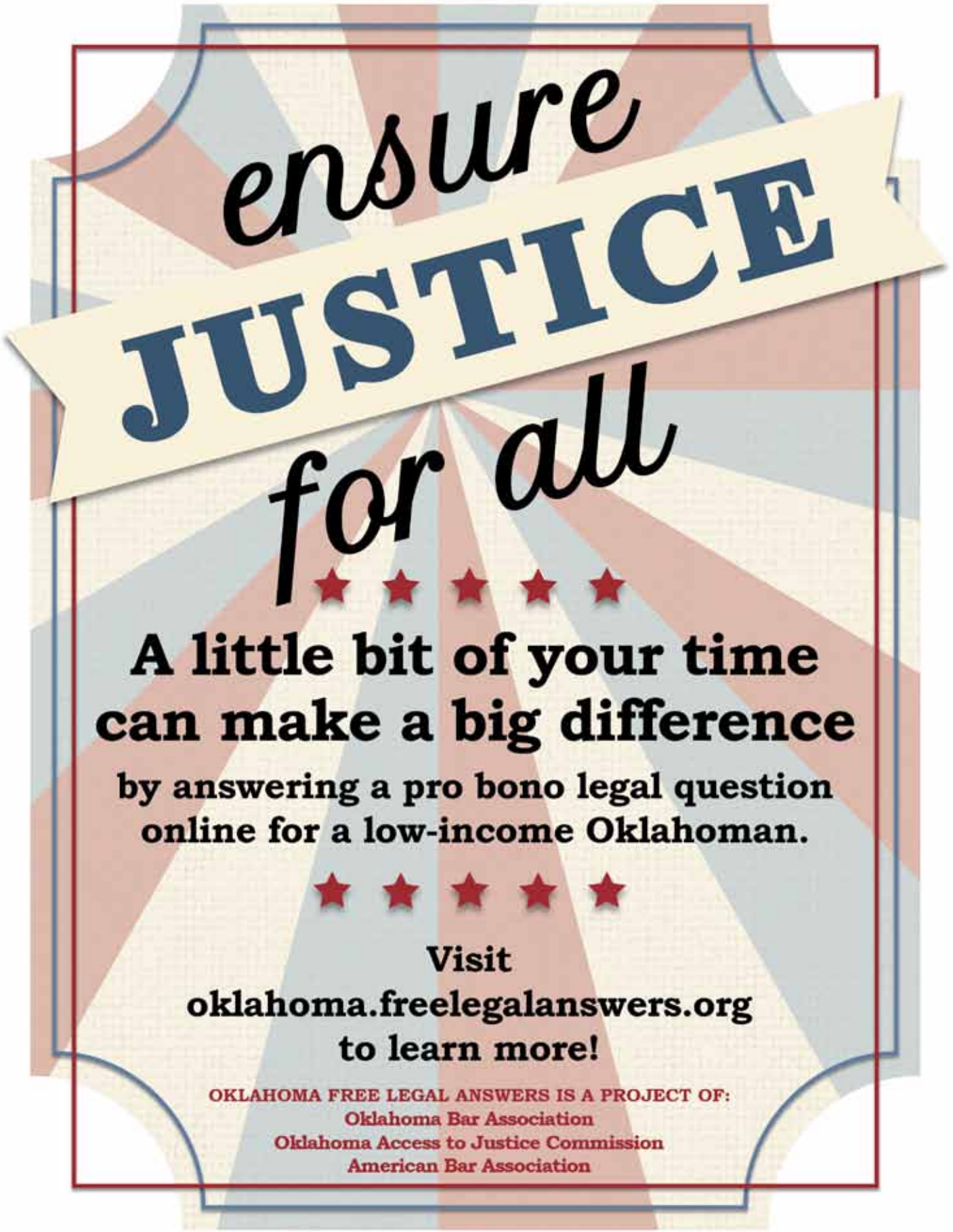
Geoffrey E. F. Speelman, The Woodlands, TX

Jonathan Wesley Sutton, Irvine, CA

Samantha Leigh Thompson, Houston, TX

Duy Khuong Tran, Allen, TX

Roslyn Madeleine West, Houston, TX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2020 OK CIV APP 1

IN RE THE MARRIAGE OF TEAGUE: SUSAN TEAGUE, Petitioner/Appellee, vs. LESLEY TEAGUE, Respondent/Appellant.

Case No. 117,101. December 6, 2019

APPEAL FROM THE DISTRICT COURT OF ROGERS COUNTY, OKLAHOMA

HONORABLE DAVID SMITH, JUDGE

AFFIRMED IN PART, REVERSED IN PART AND REMANDED WITH INSTRUCTIONS

Bradley A. Grundy, Angela L. Smoot, CONNER & WINTERS, LLP, Tulsa, Oklahoma, and

Juliana Reimer, Julie Henson, Owasso, Oklahoma, for Petitioner/Appellee,

W. Allen Vaughn, Tulsa, Okahoma, for Respondent/Appellant.

Bay Mitchell, Presiding Judge:

¶1 Respondent/Appellant Lesley Teague (Father) appeals from the trial court's order modifying child support for his disabled adult child. We find 43 O.S. 2011 §118I(A)(3), providing that an order modifying child support shall be effective upon the date the motion to modify was filed, applies to an order modifying support for a disabled adult child pursuant to 43 O.S. 2011 §112.1A. The trial court erred as a matter of law by using a different date. That part of the order is reversed and remanded with instructions to make the order effective upon the date Father filed his motion and adjust the amount of the credit to Father. We find the amount of support ordered is not clearly against the weight of the evidence so as to constitute an abuse of discretion. That part of the order is affirmed.

¶2 Father and Petitioner/Appellee Susan Teague (Mother) were married December 31, 1989. Mother filed a petition for dissolution of marriage November 18, 2011. The parties had two children during the marriage, V.C.T. and C.A.T. At the time of the divorce, V.C.T. was a minor child and C.A.T., born September 6, 1990, was a disabled adult child. The trial court entered a Decree of Dissolution of Marriage March 28, 2013. The Decree ordered Father to pay adult child support for C.A.T., who lived with Mother. On September 23, 2015, the trial court modified child support for C.A.T. from $364.36 per month to $813.70 per month and ordered Father to pay the arrearage in the amount of $16,314.71 plus interest. That order was not appealed.

¶3 On December 21, 2015, Father filed a Combined Motion to Terminate Child Support and Motion for Developmental Assessment of the Parties' Adult Child. Father alleged that C.A.T. was capable of being independent and self-supportive. While the motion to terminate support was still pending, Father filed a Motion to Modify Child Support January 19, 2016. Father asserted that since the September 23, 2015 support order, the factors upon which child support was computed had materially and significantly changed. Father alleged that his wages had decreased and Mother's wages had increased. The trial court ordered a psychoeducational evaluation by Dr. Jennifer Benton. Dr. Benton evaluated C.A.T. July 19, 2016. She diagnosed C.A.T. with mild intellectual disability and anxiety disorder, found her IQ was 65, and opined that she will continue to need supervision and support.

¶4 On August 22, 2016, Father filed an Amended Motion to Modify Child Support and Request for Extraordinary Relief based on the change in wages. He alleged that he lost his job in June 2015 and earns less at his new job. Father also argues that in addition to the $813.70 per month in child support for C.A.T., he has been ordered to pay past due child support at 10% interest, has been found guilty of indirect contempt, and ordered to pay Mother's attorney fees related to the contempt citation. These liabilities make his total monthly payment to Mother $1,181.57. Father also asserts that he is paying Mother $403.00 per month pursuant to a Chapter 13 bankruptcy proceeding and he has incurred additional medical expenses from having his gall bladder removed. Father claims that based on his current household budget he cannot make these payments and asks the trial court to reduce the amounts.[1] On September 23, 2016, Father filed a motion to dismiss his Motion to Terminate Child Support, which was filed December 21,

2015. The trial court granted the motion to dismiss September 27, 2016.

¶5 The trial on Father's Amended Motion to Modify Child Support was held October 28, 2016, June 30, 2017, August 15, 2017, and September 28, 2017. The trial court found there has been a permanent, material and substantial change of condition in Father's income and reduced his support obligation from $813.70 per month to $387.31 per month. The trial court found this amount was "for the minimum needs directly related to the disabled adult child." The trial court determined the effective date of the modified amount of child support was January 15, 2017 and ordered Father a credit in the amount of $426.39 per month from January 2017 through May 2018. Father appeals.[2]

¶6 Father raises two issues on appeal.[3] First, he argues the order modifying child support should have been effective upon the date he filed his Motion to Modify Child Support. Second, he argues Mother failed to prove C.A.T.'s mental or physical disability required 24-hour personal supervision or substantial care.

¶7 Father's first proposition of error raises an issue of statutory construction. Statutory construction presents a question of law which we review *de novo. See Fanning v. Brown*, 2004 OK 7, ¶8, 85 P.3d 841. We have plenary, independent and nondeferential authority to determine whether the trial court erred in its legal rulings. *Id.*

¶8 Father argues 43 O.S. §118I(A)(3) applies to the modification of support for a disabled adult child. Section 118I concerns the modification of support orders for minor children. The statute provides, in pertinent part, that "[a]n order of modification shall be effective upon the date the motion to modify was filed, unless the parties agree to the contrary or the court makes a specific finding of fact that the material change of circumstance did not occur until a later date." 43 O.S. 2011 §118I(A)(3). Father filed his Motion to Modify Child Support January 19, 2016. Without making a specific finding of fact that the material change of circumstances did not occur until a later date, the trial court ordered that child support be modified beginning January 15, 2017. Father argues the trial court erred by not using the filing date – January 19, 2016 – as the effective date. Relying on *In re Marriage of Morgan*, 2019 OK CIV APP 5, 438 P.3d 837, Mother argues an order modifying child support does not relate back to the date of filing when the order is for support of a disabled adult child.[4]

¶9 The fundamental purpose of statutory construction is to determine and give effect to the intent of the Legislature. *See Humphries v. Lewis*, 2003 OK 12, ¶7, 67 P.3d 333. If the language is clear and unambiguous, this Court must apply the plain meaning. *Id.* However, when the legislative intent cannot be determined from the statutory language due to ambiguity or conflict, rules of statutory construction should be employed. *See Keating v. Edmondson*, 2001 OK 110, ¶8, 37 P.3d 882.

¶10 Title 43, §112.1A does not expressly adopt §118I(A)(3) or otherwise provide when an order modifying disabled adult child support is effective. However, subsection (F) provides that "[a]n order provided by this section . . . ***may be modified*** or enforced ***in the same manner as any other order provided by this title***." 43 O.S. §112.1A(F) (emphasis added). This language is unambiguous. We find the plain and ordinary meaning of subsection (F) is that a disabled adult child support order may be modified in the same manner as orders modifying child support for minor children, which includes 43 O.S. §118I(A)(3). Reading §112.1A(F) and §118I(A)(3) together does not conflict with any other provisions, as §112.1A is silent as to the effective date of an order modifying disabled adult child support. Like an order modifying support for a minor child, an order modifying support for a disabled adult child shall be effective upon the date the motion to modify was filed, unless the parties agree to the contrary or the court makes a specific finding of fact that the material change of circumstance did not occur until a later date. *See* 43 O.S. §118I(A)(3).

¶11 In *Morgan*, the Court of Civil Appeals touched on this issue. *See Morgan*, 2019 OK CIV APP 5, ¶¶47-50. *Morgan* was also a post-divorce proceeding. However, the procedural history is slightly different. The parties were divorced when the disabled child was a minor, and the father was ordered to pay child support. *Id.* ¶2. Prior to the disabled child's eighteenth birthday, the mother filed a motion for adult child support. *Id.* ¶5. The trial court granted the motion and ordered child support for the disabled adult child. *Id.* ¶25. Additionally, the trial court found that because the father had stopped paying any support after the child turned eighteen years old, he owed past due child support since that time. *Id.* One

of the issues Father raised on appeal was whether the trial court could "retroactively" establish support and award the mother an arrearage from the date he stopped paying support (the child's eighteenth birthday). *Id.* ¶47. The appellate court determined that because the Legislature did not explicitly extend 43 O.S. §118I(A)(3) to 43 O.S. §112.1A, the statute providing for support of disabled adult children, the trial court erred by entering a judgment for past due support. *See id.* ¶¶49-50.

¶12 We acknowledge that another Division of this Court has suggested that an order modifying support for a disabled adult child is not effective upon the date the motion to modify was filed. *See id.* ¶¶47-50. However, opinions ordered for publication by the Court of Civil Appeals only have persuasive effect. *See* Rule 1.200(d)(2), Okla. Sup. Ct. Rules, 12 O.S. 2011, ch. 15, app. 1. We are unpersuaded by the analysis construing 43 O.S. §112.1A in *Morgan* and conclude that §118I(A)(3) applies to orders modifying support for an adult disabled child under §112.1A. In reaching the opposite conclusion, the *Morgan* court did not address the meaning of subsection (F) of §112.1A.[5]

¶13 Father filed his Motion to Modify Child Support January 19, 2016. The trial court erred as a matter of law by making the modification order effective January 15, 2017. We reverse that part of the order and remand with instructions for the trial court to modify paragraph 3 of the order to provide that Father shall pay $387.31 per month beginning February 15, 2016 (the date the next payment was due after he filed his motion to modify) and to modify paragraph 5 to give Father a credit in the amount of $426.39 per month from February 2016 to May 2018.

¶14 Father's second proposition of error is that Mother "failed to prove that the adult child had sufficient mental or physical disability needs which required 24 hour personal supervision or substantial care." This actually suggests two errors: (1) the trial court erred by finding C.A.T. is eligible for any support because she does not require substantial care and personal supervision because of her disability and she is capable of self-support, *see* 43 O.S. §112.1A(B)(1); and (2) the trial court erred by ordering support in the amount of $387.31 per month, because Mother failed to show C.A.T.'s living expenses are "directly related to [her] mental or physical disability and the substantial care and personal supervision directly required by or related to that disability," 43 O.S. §112.1A(E)(1).

¶15 We review the trial court's modification of support for a disabled adult child for an abuse of discretion. *See Gregory v. Gregory,* 2011 OK CIV APP 89, ¶4, 259 P.3d 914. Child support proceedings are matters of equitable cognizance. *See Thrash v. Thrash*, 1991 OK 32, ¶12, 809 P.2d 665, 668. The appellate court reviews the entire record, weighs the evidence and will affirm a trial court's judgment relating to child support where it is just and equitable. *Id.* The appellate court will not disturb the trial court's determination as to the modification of child support unless the decision is clearly against the weight of the evidence so as to constitute an abuse of discretion. *See Williamson v. Williamson*, 2005 OK 6, ¶5, 107 P.3d 589.

¶16 Section 112.1A(B)(1) provides that the trial court may order support for a disabled adult child if it finds the child "requires substantial care and personal supervision because of a mental or physical disability and will not be capable of self-support" and the disability exists on or before the child's eighteenth birthday. 43 O.S. §112.1A(B)(1). This is the threshold question to determine if an adult child is eligible for support. After finding the adult child satisfies the requirements in subsection (B)(1), the trial court then determines the amount of support by considering the factors set forth in subsection (E). *See* 43 O.S. §112.1A(E); *Morgan,* 2019 OK CIV APP 5, ¶¶39-46; *see also Gregory,* 2011 OK CIV APP 89, ¶10. Section 112.1A(E) provides:

> E. In determining the amount of support to be paid after a child's eighteenth birthday, the specific terms and conditions of that support, and the rights and duties of both parents with respect to the support of the child, the court shall determine and give special consideration to:
>
> 1. Any existing or future needs of the adult child directly related to the adult child's mental or physical disability and the substantial care and personal supervision directly required by or related to that disability;
>
> 2. Whether the parent pays for or will pay for the care or supervision of the adult child or provides or will provide substantial care or personal supervision of the adult child;

3. The financial resources available to both parents for the support, care, and supervision of the adult child; and

4. Any other financial resources or other resources or programs available for the support, care, and supervision of the adult child.

43 O.S. 2011 §112.1A(E).

¶17 The trial court determined C.A.T. was a disabled adult child in need of some support, as defined by 43 O.S. §112.1A(B)(1), and ordered Father to pay support in the Decree of Dissolution of Marriage filed March 28, 2013 and the Joint Order Granting in Part and Denying in Part the Petitioner's Motion to Reconsider/Motion for New Trial and Judgment Regarding Child Support filed September 23, 2015. Father did not appeal those decisions. Father first challenged C.A.T.'s status as a disabled adult child in his Motion to Terminate Child Support and Motion for Developmental Assessment of the Parties' Adult Child filed December 15, 2015. He argued C.A.T. was capable of independence and self-support. However, on September 23, 2016, Father filed a motion to dismiss his motion to terminate support. In the motion to dismiss, Father asserted that the findings in the pyschoeducational evaluation are findings which may require the adult child to receive some type of child support pursuant to 43 O.S. §112.1A. The trial court granted Father's motion to dismiss September 27, 2016. The case proceeded to trial on Father's Amended Motion to Modify Support only. Several times throughout these proceedings and during trial, Father admitted C.A.T. is disabled and in need of some support. Father's counsel confirmed he had withdrawn his motion to terminate support challenging whether C.A.T. is a disabled adult child for purposes of subsection (B)(1). Mother argues and we agree Father cannot challenge C.A.T.'s status as a disabled adult child and whether she is eligible for any support based on the criteria in §112.1A(B)(1) for the first time on appeal. As a result, our review is limited to the trial court's decision to order support in the amount of $387.31 per month.

¶18 Father's Amended Motion to Modify identified his decrease in wages and Mother's increase in wages as the changed circumstances permitting the modification of child support.[6] The trial court found there was a change in Father's income and, as a result, reduced his support obligation by $426.39 per month. The trial court ordered Father to pay $387.31 per month "as disabled adult child support for [Father's] contribution for the minimum needs directly related to the disabled adult child." On appeal, Father briefly argues that he does not have the financial resources to pay child support, but he does not cite to evidence in the record on appeal. Father does not point to any evidence that supports a lesser amount of support nor does he identify the amount of support the trial court should have ordered. Father's arguments on appeal focus on to what extent C.A.T. can support herself and whether her living expenses are directly related to her disability.

¶19 Contrary to Father's assertion, the amount of support is not determined solely by whether the disabled adult child needs 24 hour personal supervision and substantial care. The "substantial care and personal supervision directly required by or related to [C.A.T.'s] disability" and whether Mother pays for or provides such care and supervision are just some of the factors the trial court is to give special consideration. *See* 43 O.S. §112.1A(E)(1)-(2). The trial court is to also consider any of C.A.T.'s existing or future needs directly related to her disability, the financial resources of both parents for her support, care, and supervision, and other financial resources or programs available. *See id.* §112.1A(E)(1)-(4).

¶20 There is evidence that C.A.T. needs some supervision. Due to her disability, C.A.T. cannot live independently and cannot meet basic needs, such as housing, transportation, food, clothing, and health care without financial support from her parents. These living expenses are directly related to C.A.T.'s disability. C.A.T. lives with Mother. Mother provides the other necessities, as well as non-essentials such as entertainment and family vacations. Mother put on evidence that C.A.T.'s average monthly living expenses are $2,068. C.A.T. receives $375 per month in SSDI benefits. She also has a job earning $300-325 per month for nine months out of the year. Father complains that the $2,068 in average monthly living expenses includes one-fourth of Mother's own household expenses (mortgage, utilities, etc.). He also disagrees with the inclusion of travel ($85) and entertainment ($200). However, Father's arguments are not well-developed and he has failed to show this Court how ordering him to pay child support in the amount of $387.31 per

month is clearly against the weight of the evidence so as to constitute an abuse of discretion.

¶21 AFFIRMED IN PART, REVERSED IN PART AND REMANDED WITH INSTRUCTIONS.

BELL, J., and SWINTON, J., concur.

Bay Mitchell, Presiding Judge:

1. Only modification of the amount of support for C.A.T. is an issue in this appeal.

2. Mother filed a counter-appeal which was dismissed as untimely by order of the Supreme Court of Oklahoma September 17, 2018.

3. Additionally, in his brief in chief, Father argues he is entitled to attorney fees and costs for both the trial court proceedings and the appeal. The record on appeal does not indicate Father sought attorney fees in the trial court or that he has appealed an order denying such request. Therefore, we will not review whether he is entitled to fees for the trial court proceedings. Pursuant to Okla. Sup. Ct. Rule 1.14, Father's request for appeal-related attorneys fees and costs must be made by a separately filed and labeled motion in the appellate court prior to issuance of mandate.

4. Mandate issued in *Morgan* after Father filed his brief in chief.

5. The *Morgan* court emphasized that the Legislature expressly provided that 43 O.S. §115, which addresses income assignments, applied to modification of disabled adult child support under 43 O.S. §112.1A(D)(3) but did not make a similar arrangement for 43 O.S. §118I(A)(3). *See In re Marriage of Morgan*, 2019 OK CIV APP 5, ¶50, 438 P.3d 837. Section 112.1A(D)(3) provides: "If there is a court of continuing, exclusive jurisdiction, an action under this section may be filed as a suit for modification pursuant to Section 115 of this title." Section 115 deals with income assignments in child support orders. In *Morgan*, the mother suggested the Legislature made a mistake and argued "it is possible that subsection 112.1A(D)(3) should refer to 43 O.S. §118I, regarding modification of child support orders, instead of §115." 2019 OK CIV APP 5, ¶48. The *Morgan* court noted it cannot speculate as to what the Legislature meant to do. *See id*. ¶50.

We acknowledge that §112.1A(D)(3), as written, does not make much sense. A suit for modification is filed pursuant to §118I, not §115. However, this observation does not alter our decision, because our analysis is based on the plain and ordinary meaning of §112.1A(F), rather than §112.1A(D)(3). Section 112.1A(D)(3) does not address the effective date of an order modifying adult disabled child support and is irrelevant hereto.

6. "Child support orders may be modified upon a material change in circumstances which includes, but is not limited to, an increase or decrease in the needs of the child, an increase or decrease in the income of the parents, … or when one of the children in the support order … ceases to be entitled to support pursuant to the support order. The court shall apply the principles of equity in modifying any child support order due to changes in the circumstances of either party as it relates to the best interests of the children." 43 O.S. §118I(A)(1). Father's motion was not based on a decrease in C.A.T.'s needs.

Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS
Thursday, January 2, 2020

J-2019-578 — Appellant S.M.W.B. was charged as a youthful offender in Caddo County District Court, Case No. YO-2019-1, on February 13, 2019, with five counts of Lewd or Indecent Acts To Child Under 12. The State filed a Motion to Impose an Adult Sentence and Appellant filed a Motion for Certification to the Juvenile Justice System. The trial court denied Appellant's motion and sustained the State's motion. Appellant appeals. The trial court's order is AFFIRMED. Opinion by: Hudson, J., Lewis, P.J., concurs in results; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Rowland, J., concurs.

F-2017-1001 — Jacob Darrell Tyre, Appellant, was tried by jury for the crimes of Count 1, child abuse and Count 2, child neglect in Case No. CF-2015-4200 in the District Court of Tulsa County. The jury returned a verdict of guilty and set punishment at eight years imprisonment and a $5,000.00 fine in Count 1 and twelve years imprisonment and a $5,000.00 fine in Count 2. The trial court sentenced accordingly and ordered the sentences to be served consecutively. From this judgment and sentence Jacob Darrell Tyre has perfected his appeal. The judgment and sentence of the District Court is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs in results; Hudson, J., concurs; Rowland, J., concurs.

F-2018-667 — Ernest Lewis, Appellant, was tried by jury for the crime of First Degree Murder in Case No. CF-2017-243 in the District Court of McCurtain County. The jury returned a verdict of guilty and asset as punishment life imprisonment. The trial court sentenced accordingly. From this judgment and sentence Ernest Lewis has perfected his appeal. AFFIRMED. Appellant's Application to Supplement the Appeal Record; in the Alternative, Request for Evidentiary Hearing on Sixth Amendment Claim of Ineffective Assistance of Counsel is DENIED. Appellee's Motion to Supplement the Record on Appeal is GRANTED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs.

F-2018-136 — Michael Emmanuel Ishman, Appellant, was tried by jury for the crimes of Count 1: Murder in the First Degree; Count 2: Robbery with a Dangerous Weapon, After Former Conviction of Two or More Felonies; and Count 3: Possession of a Firearm, After Former Felony Conviction, After Former Conviction of Two or More Felonies, in Case No. CF-2017-33, in the District Court of Comanche County. The jury returned a verdict of guilty and recommended as punishment life imprisonment with the possibility of parole for each count. The Honorable Gerald Neuwirth, District Judge, sentenced accordingly and ordered all three counts run consecutively. From this judgment and sentence Michael Emmanuel Ishman 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.

Thursday, January 9, 2020

F-2018-835 — Anthony Bruce Henson, Sr., Appellant, was tried by jury for the crimes of sexual abuse of a child under twelve (Counts 1-6) and child abuse (Count 7) in Case No. CF-2017-3127 in the District Court of Tulsa County. The jury returned a verdict of guilty and set punishment at life imprisonment and a $1,000.00 fine on each of Counts 1-6 and six years imprisonment on Count 7. The trial court pronounced judgement and ordered the sentences of imprisonment served consecutively, but did not impose the fines. From this judgment and sentence Anthony Bruce Henson, Sr. has perfected his appeal. The Judgment and Sentence is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs in results; Hudson, J., concurs; Rowland, J., concurs.

S-2019-479 — Appellees, Chris Forte and Skyla Forte, were charged by Information in the District Court of Tulsa County, Case No. CF-2019-361, with Count 1, Child Abuse by Injury, and Count 2, Child Neglect. On March 22, 2019, the Honorable J. Anthony Miller, Special Judge, bound Appellees over for trial follow-

ing preliminary hearing on both counts. At a hearing held June 26, 2019, the Honorable Dawn Moody, District Judge, sustained Appellees' motions to quash as to Count 1. The State announced its intent to appeal in open court. The order of the District Court of Tulsa County quashing Count 1 in this case for insufficient evidence is REVERSED. The matter is REMANDED for further proceedings consistent with this Opinion. Opinion by: Lumpkin, J.; Lewis, P.J., Concur in Results; Kuehn, V.P.J., Concur; Hudson, J., Concur; Rowland, J., Concur.

F-2018-805 — Appellant, Johnny Earl Jones, was tried by jury and convicted of Child Neglect, After Former Conviction of Two or More Felonies, in the District Court of Tulsa County Case Number CF-2017-1887. The jury recommended punishment of forty years imprisonment and payment of a $5,000.00 fine. The trial court sentenced Appellant accordingly. From this judgment and sentence, Appellant appeals. The Judgment and Sentence is hereby AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., Concur in Results; Kuehn, V.P.J., Concur in Results; Hudson, J., Concur; Rowland, J., Concur in Results.

F-2018-900 — Angel Munoz appeals from the acceleration of his deferred judgment and sentencing in Case No. CF-2016-701 in the District Court of Oklahoma County, by the Honorable Glenn M. Jones, District Judge. AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs; Rowland, J., concurs.

F-2018-1188 — Alfonzo Lamonse Vineyard, Appellant, was tried by jury for the crime of Assault and Battery with a Deadly Weapon (Count 1), First Degree Burglary (Count 4), Assault and Battery (Count 5), Domestic Assault and Battery (Count 7), each After Former Conviction of Two or More Felonies, Possession of a Firearm AFCF (Count 2), and Obstructing an Officer (Counts 3 and 6) in Case No. CF-2017-6169 in the District Court of Tulsa County. The trial court dismissed Count 5 in the first stage of trial. The jury returned verdicts of guilty and set as punishment life imprisonment and a $10,000.00 fine on each of Counts 1, 2, and 4, one year and a $500.00 fine on each of Counts 3 and 6, and life imprisonment and a $5,000.00 fine on Count 7. The trial court sentenced accordingly ordering the sentences imposed on Counts 1, 2, and 3 be served concurrently with each other. He ordered that sentences imposed on Counts 4, 6, and 7 be served concurrently with each other and consecutive to sentences imposed in Counts 1, 2, and 3. From this judgment and sentence Alfonzo Lamose Vineyard has perfected his appeal. AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs in results; Lumpkin, J., concurs in results; Hudson, J., concurs.

F-2018-989 — Arnulfo Campos Gonzales, Appellant, was tried by jury for the crime of Trafficking in Illegal Drugs (Count 1), Conspiracy to Traffic Methamphetamine (Count 2), and Conspiracy to Distribute Methamphetamine (Count 3) in Case No. CF-2017-197 in the District Court of Haskell County. The jury returned verdicts of guilty and set as punishment twenty-five years imprisonment on Count 1, and ten years imprisonment on each of Counts 2 and 3. The trial court sentenced accordingly ordering the sentences to be served consecutively. From this judgment and sentence Arnulfo Campos Gonzales has perfected his appeal. AFFIRMED. The Judgment and Sentence on Count 3 is REMANDED to the district court with instructions to DISMISS. Gonzales's Application for Evidentiary Hearing is DENIED. Opinion by: Rowland, J.; Lewis, P.J., concurs in results; Kuehn, V.P.J., concurs; Lumpkin, J., concurs in results; Hudson, J., concurs.

COURT OF CIVIL APPEALS
(Division No. 2)
Monday, January 6, 2020

117,839 — Ryan McCulloh, an individual, Plaintiff/Appellant, vs. Michelle Brown, an individual; Carrie Short, an individual; In-Focus Health, Inc., an Oklahoma Professional Corporation (suspended); David Paul Jubelirer, M.D., an individual; and Rebound Mental Health, LLC, an Oklahoma Limited Liability Company, Defendants/Appellees. Appeal from an Order of the District Court of Tulsa County, Hon. William D. LaFortune, Trial Judge. Ryan McCulloh (Appellant) appeals the decision of the district court that Appellees Michelle Brown and Carrie Short (Brown and Short) had statutory immunity against Appellant's claims that he was harmed by their incorrect reporting of suspected child abuse pursuant to 10A O.S. Supp. 2015 § 1-2-101 and 10A O.S.2011 § 1-2-104. We find no indication that extending § 1-2-104 immunity to employers who are subject to respondeat superior claims arising from an employee's immunized reporting would obstruct the purpose of § 1-2-104. The opposite

is indicated. We therefore find that the statutory grant of immunity to Brown and Short disposes of the respondeat superior claims against the Other Defendants. The judgment of the district court is affirmed. AFFIRMED. Opinion from the Court of Civil Appeals, Division II, by Thornbrugh, J.; Reif, S.J. (sitting by designation), and Fischer, P.J., concur.

117,123 — In re the Marriage of: Linda Jauregui, Petitioner/Appellee, vs. Gabriel Jauregui, Respondent/Appellant. Appeal from an Order of the District Court of McClain County, Hon. Charles N. Gray, Trial Judge. Gabriel Jauregui (Husband) appeals certain aspects of the district court's property division in this divorce case between Husband and Wife, Linda Jauregui. We find the actions of the trial court to be within its discretion, and therefore affirm its decisions. 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, January 10, 2020

116,883 — Bank of America, N.A., Successor by Merger to BAC Home Loans Servicing, L.P., f/k/a Countrywide Home Loans Servicing, L.P., Plaintiff/Appellee, vs. Augustine C. David; Lee Dianne David; John Doe, as Occupant of the Premises; and Jane Doe, as Occupant of the Premises, Defendants/Appellees. Defendants/Appellants Augustine C. David and Lee Dianne David (Borrowers) appeal from an order denying their motion to dismiss, motion to vacate, and motion to supplement in a foreclosure action filed by Plaintiff/Appellee Bank of America (Appellee). Borrowers argue that Appellee did not have standing to bring the action against them, that Appellee was required to establish acceleration before seeking relief in court, that Appellee failed to comply with federal regulations, and that Appellee's affidavit was insufficient to establish its entitlement to summary judgment. We AFFIRM. Opinion by Swinton, V.C.J.; Mitchell, P.J., and Buettner, J. (sitting by designation), concur.

(Division No. 4)
Tuesday, December 31, 2019

117,336 — In re the Marriage of: Shabnam Norasimilani, Petitioner/Appellee, v. Latif Samadi, Respondent/Appellant. Appeal from the District Court of Cleveland County, Hon. Jeff Virgin, Trial Judge. In this dissolution of marriage proceeding, Latif Samadi (Husband) appeals from the trial court's final decree claiming procedural errors, denial of due process, and an inequitable property division re-quiring reversal of the decree. Shabnam Norasimilani (Wife) counter-appeals that part of the decree forbidding the minor child from leaving the United States absent mutual agreement of the parties and appeals the denial of her re-quest for attorney fees. Based upon our review of the record and the applicable law, we conclude the trial court did not commit error in denying Husband's motion to dismiss the dissolution proceedings and did not abuse its discretion in dividing the marital estate. We further conclude Husband's due process rights were not denied in these proceedings. As to Wife's counter-appeal, we conclude the trial court abused its discretion in requiring Husband's consent to allow the minor child to leave the United States, but did not abuse its discretion in denying Wife's request for attorney fees. Accordingly, we affirm in part and reverse in part. AFFIRMED IN PART AND REVERSED IN PART. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Wiseman, V.C.J., concurs, and Rapp, J., concurs in part and dissents in part.

Thursday, January 2, 2020

117,315 — In the Matter of the Estate of Jerry Daniel Poe, Deceased: Jenifer Poe, Appellant, vs. Alice J. Griffith Poe, Personal Representative of the Estate of Jerry Daniel Poe, Deceased, Appellee. Appeal from an order of the District Court of Tulsa County, Hon. Kurt G. Glassco, Trial Judge, finding that the weight of the evidence showed Decedent's daughter, Jenifer Poe, "concealed, embezzled, smuggled, conveyed away, or disposed of monies of the Decedent" in the sum of $208,000. Alice J. Poe, the surviving spouse of Decedent, Jerry Daniel Poe, is the personal administrator of his estate. Alice filed a verified motion alleging that while she and Decedent jointly operated a bar, they "collected a considerable amount of cash" and that "Decedent decided to separate the cash for safety and have his daughter, Jenifer Poe, keep a portion [of] jointly acquired cash in the sum of $208,000.00 in safe keeping." Alice further claimed, "After making the delivery of the cash to Jenifer Poe, Decedent carefully noted the sum held with her as a part of his assets in his books and records" and Jenifer still holds the $208,000 which she has failed and refused to

return, although Decedent had asked her to do so. Title 58 O.S.2011 § 293 provides authority for the probate court to require Jenifer to appear before the court and be questioned as to whether she had estate property. Section 293, however, only addresses part of the procedure. Section 294 allows the trial court to order disclosure and "[t]he order for such disclosure made upon such examination is prima facie evidence of the right of such administrator to such property in any action brought for the recovery thereof." The probate court's only permissible action pursuant to the statute was limited to making "an order requiring [Jenifer] to disclose [her] knowledge thereof to the executor or administrator." Alice could then use the order as prima facie evidence in a separate action to recover the money and Jenifer could present evidence to rebut that prima facie showing to prove she did not conceal, embezzle, smuggle, convey away, or dispose of Decedent's money. We conclude it was error as a matter of law for the trial court to exceed the procedure set out in §§ 293-294. Section 294 circumscribes the trial court's ability to act by limiting it to requiring Jenifer to disclose her knowledge of the matter to Alice. Alice could then use that order of disclosure as prima facie evidence of her right to the property in a separate action, giving Jenifer the opportunity to defend against that claim. The trial court's order requires reversal and remand for further proceedings in conformity with this Opinion. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, V.C.J.; Barnes, P.J., and Rapp, J., concur.

117,850 — Donald Williams, Petitioner, vs. Carlisle Foodservice Inc., New Hampshire Insurance Co., and The Workers' Compensation Commission, Respondents. Proceeding to review an order of the Workers' Compensation Commission *En Banc*, Hon. T. Shane Curtin, Administrative Law Judge, affirming the ALJ's decision denying Claimant's claim for compensation. The ALJ concluded Claimant was not credible when he testified he was symptom-free from a previous injury, for which he never received the recommended surgery when the incident occurred in September 2017. With the evidence and its inherent inconsistencies, we will not substitute our judgment as to Claimant's credibility for the ALJ's on the issue of whether Claimant was symptom-free. We reject Claimant's assertion that the ALJ's decision on this question was against the clear weight of the evidence. We will not address the issue of the failure to appoint an independent medical examiner because Claimant waived this issue by failing to assert it before the WCC *en banc*. We sustain the order of the Workers' Compensation Commission *en banc*. SUSTAINED. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, V.C.J.; Barnes, P.J., and Rapp, J., concur.

116,998 — Creditors Recovery Corporation, Plaintiff, v. Pamela Conley, Defendant/Third-Party Plaintiff/Appellant v. Bundren Law Firm, P.C., Third-Party Defendant/Appellee. Appeal from an Order of the District Court of Tulsa County, Hon. Kirsten Pace, Trial Judge. The defendant and third-party plaintiff, Pamela Conley (Conley), appeals the Order granting summary judgment to the third-party defendant, Bundren Law Firm, P.C. (Bundren). Conley filed a third-party petition against Bundren asserting several theories of recovery. All of these theories are predicated upon the erroneous assumption that the May 14, 2015 Agreement also included the Hourly Fee Agreement, thereby making the CRC lawsuit wrongful. Bundren moved for summary judgment and demonstrated that at least one critical element of each claim had no factual support. One such element, common to all claims, is the absence of damages. In addition to other shortcomings, Conley failed to articulate any damages for any of her theories of recovery. The trial court did not err by granting summary judgment. AFFIRMED. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., and Wiseman, V.C.J., concur.

ORDERS DENYING REHEARING
(Division No. 3)
Friday, January 10, 2019

117,776 — New Dominion, LLC, an Oklahoma Limited Liability Company and New Source Energy Corporation, a Delaware Corporation, Plaintiffs/Appellants, vs. Kristian B. Kos, an individual, Richard D. Finley, an individual, Dikran Tourian, an individual, and Carol Bryant, an individual, Defendants/Appellees. Defendants/Appellees' Petition for Rehearing, filed December 4, 2019, is *DENIED.*

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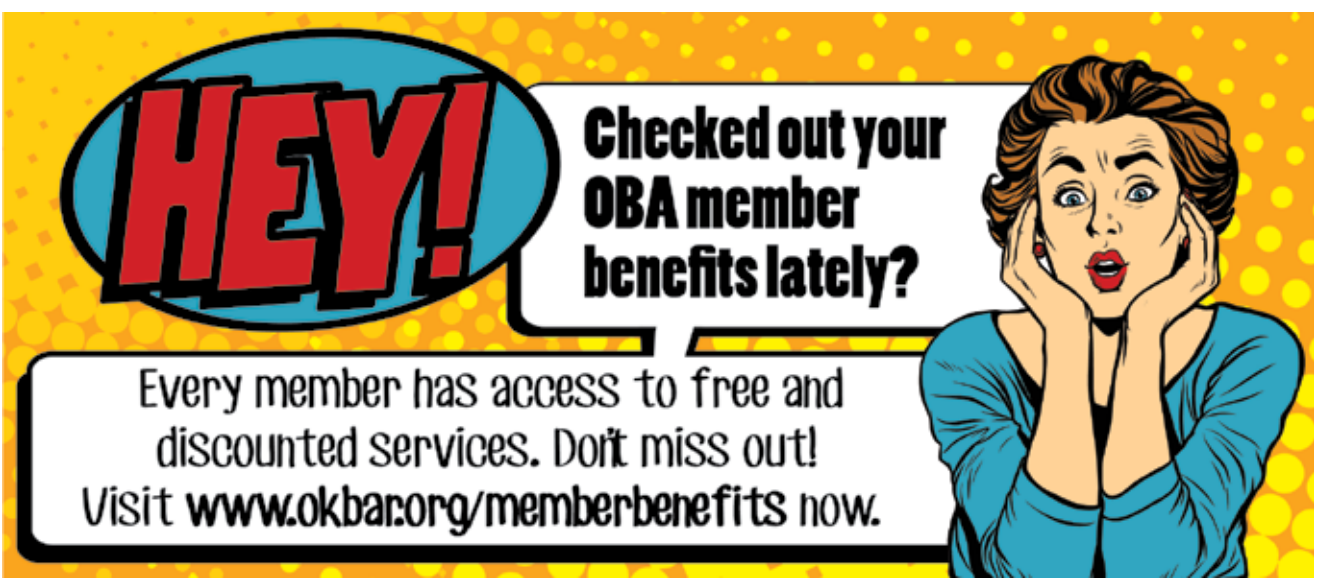

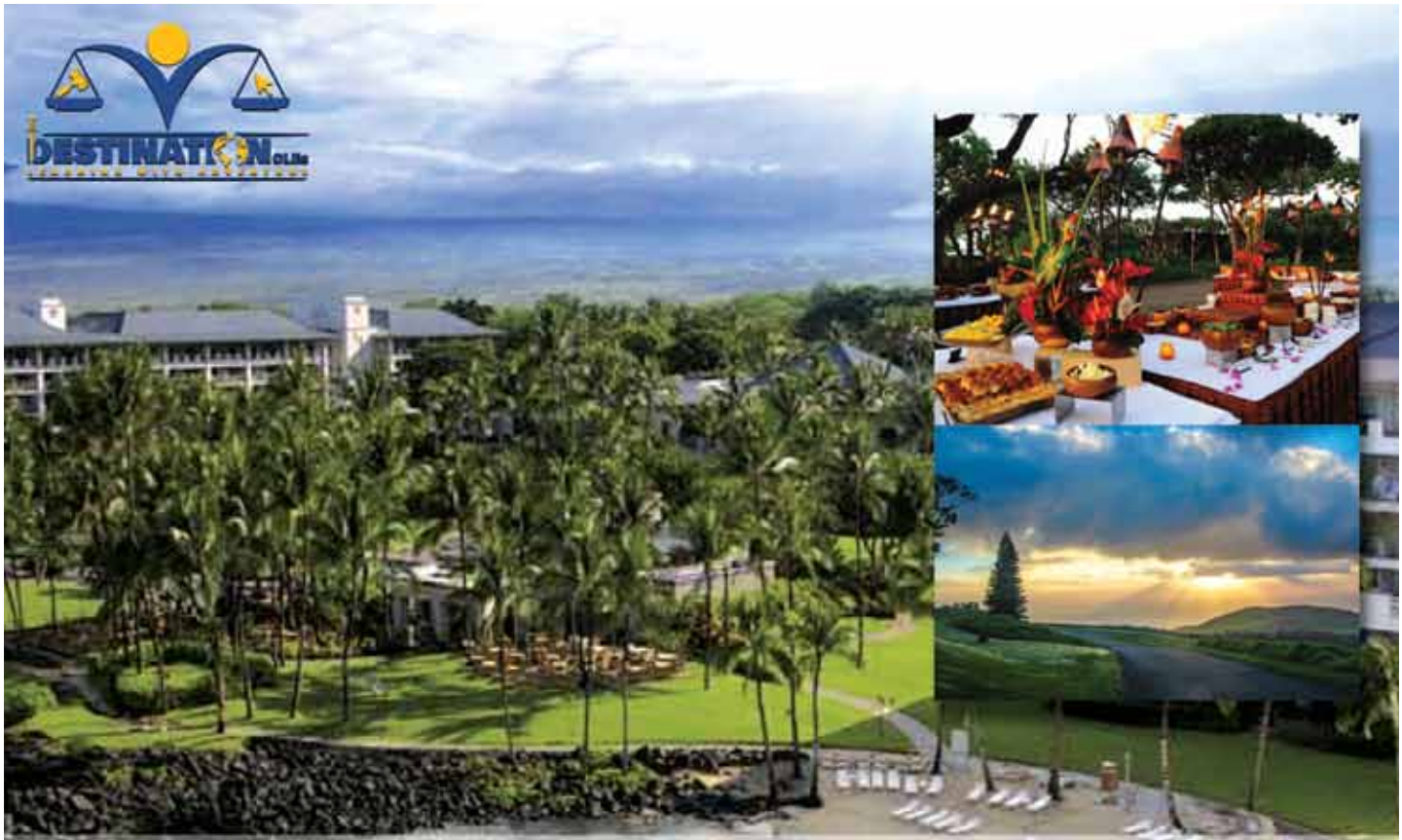

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