THE OKLAHOMA BAR
Journal
Volume 91 — No. 3 — 2/14/2020

Court Issue

oba cle
continuing legal education

ELDER LAW IS ON THE RISE:

IMPROVE YOUR PRACTICE, INCREASE YOUR CLIENTS!

THURSDAY, APRIL 2, 2020
9 A.M. - 2:50 P.M.

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

MCLE 6/1

PROGRAM PLANNERS:/ MODERATORS

Donna Jackson
Donna J. Jackson & Associates, PLLC

Stephanie Alleman
Alleman Law Firm, PLLC

Topics Include:

Durable Power of Attorney

Health Care Power of Attorney

Relocation, Downsizing & Estate Sales

Crisis Planning with Respect to Medicaid Eligibility

Guardianships 101

Ethics and more!

THIS PROGRAM WILL NOT BE LIVE WEBCAST

Stay up-to-date and follow us on

TUITION: Early-bird registration by March 26, 2020 is $150.00. After March 26th, registration is $175 and walk-ins are $200. Registration includes continental breakfast and lunch. Members licensed 2 years or less may register for $75 (late fees apply). All programs may be audited (no materials or CLE credit) for $50 by emailing ReneeM@okbar.org to register.

TO REGISTER GO TO WWW.OKBAR.ORG/CLE

BAR CENTER STAFF

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

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THE OKLAHOMA BAR
Journal

Volume 91 – No. 3 – February 14, 2020

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

THE OBA IS HIRING.

Oklahoma Bar Association is seeking a director of educational programs.

SUMMARY The Oklahoma Bar Association, the leading provider of continuing legal education in the state of Oklahoma, seeks a director of educational programs. The position manages and directs the OBA's CLE Department and other educational events for the association. The OBA CLE Department offers comprehensive and unique live programming for Oklahoma lawyers and has an impressive list of online programs that are available to lawyers nationwide. The OBA is a mandatory bar association of 18,000 members with its headquarters in Oklahoma City.

REQUIREMENTS

- Five years of legal practice, CLE management and/or marketing experience
- Law degree required; preference given to those licensed to practice in Oklahoma
- Must be self-motivated, positive, dependable and creative
- Possess a high degree of integrity and work well with others to achieve common goals
- Highly organized and able to handle multiple projects and deadlines
- Knowledge of budgeting processes and ability to effectively oversee budgets
- Must be able to meet member needs in a fast-paced work environment
- Exceptional attention to detail
- Strong oral, written and interpersonal communication skills and the ability to work effectively with a wide range of constituencies
- Ability to build relationships with faculty, participants and outside vendors
- Problem solver, quick thinker and idea generator
- Must be able to work within limits of an inside office position plus haul and transport equipment or materials required to conduct a CLE seminar

SKILLS

- Must be able to function in a Windows desktop environment
- Proficient in Microsoft Office including Outlook and Excel
- Internet resource, research and marketing expertise
- Experience with online CLE presentations

Send cover letter and resume by March 16, 2020, to johnw@okbar.org.
All inquiries and applications will be kept confidential.
Anticipated start date May 1.
The OBA is an equal opportunity employer.

Oklahoma Bar Association

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2019 OK 32

In The Matter of the Reinstatement of Janet Bickel Hutson to Membership in the Oklahoma Bar Association, and to the Roll of Attorneys JANET BICKEL HUTSON, Petitioner, v. OKLAHOMA BAR ASSOCIATION, Respondent.

SCBD #6672. February 4, 2020

BAR REINSTATEMENT PROCEEDING

On April 30, 2019, we denied reinstatement and ordered the petitioner, Janet Bickel Hutson, to pay the remaining costs of $1,999.50.

On May 8, 2019, the petitioner filed a motion, pursuant to Rule 11.6 of the Rules Governing Disciplinary Proceedings, 5 O.S. Ch. 1, App. 1-A, to remand the matter to the Professional Responsibility Tribunal for another hearing regarding her reinstatement to ensure that she has adhered to and completed the conditions we imposed for reinstatement and paid the costs imposed.

On May 20, 2019, we remanded the matter and allowed the respondent to use the same evidence presented at her initial hearing and any other evidence which is pertinent to the conditions of reinstatement set forth in our opinion of Hutson v. Oklahoma Bar Association, 2019 OK 32, __ P.3d ___.

On November 12, 2019, the Professional Responsibility Tribunal held an additional reinstatement hearing. Subsequently, the PRT unanimously recommended reinstatement, suggested a one year review of the petitioner. The Petitioner has paid the costs of $219.19 assessed against her for these proceedings.

Upon consideration of the matter, we find that the respondent should be reinstated without conditions.

IT IS THEREFORE ORDERED that the petition of Janet Bickel Hutson for reinstatement be granted.

DONE BY ORDER OF THE SUPREME COURT THIS 3rd DAY OF FEBRUARY, 2020.

/s/ Noma D. Gurich
CHIEF JUSTICE

ALL JUSTICES CONCUR.

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, professional-

ism, 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.}

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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.

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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. Alterna-

tively, 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. *Continenta'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]** employees 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 invitee'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.

CAPRON V. EDWARDS, PLLC, Petitioner, v. Hon. Kurt Glassco, Respondent

No. 118,345. February 3, 2020

ORDER

On December 2, 2019, the Court granted Capron & Edwards, PLLC's Application to Assume Original Jurisdiction and Petition for Writ of Mandamus. On December 23, 2019, Real Party in Interest Shane Lewis filed a petition for rehearing. This Court generally grants rehearing (1) to correct an error or omission; (2) to address an unresolved jurisdictional issue; or (3) to clarify the opinion. *Tomahawk Res., Inc. v. Craven*, 2005 OK 82, Supp.Op. ¶1, 130 P.3d 222, 224-25. Rehearing is neither for rearguing a question which has been previously presented and fully considered by this Court nor for presenting points which the losing party overlooked, misapprehended, or failed to fully address. *Id.* The petition for rehearing is denied.

On December 6, 2019, Capron filed a motion for taxation of costs on appeal as the prevailing party following our December 2, 2019 order. Capron's motion is granted pursuant to Sup.

Ct. R. 1.14(A). Costs are awarded in the requested amount of $486.51.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 3rd DAY OF FEBRUARY, 2020.

/s/ Noma D. Gurich
CHIEF JUSTICE

Gurich, C.J., Darby, V.C.J., Kauger, Winchester, Edmondson, Colbert, Combs, Rowe, JJ. - concur

Kane, J. - not voting

2020 OK 5

THE INSTITUTE FOR RESPONSIBLE ALCOHOL POLICY, SOUTHERN GLAZER'S WINE AND SPIRITS OF OKLAHOMA, LLLP, J.B. JARBOE II, CENTRAL LIQUOR CO. L.P. d/b/a RNDC OKLAHOMA, JUSTIN NAIFEH, E. & J. GALLO WINERY, SUTTER HOME WINERY INC., d/b/a TRINCHERO FAMILY ESTATES, DIAGEO AMERICAS, INC., LUXCO, INC., RIBOLI FAMILY OF SAN ANTONIO WINERY, INC., JENNIFER BLACKBURN, d/b/a CELLAR WINE AND SPIRITS OF NORMAN, and DALE BLACKBURN d/b/a GRAND CRU WINE AND SPIRITS SUPERSTORE, Plaintiffs/Appellees, v. STATE OF OKLAHOMA, ex rel. ALCOHOLIC BEVERAGE LAWS ENFORCEMENT COMMISSION, and THE HONORABLE KEVIN STITT, GOVERNOR, in his official capacity, Defendants/ Appellants, and BRYAN HENDERSHOT, individually, and d/b/a BOARDWALK DISTRIBUTION COMPANY, Intervenor/ Appellant.

No. 118,209. January 22, 2020

ON APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY

The Honorable Thomas E. Prince, Trial Judge

¶0 Senate Bill 608 mandates that manufacturers of the top 25 brands of liquor and wine sell their product to all licensed wholesalers. Appellees, a group of liquor and wine wholesalers, manufacturers, retail liquor stores, and consumers, challenged Senate Bill 608 as unconstitutional, contending it was in conflict with Okla. Const. art. 28A, § 2(A)(2)'s discretion given to a liquor or wine manufacturer to determine what wholesaler sells its product. The district court agreed and ruled Senate Bill 608 unconstitutional. Appellants appealed, and this Court retained the appeal.

DISTRICT COURT'S JUDGMENT AFFIRMED.

Mithun Mansinghani, Solicitor General, and Zach West, Assistant Solicitor General, Office of the Attorney General, Oklahoma City, Oklahoma, for Defendants/Appellants.

Thomas G. Wolfe, Heather L. Hintz, Fred A. Leibrock, and Martin J. Lopez III, Phillips Murrah P.C., Oklahoma City, Oklahoma, for Intervenor/Appellant.

Robert G. McCampbell, Amelia A. Fogleman, and Travis V. Jett, GableGotwals, Oklahoma City, Oklahoma, for Plaintiffs/Appellees.

D. Kent Meyers, Crowe & Dunlevy, P.C., Oklahoma City, Oklahoma, for Plaintiffs/Appellees.

Winchester, J.

¶1 The Oklahoma Legislature passed Senate Bill 608 ("SB 608") which mandates that liquor and wine manufacturers of the 25 top-selling brands must sell their products to all licensed Oklahoma wholesalers. Appellees, The Institute for Responsible Alcohol Policy; Southern Glazer's Wine & Spirits of Oklahoma, LLLP; J.B. Jarboe II; Central Liquor Co. L.P., d/b/a RNDC Oklahoma; Justin Naifeh; E. & J. Gallo Winery; Sutter Home Winery, Inc., d/b/a Trinchero Family Estates; Diageo Americas, Inc.; Luxco, Inc.; Riboli Family of San Antonio Winery, Inc.; Jennifer Blackburn, d/b/a Cellar Wine and Spirits of Norman; and Dale Blackburn, d/b/a Grand Cru Wine and Spirits Superstore (collectively "Distributors"),[1] challenged SB 608 as unconstitutional, arguing it conflicts with the recently passed Article 28A, § 2(A)(2) of the Oklahoma Constitution (State Question 792).

¶2 The issues before the Court are (1) whether SB 608 is in conflict with Article 28A, § 2(A)(2), and (2) whether SB 608 is a proper use of legislative authority under the anticompetitive provisions of the Oklahoma Constitution. For the reasons stated herein, we hold SB 608 is "clearly, palpably, and plainly inconsistent" with Article 28A, § 2(A)(2)'s discretion given to a liquor or wine manufacturer to determine what wholesaler sells its product. *See EOG Res. Mktg. v. Okla. State Bd. of Equalization*, 2008 OK 95, ¶ 13, 196 P.3d 511, 519. We further rule that SB 608 is not a proper use of legislative authority

as Article 28A, § 2(A)(2) is not in conflict with the Oklahoma Constitution's anticompetitive provisions. The district court did not err by granting Distributors' Motion for Summary Judgment and ruling SB 608 unconstitutional.

I. FACTS

¶3 Since the end of alcohol prohibition, Oklahoma has maintained strict control over the distribution of alcoholic beverages. *See State ex rel. Hart v. Parham,* 1966 OK 9, ¶ 11, 412 P.2d 142, 147. Beginning in 1984, Oklahoma regulated alcohol pursuant to Article 28 of the Oklahoma Constitution, which created Appellant Alcoholic Beverage Laws Enforcement Commission ("ABLE Commission"). The centerpiece of this regulation still in place today is Oklahoma's three-tier system for alcohol distribution: alcohol manufacturers (first tier) can only sell to licensed Oklahoma wholesalers (second tier); licensed Oklahoma wholesalers (second tier) can only sell to licensed retailers (third tier); and licensed retailers (third tier) can only sell to consumers. This case involves the relationship between the first and second tiers under the recently passed Article 28A. Until recently, the top two tiers operated under a "forced sale clause" that required a manufacturer to sell its products to every licensed Oklahoma wholesaler. *See Central Liquor Co. v. Okla. Alcoholic Beverage Control Bd.*, 1982 OK 16, ¶ 4, 640 P.2d 1351, 1353 (discussing the forced sale clause). Now repealed Article 28 of the Oklahoma Constitution stated:

> Provided, that any manufacturer . . . shall be required to sell such brands . . . to every licensed wholesale distributor who desires to purchase the same, on the same price basis and without discrimination . . . .

Okla. Const. art. 28, § 3(A) (repealed Oct. 1, 2018).

¶4 In 2016, the Oklahoma Legislature passed a joint resolution to place State Question 792 on the November 2016 ballot. State Question 792 repealed Article 28 of the Oklahoma Constitution, replacing it with Article 28A and fundamentally changed how Oklahoma regulates the sale and distribution of alcohol. The people of Oklahoma approved State Question 792 by a 65.62% vote,[2] and it went into effect on October 1, 2018. The Legislature also passed companion legislation in Title 37A of the Oklahoma Statutes to create Oklahoma's new alcohol regulatory scheme. The key provision in Article 28A at issue here permits how a liquor or wine manufacturer can sell products to a licensed Oklahoma wholesaler:

> A manufacturer . . . may sell such brands or kinds of alcoholic beverages to any licensed wholesaler who desires to purchase the same. Provided, if a manufacturer, except a brewer, elects to sell its products to multiple wholesalers, such sales shall be made on the same price basis and without discrimination to each wholesaler.

Okla. Const. art. 28A, § 2(A)(2).[3]

¶5 After passage of State Question 792, Oklahoma's two largest wholesalers, Central Liquor and Jarboe Sales Company, each sold 49% of their respective businesses to the two largest national alcohol distributors, Southern Glazer's Wine & Spirits and Republic National Distribution Co. As a result, these two wholesalers – now known as Appellees Southern Glazer's Wine and Spirits of Oklahoma, LLLP and Central Liquor Co. L.P., d/b/a RNDC Oklahoma – obtained exclusive distribution contracts with the majority of liquor and wine manufacturers, including distribution of the top 25 brands at issue here.[4] The two largest wholesalers controlled the majority of all wholesale distribution in Oklahoma when Article 28A went into effect on October 1, 2018.

¶6 Intervenor/Appellant Bryan Hendershot, owner of Oklahoma's third-largest wholesaler, Boardwalk Distribution Company, and other wholesalers and liquor stores, advocated for a change to the statutory scheme. The Legislature took up what became SB 608:

> Any wine or spirit product that constitutes a top brand, as defined in this section, shall be offered by the manufacturer for sale to every licensed wine and spirits wholesaler who desires to purchase the same on the same price basis and without discrimination or inducements.[5]

S.B. 608, 57th Leg., 1st Sess. (Okla. 2019) (codified as 37A O.S. Supp. 2019, § 3-116.4). The Legislature passed SB 608, and Governor Stitt signed the bill on May 19, 2019. *Id.*

II. PROCEDURAL HISTORY AND ARGUMENTS

¶7 Distributors previously requested this Court exercise its original jurisdiction and either issue a writ of prohibition against enforcement of SB 608 or declaratory relief that SB 608 is unconstitutional. This Court declined

to exercise its concurrent jurisdiction and transferred the case to district court.

¶8 The parties moved for summary judgment in district court. Distributors claimed that SB 608 directly conflicts with Article 28A, § 2(A)(2), as SB 608 makes Article 28A, § 2(A)(2)'s discretion to select a single wholesaler a nullity. Had Article 28A allowed the Legislature's actions here, Distributors contended Article 28A would have said "shall sell," which the now-repealed Article 28 had required, not "may sell." Appellants, ABLE Commission, Governor Kevin Stitt, and Bryan Hendershot, individually and d/b/a Boardwalk Distribution Center (collectively "the State"), filed a cross-motion for summary judgment and countered that Article 28A must be read in conjunction with the anticompetitive provisions of the Oklahoma Constitution, specifically Okla. Const. art. V, § 44 and § 51. The State further argued that Article 28A, § 2(A)(2)'s phrase a *manufacturer . . . may sell* does give manufacturers discretion to sell to one wholesaler, but that discretion must give way where the Legislature passes a law otherwise.

¶9 Judge Prince granted Distributors' motion, ruling the clear and ordinary language of Article 28A, § 2(A)(2) identifies an intent by the voters to give discretion to liquor and wine manufacturers to decide to sell to only one wholesaler. The district court held the language of SB 608 requiring manufacturers to sell to all wholesalers is "clearly, palpably, and plainly inconsistent with Article 28A," and therefore, unconstitutional. The State appealed. This Court retained the appeal.

III. STANDARD OF REVIEW

¶10 Summary judgment is properly granted when there are no disputed questions of material fact and the moving party is entitled to judgment as a matter of law. *S. Tulsa Citizens Coal., L.L.C. v. Ark. River Bridge Auth.*, 2008 OK 4, ¶ 10, 176 P.3d 1217, 1220. An appeal on summary judgment comes to this Court as a *de novo* review, as the matter presents only questions of law, not fact. *In re Estate of Bell-Levine,* 2012 OK 112, ¶ 5, 293 P.3d 964, 966; *Carmichael v. Beller,* 1996 OK 48, ¶ 2, 914 P.2d 1051, 1053. This Court assumes "plenary independent and non-deferential authority to reexamine a trial court's legal rulings." *Kluver v. Weatherford Hosp. Auth.*, 1993 OK 85, ¶ 14, 859 P.2d 1081, 1084.

IV. DISCUSSION

¶11 This Court is the final interpreter of Oklahoma's laws, including the Oklahoma Constitution. *See Monson v. State ex rel. Okla. Corp. Comm'n*, 1983 OK 115, ¶ 7, 673 P.2d 839, 843. We are bound to follow the Oklahoma Constitution, and we cannot "'circumvent it because of private notions of justice or because of personal inclinations.'" *Gurney v. Ferguson,* 1941 OK 397, ¶ 12, 122 P.2d 1002, 1004 (quoting *Judd v. Bd. of Educ.*, 15 N.E. 2d 576, 584 (N.Y. 1938)). "In assessing the conformity of a challenged state statute to our fundamental law, we are guided by well-established principles. The Constitution is the bulwark to which all statutes must yield." *Liddell v. Heavener,* 2008 OK 6, ¶ 16, 180 P.3d 1191, 1199.

¶12 The objective of construing the Oklahoma Constitution is to give effect to the framers' intent, as well as the people adopting it. *Shaw v. Grumbine*, 1929 OK 116, ¶ 30, 278 P. 311, 315. When a challenge is limited to the Oklahoma Constitution, the Court looks first to its language, which if unambiguous, binds the Court. *Id.* ¶ 0, 278 P. at 311 (Syllabus by the Court No. 5). "Every provision of the Constitution and statutes of Oklahoma is presumed to have been intended for some useful purpose and every provision should be given effect." *Darnell v. Chrysler Corp.*, 1984 OK 57, ¶ 5, 687 P.2d 132, 134; *Cowart v. Piper Aircraft Corp.*, 1983 OK 66, ¶ 5, 665 P.2d 315, 317 (holding "each portion of the Constitution was intended to be operative and not surplus language"). The Court, therefore, construes constitutional provisions "as a consistent whole in harmony with common sense and reason." *Cowart*, 1983 OK 66, ¶ 4, 665 P.2d at 317. We will uphold a duly enacted statute unless it is "clearly, palpably and plainly" inconsistent with the Constitution. *Lafalier v. Lead-Impacted Cmtys. Relocation Assistance Trust,* 2010 OK 48, ¶ 15, 237 P.3d 181, 188.

¶13 In determining whether SB 608 is in conflict with the Oklahoma Constitution, the key question before the Court is whether Article 28A, § 2(A)(2) grants to liquor or wine manufacturers the discretion to select a single wholesaler free from legislative interference. A comparison of now-repealed Article 28, § 3(A), Article 28A, § 2(A)(2), and SB 608 is helpful for this discussion:

(see table following page)

Okla. Const. art. 28, § 3(A) (repealed Oct. 1, 2018)	Okla. Const. art. 28A, § 2(A)(2)	**S.B. 608, 57th Leg., 1st Sess. (Okla. 2019)**
Provided, that any manufacturer . . . ***shall be*** required to sell such brands . . . to ***every*** licensed wholesale distributor who desires to purchase the same, on the same price basis and without discrimination….	A manufacturer . . . ***may sell*** such brands or kinds of alcoholic beverages to any licensed wholesaler who desires to purchase the same. Provided, ***if*** a manufacturer, except a brewer, ***elects to sell*** its products to multiple wholesalers, such sales shall be made on the same price basis and without discrimination to each wholesaler.	Any wine or spirit product that constitutes a top brand, as defined in this section, ***shall be*** offered by the manufacturer for sale to ***every*** licensed wine and spirits wholesaler who desires to purchase the same on the same price basis and without discrimination or inducements.

¶14 This Court must interpret constitutional provisions in conformity with their ordinary significance in the English language – given their commonly accepted and nontechnical meaning. *See In re Initiative Petition No. 363, State Question No. 672,* 1996 OK 122, ¶ 33, 927 P.2d 558, 570. The clear and ordinary language of Article 28A, § 2(A)(2) allows a liquor or wine manufacturer to select one or more than one wholesaler to distribute its product. The second sentence of the section provides: *"a manufacturer … **may** sell such brands … to any licensed wholesaler who desires to purchase the same." May* denotes that an action is permissive or discretional, and not mandatory. *Shea v. Shea*, 1975 OK 90, ¶ 10, 537 P.2d 417, 418. The third sentence of Article 28A, § 2(A)(2) further clarifies the second: "Provided, *if* a manufacturer . . . *elects* to sell its products to multiple wholesalers, such sales shall be made on the same price basis . . . ." By providing direction to manufacturers when they choose to sell to more than one wholesaler, Article 28A, § 2(A)(2) implies that a manufacturer can also select only one wholesaler. The third sentence is purely conditional based on a manufacturer's decision to *elect* to sell to more than one wholesaler and forbids price discrimination when a manufacturer elects to do so. We must conclude then that a manufacturer can elect to sell to only one wholesaler.

¶15 An opinion by the Office of the Attorney General also supports this conclusion:

> Thus, whereas both Article 28 of the Oklahoma Constitution and Section 533 of the Old Act required a manufacturer to sell its products to every wholesaler wishing to purchase them, Article 28A and Section 3-116 of the New Act permit a manufacturer to choose to sell its products to any or every wholesaler who wishes to distribute its products. Indeed, Article 28A explicitly leaves to the manufacturer's discretion whether to sell to more than one wholesaler. OKLA. CONST. art 28A, § 2(A)(2) ("If a manufacturer, except a brewer, elects to sell its products to multiple wholesalers . . . .").

Question Submitted by: Harry "Trey" Kouri, III, Chairman, ABLE Commission, 2018 OK AG 6, ¶ 11. Legislation passed after State Question 792 made the same determination that a manufacturer may select one wholesaler to the exclusion of all others. *See* 37A O.S. Supp. 2016, §§ 3-123(A)(1), 3-116 (repealed May 7, 2019).[6]

¶16 Constitutional construction requires the Court to garner the drafter's intent, as well as the people adopting it, from the plain language of the provision. *Darnell*, 1984 OK 57, ¶ 5, 687 P.2d at 134; *Shaw,* 1929 OK 116, ¶ 30, 278 P. at 315. The now repealed Article 28, § 3(A) further clarifies what the Legislature, through a vote of the people, granted to all manufacturers in Article 28A, § 2(A)(2) – the removal of the "forced sale clause" from *both* the Oklahoma Constitution and statutes and the ability to select a single wholesaler to the exclusion of all other licensed wholesalers.[7] For the Court to construe Article 28A in a vacuum without reference to the repealed Article 28 would turn a blind eye to what the public intended.

¶17 In contrast, SB 608 states that manufacturers ***shall*** sell the top 25 brands to ***every*** licensed wholesaler. *Shall* is usually "given its common meaning of 'must'. . . implying a command or mandate." *Sneed v. Sneed*, 1978 OK 138, ¶ 3, 585 P.2d 1363, 1364. From its plain language, SB 608 modifies the alcohol distribution scheme by mandating that all manufacturers of the top 25 brands of liquor and wine – as

determined by the ABLE Commission each quarter – sell those products "to every licensed wine and spirits wholesaler who desires to purchase the same on the same price basis and without discrimination or inducements." S.B. 608, 57th Leg., 1st Sess. (Okla. 2019) (codified as 37A O.S. Supp. 2019, § 3-116.4). SB 608 thus infringes on a manufacturer's constitutionally granted discretion to select one wholesaler to the exclusion of all others, as it mandates that a manufacturer of a top 25 brand must sell to all wholesalers. We hold SB 608's infringement of Article 28A, § 2(A)(2) is unconstitutional.

¶18 The second question before this court is whether SB 608 is a proper use of legislative authority under the anticompetitive provisions of the Oklahoma Constitution. The State contends that Article 28A, § 2(A)(2) must be read in conjunction with the Oklahoma Constitution's provisions against anticompetitive markets, specifically Okla. Const. art. V, § 44[8] and § 51.[9] Taken to its logical conclusion, the State's argument that these constitutional provisions grant the Legislature broad powers to combat monopolies or anticompetitive markets confers to the Legislature broad power to overrule or amend another constitutional provision, here Article 28A. The State has pushed this argument too far. The entirety of the Oklahoma Constitution applies with equal force to statutes enacted pursuant to Okla. Const. art. V, § 44 and § 51. *Cf. Liddell,* 2008 OK 6, ¶ 18, 180 P.3d at 1200 (rejecting the argument that Okla. Const. art. X, § 8(A)(2) and § 22's grant of legislative power to define assessment classifications justified an unconstitutional statute). The Oklahoma Constitution prevails over a conflicting statute, and where a statute violates one constitutional provision, another constitutional provision cannot save it.

¶19 The passage of Article 28A also confines those anticompetitive constitutional provisions. *See, e.g., Naifeh v. State ex rel. Okla. Tax Comm'n,* 2017 OK 63, ¶ 14, 400 P.3d 759, 764 (examining other constitutional provisions to help define the constitutional provision at issue). Prior holdings of this Court instructed that if there is a conflict between a constitutional amendment and other, earlier passed, provisions of the Oklahoma Constitution, the more recent amendment prevails. *See E. Okla. Bldg. & Constr. Trades Council v. Pitts*, 2003 OK 113, ¶ 10, 82 P.3d 1008, 1012; *In re Initiative Petition No. 259,* 1957 OK 167, ¶ 23, 316 P.2d 139, 144; *Adams v. City of Hobart,* 1933 OK 646, ¶ 0, 27 P.2d 595, 595 (Syllabus by the Court No. 2). Article 28A's change in the manufacturing-wholesaling distribution tier is the most recent constitutional change, and if there is a conflict, it controls over any other constitutional provision. *See id.*

¶20 We hold, however, that the plain language of Article 28A, § 2(A)(2) is not in conflict with the anticompetitive provisions of the Constitution. *See* Okla. Const. art. V, § 44 & § 51. Article 28A, § 2(A)(2)'s discretion allows liquor and wine manufacturers and wholesalers to have exclusive distributorships, and this Court has upheld exclusive distributorships as lawful. *Crown Paint Co. v. Bankston,* 1981 OK 104, ¶ 13, 640 P.2d 948, 951 (finding an agreement between a manufacturer and a distributor setting up an exclusive territory within which the distributor will have exclusive rights to sell does not in itself violate antitrust provisions); *Teleco, Inc. v. Ford Indus., Inc.*, 1978 OK 159, ¶ 9, 587 P.2d 1360, 1363 ("It is, however, well settled that it is not a per se violation of antitrust law for a manufacturer or supplier to agree with the distributor to give him an exclusive franchise or distributorship, even if this means cutting off another distributor."). We, therefore, hold that SB 608 is not a proper use of legislative authority under the anticompetitive provisions of the Oklahoma Constitution.10

V. CONCLUSION

¶21 The Court must always presume that a law is constitutional unless "clearly, palpably, and plainly inconsistent with the Constitution." *Lafalier,* 2010 OK 48, ¶ 15, 237 P.3d at 188. Here, SB 608 is clearly, palpably, and plainly inconsistent with Article 28A, § 2(A)(2)'s grant of discretion to a liquor or wine manufacturer to determine what wholesaler sells its product.

¶22 This Court must uphold the will of the people of Oklahoma who voted to adopt Article 28A of the Oklahoma Constitution and open the market between the alcohol manufacturing and wholesaling tier – allowing those actors within the tier to make decisions without interference in a force-sale system. Only an amendment to the Constitution can change what the people enshrined. We, therefore, affirm the district court's holding SB 608 unconstitutional.

DISTRICT COURT'S JUDGMENT AFFIRMED.

Gurich, C.J., Darby, V.C.J., Winchester, Edmondson, JJ., and Reif, S.J., concur.

Kauger (by separate writing), Kane, JJ., Barnes, S.J. (by separate writing), and Goodman, S.J., dissent.

KAUGER, J., with whom KANE, J. joins, dissenting:

¶1 The Oklahoma Legislature drafted the referendum in question. The very first sentence, (A)(1) provides that "[t]he Legislature **shall enact laws** providing for the strict regulation, control, licensing and taxation of the manufacture, sale, distribution, possession, transportation and consumption of alcoholic beverages, consistent with the provisions of this Article."[1] (Emphasis supplied.)

¶2 Subsection (A)(2) also addresses monopolies and common ownership between manufacturing, wholesaling and retailing tiers which is generally prohibited. A manufacturer is not permitted to sell in Oklahoma unless they go through an Oklahoma wholesaler. It also contains two sentences which are at the heart of this cause. A manufacturer and winemaker may sell to any licensed wholesaler who desires to purchase. Provided if the manufacturer or winemaker elects to sell to multiple wholesalers (more than one), the sales must be the same price basis **and** without discrimination to each wholesaler. (Emphasis supplied.)

¶3 A cursory reading of these sentences might appear to allow a manufacturer to elect to only sell to one wholesaler or sell to more than one. However, a provision that appears to allow the election to sell to only one is immediately followed by another provision which requires the same price basis to all and that prohibits no discrimination to each wholesaler. It does not say no price discrimination. Rather, it says the "same price basis" and "without discrimination." This implies that any discrimination, including price basis, is prohibited.

¶4 An immediate ambiguity appears. If one is allowed to sell to only one wholesaler and no others but is also required to sell without any discrimination, how can this provision be met? Selling only to one and no others is a form of discrimination. For example, if there is one manufacturer in the State, and five wholesalers and the manufacturer chooses to sell to only one, but is prohibited from discriminating against the others, how can this provision be satisfied?

¶5 To further complicate the matter, the same enactment also requires the Legislature to enact further laws as long as they do not conflict with the provisions. Yet, the provisions themselves are in conflict. How is it possible for the Legislature enact anything which doesn't conflict in some way with one or more of the conflicting directions within the provisions? The meaning of language in a statute is construed by courts as internally consistent and externally consistent with the constitution, i.e., the meaning of the statute's language is construed so that it does not contradict either itself or the constitution.[2]

¶6 While it may seem somewhat illogical, this is the framework with which we are faced in deciphering this cause. Consequently, our primary duty is to ascertain the intention of the framers, and of the people who adopted the same,[3] and construe it in such a way, if possible, that it does not contradict either itself or the constitution.[4] In such construction and determination, technical rules should be disregarded, and as a rule, a mean between a strict and liberal construction followed, and when ascertained, such intent must govern.[5] The same rule applies as to the intent of the Legislature in vitalizing such provisions and in enacting legislation to prevent corruption in making, procuring, and submitting initiative and referendum petitions.[6]

¶7 On its face, this voter approved referendum is expressly and clearly aimed at: expanding a consumer's availability to purchase alcoholic beverages; excluding industry monopolies in Oklahoma; and notifying voters that the Legislature will enact further laws governing such sales.

¶8 How do we know this? The actual resolution as codified in the Oklahoma Constitution,[7] addresses the Legislature's duties in several sections to enact furtherlaws regarding alcohol sales. It also directs the prohibition of discrimination, both based on price and otherwise.[8] The Final Ballot Title approved by the Attorney General[9] informed voters that this measure "repeals Article 28 of the Oklahoma Constitution and restructures the laws governing alcoholic beverages through a new Article 28A and other laws the Legislature will create if the measure passes." It also informed voters that the laws governing alcoholic beverages will be restructured for the Legislature to: authorize direct shipments to consumers of wine; create licenses; and designate days and hours when alcoholic beverages may be sold.[10]

¶9 It also expressly informs voters that it targets monopolies as well by providing that: "[t]he new Article 28A provides that with exceptions, a person or company can have an ownership interest in only one area of the alcoholic beverage business – manufacturing, wholesaling, or retailing." It says absolutely nothing about whether a wholesaler will be allowed to sell to only one retailer or required to sell to multiple retailers.[11]

¶10 The title of the voter approved proposition notes that alcohol beverage laws will be governed by the new Article 28A **and applicable laws**. (Emphasis supplied.)[12] It also expressly targets monopolies by stating that "[c]ommon ownership between tiers of the alcoholic beverage business is prohibited, with some exceptions." It states the same language as the body of the measure, that the Legislature is required to enact laws to regulate alcoholic beverages; prescribe licenses; and designate days and hours for alcoholic beverage sales. It says absolutely nothing about whether a wholesaler will be allowed to sell to only one retailer or required to sell to multiple retailers. The gist notes that the measure is to allow grocery and convenience stores to sell wine and high-point beer.[13]

¶11 This Court has long held that the purpose of the gist, along with the ballot title, is to "prevent fraud, deceit, or corruption in the initiative process." The gist must explain the proposal's effect without extending or describing policy arguments for or against the proposal."[14] When the resolution, the title, and the gist are read collectively with each other, and with other constitutional provisions such as art. 2 §32[15], art. 5 §§44[16] and 51,[17] and art. 9 §45,[18] as mentioned in Barnes, S.J., dissent, it clearly appears that the Legislature was primarily concerned with three things:

1) monopolies forming, especially between different types of alcoholic beverage businesses;

2) preventing discrimination, whether based on price or any thing else related to alcoholic beverage sales; and

3) the retention of the Legislature's authority to regulate the sale of alcoholic beverages in Oklahoma.

¶12 When the resolution, the title, and the gist, are read collectively, it is apparent that the voters were voting on these same three things. The voters were not notified about whether to allow a manufacturer to sell to only one wholesaler and the ballot title certainly did not inform voters of it in the voting booth. The ballot title said:

> This measure repeals Article 28 of the Oklahoma Constitution and restructures the laws governing alcoholic beverages through a new Article 28A and other laws the Legislature will create if the measure passes.[19]

¶13 One need only look to what happened after the measure was adopted to see that the voter approved measure was not intended to be interpreted in such a manner as sales to one wholesaler which results in discrimination among other wholesalers. Two large wholesalers now control a large part of the market, and they do not compete with one another regarding the top 25 best-selling brands. Currently, 14 of the top 25 brands are exclusively distributed by one distributor and the other 11 brands are distributed by another.

¶14 The result of the current market? Smaller wholesalers and consequently retailers, are being left with limited options to purchase, and limited options to offer consumers the most popular brands, if they can purchase them at all.[20] According to affidavits in the record, smaller wholesalers are suffering financially and find it nearly impossible to compete. At least one was forced to close.[21] With limited options to purchase the most popular brands, retailers are "hamstrung and face decreased service quality, lower supply and higher prices and fees.[22] Deliveries have dropped and rural retailers have suffered.[23]

¶15 Once this disparate result became apparent, the Legislature swiftly responded and passed Senate Bill 608 to, consistent with the purpose of the ballot title, the gist and the voter approved measure, modify the way in which the sale of alcoholic beverages occurred. The bill does several things related to this cause. It defines what a "brand" is and what "brand extension" means.24 It defines "top brand" as those brands constituting the top twenty-five brands in total sales of spirits and of wine by all wholesalers during the past twelve month period. [Of the top 25 brands from July 1, 2018 to June 30, 2019, 10 were wines and the rest were spirits.] It defines a 'manufacturer' as a brewer, distiller, winemaker, rectifier or bottler of any alcoholic beverage and its subsidiaries, affiliates and parent companies.

¶16 The legislation also creates a new law which requires "manufacturers" to offer to sell the 'top brands' to every licensed wine and spirits wholesaler who desire to purchase at the same price basis and without discrimination or inducements. The question before the Court is whether this legislation is consistent with the State Question adopted by the voters.

¶17 Accordingly, for the statute to be "consistent" internally, and externally, with the newly enacted Article 28A, and the purpose for which it was enacted it must be interpreted to mean that:

> manufacturers and winemakers must offer the "top brand" to all, without discrimination as to price basis or inducements.

Under this construction, there is no conflict between the constitutional provision and the statute. The statute merely adds a requirement that, of the brands offered for sale, top brands must be included. That is it. That is what this whole controversy boils down to — offering the top brands to everyone.

¶18 When a constitutional provision expressly provides that the legislature shall enact laws for further licensing, regulation, taxation, sale and distribution of alcoholic beverages such as this one does, the legislatures function is to enact laws necessary to carry the provision of the amendment into effect. To, in a manner of speaking, provide the meat on the bones of the provision.[25] Actions of the Legislature are presumed to be constitutional unless it is shown beyond a reasonable doubt that the Oklahoma Constitution or the Constitution of the United States expressly prohibit the Legislative action.[26]

CONCLUSION

¶19 The Legislature's authority to impose such a requirement comes from the constitutional provision itself wherein it requires the Legislature to enact regulatory laws regarding alcoholic beverage sales. The crux of this cause is that the proposed Legislation does nothing more than adding a requirement that the top brands be made available to everyone. Adding a top brand requirement to what manufacturers and winemakers have to offer does not change the function, the meaning, or the mandate of the voter approved provision. Consequently, the law should be upheld as constitutional. If anything, it furthers the purpose of the legislation regarding sales within the heavily regulated alcoholic beverage industry and levels the playing field.

¶20 Article 28A of the Oklahoma Constitution repeals Article 28, restructures the laws governing alcoholic beverages, and clearly provides that the Legislature will create other laws if the measure passes.[27] The measure is nothing more than a robust antitrust/antidiscrimination bill. Perhaps portions were inartfully drafted or could have been drafted better. Nevertheless, interpreting the measure to bestow an absolute right for manufacturers to sell to a single wholesaler, regardless of the consequence and discriminatory fallout, collectively ignores the ballot title, the gist, and the resolution. Such an interpretation is fundamentally contrary to everything the measure seeks to restrict. The district court grant of summary judgment should be vacated.

BARNES, S.J., with whom Goodman, S.J., joins, dissenting:

¶1 I respectfully dissent. Oklahoma jurisprudence directs that we construe the Oklahoma Constitution as a consistent whole and attempt to harmonize Article 28A, § 2(A)(2) with the robust anti-monopoly provisions of the Oklahoma Constitution combined with the "broad inherent power" of the Oklahoma Legislature to regulate and supervise all phases of the alcoholic beverages industry, *Okla. Alcoholic Beverage Control Bd. v. Seely*, 1980 OK 189, ¶ 6, 621 P.2d 534, a power that "is far broader than the power to regulate or restrict ordinary businesses," *State ex rel. Hart v. Parham*, 1966 OK 9, ¶ 11, 412 P.2d 142, and which is reflected in Article 28A, § 2(A) itself.[1]

¶2 It is "our obligation as a court . . . to give vitality to *all* provisions in the Constitution," *Okla. Auto. Dealers Ass'n v. State ex rel. Okla. Tax Comm'n*, 2017 OK 64, ¶ 25, 401 P.3d 1152 (footnote omitted) (emphasis in original), and to "measure legislation not merely against a single constitutional provision. . . . [T]he constitution must be construed as a consistent whole, in harmony with common sense and reason, with all pertinent portions of the constitution being construed together." *St. Paul Fire & Marine Ins. Co. v. Getty Oil Co.*, 1989 OK 139, ¶ 12, 782 P.2d 915 (citations omitted). As with a Legislative act, which is "to be construed in such manner as to reconcile the different provisions, render them consistent and harmonious, and give intelligent effect to each," *South Tulsa Citizens Coalition, L.L.C. v. Arkansas River Bridge*

Auth., 2008 OK 4, ¶ 15, 176 P.3d 1217 (footnote omitted), the Oklahoma Constitution must similarly be viewed as a single instrument and construed in a manner that renders all pertinent provisions harmonious and operative:

> It is a universally recognized rule of construction that, in ascertaining both the intent and general purpose, as well as the meaning, of a constitution or a part thereof, it should be construed as a whole. As far as possible, each provision should be construed so as to harmonize with all the others, yet with a view to giving effect to each and every provision in so far as it shall be consistent with a construction of the instrument as a whole.

Jones v. Winters, 1961 OK 224, ¶ 42, 365 P.2d 357 (citations omitted). *See also Cowart v. Piper Aircraft Corp.*, 1983 OK 66, ¶¶ 4 & 5, 665 P.2d 315 ("It is not to be supposed that a Constitution contains excess verbiage without force and effect"; "[e]very provision of the Constitution and statutes of Oklahoma is presumed to have been intended for some useful purpose and . . . every provision should be given effect"; and "[i]t is presumed that each portion of the Constitution was intended to be operative and not surplus language.").[2] Thus, the "rule [is] that constitutional provisions are construed to harmonize with each other with a view to giving effect to each and every provision," *Okla. City Urban Renewal Auth. v. Med. Tech. & Research Auth. of Okla.*, 2000 OK 23, ¶ 17, 4 P.3d 677 (footnote omitted), and, "[i]ndeed, . . . where one constitutional provision[] butts up against another, we must harmonize the two rather than allow one to run roughshod over the other," *Okla. Auto. Dealers Ass'n*, 2017 OK 64, ¶ 25 (footnote omitted).[3]

¶3 This method of constitutional interpretation, in which we examine all pertinent provisions of the Oklahoma Constitution and attempt to harmonize them before determining whether legislation is inconsistent with the Constitution, is especially applicable to the present case involving a referendum. The Oklahoma Constitution states: "The reservation of the powers of the initiative and referendum in this article shall not deprive the Legislature of the right to repeal any law, propose or pass any measure, which may be consistent with the Constitution of the State and the Constitution of the United States." Okla. Const. art. 5, § 7.[4]

¶4 In addition, "[t]his Court does not examine the Constitution to decide whether the Legislature is permitted to act, only whether it is prohibited from acting. If there is any doubt, it should be resolved in favor of the validity of the Legislature's action; restrictions thereon should be strictly construed." *In re Detachment of Mun. Territory from City of Ada, Okla.*, 2015 OK 18, ¶ 7, 352 P.3d 1196 (citations omitted). "There is a strong presumption which favors legislative enactments. The presumed constitutionality of a legislative enactment is rebutted only when the enactment is prohibited by either the Oklahoma Constitution or federal law." *Graham v. D & K Oilfield Servs., Inc.*, 2017 OK 72, ¶ 11, 404 P.3d 863 (citations omitted). As stated in *Oklahoma Alcoholic Beverage Control Board v. Parkhill Restaurants, Inc.*, 1983 OK 77, 669 P.2d 265, "The Oklahoma Constitution vests in the Legislature the supreme power to enact laws to meet the needs of the State, and its acts should be upheld unless plainly and clearly within the express prohibitions and limitations fixed by the Constitution." *Id.* ¶ 27 (citation omitted). The Parkhill Court further stated that "a presumption in favor of validity is afforded to state laws regulating intoxicating liquors." *Id.* ¶ 11 (footnote omitted).

¶5 As reflected in Article 28A, § 2(A), which states that "[t]he Legislature shall enact laws providing for the strict regulation, control, licensing and taxation of the manufacture, sale, distribution, possession, transportation and consumption of alcoholic beverages," this Court has explained that the Legislature has "near absolute power to regulate the liquor industry":

> The broad sweep of the twenty-first amendment to the Constitution of the United States[5] gives the states near absolute power to regulate the liquor industry as long as they do not act in a discriminatory manner. Wide latitude as to choice of the means to accomplish regulation is accorded . . . .

Okla. Alcoholic Beverage Control Bd. v. Burris, 1980 OK 58, ¶ 6, 626 P.2d 1316.

Indeed, the Oklahoma Alcoholic Beverage Control Act states:

> The Oklahoma Alcoholic Beverage Control Act shall be deemed an exercise of the police power of the State of Oklahoma for the protection of the welfare, health, peace, temperance and safety of the people of this state, and all provisions hereof shall be

> construed for the accomplishment of that purpose.

37A O.S. Supp. 2018 § 1-106. *See also Okla. Alcoholic Beverage Control Bd. v. Seely*, 1980 OK 189, ¶ 6, 621 P.2d 534 (The liquor industry "is a business which is subject to a high degree of supervision and regulation in the interest of the public welfare.").[6]

¶6 Pertinent to this case, the Legislature's power in this domain to "enact laws providing for the strict regulation [and] control . . . of [inter alia] the manufacture, sale, distribution, possession [and] transportation . . . of alcoholic beverages," Okla. Const. art. 28A, § 2(A), is combined with the Oklahoma Constitution's express prohibition of monopolies: "[M]onopolies are contrary to the genius of a free government, and shall never be allowed[.]" Okla. Const. art. 2, § 32. This Court has explained that "[i]n 1906-07, the framers of our Constitution held a strong conviction against monopolies . . . and favored encouraging just competition, as shown by clauses, paragraphs, and sections of our organic law." *City of Okmulgee v. Okmulgee Gas Co.*, 1929 OK 472, ¶ 45, 282 P. 640, *overruled on other grounds in Pub. Serv. Co. of Okla. v. Caddo Elec. Coop.*, 1970 OK 219, 479 P.2d 572.[7] *See also* Okla. Const. art. 5, § 44 (commanding the Legislature to "define what is an unlawful combination, monopoly, trust, act, or agreement, in restraint of trade, and enact laws to punish persons engaged in any unlawful combination, monopoly, trust, act, or agreement, in restraint of trade, or composing any such monopoly, trust, or combination."); Okla. Const. art. 5, § 51 (prohibiting the Legislature from passing any law "granting to any association, corporation, or individual any exclusive rights, privileges, or immunities within this State."). Also relevant is Article 9, § 45, as language from this section of the Oklahoma Constitution – entitled "Monopoly or destruction of competition - Discrimination prohibited" – is mirrored in the very language in Article 28A, § 2(A)(2) upon which the Majority bases its conclusion that the Legislature is powerless to enact SB 608.[8]

¶7 Article 28A, § 2(A)(2) does not plainly and clearly prohibit or suspend the Legislature's broad anti-monopoly power over the liquor industry in our state; I believe this conclusion is all the more inescapable when Article 28A, § 2(A)(2) is interpreted in the wider context of the instrument of which it is a part. Thus, although I agree the requirement of a "forced sale," as discussed by the Majority, has been removed or deconstitutionalized, I disagree that the Legislature's power to enact laws to undo or prevent monopolies has also been removed or deconstitutionalized in the domain of alcohol sales. I disagree, in other words, that we must go from one extreme to the other, from forced sales to sales completely unlimited by the Legislature's above-described power, and, in my view, the Majority arrives at such an interpretation – that manufacturers now have an absolute right to sell to a designated wholesaler "free from legislative interference"[9] – based only on a review of Article 28A, § 2(A)(2) and repealed Article 28.[10]

¶8 A contrary interpretation is discernable, one which harmonizes the various provisions and construes them as a consistent whole. Article 28A, § 2(A)(2) sets forth, as part of the three-tier structure, a general or default ability on the part of manufacturers to sell to any – hence, zero, "multiple" or, impliedly,[11] one – licensed wholesaler who desires to buy, but it does not plainly and clearly prohibit the Legislature from exercising its broad anti-monopoly powers in this domain. This is precisely how we would construe a legislative act containing such various provisions.[12] We should also interpret the Constitution in this manner, giving effect to these various provisions consistent with a construction of the instrument as a whole. This interpretation also upholds the constitutionality of SB 608:

> We presume that every statute is constitutional, and we approach a constitutional attack on a statute with great caution and grave responsibility. Our consideration is guided by the general principles that the Legislature is sovereign and that the legislative power has no limitation except by specific declaration in the state or federal constitutions. Constitutional restriction on the Legislature will be strictly construed, and a statute will be upheld against a constitutional attack unless it is clearly and overtly inconsistent with the constitution.

Glasco v. State ex rel. Okla. Dept. of Corrections, 2008 OK 65, ¶ 27, 188 P.3d 177 (citations omitted).[13]

¶9 Importantly, this interpretation does not render Article 28A, § 2(A)(2) into a nullity, as Appellees argue.[14] Rather, this reading leaves the general ability of wine and spirit manufacturers to sell to one, and only one, wholesaler

operative with regard to more than 99% of such manufacturers as SB 608 operates to exclude just a small fraction of one percent of the many thousands[15] of wine and spirit manufacturers from the general ability to sell to one, and only one, wholesaler. It is the contrary reading which, in my view, unnecessarily renders provisions of our fundamental law into nullities. In my view, the Majority's interpretation would leave the Legislature powerless to prevent and address the potential scenario in which there remains only one wholesaler who controls all of the popular brands sold and distributed to retailers in this state; it would even leave the Legislature powerless with regard to the potential scenario in which there is only one remaining wholesaler despite Article 28A clearly contemplating the continuing viability of "multiple wholesalers." *See* Okla. Const. art. 28A, § 2(A) ("multiple wholesalers"; "each wholesaler"; "[e]very wholesaler").

¶10 Thus, in my view, the Majority adopts an overly strict and technical reading of one provision that ultimately threatens the viability of the three-tier structure itself. "The construction of a constitutional provision must not be so strict or technical as to defeat the evident object and purpose of its adoption." *State v. Millar*, 1908 OK 124, ¶ 0, 96 P. 747 (Syllabus by the Court).[16] We must avoid "parsing by lawyers" that moves at cross-purposes with the "practical interpretation" and "manifest purpose" of the Constitution. *Fent v. Fallin*, 2014 OK 105, ¶¶ 11 & 17, 345 P.3d 1113.

¶11 Furthermore, although we are ultimately concerned only with whether the Legislature is clearly prohibited under the Constitution from enacting SB 608 – and, absent such a clear prohibition, the Legislature's power is not limited to, for example, waiting until after a destruction of competition has occurred – it should nevertheless be pointed out that competition among wholesalers in Oklahoma in the sale and distribution of the most popular brands of wine and spirits has already been "destroyed." This was the conclusion reached under very similar circumstances in *State ex rel. Hart v. Parham*, 1966 OK 9, 412 P.2d 142. In *Parham*, the Court explained that "the wholesalers [had] attempted to restrict competition by the voluntary allocation of the major brands of liquor among themselves" such that, with regard to the top brands, the wholesalers had divided up the market and there was no competition at the wholesaler tier with regard to top brands. *Id.* ¶ 27. The *Parham* Court explained it was "clear that" if this arrangement were permitted, then "the extensive competition heretofore existing between wholesalers selling the same [major or top] brands of liquor *would be destroyed*." *Id.* ¶ 17 (emphasis added).

¶12 As the Majority acknowledges, in the current market only two wholesalers control the sale and distribution to retailers of all of the most popular brands, and those two wholesalers do not even compete with one another with regard to those brands. From the perspective of Oklahoma retailers, any one of the 25 most popular brands – and as many as 90 of the top 100 brands – is currently legally obtainable[17] from only one wholesaler. As the Majority notes,

> On July 15, 2019, the ABLE Commission published the top 25 brands of wine and liquor. Southern Glazer's Wine and Spirits of Oklahoma, LLLP is the exclusive distributor of fourteen of the top 25 brands. Central Liquor Co. L.P., d/b/a RNDC Oklahoma is the exclusive distributor of the other eleven top 25 brands.[18]

Thus, Oklahoma retailers have only one place to go to purchase any one of these particular top brands, a scenario that is destructive of competition among the "multiple wholesalers" contemplated under Article 28A, § 2, an Article containing as its most fundamental objective the continued viability of the three-tier structure, including a privately-owned and competitive second tier of multiple wholesalers.[19] Under the Majority's reading, the Legislature is powerless to address this scenario or prevent even more flagrant potential scenarios at the wholesaler tier.[20]

¶13 The Majority concludes that "[o]nly an amendment to the Constitution can change what the people enshrined," but, in my view, this conclusion stems from a departure from the fundamental rules of constitutional interpretation discussed above. It is nevertheless illuminating to question what such an amendment would look like. The Legislature could perhaps attempt a new referendum seeking voter approval of SB 608 (i.e., that portion of SB 608 under consideration) as part of the Oklahoma Constitution. However, the Legislature, which might in the future deem it wise to adjust the number of top brands subject to its requirements in order to address monopolization at the wholesaler tier,[21] or even to abolish SB 608 altogether, would be forced to again

seek to change the Constitution in order to do so.[22] The Legislature could instead propose language stating, in effect, that its duty to strictly regulate the alcohol industry includes the power to pass anti-monopoly laws in this domain and the ability of manufacturers to sell to one wholesaler is not absolute. However, in my view, such language would be redundant, as it is already discernable from a review of the entire instrument of the Oklahoma Constitution. *See, e.g., Okla. City Urban Renewal Auth. v. Med. Tech. and Research Auth. of Okla.*, 2000 OK 23, ¶ 17, 4 P.3d 677 ("[N]othing in the language of art. 10, § 6C indicates that it is intended to affect any other constitutional provision. It contains no language impacting or altering the debt limitations of art. 10, § 26," and "[t]o hold differently would require us to strike debt limitation provisions from the Oklahoma Constitution, and to ignore the rule that constitutional provisions are construed to harmonize with each other with a view to giving effect to each and every provision." (footnote omitted)).

¶14 In *United States v. Sprague*, 282 U.S. 716 (1931), the United States Supreme Court stated:

> If the framers of the instrument had any thought that amendments differing in purpose should be ratified in different ways, nothing would have been simpler tha[n] so to phrase article 5 as to exclude implication or speculation. The fact that an instrument drawn with such meticulous care and by men who so well understood [h]ow to make language fit their thought does not contain any such limiting phrase affecting the exercise of discretion by the Congress in choosing one or the other alternative mode of ratification is persuasive evidence that no qualification was intended.

Id. at 732. Similarly, here, Article 28A, § 2, which is more than 1,200 words long and contains various mandatory provisions, contains no explicit statement affecting the anti-monopoly provisions of the Oklahoma Constitution or providing that manufacturers have an absolute right to sell to one, and only one, wholesaler. There is certainly no such language anywhere in the ballot title.[23] Rather, the ability to sell to one wholesaler is a mere implication from the two sentences upon which Appellees base their entire argument.[24]

¶15 Finally, Appellees emphasize that Article 28A, § 2(A) states that "[t]he Legislature shall enact laws" strictly regulating the alcoholic beverages industry "consistent with the provisions of this Article." (Emphasis added.) I disagree, however, that this language effectively suspends all other provisions of the Oklahoma Constitution and requires that Article 28A be interpreted in a vacuum. The Legislature must, of course, enact laws consistent with the provisions of Article 28A, but Article 28A itself must be construed as part of the Oklahoma Constitution. *See Calvey v. Daxon*, 2000 OK 17, ¶ 14, 997 P.2d 164 ("The Legislature and the voters expect the courts to be familiar with settled rules of constitutional construction and to follow them."). All pertinent provisions of the Oklahoma Constitution must be reconciled and vitalized, not unnecessarily rendered dormant and ineffective.

¶16 For all these reasons, I respectfully dissent. In my opinion, we must construe the Oklahoma Constitution as a consistent whole, and resist reading Article 28A, § 2(A)(2) in a vacuum with its predecessor. Such a reading reveals, in my view, that the Legislature's broad anti-monopoly power over the highly-regulated alcoholic beverages industry in our state is not plainly and clearly prohibited or suspended. I would reverse the trial court's order finding SB 608 is unconstitutional.

Winchester, J.

1. Appellees are a collection of wholesalers, their principal officers, liquor and wine manufacturers, two Oklahoma retail liquor stores, and consumers.

2. *See* Official Results, Federal, State, Legislative and Judicial Races, General Election – November 8, 2016, Oklahoma State Election Board, http://ok.gov/elections/support/20161108_seb.html (last visited Nov. 13, 2019).

The ballot title for State Question 792 provided:

> This measure repeals Article 28 of the Oklahoma Constitution and restructures the laws governing alcoholic beverages through a new Article 28A and other laws the Legislature will create if the measure passes.
>
> The new Article 28A provides that with exceptions, a person or company can have an ownership interest in only one area of the alcoholic beverage business – manufacturing, wholesaling, or retailing. Some restrictions apply to the sales of manufacturers, brewers, winemakers, and wholesalers. Subject to limitations, the Legislature may authorize direct shipments to consumers of wine.
>
> Retail locations like grocery stores may sell wine and beer. Liquor stores may sell products other than alcoholic beverages in limited amounts.
>
> The Legislature must create licenses for retail locations, liquor stores, and places serving alcoholic beverages and may create other licenses. Certain licensees must meet residency requirements. Felons cannot be licensees.
>
> The Legislature must designate days and hours when alcoholic beverages may be sold and may impose taxes on sales. Municipalities may levy an occupation tax. If authorized, a state lodge may sell individual alcoholic beverages for on-premises consumption but no other state involvement in the alcoholic beverage business is allowed.
>
> With one exception, the measure will take effect October 1, 2018.

3. Article 28A, § 2(A)(4) provides the same direction to winemakers:

> Winemakers either within or without this state may sell wine produced at their wineries to any licensed wholesaler who

desires to purchase the wine; provided, that if a winemaker elects to sell the wine it produces to multiple wholesalers, then such sales shall be made on the same price basis and without discrimination to each wholesaler. In addition to its sales through one or more licensed wholesalers, a winemaker may be authorized to sell its wine as follows . . . .

4. On July 15, 2019, the ABLE Commission published the top 25 brands of wine and liquor. Southern Glazer's Wine and Spirits of Oklahoma, LLLP is the exclusive distributor of fourteen of the top 25 brands. Central Liquor Co. L.P., d/b/a RNDC Oklahoma is the exclusive distributor of the other eleven top 25 brands.

5. SB 608 also sets out how the ABLE Commission determines what liquor or wine brand constitutes a "top brand":

> "Top brand" shall mean those brands constituting the top twenty-five brands in total sales of spirits and of wine by all wholesalers during the past twelve-month period, according to the records of the ABLE Commission as revised by the ABLE Commission quarterly. In order to allow the ABLE Commission to determine the top twenty-five brands of spirits and of wine, all wholesalers must submit to the ABLE Commission every sixty (60) days a sworn affidavit listing their top thirty brands of spirits and of wine in sales for the previous sixty (60) days, excluding sales to wholesalers.

Id. The ABLE Commission's list of the top 25 brands of wine and liquor is as follows:

Barefoot Moscato	Barefoot Pink Moscato
Barton Vodka 80 Proof	Beringer White Zinfandel
Burnetts Vodka	Crown Royal
Evan Williams Black 7 Years	Fireball Cinnamon Whiskey
Franzia Chardonnay	Franzia Chillable Red
Franzia Crisp White	Franzia Fruity Red Sangria
Franzia Merlot	Franzia Sunset Blush
Franzia White Zinfandel	Heaven Hill Vodka 80 Proof
Jack Daniels Whiskey	Jim Beam White 80 Proof
Kentucky Deluxe Blend	McCormick Vodka 80 Proof
Seagrams 7 Crown Blend	SKYY Vodka
Svedka Vodka 80 Proof	Titos Handmade Vodka
Tvarscki Vodka 100 Proof	

6. For example, the Legislature prohibited price discrimination to wholesalers only "when that manufacturer has not designated a single wine and spirits wholesaler." *Id.* § 3-123(A)(1). Similarly, the Legislature provided the post and adjust price-posting system would not apply to a manufacturer that has a designated wholesaler to sell its products in the state. *Id.* § 3-116(D); § 3-116.1(A).

7. This Court has found that "[a]n amendment to a constitutional provision that has been judicially interpreted is presumed to have changed the existing law." *Williams Nat. Gas Co. v. Perkins*, 1997 OK 72, ¶ 14 n.11, 952 P.2d 483, 489 n.11.

8. Okla. Const. art. V, § 44 provides:

> The Legislature shall define what is an unlawful combination, monopoly, trust, act, or agreement, in restraint of trade, and enact laws to punish persons engaged in any unlawful combination, monopoly, trust, act, or agreement, in restraint of trade, or composing any such monopoly, trust, or combination.

9. Okla. Const. art. V, § 51 provides: "The Legislature shall pass no law granting to any association, corporation, or individual any exclusive rights, privileges, or immunities within this State."

10. The plain language of SB 608 further shows that the statute is not an operation of the Legislature's power to combat anticompetitive markets pursuant to Okla. Const. art. V, § 44. SB 608 does not define an unlawful restraint of trade nor does it set forth any punishment for those entities engaging in unlawful restraint of trade. *Id.* Further, SB 608 **only** deals with the top 25 brands of liquor and wine as determined by the ABLE Commission every quarter. To apply the State's argument beyond the top 25 brands specified in SB 608, the statute would allow for a restraint of trade on thousands of other brands of liquor and wine. If SB 608 was an anticompetitive measure, it would logically restrict anticompetition on **all** brands of liquor and wine.

KAUGER, J., with whom KANE, J. joins, dissenting:

1. State Question No. 792, Legislative Referendum No. 370, as adopted at election held on Nov. 9, 2016, is now Art. 28A §2 of the Oklahoma Constitution and it provides in pertinent parts:

> A. The Legislature shall enact laws providing for the strict regulation, control, licensing and taxation of the manufacture, sale, distribution, possession, transportation and consumption of alcoholic beverages, consistent with the provisions of this Article. Provided:
>
> 1. a. there shall be prohibited any common ownership between the manufacturing, wholesaling and retailing tiers, unless otherwise permitted by this subsection. Following the effective date of this Article, brewers may obtain beer wholesaler licenses to distribute beer, also known as brewery-owned branches, to up to two (2) territories within the state. Any brewery-owned branch in operation on the date of adoption of this Article may not expand its distribution territory that was in effect on the date of adoption of this Article. If a brewer maintained one or more licenses to distribute low-point beer in the state prior to the effective date of this Article, then up to two (2) of the brewer's low-point beer distribution licenses shall automatically convert to beer distribution licenses upon the effective date of this Article. All low-point distribution licenses shall cease to exist following this conversion date,
>
> b. [*see note below regarding effective date] from the date of adoption of this Article by the voters until the effective date of this Article, brewers may continue to obtain and operate up to two (2) low-point beer brewery-owned branches pursuant to the existing low-point beer laws pertaining to the distribution of low-point beer by brewery-owned branches,
>
> c. only after the effective date of this Article, the Legislature may duly enact legislation to require, by statute, the divestiture of all brewery-branches. If the Legislature requires brewers to divest, it must require full divestiture of every brewery-owned branch in the state, and it shall allow brewers at least (1) year but no more than three (3) years to complete said divestiture. Except as provided in this subsection, and except for a small brewer as defined by law, no other member of one tier may own an interest in a business licensed in a different tier;
>
> 2. A manufacturer, except a brewer, shall not be permitted to sell alcoholic beverages in this state unless such sales occur through an Oklahoma wholesaler. A manufacturer, except a brewer, or subsidiary of any manufacturer, who markets his or her product solely through a subsidiary or subsidiaries, a distiller, rectifier, bottler, winemaker or importer of alcoholic beverages, bottled or made in a foreign country, either within or without this state, may sell such brands or kinds of alcoholic beverages to any licensed wholesaler who desires to purchase the same. Provided, if a manufacturer, except a brewer, elects to sell its products to multiple wholesalers, such sales shall be made on the same price basis and without discrimination to each wholesaler; …

2. Young v. Station 27, Inc., 2017 OK 68, ¶18, 404 P.3d 829; St. Paul Fire & Marine Ins. Co. v. Getty Oil Co., 1989 OK 139, 782 P.2d 915, 918, ("Whenever an act of the legislature can be so construed and applied as to avoid conflict with the constitution, and give it the force of law, such construction will be adopted by the courts."), quoting Williams v. Bailey, 1954 OK 19, 268 P.2d 868, 871; Pfister v. Johnson, 1935 OK 824, 173 Okla. 541, 49 P.2d 174, 176-177, 102 A.L.R. 31 (Court's construction which results in consistency in statutory language must be adopted.).

3. In re Initiative Petition No. 2 of Cushing v. Harlow, et al., 1932 OK 124, ¶19, 10 P.2d 271.

4. Young v. Station 27, Inc., 2017 OK 68, ¶18, 404 P.3d 829; St. Paul Fire & Marine Ins. Co. v. Getty Oil Co., 1989 OK 139, 782 P.2d 915, 918, ("Whenever an act of the legislature can be so construed and applied as to avoid conflict with the constitution, and give it the force of law, such construction will be adopted by the courts."), quoting Williams v. Bailey, 1954 OK 19, 268 P.2d 868, 871; Pfister v. Johnson, 1935 OK 824, 173 Okla. 541, 49 P.2d 174, 176-177, 102 A.L.R. 31 (court's construction which results in consistency in statutory language must be adopted).

5. In re Initiative Petition No. 2 of Cushing v. Harlow, et al., 1932 OK 124, ¶19, 10 P.2d 271.

6. In re Initiative Petition No. 2 of Cushing v. Harlow, et al., 1932 OK 124, ¶19, 10 P.2d 271. When economic legislation is involved, the judiciary extends great deference to the legislature. See, e.g., Gladstone v. Bartlesville Ind. School Dist. No. 30, 2003 OK 30, ¶12, fn. 30, 66 P.3d 442 and Ross v. Peters, 1993 OK 8, ¶19, 846 P.2d 1107 where in we explained that to equal protection challenges of economic legislation, the judiciary extends great deference to the legislature's judgment as part of an aspect of legislative function and the democratic process.

7. Enrolled Senate Joint Resolution 68, Enacted by the 2nd Regular Session of the 55th Legislature of the State of Oklahoma Numbered by the Secretary of State, State Question Number 792, Legislative Referendum Number 370. Now, art. 28A §2 provides:

> § 2. Enactment of laws by Legislature - Direct shipment of alcoholic beverages - Direct sales of wine.
>
> A. The Legislature shall enact laws providing for the strict regulation, control, licensing and taxation of the manufacture, sale, distribution, possession, transportation and consumption of alcoholic beverages, consistent with the provisions of this Article. Provided:

1. a. there shall be prohibited any common ownership between the manufacturing, wholesaling and retailing tiers, unless otherwise permitted by this subsection. Following the effective date of this Article, brewers may obtain beer wholesaler licenses to distribute beer, also known as brewery-owned branches, to up to two (2) territories within the state. Any brewery-owned branch in operation on the date of adoption of this Article may not expand its distribution territory that was in effect on the date of adoption of this Article. If a brewer maintained one or more licenses to distribute low-point beer in the state prior to the effective date of this Article, then up to two (2) of the brewer's low-point beer distribution licenses shall automatically convert to beer distribution licenses upon the effective date of this Article. All low-point distribution licenses shall cease to exist following this conversion date,

b. [*see note below regarding effective date] from the date of adoption of this Article by the voters until the effective date of this Article, brewers may continue to obtain and operate up to two (2) low-point beer brewery-owned branches pursuant to the existing low-point beer laws pertaining to the distribution of low-point beer by brewery-owned branches,

c. only after the effective date of this Article, the Legislature may duly enact legislation to require, by statute, the divestiture of all brewery-branches. If the Legislature requires brewers to divest, it must require full divestiture of every brewery-owned branch in the state, and it shall allow brewers at least (1) year but no more than three (3) years to complete said divestiture. Except as provided in this subsection, and except for a small brewer as defined by law, no other member of one tier may own an interest in a business licensed in a different tier;

2. A manufacturer, except a brewer, shall not be permitted to sell alcoholic beverages in this state unless such sales occur through an Oklahoma wholesaler. A manufacturer, except a brewer, or subsidiary of any manufacturer, who markets his or her product solely through a subsidiary or subsidiaries, a distiller, rectifier, bottler, winemaker or importer of alcoholic beverages, bottled or made in a foreign country, either within or without this state, may sell such brands or kinds of alcoholic beverages to any licensed wholesaler who desires to purchase the same. Provided, if a manufacturer, except a brewer, elects to sell its products to multiple wholesalers, such sales shall be made on the same price basis and without discrimination to each wholesaler; . . .

C. All laws passed by the Legislature under the authority of the Article shall be consistent with the provisions of this section. If any provision of this Article applicable to winemakers is ruled to be unconstitutional by a court of competent jurisdiction, then no winemaker shall be permitted to directly sell its wine to restaurants or other retail stores and outlets that may be from time to time authorized by the state to sell wine for off-premise consumption or to consumers in this state.

The Okla. Const. art. 28A §3 provides:

§ 3. Legislature to prescribe licenses - On-premise and off-premise consumption.

A. The Legislature shall, by law, prescribe a set of licenses for the sale of alcoholic beverages to consumers for off-premise consumption, which shall include but not be limited to:

1. A Retail Spirits License, which shall be required in order to sell the following:

a. spirits in their original sealed package, and/or

b. refrigerated and non-refrigerated wine and beer in their original sealed package.

A holder of a Retail Spirits License shall be permitted to sell at retail any item that may be purchased at a grocery store or convenience store, as defined by law, so long as the sale of items other than alcoholic beverages do not comprise more than twenty percent (20%) of the holder's monthly sales;. . .

C. The Legislature shall, by law, prescribe a set of licenses for the sale of alcoholic beverages to consumers for on-premise consumption, which may include the sale of spirits, wine and/or beer, provided that such sales of alcoholic beverages by the individual drink have been authorized by the voters in the specific county where the alcoholic beverages are sold, either prior to or after the enactment of this Article.

The Okla. Const. art. 28A §6 provides:

The Legislature shall, by law, designate the specific days, hours and holidays on which alcoholic beverages may be sold or served to consumers for off-premise and/or on-premise consumption.

8. The Okla. Const. art 28A, §2, see note 7, supra.

9. The Secretary of State received the Final Ballot Title for State Question No. 792 on July 7, 2018.

10. The Ballot Title provides:

This measure repeals Article 28 of the Oklahoma Constitution and restructures the laws governing alcoholic beverages through a new Article 28A and other laws the Legislature will create if the measure passes.

The new Article 28A provides that with exceptions, a person or company can have an ownership interest in only one area of the alcoholic beverage business-manufacturing, wholesaling, or retailing. Some restrictions apply to the sales of manufacturers, brewers, winemakers, and wholesalers. Subject to limitations, the Legislature may authorize direct shipments to consumers of wine.

Retail locations like grocery stores may sell wine and beer. Liquor stores may sell products other than alcoholic beverages in limited amounts.

The Legislature must create licenses for retail locations, liquor stores, and places serving alcoholic beverages and may create other licenses. Certain licensees must meet residency requirements. Felons cannot be licensees.

The Legislature must designate days and hours when alcoholic beverages may be sold and may impose taxes on sales. Municipalities may levy an occupation tax. If authorized, a state lodge may sell individual alcoholic beverages for on-premises consumption but no other state involvement in the alcoholic beverage business is allowed. With one exception, the measure will take effect October 1,2018.

SHALL THE MEASURE BE APPROVED?

FOR THE MEASURE _ YES

AGAINST THE MEASURE _ NO

A "YES" vote is a vote in favor of this measure. A "NO" vote is a vote against this measure.

11. The ballot title must reflect the character and purpose of the measure and not be deceptive or misleading. In re Initiative Petition No. 409 v. Retail Liquor Assoc. of Oklahoma, 2016 OK 51, ¶3, 376 P.3d 250; OCPA Impact, Inc. v. Sheehan, 2016 OK 84, ¶9, 377 P.3d 138. The ballot must be written so that voters are afforded an opportunity to fairly express their will and it must apprise voters with substantial accuracy what they are asked to approve. *OCPA Impact, Inc. v. Sheehan, supra.*

12. Enrolled Senate Joint Resolution 68, Enacted by the 2nd Regular Session of the 55th Legislature of the State of Oklahoma Numbered by the Secretary of State, State Question Number 792, Legislative Referendum Number 370 provides:

A Joint Resolution directing the Secretary of State to refer to the people for their approval or rejection a proposed amendment to add a new Article XXVIIIA to the Oklahoma Constitution, and to repeal Sections 1, 1.A, 2, 3, 4, 5, 6, 7, 8, 9 and 10 of Article XXVIII of the Oklahoma Constitution, which relate to alcoholic beverages; providing that all beverages containing alcohol be subject to Article and applicable laws; requiring Legislature to enact laws regulating alcoholic beverages subject to certain provisions; prohibiting certain common ownership; providing exceptions; providing for automatic conversion and cessation of certain licenses; allowing continuation of certain operations for certain time period; authorizing enactment of certain legislation; specifying conditions of certain divesture; stating restrictions applicable to manufacturers, brewers, wholesalers and winemakers; requiring certain sales to be made on same price basis and without discrimination; prohibiting direct shipments of alcoholic beverages except under certain circumstances; prohibiting certain sales if provisions ruled unconstitutional; providing for certain licenses and setting forth restrictions thereon; defining term; prohibiting licensure of certain persons; providing exceptions; allowing license holders to enter into certain agreements; providing exceptions; specifying unlawful acts; requiring Legislature to designate days and hours of sales; providing for taxation of alcoholic beverage sales; prohibiting state or political subdivisions from engaging in alcoholic beverage business; providing exceptions; authorizing certain cities and towns to levy occupation tax; providing effective dates; providing ballot title; and directing filing.

13. The gist provides:

SQ 792 would amend the Oklahoma constitution to allow grocery and convenience stores to sell wine and high-point beer. Currently these stores are prohibited from selling beer containing above 3.2 percent alcohol by volume, as well as all wine and all liquor. SQ 792 would also allow Oklahoma liquor stores to sell refrigerated beer and alcohol accessories (i.e., sodas, corkscrews). The measure would allow multiple beer and wine stores to be owned by one corporation (ownership would be limited to two stores per person if spirits are sold). Currently individual liquor

store owners are not allowed to have more than one store. If SQ 792 passes, these changes would take effect on October 1, 2018.

14. In re Initiative Petition No. 409 v. Retail Liquor Assoc. of Oklahoma, see note 11, supra.

15. The Okla. Const. art. 2 §32 provides:

Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed, nor shall the law of primogeniture or entailments ever be in force in this State.

16. The Okla. Const. art 2 §44 provides:

The Legislature shall define what is an unlawful combination, monopoly, trust, act, or agreement, in restraint of trade, and enact laws to punish persons engaged in any unlawful combination, monopoly, trust, act, or agreement, in restraint of trade, or composing any such monopoly, trust, or combination.

17. The Okla. Const. art 5 §51 provides:

The Legislature shall pass no law granting to any association, corporation, or individual any exclusive rights, privileges, or immunities within this State.

18. The Okla. Const. art 9 §45 provides:

Until otherwise provided by law, no person, firm, association, or corporation engaged in the production, manufacture, distribution, or sale of any commodity of general use, shall, for the purpose of creating a monopoly or destroying competition in trade, discriminate between different persons, associations, or corporations, or different sections, communities or cities of the State, by selling such commodity at a lower rate in one section, community, or city than in another, after making due allowance for the difference, if any, in the grade, quantity, or quality, and in the actual cost of transportation from the point of production or manufacture.

19. The Ballot Title, note 10, supra.

20. For instance, in the lead up to SQ 792's implementation, a wholesaler was unable to secure any exclusive distribution agreement with a top brand manufacturer because of the manufacturers preexisting relationships with the two entities who controlled the market. Record on Accelerated Appeal (ROAA), Vol. I, Tab 4, at 4, ¶9, Ex. 22 Hendershot (Boardwalk) Affidavit ¶5.

21. ROAA), Vol. I, Tab 4, at 4, ¶9, Hendershot (Boardwalk) Affidavit ¶5, Willima Icke Affidavit, ¶¶4-6, Chris Cathey Affidavit, ¶3.

22. ROAA), Vol. I, Tab 4, at 5, ¶10, Ex. 21, Glen Brokenbush, SB 608 *Aims to Restore Competition*, The Lawton Constitution (April 21, 2019. Ex. 17, Carmen Forman, *Fierecely debated liquor bill heads to governor's desk*, The Oklahoman (May 7, 2019); Ex. 6, Tres Savage, *Liquor Bicker: Senate send SB 608 to Gov. Kevin Stitt*, Nondoc (May 6, 2019).

23. ROAA), Vol. I, Tab 4, at 54, ¶10, Ex. 27 Holt Affidavit ¶¶6-9; Jason Sheffield Affidavit ¶¶3-10.

24. Title 37A O.S. Supp. 2018 §1-103 provides in pertinent part:

9. 'Brand' means any word, name, group of letters, symbol or combination thereof, that is adopted and used by a licensed manufacturer to identify a specific beer, wine or spirit, and to distinguish that product from another beer, wine or spirit.

10. 'Brand extension' means:

a. after October 1, 2018, any brand of beer or cider introduced by a manufacturer in this state which either:

(1) incorporates all or a substantial part of the unique features of a preexisting brand of the same licensed manufacturer, or

(2) relied to a significant extent on the goodwill associated with the preexisting brand, or

b. any brand of beer that a manufacturer, the majority of whose total volume of all brands of beer distributed in this state by such manufacturer on January 1, 2016, was distributed as low-point beer, desires to sell, introduce, begins selling or theretofore has sold and desires to continue selling a strong beer in this state which either:

(1) incorporates or incorporated all or a substantial part of the unique features of a preexisting low-point beer brand of the same licensed manufacturer, or

(2) relies or relied to a significant extent on the goodwill associated with a preexisting low-point beer brand;

25. The Okla. Const. art. 5, §45 provides:

The Legislature shall pass such laws as are necessary for carrying into effect the provisions of this Constitution.

See, Shaw v. Grumbine, 1929 OK 116, ¶0, 278 P. 311. See also, In re Initiative Petition No. 281, State Question No. 441, v. Rogers, 1967 OK 230, ¶49, 434 P.2d 941.

26. See, State v. Oklahoma Corporation Commission, 1998 OK 118, ¶14, 971 P.2d 868; See also, Graham v. D&K Oilfield Services, Inc., 2017 OK 72, 404 P.3d 863; In re Askins Properties, L.L.C., 2007 OK 25, 161 P.3d 303; Fair Sch. Finance Coun. of Okla. v. State, 1987 OK 114, 746 P.2d 1135.

27. The Ballot Title, see note 10, supra.

BARNES, S.J., with whom Goodman, S.J., joins, dissenting:

1. "The Legislature shall enact laws providing for the strict regulation, control, licensing and taxation of the manufacture, sale, distribution, possession, transportation and consumption of alcoholic beverages[.]" Okla. Const. art. 28A, § 2(A).

2. The Majority, citing *Cowart*, states that it is to "construe[] constitutional provisions 'as a consistent whole in harmony with common sense and reason,'" Maj. Op., ¶ 12; thus, all pertinent provisions must be construed as a consistent whole prior to reaching a determination whether legislation is inconsistent with the Constitution. *See also Dobbs v. Bd. of Cnty. Comm'rs of Okla. Cnty.*, 1953 OK 159, ¶ 0, 257 P.2d 802 (Syllabus by the Court) ("In passing upon the constitutionality of an act of the Legislature all pertinent sections of the Constitution should be considered together in arriving at a correct interpretation.").

3. Thus, it is my understanding of the reasoning of these cases that even where a conflict appears to exist between two or more constitutional provisions, unless that conflict is truly irreconcilable, the provisions must be harmonized. In addition to the above-cited cases, *see* 16 C.J.S. Constitutional Law § 100 ("A court must reconcile provisions that appear to conflict," and "[i]n construing a constitution, distinct provisions are repugnant to each other only when they relate to the same subject, are adopted for the same purpose, and cannot be enforced without substantial conflict. When a court is faced with conflicting policies arising out of multiple constitutional provisions in a specific factual situation, it must strike a balance between the provisions if possible."). *See also In re Okla. Capitol Improvement Auth.*, 2003 OK 59, ¶ 30, 80 P.3d 109 ("the-purpose-of-borrowing provision must be harmonized with other constitutional provisions"); *Matthews v. Funck*, 2007 OK CIV APP 15, ¶¶ 20 & 24, 155 P.3d 852 ("This interpretation of section 8C [of Article 10 of the Oklahoma Constitution] not only harmonizes its provisions with the other sections of Article 10, and particularly section 8B, but also allows for a construction of section 2890.1 [of Title 68 of the Oklahoma Statutes] that is consistent with the Constitution"; "while there is no lack of confusion and contradiction in the constitutional and statutory provisions at issue in this case, we find this interpretation most consistently harmonizes these provisions with reason and common sense." (citation omitted) (footnote omitted)).

4. The Oklahoma Constitution also provides: "The authority of the Legislature shall extend to all rightful subjects of legislation, and any specific grant of authority in this Constitution, upon any subject whatsoever, shall not work a restriction, limitation, or exclusion of such authority upon the same or any other subject or subjects whatsoever." Okla. Const. art. 5, § 36. Further, sections 36 through 45 of Article 5 are entitled "Powers and Duties" of the Oklahoma Legislature, and Article 5, § 44, entitled "Unlawful restraints of trade," discussed below, is contained within this same portion of the Oklahoma Constitution.

5. "The transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI, § 2. The United States Supreme Court has explained that "[t]he States enjoy broad power under § 2 of the Twenty-first Amendment to regulate the importation and use of intoxicating liquor within their borders," *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712 (1984), and "the Twenty-first Amendment limits the effect of the dormant Commerce Clause on a State's regulatory power over the delivery or use of intoxicating beverages within its borders," *44 Liquormart, Inc. v. R.I.*, 517 U.S. 484, 516 (1996). However, just as, in my view, the mere existence of Article 28A does not insulate the alcohol industry in this state from Legislative powers and duties set forth elsewhere in the Oklahoma Constitution, the United States Supreme Court has similarly held that the Twenty-First Amendment "does not license the States to ignore their obligations under other provisions of the [United States] Constitution," such as the Equal Protection Clause and the First Amendment, *44 Liquormart, Inc.*, 517 U.S. at 516.

6. *Cf. Seal v. Corp. Comm'n*, 1986 OK 34, ¶¶ 21 & 45, 725 P.2d 278 ("It is well settled that the State may adopt reasonable regulation in the exercise of its police power to protect the correlative rights of owners through ratable taking," and "[t]he State of Oklahoma . . . has extensively and continuously regulated the natural gas industry"; "the parties could not have reasonably expected that their contractual rights were immune from alteration by subsequent State regulation.").

7. *See also* Keith D. Tracy & Ronald L. Walker, *Antitrust Law: Indirect Purchaser Standing to Sue in Oklahoma – Major v. Microsoft Corp.*, 57 Okla. L. Rev. 727, 727-28 (2004) ("Oklahoma antitrust law originated in the Oklahoma Constitution, which not only prohibits monopolies [as set forth in Okla. Const. art. 2, § 32], but also authorizes the state legislature [as set forth in Okla. Const. art. 5, § 44] to define each 'combina-

tion, monopoly, trust, act, or agreement, in restraint of trade' that should be declared unlawful."); Maurice H. Merrill, *The Administrative Law of Oklahoma*, 4 Okla. L. Rev. 286, 286-87 (1951) ("The convention to frame a constitution for Oklahoma met November 20, 1906," when Theodore Roosevelt was President of the United States and "the dominant political philosophy of the new state [of Oklahoma] envisioned a democratic equality of opportunity protected by governmental process against corporate and monied interests. Naturally, the constitution framed under this philosophy contained provisions designed to facilitate [some amount of] state control over corporate and business activities and to encourage governmental activity as an agency of general welfare." (footnotes omitted)); and Gerard Michael D'Emilio, *Comment, Frontier Feudalism: Agrarian Populism Meets Future Interest Arcana in the Land of Manifest Destiny*, 70 Okla. L. Rev. 943, 982 n.236 (2018) (The Oklahoma Constitution "struck out against monopolization[.]").

> We must take into consideration the times and circumstances under which the state constitution was formed – the general spirit of the times, and the prevailing sentiments among the people. Every constitution has a history of its own, which is likely to be more or less peculiar; and unless interpreted in the light of this history is liable to be made to express purposes which were never within the minds of the people in agreeing to it. This the court must keep in mind when called upon to interpret it; for their duty is to enforce the law which the people have made, and not some other law which the words of the constitution may possibly be made to express.

Thomas v. Reid, 1930 OK 49, ¶ 39, 285 P. 92 (citation omitted). *See also Wall v. Marouk*, 2013 OK 36, ¶ 4, 302 P.3d 775 ("The Oklahoma Constitution is a unique document. Some of its provisions are unlike those in the constitutions of any other state, and some are more detailed and restrictive than those of other states."). "A Constitution is a Magna Charta of the people's rights, the fundamental law of the land, intended, not for short periods of time, but for all time." *City of Okmulgee*, 1929 OK 472, ¶ 17 (citation omitted).

8. Article 9, § 45 states, in part, that no association or corporation

> engaged in the production, manufacture, distribution, or sale of any commodity of general use, shall, for the purpose of creating a monopoly or destroying competition in trade, discriminate . . . by selling such commodity at a lower rate in one section, community, or city than in another, after making due allowance for the difference, if any, in the grade, quantity, or quality, and in the actual cost of transportation from the point of production or manufacture.

Cf. Okla. Const. art. 28A, § 2(A)(2) ("such sales shall be made on the same price basis and without discrimination to each wholesaler"). Importantly, Article 28A, § 2(A)(5) similarly states that, as to wholesalers, "[e]very wholesaler, except a beer wholesaler, must sell its products on the same price basis and without discrimination to all on-premise and off-premise licensees, unless otherwise provided by law." Thus, whether or not SB 608 remains in effect, wine and spirit manufacturers already have no control regarding the sale and distribution of their products to the retail tier in Oklahoma as every wholesaler "must sell its products on the same price basis and without discrimination" to retailers. It is essential to keep this in mind to the extent it is relevant to contemplate whether SB 608 deprives manufacturers (i.e., that small fraction of one percent of manufacturers subject to SB 608, see n.15, *infra*) of anything of value in the distortions of the highly-regulated three-tier market, and when attempting to analogize SB 608 to industries that do not have this unique structure.

9. Maj. Op., ¶ 13.

10. The Majority states it is not "construe[ing] Article 28A in a vacuum" because it construes Article 28A with "reference to the repealed Article 28[.]" Maj. Op., ¶ 16. Indeed, the Majority reaches its conclusion that SB 608 infringes Article 28A, § 2(A)(2) and is unconstitutional based solely on a review of Article 28A and Article 28; only then does it turn to other constitutional provisions. That is, only after "hold[ing] SB 608's infringement of Article 28A, § 2(A)(2) is unconstitutional," Maj. Op., ¶ 17, does the Majority turn to a review of the anti-monopoly provisions of the Oklahoma Constitution. I respectfully disagree with the premise of the Majority's analysis here; in my view, the meaning of Article 28A, § 2(A)(2) must be discerned from a reading of the entire instrument of which it is a part, and only then can any conclusion be reached as to whether SB 608 is inconsistent with the Constitution.

11. The Majority states that "Article 28A, § 2(A)(2) *implies* that a manufacturer can also select only one wholesaler." Maj. Op., ¶ 14 (emphasis added).

12. For example, "Where the legislative intent is plainly discernible from the provisions of statute when considered as a whole, the real purpose and intent of the legislative body will prevail over the literal import of the words employed." *Keck v. Okla. Tax Comm'n*, 1940 OK 352, ¶ 0, 108 P.2d 162 (Syllabus by the Court). The primacy of the purpose and intent is even more pronounced in constitutional analysis, where we look for "the overriding purposes" or "primary purposes." *Fent v. Fallin*, 2014 OK 105, ¶¶ 14 & 15, 345 P.3d 1113. The *Fent* Court explained that "[a] constitutional provision must be construed considering its purpose and given a practical interpretation so that the manifest purpose of the framers and the people who adopted it may be carried out." *Id.* ¶ 17 (footnote omitted).

13. This legal standard is, of course, not relaxed at the summary judgment stage. In *Lafalier v. Lead-Impacted Communities Relocation Assistance Trust*, 2010 OK 48, 237 P.3d 181, the Court explained that even at the summary judgment stage, "there is a presumption that every statute is constitutional. The party seeking a statute's invalidation as unconstitutional has the burden to show the statute is clearly, palpably, and plainly inconsistent with the Constitution. We scrutinize a constitutional attack on a statute with great caution and grave responsibility." *Id.* ¶ 15 (footnotes omitted).

14. As the Majority states, "Distributors claim[] that SB 608 directly conflicts with Article 28A, § 2(A)(2), as SB 608 makes Article 28A, § 2(A)(2)'s discretion to select a single wholesaler a nullity." Maj. Op., ¶ 8.

15. As the Majority notes, there are "thousands of other brands of liquor and wine." Maj. Op., ¶ 20 n.10. Indeed, the number of wine and spirits manufacturers worldwide would appear to be at least in the tens of thousands. For example, according to the National Association of American Wineries, in January 2019 there were over 10,000 wineries in the United States alone. See the National Association of American Wineries, *United States Wine and Grape Industry FAQS*, https://wineamerica.org/policy/by-the-numbers (last updated 2019).

16. *Accord City of Guymon v. Butler*, 2004 OK 37, ¶ 11, 92 P.3d 80 ("The construction of a constitutional provision must not be so strict as to defeat the purpose of its adoption." (citation omitted)); *City of Shawnee v. Williamson*, 1959 OK 64, ¶ 9, 338 P.2d 355 ("The construction of a constitutional provision must not be so strict or technical as to defeat the evident object and purpose of its adoption."); *Lone Star Gas Co. v. Bryan Cnty. Excise Bd.*, 1943 OK 228, ¶ 2, 141 P.2d 83 ("the general principle of law that construction of a constitutional provision must not be so strict or technical as to defeat the object and purpose of its adoption" (citations omitted)); and *Williams v. City of Norman*, 1921 OK 337, ¶ 0, 205 P. 144 (Syllabus by the Court) ("The construction of a constitutional provision must not be so strict or technical as to defeat the evident object and purpose of its adoption.").

17. For example, as to wine and spirits, 37A O.S. Supp. 2019 § 3-101(A) allows "the possession and transportation of alcoholic beverages *for the personal use of the possessor and his or her family and guests*, so long as the Oklahoma excise tax has been paid thereon," but otherwise states that "[n]o person shall manufacture, rectify, sell, possess, store, import into or export from this state, transport or deliver any alcoholic beverage except as specifically provided in the Oklahoma Alcoholic Beverage Control Act." (Emphasis added.) This is yet one more restriction which well distinguishes the alcohol industry from other industries. While markets in surrounding areas and states can be examined by individuals and businesses shopping, for example, for an automobile, it would be illegal for Oklahoma retailers to shop for wine or spirits outside Oklahoma's borders, and it would be impracticable for most Oklahoma consumers to travel a great distance to shop for a bottle of wine for personal use.

18. Maj. Op., ¶ 5 n.4.

19. Although not essential to my reasoning, it is useful to note that, generally, "[i]t is the existence of monopoly power *coupled with* the intent to use it for anticompetitive purposes or with *inevitable anticompetitive effects* that establishes the offense of monopolization." *Bd. of Regents of Univ. of Okla. v. Nat'l Collegiate Athletic Ass'n*, 1977 OK 17, ¶ 17 n.26, 561 P.2d 499 (emphasis added). *See also Beville v. Curry*, 2001 OK 1, ¶ 1 n.1, 39 P.3d 754 ("Monopoly power is defined [in the Oklahoma Antitrust Reform Act] as the power to control market prices or exclude competition."). When obscure and less popular brands are sold by only one wholesaler, there are no inevitable anticompetitive effects as the thousands of less popular brands do not have the same power to control market prices and exclude competition as do the most popular brands, and a retailer can, for example, simply opt not to purchase a less popular brand and replace it with another lesser-known brand sold by another wholesaler. However, the business of many retailers is likely dependent on having some, if not all, of the most popular brands in stock, brands that can currently be obtained from only one wholesaler.

20. Regarding the importance of examining, in uncertain cases, "the effects and consequences" and "the right being vindicated in the end," the Court in *State v. State Board of Equalization*, 1924 OK 682, 230 P. 743, stated that "[i]t has been well said" that

> [n]o feature of the judicial function is of equal dignity with that which requires dealing with what is and what is not really a part of the Constitution, or those things which may have been

> engrafted upon the original instrument. None requires an equal degree of care to reach a right conclusion, and courage to pronounce it. The court may, and should, and must, on such great occasions, look to the effects and consequences. Not to do so with the thought of hesitation, much less omission to do what duty to the public requires; but as an inspiration to reach the highest attainable degree of certainty of the right being vindicated in the end.

Id. ¶ 9 (citation omitted).

21. The Majority questions whether SB 608 could even be viewed as an attempt by the Legislature "to combat anticompetitive markets pursuant to Okla. Const. art. V, § 44" because SB 608 does not "set forth any punishment for those entities engaging in unlawful restraint of trade," "does not define an unlawful restraint," and "**only** deals with the top 25 brands of liquor and wine[.]" Maj. Op., ¶ 20 n.10 (emphasis in original). However, the Oklahoma Alcoholic Beverage Control Act, at the very least, does provide a punishment for "[a]ny person who shall violate any provision of the Oklahoma Alcoholic Beverage Control Act for which no specific penalty is prescribed[.]" 37A O.S. Supp. 2018 § 6-125(A). Further, SB 608 does, in my view, define an unlawful restraint – i.e., in the Legislature's wisdom, the definition comprises manufacturers of top brands that sell their wares to one, and only one, wholesaler while refusing to sell to any other wholesaler who desires to buy those top brands. Further, it appears the Majority is asserting that a true anti-monopoly regulation would apply to all manufacturers, even manufacturers of the most obscure, boutique, or small-batch varieties of wines and spirits; however, in my view, not only, as a practical matter, would manufacturers of far less popular brands potentially not have sufficient product to sell to multiple wholesalers, but, more to the point, such a regulation would be targeting brands that have no potential anticompetitive effects. *See* n.19, *supra*. Finally, the Legislature's power is, in my view, not limited to an isolated reading of Article 5, § 44; instead, it fundamentally arises from its broad regulatory powers in the area of alcohol sales, a power which, moreover, is coupled with the anti-monopoly provisions, including the prohibition of monopolies set forth in Article 2, § 32, as well as the command and legislative duty set forth in Article 5, § 44.

22. *Cf. Oklahoma's Children, Our Future, Inc. v. Coburn*, 2018 OK 55, ¶ 17 n.33, 421 P.3d 867 (Wyrick, J., and Winchester, J., dissenting) ("[U]nlike constitutional interpretation, if a court erroneously interprets a statute, the Legislature is free to correct the error by amending the statute.").

23. In *Fent v. Fallin*, 2014 OK 105, 345 P.3d 1113, the Court stated:

> Constitutional provisions are not made for parsing by lawyers, but for the instruction of the people and the representatives of government, so that they may read and understand their rights and duties. Words used in a constitutional provision and an accompanying ballot title are to be construed in a way most familiar to ordinary people who voted on the measure.

Id. ¶ 12 (footnotes omitted). "The ballot title is a contemporaneous construction of the constitutional amendment and weighs heavily in determining its meaning." *Id.* (emphasis added) (footnote omitted). Thus, the *Fent* Court stated: "With this guidance in mind, the issue becomes what would the ordinary person who voted on [the state question at issue], as explained by its ballot title, understand they were approving[.]" *Id.* ¶ 13. *See also McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 828-29 (2010) ("When interpreting constitutional text, the goal is to discern the most likely public understanding of a particular provision at the time it was adopted," and the focus is on "what the public understood the words chosen by the draftsmen to mean.").

24. In my view, even an isolated reading of these sentences is less than persuasive regarding a right on the part of manufactures to sell to a designated wholesaler that is completely "free from legislative interference." As I read it, the purpose of the second sentence, for example, is to prevent certain monopolistic tendencies. The only explicitly mandatory language in the two sentences – certainly the only use of the word "shall" – is the prohibition of discriminatory pricing contained in the second sentence: "[I]f a manufacturer . . . elects to sell its products to multiple wholesalers, such sales *shall be made on the same price basis and without discrimination to each wholesaler*[.]" Okla. Const. art. 28A, § 2(A)(2) (emphasis added). This language, as indicated above, directly alludes to and mirrors Article 9, § 45 of the Oklahoma Constitution, which is entitled "Monopoly or destruction of competition – Discrimination prohibited." Indeed, other courts have explained that the three-tier system itself is structured so as to "prevent[] . . . monopolistic tendencies . . . ." *S.A. Discount Liquor, Inc. v. Texas Alcoholic Beverage Comm'n*, 709 F.2d 291, 293 (5th Cir. 1983). In an Oklahoma case confronting language no longer in effect but very similar to that found in Article 28A, including a "require[ment] [that] a manufacturer . . . sell to every licensed wholesaler on the same price basis and without discrimination," "prohibitions against financial assistance from any manufacturer or wholesaler to any retailer," "prohibitions against price discrimination against wholesalers or retailers," and a "constitutional amendment . . . require[ing] each manufacturer to sell to every licensed wholesaler on the same price basis and without discrimination," the Court stated that "[i]t is apparent on the face of all these sections that their general purpose is the prevention of any tendency toward monopoly, or the control of the industry by any segment or special interest group, with the resulting destruction of competition." *Parham*, 1966 OK 9, ¶ 16. Therefore, in my view, the reason for the existence of the above-quoted sentence from Article 28A, § 2(A)(2) is the prevention of monopolistic tendencies, not the enshrinement of monopoly power. This language, in my view, is aimed at only those scenarios involving sales "to multiple wholesalers" simply because it would be illogical if its requirement (i.e., that such sales shall be made on the same price basis and without discrimination to each wholesaler) sought to embrace other scenarios. Thus, Appellants justifiably assert that the purported right on the part of manufacturers to sell to only one wholesaler completely free from legislative interference would constitute a proverbial "elephant in a mouse hole." *See, e.g., Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes. Respondents' textual arguments ultimately founder upon this principle." (citations omitted)); *see also Dep't of Commerce v. N.Y.*, 139 S. Ct. 2551, 2602 (2019) (Alito, J., concurring in part and dissenting in part) ("Reading [the particular statutory provision] to mean what the District Court thought would turn it into the proverbial elephant stuffed into a mouse hole. [The provision], however, is a decidedly mouse-like provision. It was enacted with no fanfare and no real explanation . . . ." (footnote omitted)).

2020 OK 6

In Re THE MARRIAGE OF: JOSHUA JOE DUKE, Petitioner/Appellee, v. PAIGE TAYLOR DUKE, Respondent/Appellant.

No. 116,221. January 22, 2020 As Corrected January 23, 2020

APPEAL FROM THE DISTRICT COURT OF LOGAN COUNTY

¶0 A divorce proceeding was filed in the District Court of Logan County where husband and wife each requested sole custody of their minor child. Trial was held and the Honorable R. L. Hert, Special Judge, of the District Court of Payne County, assigned to hear the matter pronounced a decree which awarded sole custody of the parties' minor child to the father. Mother appealed and filed a motion to retain the appeal in the Supreme Court. The appeal was retained by a previous order of the Court. We hold: (1) Application of the clear-weight-of-the-evidence appellate standard to determine if a child custody order was based upon insufficient evidence must be reviewed on appeal by reviewing all of the evidence used by the trial court when adjudicating custody; (2) When all of the evidence used by the trial court to adjudicate custody is not before the appellate court the clear-weight-of-the-evidence standard may not be applied, and if the parties had an opportunity to preserve the assigned appellate error in the trial and appellate record but failed to do so, the District Court's order must be affirmed.

DECREE OF DISTRICT COURT AFFIRMED

Barry K. Roberts, Norman, Oklahoma, for Appellant.

Jill M. Ochs-Tontz, Guthrie, Oklahoma, for Appellee.

EDMONDSON, J.

¶1 Mother challenges an order awarding sole custody of the parties' minor child to the child's father. The parties had an opportunity in the trial court to present their evidence and make a complete trial court record and a complete appellate record. The record we are presented with is incomplete and does not contain the guardian *ad litem* reports used by the trial court. We decline to expand our traditional appellate review beyond its appropriate sphere and make independent credibility determinations on appeal. Mother's assignment of error challenging the conclusion it was in the child's best interests for custody to father requires us to apply a clear-weight-of-the-evidence standard which in turn requires all of the evidentiary record to be before us. All of the record is not before us and we must affirm the District Court's decree.

I. The Case

¶2 Joshua Duke filed a petition seeking divorce and sole legal custody of the parties' child. He requested Logan County standard visitation for the mother, Paige Duke. Mother filed a response and petitioned for a divorce, sole legal custody of the parties' child, and an award for child support conforming to the Oklahoma Child Support Guidelines. She requested father be given Logan County standard visitation. A trial was held in the District Court of Logan County.[1] The parties' minor child was represented in the District Court by a guardian *ad litem* (GAL).

¶3 The trial court's decree dissolved the marriage, recognized the parties' previous agreement concerning marital debts and assets, and determined the ownership status of certain properties and assets which had been disputed. The trial court determined joint custody was not proper because mother resided in Weatherford, OK, and father resided in Guthrie, OK. The court awarded sole custody of the parties' six-year-old child to the child's father. The trial court made several additional provisions including, but not limited to, sale of the parties' residence, child support, visitation, the child's medical insurance, dependency status of the child for income tax purposes, and a ratio for splitting the child's medical costs which were not covered by the father's insurance.

¶4 Mother appealed and she raised four assignments of error in her amended petition in error which relate to (1) child custody and visitation, (2) the best interests of the child and child support, (3) division of marital property and marital debt, and (4) a catchall provision stating additional assigned error will be presented in her appellate brief. Mother's brief-in-chief contains two propositions with cited authority: (1) The trial court erroneously used an expunged domestic abuse criminal conviction involving mother's fiancé when awarding custody to the father; and (2) The trial court erroneously awarded child custody to the father when the evidence showed the best interests of the child required custody to be awarded to the mother.

¶5 The District Court's journal entry states it is in the best interests of the mental, physical, and moral welfare of the minor child that father be awarded sole physical and legal custody of the parties' child. The journal entry states in part: "The parties have demonstrated that joint custody is not a possibility. Because the distance shared parenting is not feasible." The journal entry also states the following.

> IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED testimony was presented that the fiancée [sic] of the Respondent was convicted of domestic abuse. Apparently, he received a deferred sentence and the case was dismissed and the record expunged. He was not called to testify about the matter or provide any evidence of how he fulfilled any condition of his deferred sentence. I do not know if the legislature intended to exclude a deferred sentence from, consideration under 43 O.S. 112.2, however, it certainly intended to protect children. If a rebuttable presumption exists that it is not in the best interest of the child to grant custody to the Respondent who either lives with or intends to marry and live with a person who has been convicted of domestic abuse within the last five years, the presumption was not rebutted. If not a conviction for the purpose of the statute, it still concerns me. No evidence was presented which alleviate my concerns and establish that living in a house with him could not or would not place the child in jeopardy.

> Considering all the evidence presented and the law, I find that it is in the best interest of the child of the parties, [name deleted], be granted to the Petitioner with Respondent to have Logan County Standard Visitation.

¶6 The issues raised by mother on appeal are limited to those briefed with supporting authority[2] in the brief-in-chief and which are properly supplemented in her reply brief.[3] Issues raised by father in support of the District Court's decree are limited to the legal propositions raised in his answer brief with supporting authority and which relate to the facts shown in the appellate record.[4]

II. Standard of Review

¶7 Mother's briefs on appeal raise issues concerning the construction and application of five statutes: 12 O.S. §2608; 22 O.S.2011 §60.1; 22 O.S.Supp.2016 §19; 43 O.S.2011 §112.2; and 75 O.S.2011 §22. Father's answer brief adds 12 O.S. §2104 for additional consideration. Generally, an issue of law is presented by questions concerning the application and construction of a statute to an uncontested fact, and *de novo* appellate review is used by the Court.[5] Mother filed a motion for this Court to retain the appeal in this Court for an appellate decision and her motion was granted. Her motion argued an "intolerable conflict" exists between two statutes, 43 O.S.2011 § 112.2 and 22 O.S.Supp.2016 § 19. The issue whether statutes conflict when applied to an uncontested fact presents a question of law concerning interpretation and application of the statutes, and the Court uses *de novo* review to adjudicate the alleged conflict.[6] The arguments by both mother and father on the application and construction of these statutes present issues of law reviewed *de novo* by this Court.

¶8 Generally, an appellate court affirms the decree unless it is (1) against the clear weight of the evidence, or (2) contrary to law, or (3) contrary to established principles of equity.[7] Appellate review of a decree in equity determines whether (1) an error of law occurred of such magnitude that it created a decree "contrary to established principles of equity jurisprudence,"[8] or (2) the decree is contrary to the weight of the evidence.[9] The decree contrary to the weight of the evidence refers to the specific adjudication the trial court in equity was required to make, an equitable discretion exercised to determine the best interests of the child for the purpose of child custody.[10] A finding by the trial court in an equity proceeding carries with it a finding of all facts necessary to support the finding which may be found in the evidence considered by the trial judge.[11] If the appellate record is sufficient to show a decision has been made contrary to the weight of the evidence, then this Court will render the decree in equity the trial judge should have rendered.[12]

¶9 Mother challenges the trial court's award of child custody to father as contrary to the best interests of the child. This assigned error invokes our appellate review of an order adjudicating parents' opposing equitable and statutory claims to obtain child custody in a divorce proceeding.[13] Mother also asserts the trial court's exercise of discretion involved legal error when the trial court considered (1) fiancé's former conviction, and (2) apart from the conviction, the fact of fiancé's conduct giving rise to a conviction. Finally, mother asserts the appellate record requires her to be awarded child custody. This is an allegation of error in the trial court's discretion when it assessed the evidence and awarded child custody to the child's father.

¶10 A correct judgment in an equity proceeding "will be affirmed regardless of the reasons given for its rendition" because the appellate court is not bound by the legal reasoning or findings of the trial court expressed in its decree.[14] When a trial court's error of law prevented the parties from a constitutionally required due process opportunity to present facts in support of claims and defenses in equity, then appellate review requires remanding the matter to the trial court for additional proceedings[15] if the party aggrieved was denied a personal right and timely preserves the error in the District Court and on appeal with a supporting appellate record.

¶11 Even if the trial court erroneously considered the fiancé's previous conviction for domestic abuse, the decree awarding custody should be reversed on appeal only if: (1) The error caused prejudice to mother and resulted in a child custody award to the father contrary to equity principles and causing an incorrect equitable result; or (2) The award was against the clear weight of the evidence on the issue of the best interests of the child and created an incorrect result; or (3) The legal error by the trial court prevented mother from having an opportunity to present a legally cognizable claim or a defense relating to her claim for child custody. These first two issues require an

appellate review of the entire evidentiary record.

¶12 We explain herein a truncated trial court record appearing before us as an appellate record prevents our review for a clear-weight-of-the-evidence type of error. Mother's appellate challenge to the trial court's consideration of her fiancé's alleged former conviction also lacks appellate force due to the absence of a complete evidentiary record on appeal. We must affirm the trial court as we now explain.

III.

¶13 Joshua Duke stated in his testimony he was concerned with his son "being around" Paige Duke's fiancé. He testified the fiancé "was convicted of domestic violence in the presence of his minor child." The identity of "his child" was not specified. Mr. Duke stated the fiancé's conviction occurred in June of 2015. No objection was made to this testimony. This topic was not addressed during Mr. Duke's cross examination.

¶14 This topic was raised during cross examination of the child's maternal grandfather: Do you have knowledge that [your daughter's fiancé] . . . had been convicted of domestic violence?" Mother's counsel objected to the question: "I want to object to that because I have reason to believe that that's a lie. It's already been perpetrated on the stand by . . . [opposing counsel's client], and I'm not willing to let [opposing counsel] to repeat that lie." This objection was overruled. No additional reason was made for objecting to the testimony. The maternal grandfather stated he was aware of the conviction because his daughter's fiancé had informed him of his conviction. He stated he had been concerned his daughter was engaged to someone who had been convicted of domestic violence in front of his [the fiancé's] child."

¶15 The topic was raised during direct examination of Paige Duke by her counsel. She was asked "And, to your knowledge, what is the status of any charge that was made against him for domestic assault?" She responded: "Six months." She was then asked "Was he ever convicted of that to your knowledge?" She responded: "No." She stated she had no concerns "about her child being around him [her fiancé]."

¶16 The subject was raised again during her cross examination. She stated she began dating her then current fiancé at the end of July 2015. She subsequently stated they were friends in July 2015 and not dating at that time. She then explained they began dating in December 2015, one month after her deposition in November 2015 wherein she stated they were not dating. She stated she had not seen any documents relating to a criminal conviction or probation relating to her fiancé. She agreed she had previously reviewed the "exhibits in the binders that were submitted to her attorney in September 2016." However, she answered in the negative to the question whether she had seen a copy of her fiancé's "deferment out of Custer County in those pleadings marked as an exhibit." She simply denied any knowledge of her fiancé's alleged criminal history.

¶17 Mother's lawyer during the trial[16] objected to mother's cross examination on the subject of her knowledge relating to her fiancé's alleged criminal history. For example, her counsel stated the following.

> Your Honor, I'm going to object. The charge — I have reason to believe the charges have been dismissed and expunged. If they have been expunged, they're not subject to perusal by the Court. I'm sure that Counsel knows they have been too.

Mother was subsequently asked by father's counsel: "Does that not cause you any concern as a mother that you are now engaged to be married to someone who has pled guilty to domestic violence?" She responded: "No." Mother also testified on cross examination her fiancé's name and telephone number were listed by her on a form indicating persons who will provide care for her child. Mother's fiancé was not called as a witness.

¶18 Mother argues the trial court misapplied two statutes, 43 O.S.2011 § 112.2 and 22 O.S. Supp.2016 § 19. Section 112.2 required a trial court in a child custody proceeding to consider if the person seeking child custody "is residing with a person who has been convicted of domestic abuse within the past five (5) years."[17] If this circumstance is present, then "there shall be a rebuttable presumption that it is not in the best interests of the child to have custody or guardianship granted to a person who: . . . is residing with a person convicted of domestic abuse within the past five (5) years."[18] In section 112.2 the phrase "domestic abuse" has the same meaning as defined in 22 O.S. § 60.1.[19] At the time of the trial in the District Court, "do-

mestic abuse' meant any act of physical harm, or the threat of imminent physical harm committed by an adult, emancipated minor, or minor child thirteen (13) years of age or older against another adult, emancipated minor or minor child who are family or household members or who are or were in a dating relationship.[20]

¶19 Mother argued the court could not consider her fiancé's conviction for domestic abuse because the conviction had been expunged pursuant to 22 O. S. Supp. 2016 § 19.[21] Expungement is a sealing of a criminal record.[22] Section 19 includes the following.

> D. Upon the entry of an order to seal the records, or any part thereof, the subject official actions shall be deemed never to have occurred, and the person in interest and all criminal justice agencies may properly reply, upon any inquiry in the matter, that no such action ever occurred and that no such record exists with respect to such person. . . .

22 O. S. Supp. 2016 § 19 (D).

Counsel argues a conflict exists when a court simultaneously applies 43 O.S.2011 § 112.2 and 22 O. S. Supp.2016 § 19.

¶20 The clear and obvious language "subject official actions" in section 19 (D) includes a criminal conviction. The language of section 112.2 invoked by father requires the person to have been "convicted of domestic abuse" while section 19 states the "subject official actions" or conviction "shall be deemed never to have occurred." This language indicates *if* mother's fiancé had an expunged conviction, then the *conviction* could not be used for creation of the section 112.2 rebuttable presumption.

¶21 The primary goal when reviewing a statute is to ascertain legislative intent, if possible, from a reading of the statutory language using its plain and ordinary meaning.[23] This is so because the plain words of a statute are deemed to express legislative authorial intent in the absence of any ambiguity or conflict in language.[24] If a literal construction of statutory language necessarily conflicts with language in the same statute or other statutes on the same or relative subjects, then the Court will construe the statutory language to effectuate the intent of the Legislature.[25] There is no ambiguity in the language before us.[26] The conflict herein does not involve a conflict in the statutory language, but what counsel perceive to be conflicting public policies imperfectly enacted by the Legislature; *i.e.*, counsel claims the Legislature would not permit public policies involving children and expungement which allow a conviction for domestic abuse to be expunged for the purpose of a subsequent child custody adjudication. It is not this Court's role to review the wisdom or prudence of a legislative expression deciding a public policy.[27]

¶22 Mother states the trial court erroneously considered the conviction for creating a statutory rebuttable presumption. Even if we assume mother is correct, we do not agree the trial court's error on this point requires a reversal of the custody determination based on the record before us.

¶23 The trial judge stated he was concerned about the fact of the fiancé's previous domestic abuse apart from the *conviction*. A judicial decision on child custody involves a determination of the best interests of a child, and this includes evidence of the child's exposure to a person other than the child's parents when this third party may significantly affect the child as a result of a judicial custody decision. For example, a child's relationship to a new stepparent was considered by courts more than forty years ago when awarding custody to a parent,[28] and more recently certain stepparents have obtained statutory rights involving child custody[29] requiring courts to consider a child's relationship to stepparents. A parent-child bond may be created by an adult functioning as a parent,[30] and a stepparent residing with a child has an impact on the child by the mere physical proximity of the adult in the home. A trial court's consideration of a stepparent's previous behavior when that person will reside in the home of the potential custodial parent is consistent with legislative expressions of public policy requiring a court to consider custodial decisions involving someone who has committed domestic abuse and thereafter seeks custody of a child.[31]

¶24 The trial judge stated he was concerned neither party had offered any proof relating to the circumstances of the fiancé's previous domestic abuse behavior. Some authors have distinguished different types of domestic violence and argued for courts to consider the type of violence when making child custody decisions, and others have suggested caution by courts.[32] Some courts have partially followed this advice and used the nature of the

particular violence as part of their decision when awarding custody, and they have included a review of the circumstances relating to the abuse.[33] The trial judge wanted to know as much as possible about the circumstances raised by the testimony presented to him. However, the trial judge's knowledge of the circumstances was limited by the trial strategies used by counsel for both parties.

¶25 Mother testified she had no knowledge of the conviction. The record on appeal contains no motion, pleading, or exhibit showing mother's fiancé had a prior conviction for domestic abuse. The trial testimony appears to indicate a court document referencing the conviction was prepared by father's counsel for opposing counsel as a pretrial exhibit, but no such exhibit was admitted at trial and it does not appear in the appellate record. The record on appeal contains no motion, pleading, exhibit, or testimony showing an expungement, but arguments made to the trial court by counsel indicate a conviction and an expungement. The arguments made by mother's counsel were that no conviction existed because it had been expunged; and because of the expungement "the conviction did not occur" and it could not be considered by the trial court. Arguments by counsel are not evidence.[34] Father's counsel did not provide any proof at trial relating to the fiancé's previous domestic abuse behavior except the testimony elicited from father and the maternal grandfather stating the fiancé had a previous conviction. Father did not call as witnesses either the fiancé or the victim of the domestic abuse in order to testify on the issue of fiancé's past behavior apart from the alleged conviction. The trial court did not have evidence concerning the circumstances of fiancé's behavior other than the testimonial references to the conviction. The trial court made no specific findings classifying the behavior of the fiancé for purposes of a child custody adjudication other than the rebuttable presumption and the alleged fact of the domestic event.

¶26 The trial was a nonjury or bench trial. We usually assume a trial court disregarded incompetent evidence when rendering a judgment, unless the contrary clearly appears.[35] The trial court references the conviction in its decree both as a conviction and as evidence of the behavior apart from a conviction. Mother's appellate brief characterizes the testimony of fiancé's conviction as "innuendo, hearsay, and unsupported, self-serving statements," but does not address this issue as a preserved trial court error subsequently raised as assigned appellate error with supporting authority challenging the admission of the testimony. An objection to admitting evidence must be made in the trial court.[36] We are not asked to review a preserved objection based upon the Oklahoma Evidence Code[37] and the challenged testimony in the dual context it was used by the trial court, (1) the fact of the conviction and (2) the fact of the abuse underlying the conviction.

¶27 Failure to properly object to admission of evidence at trial may be raised on appeal when fundamental error and prejudice are shown by an appellant.[38] Application of this standard does not relieve an appellant from the burden of showing the alleged improper evidence was both incompetent and prejudicial.[39] Appellant's burden of showing incompetent testimony includes a burden to supply authority on the issue.[40] In this proceeding, the burden includes the application of the appropriate provisions of the Oklahoma Evidence Code in the context of showing a violation of a substantial right[41] as well as explaining the challenged evidence caused a prejudicial adjudicated result where the prejudicial result does not rely on a *post hoc ergo propter hoc* analysis.[42] Mother's ability to show prejudice on appeal is hampered by the trial and appellate record.

¶28 We have explained the necessity for an appellant to show a probability of prejudice caused by challenged evidence when we have reviewed judgments on a jury verdict,[43] a decision on a motion for new trial,[44] and a judgment based on a nonjury or bench trial.[45] This showing of prejudice requires an appellant to frame an argument on the topic of prejudice in the context of all of the evidence used by the judge when adjudicating the causes of action. This is so because an erroneous decision to admit evidence in a nonjury trial will not be considered to be prejudicial when the other evidence is sufficient to support the judgment.[46]

¶29 Assuming but not deciding for the purpose of this appeal that the testimony of fiancé's prior conviction was not admissible, we are required to affirm the decree if it was otherwise supported by the clear weight of the additional evidence used by the trial court.[47] Mother's appellate brief recognizes additional evidence must be considered, and she has several citations to testimony in support of her request for custody. However, application of the clear-weight-of-the-evidence standard is

frustrated herein due to the incompleteness of the appellate record caused by the parties' litigation strategies.

¶30 Trial was held in December 2016.[48] In a child custody controversy a guardian *ad litem* "may be appointed to objectively advocate on behalf of the child and act as an officer of the court to investigate all matters concerning the best interests of the child."[49] A guardian *ad litem* has a statutory duty to "present written factual reports to the parties and court prior to trial or at any other time as specified by the court on the best interests of the child...."[50] The trial court relied on the reports by the guardian *ad litem* (GAL) when determining custody of the child.

¶31 Father sought to admit the GAL's reports at trial and mother objected. Father released the GAL from his subpoena and further attendance at the end of the first day of trial. Mother argued she had a right to cross-examine the GAL and the GAL was not present for her to cross-examine.[51] Father argued mother had waived an objection to the reports being admitted during the pretrial stage of the proceeding. The appellate record does not contain a District Court Rule 5 Pretrial Conference Order specifying exhibits and witnesses.[52]

¶32 The trial court sustained mother's objection to the GAL's reports at the conclusion of the trial. However, when it issued its detailed minute order the trial court included language stating both mother and father had waived their rights to examine and cross-examine the GAL. The trial court also included language stating it would not be in the best interests of the child to ignore the GAL's reports. The minute order was filed and two months later a motion to settle the journal entry was filed. A hearing was held on the motion and a decree was filed. Mother then filed an application for an order *nunc pro tunc* for the purpose of the divorce decree including attached exhibits with child support calculations and a child visitation schedule. The application was granted and an order *nunc pro tunc* including the requested exhibits was filed. The application did not address the GAL's reports.

¶33 Nothing in the record suggests mother objected to the trial court using the GAL's reports when the court's decision was memorialized by its minute order and subsequent journal entry. The trial judge's order concluded a waiver to admission into evidence had occurred because the GAL was present in the courtroom and not called to testify by either party. No assigned appellate error suggests the trial court incorrectly concluded a waiver to their admission occurred.[53] The application for an order *nunc pro tunc* did not address whether the GAL's reports were made a part of the evidentiary record in the case by the judge's order utilizing the reports, or whether an additional order need be entered to make them part of the evidentiary record. The Designation of Record herein designates specific filings, the trial transcripts, and "all exhibits entered into evidence and/or all materials presented to and considered by the court during the proceedings" on the two specific days of trial. The designation does not list the GAL's reports.

¶34 A trial court's record "constitutes the only means for communication of its proceedings to an appellate court."[54] The Due Process provision of the Oklahoma Constitution[55] prohibits a court from adjudicating a legal cause of action based upon evidence which the trial court also *requires* to be excluded from the court's *evidentiary record*.[56] No assigned error suggests the trial court used a procedure which denied mother an opportunity to include the GAL reports as part of the trial court record for the purpose of preserving them in an appellate record.

¶35 An appellant has the undivided responsibility for producing an appellate record necessary to show the error in a trial court's decree.[57] An appellant must include in the record on appeal "all materials necessary for corrective relief."[58] This principle applies to an appellant arguing an award of child custody was contrary to the child's best interests.[59] The appellate standard of review requires weighing *all* of the evidence. A trial court record necessary for this appeal includes *all of the evidence the trial court used to adjudicate child custody.* This applies to a party challenging a custody decree based, in part, on reports made by a GAL. We are asked to review the correctness of the trial court's decision on child custody when the trial court's decision was based on GAL reports which are not before this Court.

¶36 Mother asks us to review the evidence. Testimony from the witnesses was conflicting on certain issues. For example, the evidence was conflicting on the extent of time mother and father provided primary care for the child when the family resided as a unit in Guthrie. The parties disagreed on which party was

responsible for dressing and feeding the child in the morning and then transporting him to morning pre-K classes. Father testified mother's work schedule conflicted with transporting the child to and from classes. Mother pointed to the maternal grandmother providing child care, and father's work schedule during the first two years of the child's life. Mother testified that when the child was approximately two years old she changed employment, and both she and father transported the child from her mother's residence to the family home at the end of the day. Father testified he picked-up the child because mother's work schedule and her after-work activities delayed her presence at home. One witness testified mother was observed on many occasions picking-up the child at the conclusion of a mothers' day out program which occurred on Fridays, a day which mother often did not work. Father testified he also changed employment when the child was approximately two years old. He testified he began working in his family's local business in Guthrie to enable him to be with the child on a daily basis. The trial court also heard testimony relating to grandparents residing in Guthrie and the extent to which they provided child care assistance.

¶37 The trial judge's minute order states: "Much of the evidence was confusing and the parties at times appeared to disregard the truth." A trial court determines which testimony it chooses to believe, and the trial court has the advantage over this Court in observing the behavior and demeanor of the witnesses.[60] We decline mother's invitation for us to expand our traditional role when reviewing a decree in equity, and we decline the opportunity to decide which conflicting testimony to believe and which not to believe and disregard.

¶38 The trial judge had before him a divorce proceeding involving a minor child with both father and mother seeking sole custody. The trial judge stated he was guided by the best-interests-of-the-child standard in awarding custody to the child's father. The record before us shows his attempt to apply that standard. In *Ray v. Ray, supra,* a trial record lacked proof critical to support a monetary award of support alimony in the trial court.[61] Contrary to that circumstance, in this case the trial judge heard testimony concerning the best interests of the child and considered reports from the GAL. There is no insufficiency in evidence critical to support a child custody award. The alleged error is that the weight of the evidence supports one party over another for receiving child custody. The record is insufficient to review this claim.

IV. Conclusion

¶39 The parties had an opportunity in the trial court to present their evidence and make a complete trial court record and a complete appellate record. Mother's assigned error challenging the trial court's consideration of her fiancé's alleged conviction may not be reviewed on appeal since the error requires us to consider its prejudicial effect in relation to the entire evidentiary record considered by the trial judge, which we do not have before us. Mother's assignment of error challenging the conclusion it was in the child's best interests for custody to father requires us to apply a clear-weight-of-the-evidence standard which in turn requires all of the evidentiary record to be before us. All of the record is not before us.

¶40 We hold: (1) Application of the clear-weight-of-the-evidence appellate standard to determine if a child custody order was based upon insufficient evidence must be reviewed on appeal by reviewing all of the evidence used by the trial court when adjudicating custody; (2) When all of the evidence used by the trial court to adjudicate custody is not before the appellate court the clear-weight-of-the-evidence standard may not be applied, and if the parties had an opportunity to preserve the assigned appellate error in the trial and appellate record but failed to do so, the district court's order must be affirmed.

¶41 CONCUR: WINCHESTER, EDMONDSON, and KANE, JJ; REIF, S.J., and BARNES, S.J.

¶42 DISSENT: GURICH, C.J., (I would vacate and remand for a new trial.); DARBY, V.C.J.; and KAUGER, J. (joins Gurich, C.J.); and COMBS, J. (joins Gurich, C.J.).

¶ 43 RECUSED: COLBERT, J.

¶44 NOT PARTICIPATING: ROWE, J.

EDMONDSON, J.

1. The Honorable R. L. Hert, Special Judge, of the District Court of Payne County, was assigned to hear the matter by the Honorable Phillip C. Corley, District Judge, of the District Courts of Logan and Payne Counties.

2. *Osage Nation v. Bd. of County Comm'rs of Osage Cnty.*, 2017 OK 34, n. 20, 394 P.3d 1224, citing *Worsham v. Nix*, 2006 OK 67, ¶ 28, 145 P.3d 1055, 1064 (failure to brief an issue with authority is a waiver of an assignment of error relating to that issue). *See also Matter of Estate of*

Vose, 2017 OK 3, n.1, 390 P.3d 238, 242 (argument without supporting authority will not be considered).

3. *Green v. Oklahoma Tax Commission*, 1940 OK 360, 107 P.2d 180, 181 (Syllabus by the Court), (an additional proposition of law presented by an appellant for the first time in a reply brief, and which is not in reply to new matter or independent propositions advanced by the appellee in an answer brief, will not ordinarily be considered by the Supreme Court). *Cf. Cox Oklahoma Telecom, LLC v. State ex rel. Oklahoma Corp. Comm.*, 2007 OK 55, ¶33, 164 P.3d 150, 162-163 (new propositions of law and assignments of error should not be raised for the first time in an appellate reply brief); *In re M.K.T.*, 2016 OK 4, ¶ 88, 368 P.3d 771, 799 (appellate reply brief may not be used for making facts appear for the first time in the judicial record).

4. *In re M.K.T.*, 2016 OK 4, at ¶ 86, 368 P.3d at 798 (appellee's legal issues in support of a District Court's judgment or decree and which are presented in an appellate answer brief are limited in scope by their application to those facts shown in the certified record on appeal).

5. *Braitsch v. City of Tulsa*, 2018 OK 100, ¶ 2, 436 P.3d 14,17. *See also Christian v. Christian,* 2018 OK 91, ¶ 5, 434 P.3d 941, 942 ("when this Court is faced with a question of statutory interpretation, we apply a *de novo* standard of review").

6. *In re City of Durant*, 2002 OK 52, ¶ 2, 50 P.3d 218, 219-220.

7. *Laubenstein v. Bode Tower, L.L.C.*, 2016 OK 118, ¶ 9, 392 P.3d 706, 709 (In a case of equitable cognizance, a judgment will be sustained on appeal unless it is found to be against the clear weight of the evidence or is contrary to law or established principles of equity.), citing *McGinnity v. Kirk,* 2015 OK 73, ¶ 8, 362 P.3d 186, 190.

8. Some of our opinions discuss our review of an appealable order in equity and it will not be disturbed on appeal in the absence of "prejudicial error" or when it is against the clear weight of the evidence. *Emerson v. Youngs,* 1962 OK 68, 370 P.2d 25, 28, quoting *Walden v. Potts*, 1924 OK 55, 222 P. 549, 550 (Syllabus by the Court).

9. *A. A. Murphy. Inc. v. Banfield*, 1961 OK 197, 363 P.2d 942, 945 (In a suit of equitable cognizance, this Court will examine the entire record and weigh the evidence, but unless the decree of the lower court is found to be clearly against the weight of the evidence or contrary to established principles of equity jurisprudence, it will not be disturbed on appeal.); *Cleary Petroleum Corp. v. Harrison*, 1980 OK 188, 621 P.2d 528, 533 (appellate review determines whether the decree is (1) against the clear weight of the evidence or (2) contrary to law).

10. *Foshee v. Foshee,* 2010 OK 85, ¶ 18, 247 P.3d 1162, 1169, ¶ 18, (explaining upon termination of joint custody the trial court proceeds as if it is making an initial custody decision, and an appellant must show on appeal the trial court's custody decision is "erroneous and contrary to the child's best interests"), quoting *Daniel v. Daniel*, 2001 OK 117, ¶ 21, 42 P.3d 863, 871.

See also 43 O.S. 2011 § 109(A) at note 13 *infra. See also Rowe v. Rowe,* 2009 OK 66, ¶ 3, 218 P.3d 887, 889 (in a divorce action, the trial court is vested with discretion in awarding custody and visitation, but the best interests of the child must be a paramount consideration), citing *Daniel v. Daniel*, 2001 OK 117 ¶ 21, 42 P.3d 863, 871.

11. *Watkins v. McComber,* 1952 OK 422, 2566 P.2d 158, 159 (Syllabus by the Court) ("In a case of equitable cognizance the judgment of the trial court carries with it a finding of all facts necessary to support it, which could have been found from the evidence, and the judgment will not be set aside unless clearly against the weight of the evidence.").

12. *Hedges v. Hedges*, 2002 OK 92, ¶ 23 & n. 37, 66 P.3d 364, 372 ("If the record is sufficient, this court will – in an appeal from an equity decision – render that decree which the chancellor should have entered."), citing *Larman v. Larman*, 1999 OK 83, ¶ 18, 991 P.2d 536, 542-543.

13. 43 O.S. 2011 § 109(A): "In awarding the custody of a minor unmarried child or in appointing a general guardian for said child, the court shall consider what appears to be in the best interests of the physical and mental and moral welfare of the child."

See Schmedler v. Lee, 2019 OK 52, ¶ 11, 445 P.3d 238, 242 (court supervision over the welfare of children is equitable in character), quoting *In re Bomgardner*, 1985 OK 59, 711 P.2d 92, 97.

14. *Bankhoff v. Bd. of Adjustment of Wagoner Cnty.*, 1994 OK 58, 875 P.2d 1138, 1143.

15. *Hedges v. Hedges,* 2002 OK 92 at ¶ 23, 66 P.3d at 373 (if necessary facts to adjudicate a legally cognizable claim or defense in equity were prevented from insertion into the judicial record by trial court legal error, and the trial court did not make findings necessary to those claims and defenses; then the matter must be remanded to the trial court for a proper adjudication of those facts as they relate to the claim or defense; and this is so because the Supreme Court's appellate cognizance in equity does not include making or adjudicating original findings of facts necessary to show elements of a claim or defense in equity and which are missing from the judicial record).

16. Appellate counsel for Paige Duke in the present proceeding did not represent her during the trial in the District Court.

17. 43 O.S. 2011 § 112.2 states in part: "A. In every case involving the custody of, guardianship of or visitation with a child, the court shall consider for determining the custody of, guardianship of or the visitation with a child whether any person seeking custody or who has custody of, guardianship of or visitation with a child... 7. Is residing with a person who has been convicted of domestic abuse within the past five (5) years...."

18. 43 O.S. 2011 § 112.2 states in part: "B. There shall be a rebuttable presumption that it is not in the best interests of the child to have custody or guardianship granted to a person who:... 7. Is residing with a person convicted of domestic abuse within the past five (5) years...."

19. 43 O.S. 2011 § 112.2 states in part: "E. For purposes of this section:...2. 'Domestic abuse' has the same meaning as such term is defined in Section 60.1 of Title 22 of the Oklahoma Statutes...."

20. 22 O.S.2011 § 60.1(1) stated: "'Domestic abuse' means any act of physical harm, or the threat of imminent physical harm which is committed by an adult, emancipated minor, or minor child thirteen (13) years of age or older against another adult, emancipated minor or minor child who are family or household members or who are or were in a dating relationship."

Section 60.1 was amended by Laws 2019, c. 200, § 2, eff. Nov. 1, 2019, and the definition for domestic abuse states: "2. 'Domestic abuse' means any act of physical harm, or the threat of imminent physical harm which is committed by an adult, emancipated minor, or minor child thirteen (13) years of age or older against another adult, emancipated minor or minor child who is currently or was previously an intimate partner or family or household member...."

21. Section 18 was amended in 2015, 2016, 2018, and 2019. Section 19 was amended in 2015 and 2016. The 2016 amendment was effective Nov. 1, 2016, by Laws 2016, c. 348, § 2. The trial was held in December 2016. Based upon comments made by counsel for both parties the expungement *may* have occurred prior to November 1, 2016. Counsel rely on the 2016 version of sections 18 and 19, and we also use the 2016 version of section 19.

22. 22 O. S. Supp. 2016 § 18 (B): "For purposes of this act [22 O.S. Supp.2016 §§ 18,19], 'expungement' shall mean the sealing of criminal records, as well as any public civil record, involving actions brought by and against the State of Oklahoma arising from the same arrest, transaction or occurrence."

23. *In re Initiative Petition No. 397, State Question No. 767*, 2014 OK 23, ¶ 9, 326 P.3d 496, 501.

24. *In re Initiative Petition No. 397, etc.*, 2014 OK 23, ¶ 9, 326 P.3d at 501.

25. *Raymond v. Taylor*, 2017 OK 80, ¶ 12, 412 P.3d 1141, 1145. *See also Antini v. Antini*, 2019 OK 20, ¶ 12, 440 P.3d 57, 60 (the meaning of language in a statute is harmonized with related statutes) that address the same subject matter are generally to be construed in a manner that imparts intelligent effect to each and reconciles any differing provisions); *Mustain v. Grand River Dam Authority,* 2003 OK 43, ¶ 23, 68 P.3d 991, 999 (statutes addressing the same subject matter are to be construed in a manner which reconciles differing provisions and imparts to each of them an intelligent effect).

26. *In re Initiative Petition No. 397, etc.*, 2014 OK 23, ¶ 9, 326 P.3d at 501, (the test for ambiguity in a statute is whether the statutory language is susceptible of more than one reasonable interpretation).

27. *Wylie v. Chesser,* 2007 OK 81, ¶ 19, 173 P.3d 64, 71.

28. *See, e.g., Marshall v. Marshall*, 1976 OK 127, 555 P.2d 598 (when mother did not want custody the father was awarded custody on appeal because no evidence was presented challenging father's unfitness or the unfitness of his then present wife as a stepparent); Jeff Atkinson, *Criteria for Deciding Child Custody in the Trial and Appellate Courts,* 18 Fam. L.Q. 1, 34 (a publication by the American Bar Association noting thirty-one court opinions from the year 1982 where a stepparent relationship was used by courts in support of a custody decision).

29. *See, e.g., Kohler v. Chambers,* 2019 OK 2, ¶¶ 9, 15, 435 P.3d 109, 112-113, 114 (application of Oklahoma Deployed Parents Custody & Visitation Act [43 O.S. 2011 §§ 150-150.10] and noting parent was not a "deploying parent" for the purpose of transferring custody and visitation rights).

30. *See, e.g., In re M.K.T.*, 2016 OK 4, ¶ 66, 368 P.3d 771, 792 (the Adoption and Safe Families Act of 1997, [Pub. L. No. 105-89, 111 Stat. 2115, as codified in noncontiguous sections of 42 U.S.C.] recognizes a parent-child bond may be created in foster care relationships when an adult is functioning as a parent for the child).

31. 43 O.S.2011 § 109.3:

> "In every case involving the custody of, guardianship of or visitation with a child, the court shall consider evidence of domestic abuse, stalking and/or harassing behavior properly brought before it. If the occurrence of domestic abuse, stalking or harassing behavior is established by a preponderance of the evidence,

there shall be a rebuttable presumption that it is not in the best interest of the child to have custody, guardianship, or unsupervised visitation granted to the person against whom domestic abuse, stalking or harassing behavior has been established."

32. Joan S. Meier, *Dangerous Liaisons: A Domestic Violence Typology in Custody Litigation,* 70 Rutgers U.L. Rev. 115 (2017) (urging courts to exercise caution if deciding to adopt a particular domestic violence typology); Joan B. Kelly & Michael P. Johnson, *Domestic Violence: Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions*, 46 Fam. Ct. Rev. 476, 476-78 (2008) (stated intimate partner violence may be differentiated with respect to partner dynamics, context, and consequences; and authors provided as examples: coercive controlling violence, violent resistance, situational couple violence, and separation-instigated violence); Clare Huntington, *The Empirical Turn in Family Law,* 118 Colum. L. Rev. 227, n. 139, 252 (2018) (citing *Nicholson v. Williams*, 203 F.Supp.2d 153, 197-198 (E.D.N.Y. 2002), and noting opinions by five experts relating to potential adverse effects for children in a home where intimate partner abuse had occurred).

33. *See, e.g., Mallory D. v. Malcolm D.*, 290 P.3d 1194, 1201-1202 (Alaska 2012) (court characterized discrete instances of domestic violence as "situational" and concluded neither party was less likely than the other to perpetrate domestic violence); *Jordan v. Jordan*, 14 A.3d 1136, 1149 (D.C. 2011) (court relied upon an expert opinion the father's past conduct was "situational and did not predict future violence"); *Malenko v. Handrahan*, 979 A.2d 1269, 1272 (Me. 2009) (GAL stated the domestic violence was "situational couple violence," not typical because the mother had more power and control, and there was a lack of evidence the father had been inappropriate with any child); *Cesare v. Cesare*, 154 N.J. 394, 713 A.2d 390, 395 (1998) (a particular history can greatly affect the context of a domestic violence dispute, trial courts must weigh the entire relationship between the parties, and a court may consider evidence of a party's prior abusive acts regardless of whether those acts have been the subject of a domestic violence adjudication).

34. *Young v. Station 27, Inc.*, 2017 OK 68, n. 5, 404 P.3d 829. *See also Crest Infiniti, II, LP v. Swinton*, 2007 OK 77, ¶ 10, 174 P.3d 996, 1002 (unsworn statements by counsel in both a motion and a response by opposing counsel do not constitute evidence).

35. *Maras v. Smith*, 1966 OK 231, 420 P.2d 483, 485. *Cf. Taylor v. Taylor,* 211 F.2d 794, 797 (8th Cir.1954) ("It has long been the practice in the federal courts that [i]n a nonjury case, the presumption is that the trial court considered only the competent evidence and disregarded all evidence which was incompetent.") (internal quotations omitted).

36. *Callison v. Callison,* 1984 OK 7, 687 P.2d 106, 112 (in a proceeding commenced as a divorce action a party waived error as to admission of evidence when the party failed to use an available Oklahoma Evidence Code procedure for objecting to admission).

37. 12 O.S. 2011 §§ 2101- 3011.

38. *Matter of J.L.O., IV*, 2018 OK 77, ¶ 25, 428 P.3d 881, 889. *See also Covel v. Rodriguez*, 2012 OK 5, ¶¶ 8-10, 272 P.3d 705, 710 ("the fact that evidence may be incompetent under one or more exclusionary rules of evidence does not destroy its probative effect if it is admitted without objection;" and failing to object the error is waived on appeal in the absence of a fundamental error having a substantial effect on the rights of a party).

39. *Rogers v. Citizens National Bank in Okmulgee*, 1962 OK 176, 373 P.2d 256, 258, explaining the holding in *Benzel v. Pitchford*, 1952 OK 217, 245 P.2d 1131 ("we held a cause will not be reversed for admission of incompetent evidence if it does not affirmatively appear that such admission resulted prejudicially to the interest of the objecting party").

40. *Lee v. Bueno,* 2016 OK 97, ¶ 37, 381 P.3d 736, 749.

41. 12 O.S. 2011 § 78: "The court, in every stage of action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."

42. An improper *post hoc ergo propter hoc* (after this, because of this) analysis to show prejudice as to a judicial outcome is one which merely asserts the challenged evidence was admitted and followed by a judgment contrary to the party's request for relief, and fails to explain the weight of the alleged prejudicial error in relation to the rest of the evidence. *See, e.g., Boyle v. ASAP Energy, Inc.*, 2017 OK 82, n. 47, 408 P.3d 183 (noting a *post hoc* or temporal sequence is *logically* insufficient to show causation); *Fike v. Peters,* 1935 OK 1009, 52 P.2d 700, 704 (alleged prejudicial testimony which was admitted even if "technically inadmissible," "it could not have affected the substantial rights of the defendant"... because a review of the record shows the alleged errors were not of a nature "which might have changed the final result").

43. *Hames v. Anderson*, 1977 OK 191, 571 P.2d 831, 833 (when reviewing a judgment on a jury verdict the Court stated "for reversal, there must be prejudice as well as the evidence being incompetent"); *Digital Design Group, Inc. v. Information Builders, Inc.*, 2001 OK 21, ¶ 36, 24 P.3d 834, 845 (it is error for the trial judge to submit an issue not supported by competent evidence to the jury; but jury verdict will not be disturbed because of error in an instruction unless the error was prejudicial to the complaining party, as measured by a probability that the finder of fact was misled and thereby reached a different result but for the error); *Bouziden v. Alfalfa Elec. Co-op, Inc.*, 2000 OK 50, ¶ 35, 16 P.3d 450, 459 (same); *City of Pawhuska v. Martin,* 1931 OK 462, 1 P.2d 638, 639 (if admitting testimony was error, it was harmless because it did not affect the jury's verdict).

44. *Akin v. Missouri Pacific R. Co.*, 1998 OK 102, ¶ 34, 977 P.2d 1040, 1053-1054 ("the court has also held that it is reversible error for a trial court to grant a new trial when the decision complained of was not prejudicial to the outcome of the trial").

45. *Kahre v. Kahre,* 1995 OK 133, 916 P.2d 1355, 1365 (in an appeal from an order adjudicating child custody the Court stated "before any claimed error concerning the admission or exclusion of evidence will be deemed reversible error, an affirmative showing of prejudicial error must be made"); *Mulkey v. Blankenship,* 1976 OK 194, 558 P.2d 398, 399 (erroneous trial court rulings in a proceeding where the trial court denied plaintiffs' request for equitable relief will be insufficient to require reversal when the rulings were not prejudicial to the complaining party); *Hankins v. Hankkins*, 1944 OK 349, 155 P.2d 720, 722 (in a proceeding for imposition of a resulting trust the judgment was reversed when all of the evidence showed the trial court's exclusion of certain evidence might have changed the result if it had been admitted and was prejudicial to the aggrieved party). *Cf. Camp v. Camp,* 1945 OK 234, 163 P.2d 970, 972 (trial court's judgment will not be reversed when supported by the record as a whole and it is immaterial if the trial court states an additional reason for its judgment which may not apply).

46. *Kahre v. Kahre*, 1995 OK 133, 916 P.2d at 1365, citing *Phillips v. Thompson*, 1964 OK 18, 389 P.2d 473, 476 (error of admitting evidence was insufficient for a reversal in a nonjury case where additional evidence was sufficient to support the judgment). *See also Kendall v. Sharp*, 1967 OK 66, 426 P.2d 707, 709 (no prejudicial error occurred when alleged error in admission of hearsay evidence was corroborated by other evidence admitted in the bench trial); *Stekoll v. Wilson*, 1952 OK 355, 250 P.2d 454, 457 ("judgment rendered in a case heard without the intervention of a jury will not be reversed on account of admission of incompetent evidence unless the record discloses that there was no competent evidence to affirm it or in some way shows affirmatively that the improper evidence affected the result").

47. *Boughan v. Herington*, 1970 OK 125, 472 P.2d 434, 436-437, quoting *LaDoux v. Bohn*, 1966 OK 223, 420 P.2d 501), (when a judgment is not clearly against the weight of the evidence in a bench trial the Supreme Court will not assume that the judgment was necessarily based on allegedly incompetent evidence absent a showing the judgment requires the challenged evidence). *See Maras v. Smith*, 1966 OK 231, 420 P.2d 483 ("There are many previous holdings of this Court that a presumption exists on appeal from a non-jury case that the trial court disregarded all incompetent evidence in rendering its judgment, unless the contrary clearly appears.").

48. At the time of the GAL's appointment and the District Court trial, 43 O.S.2011 § 107.3 was in effect except for language in the statute previously determined to be unconstitutional. *Kelley v. Kelley,* 2007 OK 100, ¶¶ 8-10, 175 P.3d 400, 404-405 (regardless of former 43 O.S. Supp.2006 § 107.3(A)(2)(e) due process requires providing an opportunity to cross-examine the GAL); *Rowe v. Rowe*, 2009 OK 66, ¶ 4, 218 P.3d 887, 889-890 (in Kelley we "overturned that part of § 107.3(A)(2)(e) that provided that the guardian *ad litem* is not subject to discovery pursuant to the Oklahoma Discovery Code").

49. 43 O.S.2011 § 107.3:

> "A. 1. In any proceeding when the custody or visitation of a minor child or children is contested by any party, the court may appoint an attorney at law as guardian *ad litem* upon motion of the court or upon application of any party to appear for and represent the minor children.
>
> 2. The guardian *ad litem* may be appointed to objectively advocate on behalf of the child and act as an officer of the court to investigate all matters concerning the best interests of the child. In addition to other duties required by the court and as specified by the court, a guardian *ad litem* shall have the following responsibilities: . . .
>
> d. present written reports to the parties and court prior to trial or at any other time as specified by the court on the best interests of the child that include conclusions and recommendations and the facts upon which they are based...."

50. 43 O.S.2011 § 107.3(A)(2)(d), *supra,* note 49.

51. A party in a proceeding adjudicating child custody possesses a due process right to cross-examine a GAL's recommendation for child custody. *Kelley v. Kelley,* 2007 OK 100, ¶¶ 2-3, 175 P.3d 400, 403. *See also Rowe v. Rowe*, 2009 OK 66, ¶ 4, 218 P.3d 887, 889-890 (stating our holding in *Kelley*).

52. 12 O.S. Supp. 2013, Ch. 2, App., Rules for District Courts of Oklahoma, Rule 5, Pretrial Proceedings.

53. For example, no argument and authority is submitted on whether mother's rights relating to the GAL's reports were anything other than personal procedural rights subject to waiver by the litigation strategy pursued by counsel. *Tucker v. Cochran Firm-Criminal Defense Birmingham L.L.C.*, 2014 OK 112, n. 16, 341 P.3d 673, 680 (personal and private rights may be waived but the law involving the power or structure of government may not be waived); *Barringer v. Baptist Healthcare of Oklahoma*, 2001 OK 29, ¶¶ 23-26, 22 P.3d 695, 701 (in the context of a party's legal right seeking contribution, Court noted question of waiver is one of fact but may become a question of law when the facts concerning waiver are not disputed and subject to only one interpretation).

54. *Cumbey v. State*, 1985 OK 36, 699 P.2d 1094, 1099 ("A trial court's record constitutes the only means for communication of its proceedings to an appellate court.").

55. Okla. Const. Art. 2 § 7: "No person shall be deprived of life, liberty, or property, without due process of law."

56. *La Bellman v. Gleason & Sanders, Inc.*, 1966 OK 183, 418 P.2d 949, 953 ("The jurisdiction of the trial court is limited to the particular subject matter presented by the pleadings, and any judgment which is beyond the issues framed by the pleadings and proof is in excess of the court's jurisdiction and is void.") (emphasis added). *See also Oklahoma City v. Robinson*, 1937 OK 16, 65 P.2d 531, quoting *Gille v. Emmons*, 58 Kan. 118, 48 P. 569, 570 (1897) in turn quoting *Munday v. Vail*, 34 N.J.L. 418, 422 (1871) (A judgment upon a matter outside of the issues pled and tried of record must, of necessity, be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard.).

57. *In re M.K.T.*, 2016 OK 4, n. 98, 368 P.3d 771, 799; *Pracht v. Oklahoma State Bank*, 1979 OK 43, 592 P.2d 976, 978. *See also Chamberlin v. Chamberlin*, 1986 OK 30, 720 P.2d 721, 724 ("It is the duty of the appealing party to procure a record that is sufficient to obtain the corrective relief sought").

58. *Ray v. Ray*, 2006 OK 30, ¶ 12, 136 P.3d 634, 637.

59. *Fleck v. Fleck*, 2004 OK 39 ¶ 9, 99 P.3d at 240 ("the burden is on the appellant to produce a record sufficient to show that the custody award was contrary to the child's best interest") citing, *Daniel v. Daniel*, 2001 OK 117, ¶ 21, 42 P.3d 863, 871 ("The burden is upon the party appealing from the custody and visitation award to show that the trial court's decision is erroneous and contrary to the child's best interests."). *See Gorham v. Gorham*, 1984 OK 90, n. 4, 692 P.2d 1375, 1378 (one who challenges the trial court's determination on custody, as to the best interests of the child, must put forth the evidence presented upon which the party relies to establish the trial court's error and the party must affirmatively show how this evidence shows the trial court's decision to have been contrary to the child's best interests").

60. *Kahre v. Kahre*, 1995 OK 133, 916 P.2d 1355, 1360. *See also Daniel v. Daniel*, 2001 OK 117, ¶ 22, 42 P.3d 863, 871 (the trial court is better able to determine controversial evidence by its observation of the partes, the witnesses, and their demeanor).

61. *Ray v. Ray*, 2006 OK 30, ¶ 15, 136 P.3d at 638.

2020 OK 7

IN RE THE ESTATE OF FRED FRANKLIN JAMES, SR., deceased, and In the Matter of the Creditor Claims of: PAMELA A. FLENER, Plaintiff/Appellee, and Glenn Flener, Plaintiff, v. F. NILS RAUNIKAR, Personal Representative of the Estate of Fred Franklin James, SR., deceased, Defendant/Appellant, and FRED FRANKLIN JAMES, JR., Appellant, and DALE BRYAN JAMES, Appellee.

No. 115,514; Cons. w/115,516
January 28, 2020
As Corrected February 3, 2020

CERTIORARI TO THE COURT OF CIVIL APPEALS DIVISION III

Honorable Jennifer H. McBee, Trial Judge

¶0 After Fred Franklin James, Sr.'s will was admitted for probate, two of this three children objected to it. One of the children (the daughter) asserted that some of the father's real property, a mechanic's/body shop, should belong to her because she had purchased it from her father pursuant to an oral contract. The other child (a son) asserted that he was a pretermitted heir because the proceeds of the insurance policy his father left to him in the will had beneficiaries inconsistent with the will. In a second, separate case, the daughter also filed a breach of contract/creditor/equitable action against the estate also, again asserting that she purchased the body shop from her father pursuant to an oral agreement with her father. The trial court consolidated the causes and determined that both children were pretermitted. We granted certiorari to address whether the children were pretermitted. We hold that heirs are not pretermitted because their beneficiary status on a non-probate asset differs from a bequest in a will. We reverse the trial court in part, and remand for proceedings consistent with our determination neither child was a pretermitted heir.

COURT OF CIVIL APPEALS OPINION VACATED; TRIAL COURT REVERSED IN PART AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH OUR DECISION.

Clyde Muchmore, Oklahoma City, Oklahoma, Mary H. Tolbert, Oklahoma City, Oklahoma, for Appellants Fred Franklin James, Jr., and the Estate of Fred Franklin James, Sr., Deceased, F. Nils Raunikar, Personal Representative.

Douglas W. Sanders, Jr., Poteau, Oklahoma, for Appellant Fred Franklin James, Jr.

F. Nils Raunikar, Wilburton, Oklahoma, for Defendant/Appellant Estate of Fred Franklin James.

Douglas G. Dry, Tahlequah, Oklahoma, for Plaintiffs/Appellees Pamela A. Flener and Glenn Flener, and Bryan Dale James.

KAUGER, J.:

¶1 We granted certiorari to address whether two children who were named beneficiaries in a will were pretermitted heirs. We hold that heirs are not pretermitted because their beneficiary status on a non-probate asset differs from their bequests in a will. We reverse the trial

court in part, and remand for proceedings consistent with our determination neither child was a pretermitted heir.

FACTS/PROCEDURAL POSTURE

¶2 This cause concerns two cases with some of the same parties and with some of the same issues which were consolidated in the trial court under one case number. Nevertheless, even though the cases were consolidated, the trial court issued two separate decisional orders regarding each case. The first case is: Case 1, a probate proceeding. The second case is: Case 2, a breach of contract/creditor's claim proceeding against the estate involved in Case 1. Determinations that the trial court made in Case 1 influenced determinations that the trial court made in Case 2.

a. Case 1: Probate Proceeding

¶3 The decedent, Fred Franklin James, Sr., primarily known as "Duke" (decedent/father/Duke), had three children: Fred Franklin, Jr. (Fred.), Bryan Dale James, (Bryan/son) and Pamela Ann Flener (Pamela/daughter). Duke, suffering from terminal cancer, executed a will on July 28, 2009. At that time he owned some real property, all of which is not all identified in the record, some bank accounts/Certificates of Deposits, and a life insurance policy. Included in his real property was a mechanics shop. In Article I of the will, he expressly acknowledged his three children. Article I provides in pertinent part:

I declare that I am not married and I further declare that I have three children, namely:

1) Fred Franklin James, Jr., a son

2) Bryan Dale James, a son; and

3) Pamela Ann Flener, a daughter. . . [1]

¶4 Duke did not divide his estate among his three children equally. Instead, he provided for the three children as follows:

1. to Fred Franklin James Jr., he left the funds from a checking account and two savings account which he had at Latimer State Bank in Wilburton, Oklahoma, all of his vehicles, all of his real property, and all of his mineral interests;

2. to Bryan Dale James, he left the proceeds from a Jackson National Life Insurance Policy to be held in trust with Duke's granddaughter as the trustee;

3. to Pamela Flener, all accounts held in the First National Bank of McAlester;

4. any residue and remainder to Fred Franklin, Jr.

He also left two CD's in Latimer State Bank in trust for his disabled sister Donna Jean James.

¶5 Duke died nearly eighteen months later after the execution of his will on December 16, 2010. The challenges to his will and division of property began thereafter. Fred Franklin, Jr., filed the will for probate on January 14, 2011. On March 3, 2011, the daughter and her brother, Bryan, filed a contest to the will in the District Court of Latimer County. They objected to its admittance to probate, and to their brother Fred being appointed as personal representative pursuant to the terms of the will. They alleged that their father could not have possibly been of sound mind when he made the will because he had been diagnosed with terminal colon cancer, was in severe pain, and was on pain killers. They also argued that because Fred had too much influence over their father during his lifetime, he was unqualified to serve as personal representative.

¶6 As evidence of too much influence, they showed that the decedent used another attorney to draft his will other than a long time attorney. They also argued that: 1) Fred, Jr. drove their father to the attorney's office where the will was drafted and arranged for the meeting, but Fred and the attorney both disputed their allegations; 2) Fred, Jr. had a tumultuous relationship with the siblings; and 3) Fred, Jr. was the stronger person in the relationship with his father. Fred, Jr. did work together with his father for many years and provided meals, transportation to medical appointments, and care for his father in his last years. However, there was no direct evidence that Fred, Jr. participated in procurement of the will.

¶7 Bryan also sought an increased share of the estate as an pretermitted child, should the will be admitted to probate. He acknowledged that he was mentioned in the will, but argues that he was omitted and entitled to an intestate share because the life insurance policy his father purported to leave him by creating a testamentary trust, was a non-probate asset.

¶8 The policy actually listed all three children as equal beneficiaries, rather than just Bryan. Bryan received $26,098.31 which was 1/3 of the proceeds of the policy (1/3 of

$78,294.92) pursuant to being a co-listed beneficiary on the policy, rather than the entire amount of it as outlined in the will. Consequently, Bryan contends he took nothing under the will and was "omitted." Similarly, Pamela received $88,270.13 in CD proceeds directly from the bank because she was listed on CDs as a joint owner with her father, the decedent. Thus, the CD funds were also transferred outside of the will and probate process, and she received nothing else under the will.

¶9 On August 9, 2011, the trial court appointed a local attorney, F. Nils Raunikar, as special administrator and personal representative of Duke's estate, while the will contest unfolded. On July 16, 2012, Pamela and her husband Glenn Flener (collectively, the Fleners) filed a claim in Case 1 alleging that they had an oral contract with Duke to purchase real property known as the mechanic/body shop (the shop) that Duke bought in 1995. The Fleners alleged that they: 1) worked at the shop since Duke purchased it in 1995; 2) had completed the terms of an alleged oral shop purchase contract; and 3) were entitled to ownership of the shop after Duke's death.

b. Case 2: Breach of Contract/Creditor's Claim

¶10 A few months later, on September 28, 2012, the Fleners filed Case 2, a separate lawsuit as a breach of contract/a creditor's claim against Duke's estate also in Latimer County District Court, also asserting that essentially the same arguments that they had made in Case 1: 1) they had taken possession of the shop since Duke purchased it in 1995; 2) made improvements therein; and 3) had completed the terms for purchase under an alleged oral contract. Consequently, in Case 2, the Fleners asserted claims for breach of contract, and equitable estoppel based on part performance.[2] The special administrator counterclaimed for unpaid rent since the decedent's death. On October 01, 2012, Glenn Flener, son-in-law of the decedent, added a personal creditor's claim for work done on a 1971 Ford Torino totaling $10,317.32 after the special administrator had rejected the claim.

¶11 The deed for the shop property had remained in the decedent's name since it was purchased in 1994. The shop property appeared in his depreciation schedules on his income tax forms to the IRS. The decedent leased a portion of the property to a drilling company to store equipment, etc. for $700.00 a month, which he also reported as rental income on his taxes. The only evidence that the Fleners had an oral agreement to purchase the property was that they had possession of it, made improvements to it, and made payments to the father for a brief period in 1997-1998.

c. This Cause: Cases 1 and 2 Consolidated and the Evidence Therein.

¶12 Eventually, the cause proceeded to a trial on September 8-12, 15, and October 23, 2014. On June 20, 2015, the trial court signed an order regarding the probate proceedings which was filed the next day. In it, the trial court admitted the decedent's will to probate, but reserved the issues of the interpretation of the will and the determination of pretermitted heir for a separate dispositional order. On July 30, 2015, the trial court consolidated Case 2 with Case 1, in the "interest of more efficient judicial administration and disposition."

¶13 Even though they were consolidated, both the will contest and the creditors' claims proceeded, resulting in separate orders with evidence and issues overlapping in each case. On October 11, 2016, the trial court filed an order designating the status of heirs concerning Case 1, the probate proceedings. The trial court order provides in pertinent part:

> . . . It is undisputed that Duke intended to provide for his three, natural children within the four corners of his Will. It is also apparent from the four corners of the Will that Duke's intended bequests to his three individual children were far from equal in nature, and that Fred James, Jr's share of the estate was intended to be greater in quantity than that of his two siblings. However, the bequests to Pamela Flener and Brian James failed for solely containing non-probate assets, a failed testamentary trust, and ambiguities as to form, quantity, and substance of the bequests. A separate testamentary trust intended to benefit Duke's sister, Donna James, also failed as the funding source was solely a non-probate asset held in joint tenancy with a right of survivorship in her favor.
>
> Duke received legal counsel regarding the nature of his bequests. In order for operation of his Will, Duke would need to ensure that the source assets were correctly designated, titled, and not otherwise payable on death. After receiving this advice, Duke

took no action to change the legal divestiture of these assets. By operation of contract law, these bequests failed as the source assets passed outside of probate.. . .

[It appears that the trial court treated the CDs bequested to Pamela as failed bequests under the terms of the will because they were jointly owned by Pamela and the decedent, and thus not part of the decedent's estate, and, like the insurance policy proceeds, were not subject to the will.]

¶14 Consequently, the trial court determined that the attempted bequests were non-probate assets which appeared to be inadvertent, resulting in two unintentionally omitted children entitled to a statutory share of their father's estate as natural, pretermitted heirs. It also held that when any testator unintentionally omits to provide in his will for any of his children, such child must have the same share in the estate of the testator as if he had died intestate. The trial court also held that the common law doctrine of ademption[3] was inapplicable to this cause because the certificate of deposit and the life insurance policy did not pass to the pretermitted heirs prior to Duke's death.

¶15 On October 11, 2016, the trial court, apparently relying on its decision regarding Case 1, filed an order concerning Case 2, regarding the creditors' claims. In it, the trial court found that: 1) the Fleners were entitled to a refund from the estate for $17,100.00 for monetary payments they had made to the decedent between 1997 and 1998; 2) the estate also owed the Fleners the value of improvements, if any, which may have resulted in the shop's increased value; 3) the Fleners could retain possession of the shop property rent free because as a pretermitted heir, Pamela Flener was entitled to an intestate share of the estate, resulting in a tenancy in common; and 4) the shop property was part of the estate and would remain part of the estate until distribution. The estate appealed both the Case 1 and Case 2 orders and on May 3, 2019, the Court of Appeals, in an unpublished opinion, affirmed the trial court. We granted certiorari on October 29, 2019, to address the pretermitted heir issue.

A NAMED HEIR IN A WILL IS NOT PRETERMITTED BECAUSE THEIR BENEFICIARY STATUS OF A NON-PROBATE ASSET DIFFERS FROM THE BEQUEST IN THE WILL.

¶16 The brother and sister argue that the fact that they were named in the will is irrelevant. Rather, it is the fact that because their father did not properly change the beneficiaries on the CD and life insurance policy to match the will they were "unprovided" for in the will and thus pretermitted. The estate argues that the daughter received $88,270.13 directly from the First National Bank of McAlester payable on death from the Certificates of Deposits and that was exactly what the testator devised to her in the will. The son received $26,098.31 which was 1/3 of the $78,294.92 life insurance policy, because he, along with the other two children were named beneficiaries on the policy. While this may not have been what was devised in the will, he was expressly provided for in the will and not pretermitted.

¶17 Disposing of property is an inalienable natural right throughout a person's lifetime.[4] However, the method of disposition of property after death and the right of inheritance are statutory.[5] The Oklahoma Legislature provided for wills and trust as a means of disposing of one's property at death.[6] The Oklahoma pretermitted heir statute, 84 O.S. 2011 §132, provides a statutory method of inheritance for children whom a testator unintentionally fails to provide for or name in a will. It is not a limitation on a testator's power to dispose of his or her property. Rather, it is an assurance that a child is not unintentionally omitted from a will.[7] It provides:

> When any testator omits to provide in his will for any of his children, or for the issue of any deceased child unless it appears that such omission was intentional, such child, or the issue of such child, must have the same share in the estate of the testator, as if he had died intestate, and succeeds thereto as provided in the preceding section.

The pretermitted heir statute does not secure a child with a minimum statutory share of a parent's estate upon the death of a parent.[8] The purpose of the statute is merely to protect an issue's right to take, unless the will gives a clear expression of intentional omission.[9] By the terms of the statute, it must "appear" that the testator intended to leave his child with nothing.[10]

¶18 Cases are legion holding that the prime purpose in construing a will is to arrive at and

give effect to the intent of the testator.[11] Since 1928, this Court has consistently interpreted this statute to the effect that an intentional omission to provide for the testator's issue must appear clearly within the four corners of the testamentary document itself.[12] In other words, was there an omission of the will contestant completely, either by name or class? Is there any language in the will manifesting the omission as an intentional act?[13]

¶19 Even the disposition of the entire estate does not alone evince an intent to omit a child or a deceased child's issue. Intent to disinherit must appear upon the face of the will in strong and convincing language.[14] It is also well established that the intent to disinherit must appear within the four corners of the testamentary document, and that extrinsic evidence is inadmissable unless ambiguities appear on the face of the will.[15]

¶20 We have previously noted that there are many ways a person can express the intention to omit to provide for his or her children, including: 1) expressly state that the named child is to receive nothing;[16] 2) provide only a nominal amount for the child who claims to be pretermitted;[17] 3) name a child, but then leave them nothing;[18] 4) declare any child claiming to be pretermitted take nothing;[19] or 5) specifically deny the existence of members of a class to which the claimant belongs coupled with a complete disposition of the estate.[20]

¶21 None of these ways were expressed in this cause. The testator did not state that his children were to take nothing or provide only a nominal amount to them. He did not name a child, but leave it nothing, nor declare any child was to take nothing. He did not specifically deny the existence of a child coupled with complete disposition of the estate. To the contrary of an express omission, the testator expressly listed all three of his children and expressly left all three children something in his will. There were no children pretermitted in this will. Rather, the problem lies in how he handled his affairs after the wills were created, and apparently against the advice of counsel.

¶22 A certificate of deposit (CD) and insurance policy are contracts interpreted under contract principles. A CD, unless on its face shows an interest in one's estate is not part of the estate subject to probate.[21] Similarly, neither is a life insurance policy unless the policy names the estate as beneficiary.[22] One child was left a portion of the proceeds of a life insurance policy and the other child the proceeds of CDs – both of which were designated as beneficiaries outside of the will and thus outside of probate.

¶23 Either or both of these items could have been made part of his estate had the testator designated his estate as the beneficiary. However, because he did not designate the estate as the beneficiary, the items passed outside of his estate pursuant to the designations as he listed directly on the life insurance policy and the CDs. While this inaction may have resulted in an amount different than what the children would have actually received from the amounts the testator acknowledged in his will, it did not render the children pretermitted entitled to the statutory protections as a pretermitted child. Such a failed bequest to a named heir does not, as a matter of law, render the heir pretermitted.

¶24 In Crump's Estate v. Freeman, 1980 OK 80, 614 P.2d 1096, we held that a granddaughter was pretermitted. The testator totally omitted one of his granddaughters from his will. She was not mentioned at all – either by name or class. Nor was there any ambiguity on the face of the will regarding her omission being intentional or unintentional. The Court said:

> ¶8 Our pretermitted-heir statute, as interpreted since 1928, does more than raise a presumption that the testator unintentionally omitted to provide for a child or issue of a deceased's child. It calls upon a testator who wishes to disinherit his issue to affirmatively and clearly state his intention to exclude such person. Our interpretation of § 132 provides an efficient, safe and easy method to determine the testator's intention. Thousands of wills have been written in reliance on the continued expression of this court over a long period of time. A departure from precedent would, at this late date, be most inadvisable and inappropriate. (Citations omitted.)

¶25 The same principle applies here. If a testator wishes to bequeath a CD or life insurance policy pursuant to a will, the testator must make certain that the estate is the beneficiary listed on the CD or life insurance policy. Otherwise, they will pass according to their terms and not pursuant to the will. If this were not the case, every time people made a change to their bank accounts or life insurance, they would have to re-write their will to ensure that

the changes were identical in the will for the changes in the bank account or life insurance policy to be effective. Here, the testator was advised of the ramifications of his estate planning and he chose to leave the will intact. There is a presumption that he was satisfied with the distribution of his assets.

¶26 We agree with the Crump's Estate Court, supra, thousands of wills, CDs and life insurance policies have been written in reliance on the continued expression of this court over a long period of time. A departure from this precedent would, at this late date, be inadvisable and inappropriate. Accordingly, we reverse the trial court in part, and remand for proceedings consistent with our determination neither child was a pretermitted heir.

CONCLUSION

¶27 Testators have the freedom to dispose of their estate as they wish.[23] A testator also has a responsibility to take the appropriate, legal, and necessary steps to ensure what has been done is necessary for that disposition to happen as they wish. In this case, it was the testator's responsibility make sure that non-estate assets such as life insurance policies and bank accounts were designated as he stated in his will – if that is how he wanted them to be bequeathed. After receiving advice of counsel, he apparently was satisfied with the distribution of his assets.

¶28 Because they were actually designated differently than indicated in his will does not render their beneficiaries pretermitted. The trial court based the order on October 11, 2016, on its finding that a son and daughter were both pretermitted heirs. While the daughter may be entitled to a refund for money she paid to the decedent or improvements she made to the shop property, because she was not pretermitted she is not entitled to an intestate share of the shop property. Consequently, we remand this consolidated cause for proceedings consistent with our determination neither child was a pretermitted heir.

COURT OF CIVIL APPEALS OPINION VACATED; TRIAL COURT REVERSED IN PART AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH OUR DECISION.

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

COLBERT, J., not voting.

KAUGER, J.:

1. The only arguable "ambiguity" in the will appears to be nothing more than a typographical error because immediately after the testator declares that he has three children and names them, the will states that "I declare I have no living or deceased, natural or adopted child or children."

2. They also alternatively asserted a claim for adverse possession which the trial court dismissed on January 8, 2014.

3. For a discussion of ademption, see generally, In Re Van Duyne's Estate, 1951 OK 299, 239 P.2d 387. Ordinarily, to make a specific legacy effective the property bequeathed must be in existence and owned by the testator. Ademption comes into play when a specific bequest has been previously sold or disposed of prior to death. The question becomes whether the beneficiary should get the proceeds of the sale because the actual property was no longer owned by the testator at the time of death.

4. Estate of Jackson, 2008 OK 83, ¶15, 194 P.3d 1269; Snodgrass v. Snodgrass, 1924 OK 597, ¶10, 231 P.237.

5. Estate of Jackson, see note 4, supra; Snodgrass v. Snodgrass, see note 4, supra.

6. Title 84 O.S. 2011 §44; 60 O.S. 2011 §175.1; 84 O.S. 2011 §301.

7. Estate of Jackson, see note 4, supra; Estate of Hoobler, 1996 OK 56, ¶8, 925 P.2d 13.

8. Estate of Jackson, see note 4, supra; Estate of Hoobler, see note 7, supra.

9. Estate of Hoobler, see note 7, supra; Crump's Estate v. Freeman, 1980 OK 80, ¶3, 614 P.2d 1096.

10. In the Matter of the Estate of Hester, 1983 OK 93, ¶4, 671 P.2d 54.

11. Estate of Hester, see note 10, supra at ¶9, and citing for e.g., In re Estate of Bovaird, 1982 OK 48, 645 P.2d 500; Miller v. First National Bank & Trust Co., 1981 OK 133, 637 P.2d 75; Bridgeford v. Estate of C.E. Chamberlin, 1977 OK 206, 573 P.2d 694.

12. Weaver v. Laub, 1978 OK 242 ¶6, 574 P.2d 609; Spaniard v. Tantom, 1928 OK 202, ¶0, 267 P.623.

13. Estate of Severns v. Severns, 1982 OK 64, ¶6, 650 P.2d 854.

14. Estate of Severns v. Severns, see note 13, supra.

15. Estate of Hester, see note 10, supra; Estate of Severns v. Severns, see note 13, supra.

16. Estate of Hester, see note 10, supra at ¶10.

17. Estate of Hester, see note 10 supra ¶10; Bridgeford v. Estate of C.E. Chamberlin, see note 11, supra.

18. Estate of Hester, see note 10, supra at ¶10; Pease v. Whitlach, 1964 OK 264, ¶7, 397 P.2d 894.

19. Estate of Hester, see note 10 supra at ¶10, Dilks v. Carson, 1946 OK 108, 168 P.2d 1020.

20. Estate of Hester, see note 10 supra at ¶10; Dilks v. Carson, see note 19, supra. We have also held that the intention to disinherit children can appear on the face of a will within which no mention of the children has been made by name or class. Compare, In Re Adams' Estate, 1950 OK 204, 222 P.2d 366 with Estate of Glomset, 1976 OK 30, 547 P.2d 951 and Estate of Severns v. Severns, see note 13, supra.

21. See, Estate of Kizziar, 1976 OK 114, ¶5, 554 P.2d 791.

22. See, Randall v. Travelers Cas. & Sur. Co., 2006 OK 65, ¶25, 145 P.3d 1048; Prudential Ins. Co. of America v. Glass, 1998 OK 52, ¶13, 959 P.2d 586.

23. Estate of Jackson, see note 4, supra; Snodgrass v. Snodgrass, see note 4, supra.

2020 OK 8

IN THE MATTER OF THE REINSTATEMENT OF: BLAIR STEVEN HOLLAWAY TO MEMBERSHIP IN THE OKLAHOMA BAR ASSOCIATION AND TO THE ROLL OF ATTORNEYS

SCBD #6811. January 28, 2020

ORIGINAL PROCEEDING FOR RULE 11 BAR REINSTATEMENT

¶0 Petitioner, Blair Steven Hollaway, filed a petition for reinstatement to membership in the Oklahoma Bar Association. By unanimous vote, the Trial Panel recommended that Petitioner should be reinstated. The Oklahoma Bar Association recommends that the findings of the Trial Panel be adopted. Upon *de novo* review, we determine that reinstatement should be granted and impose costs of $95.11 within thirty (30) days from the date this opinion becomes final.

PETITION FOR REINSTATEMENT GRANTED; PETITIONER ORDERED TO PAY COSTS OF $95.11

Blair Steven Hollaway, Moore, Oklahoma, Petitioner/Pro Se,

Katherine M. Ogden, Assistant General Counsel, Oklahoma Bar Association, Oklahoma City, Oklahoma, for Respondent.

OPINION

EDMONDSON, J.:

¶1 Petitioner, Blair Steven Hollaway, filed his Petition for Reinstatement on June 14, 2019 requesting he be readmitted as a member of the Oklahoma Bar Association (OBA) pursuant to Rule 11, Rules Governing Disciplinary Proceedings, 5 O.S. 2011, Ch. 1, App. 1-A (RGDP). Petitioner graduated from the Oklahoma City University School of Law in 2010. He was admitted to the OBA and his name was entered on the roll of attorneys on July 13, 2010. Petitioner resided in Oklahoma until June 2011 but he did not practice law.

¶2 In June, 2011, Petitioner moved to Atlanta, Georgia where he accepted a job as general counsel with a company located in that city. Petitioner's position did not require him to appear in court or to be a member of the Georgia Bar Association. He worked with this company until 2013. Next, he accepted a position with a different company in Georgia as an account executive where he worked from 2013 until January, 2019. Petitioner returned to Oklahoma in February, 2019.

¶3 In 2014, Petitioner's license was suspended for failure to pay his OBA membership dues. In 2015, Petitioner was stricken from the roll of attorneys of the OBA for non-payment of membership dues.

¶4 On September 4 and October 4, 2019, a hearing on the Petition for Reinstatement was held before the Trial Panel of the Professional Responsibility Tribunal (PRT). The OBA did not contest the Petition for Reinstatement but noted that because Petitioner was suspended for five years the PRT was required to make a finding as to whether Petitioner would have to take the bar exam, whether Petitioner engaged in the unauthorized practice of law, and whether Petitioner met the standards for good moral character.

¶5 Petitioner testified at the hearing, and he also presented five different witnesses to testify as to his competency as an attorney, his moral character, and to determine if he had engaged in the unauthorized practice of law. The OBA presented only one witness, the OBA investigator.

¶6 The PRT found by clear and convincing evidence that the Petitioner possesses the competency and learning in the law required for admission to practice law in the State of Oklahoma. Further, that Petitioner has shown that notwithstanding his long absence from the practice of law, he has continued to study the law and he has completed significant hours of continuing legal education. Specifically, the PRT determined that Petitioner was informed as to current developments in the law sufficient to maintain his competency. In addition, the PRT found that Petitioner demonstrated by clear and convincing evidence that he possessed stronger proof of qualifications than an applicant seeking admission to the bar for the first time.

¶7 Petitioner testified under oath that he was not engaged in the practice of law at the time of his suspension and therefore, he had no clients to notify. The PRT found this testimony was sufficient proof for Petitioner to overcome the failure to file an Affidavit pursuant to Rule 9.1 of the Rules Governing Disciplinary Proceedings ("RGDP"). In addition, the PRT found that Petitioner demonstrated by clear and convincing evidence that he possesses good moral character sufficient to entitle him to be admitted to the OBA. Finally, the PRT found that Petitioner has shown by clear and convincing evidence that he has not engaged in the unauthorized practice of law nor has he appeared in court as attorney for any party nor has he participated as counsel of record in any litigation since he was suspended in 2014 and then stricken from the roll of attorneys in 2015. By a unanimous vote, the PRT recommended that

Petitioner be reinstated to the Oklahoma Bar Association.

¶8 The PRT's report was filed with this Court on November 20, 2019 and this Court issued a briefing schedule on November 21, 2019. Petitioner filed a Waiver of Right to File Brief in Support on December 10, 2019. The OBA filed a Waiver of Answer Brief on December 17, 2019 stating the OBA agrees with the findings submitted by the PRT and recommended the adoption of all findings by the PRT.

¶9 This Court has the non-delegable, constitutional responsibility to regulate both the practice and the ethics, licensure, and discipline of Oklahoma attorneys. *In re Reinstatement of Rickey*, 2019 OK 36, ¶ 4, 442 P.3d 571, 574. Our review of the record is made *de novo*. *State ex rel. Oklahoma Bar Ass'n v. Hulett*, 2008 OK 38, ¶ 4, 183 P.3d 1014, 1016. In a reinstatement proceeding involving no prior imposition of discipline for attorney misconduct, the focus of our inquiry concerns 1) the present moral fitness of the applicant; 2) conduct subsequent to suspension as it relates to moral fitness and professional competence; 3) whether the attorney has engaged in the unauthorized practice of law; and 4) whether the attorney has complied with the rule-mandated requirements for reinstatement. *Rickey*, 2019 OK 36, ¶ 4, 442 P.3d at 574.

¶10 The PRT's recommendations, although entitled to great weight, are only advisory as the ultimate decision rests with this Court. *In re Reinstatement of Pate*, 2008 OK 24, ¶ 3, 184 P.3d 528, 530. Rule 11.4, RGDP, provides an applicant seeking reinstatement will be required to present stronger proof of qualifications than one seeking admission for the first time. In addition, Rule 11.5, RGDP provides the following element:

> (c) Whether or not the applicant possesses the competency and learning in the law required for admission to practice law in the State of Oklahoma, except that any applicant whose membership in the Association has been suspended or terminated for a period of five (5) years or longer, or who has been disbarred, shall be required to take and successfully pass the regular examination given by the Board of Bar Examiners of the Oklahoma Bar Association. Provided, however, the before the applicant shall be required to take and pass the bar examination, he shall have a reasonable opportunity to show by clear and convincing evidence that, notwithstanding his long absence from the practice of law, he has continued to study and thus has kept himself informed as to current developments in the law sufficient to maintain his competency. If the Trial Panel finds that such evidence is insufficent to establish the applicant's competency and learning in the law, it must require the applicant to take and pass the regular bar examination before a finding as to his qualifications shall be made in his favor.

We have held this provision creates a rebuttable presumption that one who has been suspended for five years will not possess sufficient competency in the law to be reinstated, absent an extraordinary showing to that effect. *In re Reinstatement of Farrant*, 2004 OK 77, ¶ 7, 104 P.3d 567, 569. Each application for reinstatement must be considered on its own merits and the evidence presented in each case. *In re Reinstatement of Kerr,* 2015 OK 9, ¶ 19, 345 P.3d 1118, 1125.

ANALYSIS

I. Moral Fitness

¶11 Petitioner has never been disciplined by the OBA; the only issue that arose was his suspension for failure to pay dues. Petitioner was living out of state, not practicing law, and was facing financial difficulties when he was unable to pay his OBA dues. Five different witnesses testified at the hearing that overwhelmingly supported a finding that Petitioner is possessed of good moral character. The PRT found Petitioner had shown by clear and convincing evidence that he possessed good moral character sufficient to be readmitted to the OBA. Likewise, the OBA agreed with these findings. After an examination of the record, we agree with this finding.

II. Professional Competence Sufficient for Reinstatement

¶12 Rule 11.5, RGDP, requires petitioners for reinstatement to show they possess the competency and learning in the law required for admission. If they have been suspended or terminated for more than five years, there is a rebuttable presumption they will be required to retake the regular bar examination. However, this presumption can be overcome when a petitioner establishes competence and learning

in the law. *In re Reinstatement of Gill*, 2016 OK 61, 376 P.3d 200.[1]

¶13 Petitioner presented evidence that during the time he was suspended his work experience required understanding of the law. He participated in a hearing in Georgia within the parameters allowed under Georgia law and presented evidence of his competency in serving in this role. Other witnesses testified about different independent research conducted by Petitioner reflecting diligence and competency in several different areas of the law. Evidence was presented reflecting that Petitioner was in compliance with his MCLE requirements at the time of his suspension. Further evidence was provided that he completed 30 hours of MCLE in 2019, including 2 hours of ethics. The PRT made a finding by clear and convincing evidence that Petitioner possessed the competency and learning in the law required for admission to practice law in the State of Oklahoma and further that even with his absence from the practice of law, he has continued to study and he has completed significant hours of continuing legal education and kept himself informed as to current developments. The PRT did not find that Petitioner was required to take the Oklahoma Bar Examination. We agree with the PRT and find the Petitioner has proven by clear and convincing evidence he possesses the level of competency and learning in the law to be reinstated to membership in the OBA without re-examination.

III. Unauthorized practice of Law and Rule 11.1, RGDP

¶14 The OBA investigator testified she had found no evidence in her investigation that Petitioner had engaged in the unauthorized practice of law during the time of his suspension. The investigator checked various databases, reviewed tax information and conducted an independent investigation. There was no evidence presented to indicate that Petitioner engaged in the unauthorized practice of law. Testimony from witnesses indicated that a hypothetical legal research project done by Petitioner was done under the supervision of an attorney and that Petitioner had not engaged in the unauthorized practice of law.

¶15 Rule 11.1, RGDP provides a mechanism for determining whether a petitioner has engaged in the unauthorized practice of law. Pursuant to this rule, the petitioner for reinstatement is required to submit an affidavit from each court clerk of the several counties in which he resided after suspension or termination of the right to practice law, establishing the petitioner has not engaged in the unauthorized practice of law in their respective courts during that period. Petitioner submitted an affidavit from the Oklahoma County Court Clerk attesting that the Petitioner had not appeared before any judge in the county since his suspension. Further, the investigator for the OBA testified that she found no cause for concern during her investigation into whether Petitioner had engaged in the unauthorized practice of law.

¶16 The PRT's report found the Petitioner had proven by clear and convincing evidence that he has not engaged in the unauthorized practice of law nor has he appeared in court as an attorney of record for any party in any litigation. We find no evidence to the contrary.

¶17 An affidavit from the OBA's MCLE Administrator states that Petitioner did not owe any MCLE credits or MCLE fees. If he is reinstated as a member of the OBA, Petitioner will need to obtain 12 hours of CLE, including 1 hour of ethics for the calendar year in which he is reinstated. An Affidavit from the OBA Director of Administration states that Petitioner will owe only his current membership dues of two hundred seventy-five dollars ($275.00) for the year of his reinstatement. The OBA filed an Application to Assess Costs, pursuant to Rule 11.1 (c), RGDP requesting that Petitioner pay costs in the amount of ninety-five dollars and eleven cents ($95.11) for expenses relating to this investigation. This application included an exhibit that reflects Petitioner was directly invoiced and has paid the costs of the transcript of the PRT proceedings. The record reflects there have been no payments expended from the Client's Security Fund on the Petitioner's behalf.

CONCLUSION

¶18 We hold that the Petitioner has demonstrated by clear and convincing evidence his eligibility for reinstatement without examination. Within thirty days of the date of this opinion, Petitioner shall pay the costs incurred in this proceeding in the amount of ninety-five dollars and eleven cents ($95.11) as required by Rule 11.1 (c), RGDP. He will also be required to pay the current year's (2020) OBA membership dues prior to reinstatement and following reinstatement shall complete mandatory continu-

ing legal education sometime this year in the same manner as other members of the bar.

PETITION FOR REINSTATEMENT IS GRANTED; PETITIONER IS ORDERED TO PAY COSTS

ALL JUSTICES CONCUR.

EDMONDSON, J.:

1. Petitioner, Gill presented evidence of work experience that required an understanding of the law. In addition, her understanding of the law was pertinent to her extensive community service. Gill also completed continuing legal education courses as well as other evidence reflecting her competency. Also see, *In re Reinstatement of Jones*, 2006 OK 33, 142 P.3d 380, Petitioner demonstrated competency by working supervised as a volunteer law clerk, taking continuing legal education classes and regularly reading the Oklahoma Bar Journal; *In re Reinstatement of Essman*, 1987 OK 102, 749 P.2d 103, Petitioner was employed as a landman which required through knowledge of matters affecting title to real property and negotiation of purchasing oil and gas leases as well as taking continuing legal education classes.

2020 OK 9

IN RE: INITIATIVE PETITION No. 420, STATE QUESTION No. 804 ROGER GADDIS and ELDON MERKLIN, Petitioners, v. ANDREW MOORE, JANET ANN LARGENT and LYNDA JOHNSON, Respondents.

Case No. 118,405. February 4, 2020 As Corrected February 7, 2020

ORIGINAL PROCEEDING TO DETERMINE THE CONSTITUTIONAL VALIDITY OF INITIATIVE PETITION NO. 420, STATE QUESTION NO. 804

¶0 This is an original proceeding to determine the legal sufficiency of Initiative Petition No. 420, State Question No. 804. The petition seeks to create a new article to the Oklahoma Constitution, Article V-A, for the purpose of establishing the Citizens' Independent Redistricting Commission. The Petitioners filed this protest alleging the petition is unconstitutional because it violates the one general subject rule found in Article 24, Section 1 of the Oklahoma Constitution. They further allege its provisions violate the First Amendment of the United States Constitution. Upon our review, we hold Initiative Petition No. 420 does not violate the one general subject rule and the Petitioners have not met their burden to show clear or manifest facial constitutional infirmities. On the grounds alleged, the petition is legally sufficient for submission to the people of Oklahoma.

INITIATIVE PETITION NO. 420, STATE QUESTION NO. 804 IS LEGALLY SUFFICIENT FOR SUBMISSION TO THE PEOPLE OF OKLAHOMA

Robert G. McCampbell and Travis V. Jett, GableGotwals, Oklahoma City, Oklahoma, for Petitioners.

D. Kent Meyers, Alison M. Howard, and Melanie Wilson Rughani, Crowe & Dunlevy, Oklahoma City, OK, for Respondents.

COMBS, J.:

I. FACTS AND PROCEDURAL HISTORY

¶1 On October 28, 2019, the Respondents/Proponents, Andrew Moore, Janet Ann Largent, and Lynda Johnson (Respondents), filed Initiative Petition No. 420, State Question No. 804 (IP 420), with the Secretary of State of Oklahoma. The initiative measure proposes for submission to the voters the creation of a new constitutional article, Article V-A, which would create the Citizens' Independent Redistricting Commission (Commission). IP 420 would vest the power to redistrict the State's House of Representatives and Senatorial districts, as well as Federal Congressional Districts, in this newly created Commission.[1] IP 420 would also repeal current constitutional provisions concerning state legislative apportionment.[2] Notice of the filing was published on October 31, 2019. Title 34 O.S. Supp. 2015, § 8(b). Within 10 business days, the Petitioners, Rogers Gaddis and Eldon Merklin (Petitioners), brought this original proceeding under the authority of 34 O.S. Supp. 2015, § 8(b) to challenge the legal sufficiency of IP 420. They allege the proposed amendment by article suffers from two fatal constitutional defects: 1) IP 420 violates the single subject rule found in Okla. Const. art. 24, § 1, and 2) IP 420 violates the First Amendment of the U.S. Constitution. This matter was assigned to this office on December 17, 2019.

II. THE PROPOSED MEASURE

¶2 Sections 1 and 2 of IP 420 provide for the number of districts and terms of office for state senators and representatives. The number and terms are the same as that under current law. There will be forty-eight senate districts with only one senator from each district and one hundred and one house districts with only one representative from each district. State senators will serve a four-year term and state representatives will serve a two-year term. Section 3 vests the power to redistrict state legislative districts and federal congressional districts in the newly created Citizens' Independent Redis-

tricting Commission. Section 4 provides for the composition of the Commission. The Commission shall consist of nine members. Three of the members shall be affiliated with the state's largest political party and three shall be affiliated with the state's second largest political party. The remaining three members are persons who are unaffiliated with either of the state's two largest political parties.

¶3 Section 4(B)(4) of IP 420 provides a mechanism for the application and selection of the nine commissioners. The Chief Justice of the Oklahoma Supreme Court shall first appoint a special master who will oversee the application process and the training of the commissioners. The Chief Justice shall also designate a Panel to review applications for the commissioner positions. The Panel is composed of three retired appellate Justices and/or Judges. Their selection is based upon a random drawing. The special master shall accept applications to the Commission. From these applications, the Panel shall identify three pools of applicants, each containing twenty applications. The three pools are composed as follows: 1) applicants affiliated with the state's largest political party, 2) applicants affiliated with the state's second largest political party, and 3) applicants not affiliated with the state's two largest political parties. Each pool shall have no fewer than three applicants from each current congressional district. As practicable, each pool shall try to reflect the state's racial, ethnic, veteran status, sexual orientation, and gender diversity. The Panel shall then choose by lot six applicants, two from each pool, to serve on the Commission. In addition, the Panel shall choose three alternate members to the Commission from the remaining pools of applicants. One is chosen from each pool by lot. Those persons will serve as alternates in order to fill vacancies on the Commission. The six commissioners will thereafter appoint one additional commissioner from each pool. Within thirty days after all redistricting plans have been approved and any challenges have been resolved, the Commission shall be dissolved and any unexpended funds shall revert to the State's general revenue fund. Section 4(H) of IP 420.

¶4 Section 4(B)(2)(a-f) of IP 420 provides for the qualifications of the commissioners. A member of the Commission shall have been continuously domiciled in this State for the five years immediately preceding the date of appointment and shall not have changed their registered political affiliation in the four years prior to such date. In addition, in the five years immediately preceding the date of appointment to the Commission, the commissioner shall not: 1) have held, or have an immediate family member who has held, a partisan elective office at the federal, state, or political subdivision level in this State, 2) have registered, or have an immediate family member who has registered, as a federal, state or local lobbyist, 3) have held office or served, or has an immediate family member who has held office or served, as a paid staff member for a political party, 4) have been nominated, nor have an immediate family member who has been nominated, as a candidate for elective office by a political party, and 5) have been an employee of the state legislature. The term "immediate family member" is defined in Section 4(A)(9) as a father, stepfather, mother, stepmother, son, stepson, daughter, stepdaughter, brother, stepbrother, sister, stepsister, husband, wife, father-in-law, or mother-in-law. Section 4(B)(6) also prohibits members from running for an elective office in a district created while they served on the Commission.

¶5 Section 4(B)(7-8) of IP 420 provides for the compensation of the members of the Commission and funding for the Commission. The commissioners' compensation consists only of a per diem amount and travel reimbursement in the same manner as members of the State Legislature. A revolving fund, the "Citizens' Independent Redistricting Commission Revolving Fund," shall be created and the Legislature is required to annually appropriate money into the fund sufficient to enable the Commission to perform its functions.

¶6 The Commission is required to vote for the appointment of a secretary who is nominated by the special master. Section 4(C) of IP 420. The duties of the secretary include: 1) assisting in the running and convening of the Commission, 2) holding regional field hearings to seek public input relevant to redistricting, 3) hiring and managing staff to assist the Commission and secretary, 4) developing and maintaining a website that creates a public plan drawing system which will allow members of the public to monitor the Commission's work as well as submit their own proposed plans and maps indicating communities of interest. Section 4(C) also includes other duties of the Commission. Part of the duties will be to obtain data from the Oklahoma Department of

Corrections concerning the home addresses of state and federal inmates and add this data to the Federal Decennial Census data so that incarcerated people are counted in their home communities. Section 4(C)(3)(a) of IP 420.

¶7 Section 4(D) requires the Commission to conduct separate processes for drawing and submitting plans for the redistricting of State House Districts, State Senate Districts and Federal Congressional Districts. This subsection also provides the specific criteria the Commission will use in determining districts. First, it requires the Commission to comply with the U.S. Constitution and any federal law, including the requirement that it equalize total population. It also requires all districts to be contiguous, *i.e.*, to be bound by an unbroken line. Additionally, the Commission shall seek to maximize compliance with the following criteria in this order of priority: 1) **Communities of Interest** - it shall minimize the division of communities of interest, which are defined as an area with recognized similarities of interests, which include but are not limited to, racial, ethnic, economic, social, cultural, geographic, tribal, linguistic, or historic identities, but shall not include common relationships with political parties, officeholders, or political candidates; 2) **Racial and Ethnic Fairness** - a redistricting plan shall not be drawn in a way to deny or abridge the equal opportunity of racial or ethnic minority groups to participate in the political process or diminish their ability to elect representatives of their choice; 3) **Political Fairness** – on a statewide basis, no plan shall unduly favor a political party; 4) **Districts** - the districts shall respect geographic integrity of political subdivisions to the extent preceding criteria have been satisfied; and 5) **Compactness** – the draft plan should be compact to the extent preceding criteria have been satisfied. In addition, a redistricting plan is prohibited from taking into consideration: 1) the residence of any member or candidate of the Oklahoma House of Representatives, Oklahoma Senate, or U.S. Congress, and 2) the political party affiliation or voting history of the population of a district.

¶8 Section 4(E) of IP 420 provides for the approval of redistricting plans. It first requires the Commission to create a preliminary plan and hold public meetings in each congressional district. A preliminary plan shall also be published, including a version in a digital format, and the public will be allowed no fewer than fourteen days to provide comment. The Commission shall then hold an open voting meeting at which time the Commission may vote to approve the plan. Six members of the Commission are required to approve a plan and out of the six, at least one member must be from each pool. Once approved, the Commission will send the plan to the State Election Board, the Governor, the Secretary of State, the Senate President Pro Tempore, the Speaker of the House and make the plan publicly available. With all preliminary and final plans, the Commission will issue a written evaluation measuring the maps against external metrics.

¶9 The Commission has one hundred and twenty days from the release of the Federal Decennial Census data to approve a final plan. If it fails to do so, then Section 4(F) of IP 420 provides a "fallback mechanism." Under this mechanism the special master shall create and submit a report to the Oklahoma Supreme Court advising the Court of the available plans. The Supreme Court shall then have thirty days to approve a plan that is consistent with the criteria provided in Section 4(D) of IP 420.

¶10 Within thirty days after a plan's approval, any aggrieved resident of this State may petition the Oklahoma Supreme Court to invalidate that plan. Section 4(G) IP 420. All petitions challenging a plan shall be consolidated. The Supreme Court has original and exclusive jurisdiction to hear and decide all such challenges to the Commission's actions and final plans. This jurisdiction, however, is limited to remedy only the specific violation alleged on the specific plan challenged. If the Court concludes the plan approved by the Commission is invalid, then it will utilize the "fallback mechanism" previously discussed.

¶11 Section 5 of IP 420 expresses the authority of the Commission. It provides, in part, that the "People declare that the powers granted to the Commission herein are legislative functions not subject to the control or approval of the Legislature, and are exclusively reserved to the Commission." It further prohibits the Legislature from establishing a body to perform functions that are the same or similar to those of the Commission. Section 6 provides for the repeal of Article V, Sections 9A, 10A, and 11A-11E of the Oklahoma Constitution. Section 7 provides a severability clause.

II. STANDARD OF REVIEW

¶12 "The first power reserved by the people is the initiative...." Okla. Const. art. 5, § 2; *In re*

Initiative Petition No. 409, State Question No. 785, 2016 OK 51, ¶2, 376 P.3d 250; *In re Initiative Petition No. 403, State Question No. 779*, 2016 OK 1, ¶3, 367 P.3d 472. With that reservation comes "the power to propose laws and amendments to the Constitution and to enact or reject the same at the polls independent of the Legislature, and also reserve power at their own option to approve or reject at the polls any act of the Legislature." Okla. Cost. art. 5, § 1; *In re Initiative Petition No. 409*, 2016 OK 51, ¶2; *In re Initiative Petition No. 403*, 2016 OK 1, ¶3. "The right of the initiative is precious, and it is one which this Court is zealous to preserve to the fullest measure of the spirit and the letter of the law." *In re Initiative Petition No. 382, State Question No. 729*, 2006 OK 45, ¶3, 142 P.3d 400. *See In re Initiative Petition No. 349, State Question No. 642*, 1992 OK 122, ¶35, 838 P.2d 1. We have repeatedly emphasized both how vital the right of initiative is to the people of Oklahoma, as well as the degree to which we must protect it:

> Because the right of the initiative is so precious, **all doubt as to the construction of pertinent provisions is resolved in favor of the initiative. The initiative power should not be crippled, avoided, or denied by technical construction by the courts.**

In re Initiative Petition No. 403, 2016 OK 1, ¶3 (quoting *In re Initiative Petition No. 382*, 2006 OK 45, ¶3).

¶13 However, while the fundamental and precious right of initiative petition is zealously protected by this Court, it is not absolute. Any citizen can protest the sufficiency and legality of an initiative petition. *In re Initiative Petition No. 409,* 2016 OK 51, ¶2; *In re Initiative Petition No. 384, State Question No. 731*, 2007 OK 48, ¶2, 164 P.3d 125. "Upon such protest, this Court must review the petition to ensure that it complies with the 'parameters of the rights and restrictions [as] established by the Oklahoma Constitution, legislative enactments and this Court's jurisprudence.'" *In re Initiative Petition No. 384*, 2007 OK 48, ¶2 (quoting *In re Initiative Petition No. 379, State Question No. 726*, 2006 OK 89, ¶16, 155 P.3d 32).

¶14 As to challenged initiative provisions, this Court has consistently confined our pre-election review under Section 8 of Title 34 of the Oklahoma Statutes to "clear or manifest facial constitutional infirmities." *In re Initiative Petition No. 358, State Question No. 658*, 1994 OK 27, ¶7, 870 P.2d 782. Challenges to the interpretation, implementation or application of an initiative proposal present nothing more than abstract questions and will not be reviewed through this Court's inherent power to grant relief from costly expenditure of public revenues on needless elections. *Id.* We will not interpret the contents of an initiative proposal, nor speculate its implementation at this pre-election stage. *Id.* ¶12. Accordingly, the Petitioners in this matter bear the burden of demonstrating the proposed initiative petition contains clear or manifest facial constitutional infirmities. *See In re Initiative Petition No. 403,* 2016 OK 1, ¶3; *In re Initiative Petition No. 362, State Question No. 669*, 1995 OK 77, ¶12, 899 P.2d 1145.

III. ANALYSIS

A. INITIATIVE PETITION 420 DOES NOT VIOLATE THE ONE GENERAL SUBJECT PROVISION FOUND IN SECTION 1 OF ARTICLE 24 OF THE OKLAHOMA CONSTITUTION.

1. The Petitioners' alleged violations of Okla. Const. art. 24, § 1.

¶15 The Petitioners contend IP 420 violates Okla. Const. art. 24, § 1, which prohibits constitutional amendments from containing more than one general subject. This section provides in pertinent part:

> No proposal for the amendment or alteration of this Constitution which is submitted to the voters shall embrace more than **one general subject** and the voters shall vote separately for or against each proposal submitted; **provided, however, that in the submission of proposals for the amendment of this Constitution by articles, which embrace one general subject, each proposed article shall be deemed a single proposal or proposition**. (Emphasis added).

The following is an outline of the Petitioners' arguments: 1) the redistricting of state legislative districts and federal congressional districts emanate from separate constitutional schemes and standards and are therefore separate subjects, 2) the creation of a Commission to handle redistricting is a separate subject from the procedural changes made to the redistricting process itself, 3) removing the power of the Legislature to redistrict would eliminate the power of the voters to disapprove such measures by referendum[3], and the exclusive authority of the Com-

mission to redistrict "notwithstanding any other provisions of this Constitution" would vitiate the power of the voters to propose a redistricting measure through the initiative process - these provisions constitute a separate subject, 4) the Oklahoma Supreme Court's role in selecting the Panel and the special master as well as its new role in the line drawing process constitute a separate subject, and 5) the provision to include data concerning incarcerated people is not necessary or intertwined to the subject of redistricting.

2. This Court has consistently reviewed proposed constitutional amendments by article under a broad test.

¶16 Constitutional amendments through the initiative process, and especially through amendments by article, have been consistently reviewed by this Court under a broader test. A narrower test has been used by this Court for single subject rule analysis under Okla. Const. art. 5, § 57 for acts of the Legislature that do not amend the constitution.[4] *See, e.g., Douglas v. Cox Ret. Prop., Inc.*, 2013 OK 37, 302 P.3d 789. Article 24 Section 1 of the Oklahoma Constitution applies only to amendments to the Oklahoma Constitution. The very wording of these constitutional sections differs; acts of the Legislature under Okla. Const. art. 5, § 57 must "embrace but **one subject**," however, amendments to the constitution under Okla. Const. art. 24, § 1 "shall embrace" no more than "**one general subject.**" (Emphasis added). The word "general" is not meant to be superfluous.[5] Based upon our holding in *Rupe v. Shaw*, 1955 OK 223, 286 P.2d 1094, this Court held Okla. Const. art. 24, § 1 "is to receive a liberal rather than a narrow or technical construction." *In re Initiative Petition No. 271,* 1962 OK 178, ¶11, 373 P.2d 1017. *Rupe* explained that the reason for this treatment is based upon the distinction between ordinary legislation and proposed constitutional amendments. *Rupe v. Shaw,* 1962 OK 178, ¶6. When dealing with proposed constitutional amendments there is a "period of publicity in which those interested may acquaint themselves with the purpose of" the proposed amendment. *Id.*

¶17 An even more liberal review has been acknowledged by this Court when a proposal amends the constitution by article. Article 24, Section 1 of the Oklahoma Constitution provides "the voters shall vote separately for or against each proposal" and when **amending by article** "each proposed article shall be deemed a **single** proposal." (Emphasis added). In *In re Initiative Petition No. 314* an initiative petition proposed to amend 5 sections of Article 27 of the Oklahoma Constitution. 1980 OK 174, 625 P.2d 595. The initiative petition did not amend by article. The proponents alleged all the amendments were under the one general subject of "control of alcoholic beverages." *Id.* ¶37. This Court noted there were apparent inconsistencies in the rulings of many jurisdictions concerning the single subject rule. *Id.* ¶56. However, these inconsistencies disappeared once you understood those decisions were based upon judgments by the courts as to whether the purposes behind the rule were offended. *Id.* ¶59. The purpose the Court adopted was based upon a Minnesota case, *Fugina v. Donovan,* 259 Minn. 35, 104 N.W.2d 911 (1960). The Supreme Court of Minnesota held the purpose behind the single subject rule was as follows:

> The first is to prevent imposition upon or deceit of the public by the presentation of a proposal which is misleading or the effect of which is concealed or not readily understandable. The second is to afford the voters freedom of choice and prevent 'logrolling', or the combining of unrelated proposals in order to secure approval by appealing to different groups which will support the entire proposal in order to secure some part of it although perhaps disapproving of other parts.

In re Initiative Petition No. 314, 1980 OK 174, ¶59. In clarifying the rule we found an Arizona opinion to be on point. *Id.* ¶62. In *Kerby v. Luhrs,* 44 Ariz. 208, 36 P.2d 549, 554 (1934) the Supreme Court of Arizona explained:

> If the different changes contained in the proposed amendment all cover matters necessary to be dealt with in some manner, in order that the Constitution, as amended, shall constitute a consistent and workable whole on the general topic embraced in that part which is amended, and if, logically speaking, they should stand or fall as a whole, then there is but one amendment submitted. But, if any one of the propositions, although not directly contradicting the others, does not refer to such matters, or if it is not such that the voter supporting it would reasonably be expected to support the principle of the others, then there are in reality two or more amendments to be submitted, and the proposed amendment falls

> within the constitutional prohibition. Nor does the rule as stated unduly hamper the adoption of legitimate amendments to the Constitution.

We found, no matter how the courts characterized the test they apply they all examine the inherent nature of the proposed amendments to determine whether they are subjects that are separate and independent from each other so that each could stand alone, or fall as a whole, leaving the constitutional scheme harmonious and independent of the subject. *In re Initiative Petition No. 314*, 1980 OK 174, ¶75.

¶18 We held the subjects of alcohol-related advertising, franchising and liquor by the drink were not so interrelated and interdependent that they formed an interlocking package nor did they have a common underlying purpose. *Id.* None were reasonably subordinate to the other nor could it be said that any were merely incidental, supplemental or just an administrative detail to the alleged one general subject, *i.e.*, control of alcoholic beverages. *Id.* In analyzing the amendments in light of the purpose of the single subject restriction, we held the proposal was misleading and constituted logrolling of the worst type. *Id.* ¶76. However, after coming to this conclusion, we suggested[6]:

> The changes sought by the multifarious proposal could have been effected either by submission of three separate proposals or a submission amending, under Art. 24, § 1, the entirety of Art. 27, as an amendment by article, as was done in 1959 when prohibition was repealed and Art. 27 was submitted and adopted by a vote of the people.

Id. ¶81.

¶19 Several years later, a new initiative petition to propose liquor by the drink was filed. This time the proposal repealed Article 27 of the Oklahoma Constitution and replaced it with a new article which contained many of the provisions in Article 27. *In re Initiative Petition No. 319,* 1984 OK 23, ¶7, 682 P.2d 222. The amendments in the proposed new article included replacing the Alcoholic Beverage Control Board and authorizing liquor by the drink.[7] *In re Initiative Petition No. 319*, 1984 OK 23, ¶8. The protestants alleged the proposal violated the one general subject provision of Okla. Const. art. 24, § 1. They conceded all other provisions in the proposal related to the same subject, control of sale of alcoholic beverages, except for the provision authorizing liquor by the drink in state lodges (section 8 of the initiative petition). *Id.* We noted in our previous ruling, *In re Initiative Petition No. 314,* "our constitution may be amended by article under Article 24, Section 1, and that such an amendment may cover changes which would violate the single subject rule if not proposed in that format." *Id.* ¶9. "While the amendment is still required to relate to a single general subject, our previous ruling indicates clearly that the various changes need not meet the test which was applied in *Initiative Petition No. 314*, and which resulted in the invalidity of that proposal." *Id.* We found that "under the approach suggested" in *In re Initiative Petition 314*, "we could apply to this question no more restrictive test than the one approved in both *Rupe v. Shaw,* 1955 OK 223, ¶6, 286 P.2d 1094, and in *In Re Initiative Petition No. 271*, 373 P.2d 1017 (Okl.1962)." *Id.* ¶10. This Court proceeded to quote *Rupe* wherein we observed:

> [G]enerally provisions governing projects so related as to constitute a single scheme may be properly included within the same amendment; and that matters germane to the same general subject indicated in the amendment's title, or within the field of legislation suggested thereby, may be included therein.

Id.; *Rupe v. Shaw,* 1984 OK 23, ¶6, 682 P.2d 222. We also noted, *Rupe* included "within that rule items which were incidents, 'necessary or convenient or tending to the accomplishment of one general design notwithstanding other purposes than the main design may be thereby subserved.'" *Initiative Petition No. 319*, 1984 OK 23, ¶11. We concluded Initiative Petition 319 was legally sufficient for submission to a vote of the people. *In re Initiative Petition No. 319*, 1984 OK 23, ¶18.

¶20 After *In re Initiative Petition 319*, two opinions of this Court held proposed constitutional amendments by article violated Okla. Const. art. 24, § 1. *In re Initiative Petition No. 342, State Question No. 628*, 1990 OK 76, 797 P.2d 331 and *In re Initiative Petition No. 344, State Question No. 630*, 1990 OK 75, 797 P.2d 326, were decided on the same day. In both matters the initiative petitions repealed and replaced an entire article of the Oklahoma Constitution. *In re Initiative Petition No. 342* repealed and replaced Article 9 of the Oklahoma Constitution concerning "Corporations" and *In re Initiative Petition No. 344* repealed and replaced

Article 6 of the Oklahoma Constitution concerning the "Executive Department." We used the test adopted in *In re Initiative Petition No. 314* from *Kerby v. Luhrs*[8] in both opinions, found the subject matter constituted logrolling, and held the initiative petitions embraced more than one general subject in violation of Okla. Const. art. 24, § 1.[9] In *In re Initiative Petition No. 342* we determined:

> There are numerous subjects covered by the Petition ranging from financial institutions holding stock in another financial institution to the power of eminent domain of foreign corporations to the fellow-servant doctrine rule. The only connection that these topics have to each other is that they all tangentially relate to the general subject of corporations. Otherwise, they are unrelated. For example, it is clear that the power of eminent domain of foreign corporations is inconsequential to the fellow-servant doctrine rule. And the prohibition against a bank holding stock in another bank is extraneous to both the power of eminent domain and the fellow-servant doctrine rule. There is no doubt that these topics do not meet the one general subject test.

1990 OK 76, ¶8; and in *In re Initiative Petition No. 344* we determined:

> The Petition in the present case addresses numerous subjects from the method of the election of the Lt. Governor, to changing the term of board and commission members including non-attorney members of the Judicial Nominating Commission, to giving the Governor the sole authority "to grant reprieves, commutations, and pardons", to changing the Executive Branch to a cabinet form of government, to repealing the constitutional authority for certain boards. Some of the sections in the amendment are, at best, tenuously related to other sections. The sections are not so intertwined as to require that they be adopted at the same time in order to preserve the integrity of each section. It is not necessary that all the changes be contained in the same proposal in order that the Constitution be consistent on the general topic of the Executive Branch of the government. Clearly, the placing of sole authority with the Governor to grant reprieves, commutation, and pardons is not dependent on the method of electing the Lt. Governor or a cabinet form of government. A voter supporting any one of these provisions could not reasonably be expected to support the principle of the others.

1990 OK 75, ¶9.

¶21 Six years later, this Court affirmed our amendment by article approach found in *In re Initiative Petition No. 319*.[10] We determined "when the proposed *constitutional amendment is by a new article* the test for gauging multiplicity of subjects is whether the changes proposed are *all germane* to a singular common subject and purpose or are essentially unrelated one to another." *In re Initiative Petition No. 363, State Question No. 672*, 1996 OK 122, ¶15, 927 P.2d 558.[11] When testing the germaneness of a proposed constitutional amendment "we look to whether each of its several facets bears a common concern or impacts one general object or subject." *In re Initiative Petition No. 363*, 1996 OK 122, ¶16. This Court also noted that the test in *Rupe v. Shaw* allowed provisions which were related to a single scheme and included within the single subject standard components which were incidents, "necessary or convenient or tending to the accomplishment of one general design notwithstanding other purposes than the main design may be thereby subserved." *Id.* n.33. We also noted the definition of "logrolling" involved the practice of embracing in one bill several *distinct* matters. *Id.* n.32. We did not find logrolling was present and we held the elements of taxability, distribution of gaming revenue and of civil liability for debts incurred in gaming were germane to the one general subject of legalization and regulation of authorized casino gaming. *Id.* ¶16.

¶22 The validity of the germaneness test used in *Initiative Petition No. 319* and *No. 363,* for amendments by article, was upheld by this Court some twenty years later. *In re Initiative Petition No. 403*, 2016 OK 1, ¶¶5-10, 12, 367 P.3d 472. Initiative Petition No. 403 added a new Article 13-C to the Oklahoma Constitution. It created the Oklahoma Education Improvement Fund to provide for the improvement of public education in Oklahoma and an additional one-cent sales tax and use tax to fund the improvements. *Id.* ¶1. The funds generated were to be distributed to public school districts, higher education institutions, career and technology centers, and early childhood education providers for certain educational purposes outlined in the proposal. *Id.* In addition, it provided for a $5,000 pay raise to public school teachers and delegated oversight responsibilities to the State

Board of Equalization to ensure the Legislature did not supplant current public education appropriations with the funds. *Id.* The opponents claimed the proposal violated Okla. Const. art. 24, § 1. We found the appropriate test to review the challenge was the germaneness test used in *Initiative Petition No. 319* and *No. 363*. *Id.* ¶¶6-10. The subject of the initiative petition was determined to be "the Oklahoma Education Improvement Fund." *Id.* ¶12. Using this germaneness test, we held each section of the amendment was reasonably interrelated and interdependent, forming an interlocking package "**deemed necessary by the initiatives' drafters to assure effective public education improvement funding**." *Id.* (emphasis added). The proposal was found to be a "single scheme" that stood or fell as a whole and "each section was germane to creating and implementing the Oklahoma Education Improvement Fund." *Id.* Having made this determination, hypothetical examples of logrolling were found invalid, e.g., a voter may agree with the creation of the fund but disagree with the funding mechanism. *Id.* We held, such decisions "are the consequence of the voting process rather than any constitutional defect in the proposal." *Id.* The fact that a voter must choose whether to approve the proposal based upon such considerations did not constitute logrolling. *Id.*

¶23 The proper test to use in the review of Initiative Petition 420 is the more liberal test applicable to amendments by article. A recent opinion of this Court determined our holdings in *In re Initiative Petition No. 342* and *No. 344* were not in conflict with the germaneness test nor did those opinions "disavow the liberal approach taken in *Rupe v. Shaw." Oklahoma Oil & Gas Ass'n v. Thompson*, 2018 OK 26, ¶11, 414 P.3d 345. Initiative Petition 420 creates a new article focused on the one general subject of "redistricting." It repeals only sections concerning reapportionment. In contrast, the initiative petitions in *In re Initiative Petition No. 342* and *No. 344* repealed and replaced entire articles of the Oklahoma Constitution which contained matters not all germane to one another.

¶24 The Petitioners first argue the redistricting of state legislative districts is a distinct subject from redistricting of congressional districts. This argument is based upon an opinion of the Supreme Court of Colorado, *In Matter of Title, Ballot Title*, 2016 CO 55, 374 P.3d 460, that held redistricting provisions for state and congressional districts in an initiative petition violated Colorado's single subject restriction. However, the case was decided under Article 5, Section 1 of the Colorado Constitution which states in pertinent part: "[n]o measure shall be proposed by petition containing more than one subject. . . ." That language is essentially the same as Okla. Const. art. 5, § 57 to which we apply a more restrictive single subject test. The Colorado case is not persuasive and is inapplicable to the matter at hand.

¶25 Petitioners contend the creation of the Commission and changes made to redistricting also violate the single subject rule. Again Petitioners rely on another jurisdiction's case law. They cite to an advisory opinion of the Supreme Court of Florida which held the creation of a new redistricting commission and provisions that would change the standards applicable to the districts were two separate subjects. *Advisory Opinion To Attorney Gen. re Indep. Nonpartisan Comm'n to Apportion Legislative & Cong. Districts Which Replaces Apportionment by Legislature*, 926 So.2d 1218, 1225–26 (Fla. 2006). As with the Colorado opinion, the Florida opinion was decided under a narrow constitutional provision concerning single subjects. Article 9, Section 3 of the Florida Constitution provides:

> The power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people, provided that, any such revision or amendment, except for those limiting the power of government to raise revenue, *shall embrace but one subject and matter directly connected therewith.*

Id. at 1224. This section is also like Okla. Const. art. 5, § 57.

¶26 The one general subject of IP 420 is "redistricting." Each section of the amendment is reasonably interrelated and interdependent forming an interlocking package deemed necessary by the initiative's drafters to further the one general design of redistricting. The creation of the Commission and the exclusive powers granted to it, the criteria used to determine the districts, and all the working processes included in IP 420 to make redistricting happen are germane to each other, or at the very least, incidents, necessary or convenient or tending to the accomplishment of this one general design.[12] Having made this determination, the Petitioners' hypothetical examples of logrolling are invalid. The Petitioners assert, e.g., a voter may approve of an independent

redistricting commission but have reservations on the proposed redistricting criteria. Such decisions are the consequence of the voting process rather than any constitutional defect in the proposal. *In re Initiative Petition No. 403,* 2016 OK 1, ¶12, 367 P.3d 472. The proposed initiative petition here is composed of a single scheme to be presented to the voters, and each section is germane to creating and implementing redistricting in Oklahoma.

B. PETITIONERS' FIRST AMENDMENT ARGUMENT AND OUR LIMITED REVIEW AT THE PRE-ELECTION STAGE.

¶27 The Petitioners assert IP 420's proposed qualifications to be a commissioner, the special master and the secretary violate the First Amendment of the United States Constitution.[13] These qualifications temporarily restrict who may participate in these positions. The restrictions include prohibiting persons who either themselves or who had an immediate family member, within the five years preceding the date of appointment, that engaged in: holding a partisan elective office, were registered as a state or federal lobbyist, was nominated as a candidate for political office, or was employed by the state legislature. Section 4 (B)(2)(a-f) of IP 420. Additionally, the prohibition includes persons who have changed their party affiliation within the last four years preceding the date of appointment. Section 4 (B)(2)(a) of IP 420.

¶28 The Petitioners note IP 420 compensates the commissioners with a per diem and travel reimbursement in the same manner as that received by members of the state legislature. Section 4 (B)(7) of IP 420. They also assume the positions of special master and secretary will be compensated.[14] The Petitioners argue that because "the First Amendment protects political association as well as political expression"[15] these qualifications constitute an unconstitutional condition of employment. The act of "conditioning hiring decisions on political belief and association plainly constitutes an unconstitutional condition, unless the government has a vital interest in doing so." *Rutan v. Republican Party of Illinois,* 497 U.S. 62, 78 (1990).

¶29 In *Elrod v. Burns*, public employees of a sheriff's office brought suit alleging they were discharged or threatened with discharge solely because they were not affiliated with the same political party as the new sheriff. 427 U.S. 347, 350 (1976). The Court found that the practice of patronage dismissals "clearly infringes First Amendment interests" but the "prohibition on encroachment of First Amendment protections is not an absolute. Restraints are permitted for appropriate reasons." *Id.* at 360. A mere legitimate state interest would not justify such an encroachment; the government has the burden to show the "interest advanced" is "paramount," and "one of vital importance." *Id.* at 362. In reviewing possible interests the government would have in support of patronage, the Court noted the "need for political loyalty of employees" could be achieved by "[l]imiting patronage dismissals to policymaking positions." *Id.* at 367. Doing so would be "sufficient to achieve this governmental end." *Id.* The Court, however, held the practice of patronage dismissals was unconstitutional under the First Amendment as alleged by the respondents in that case. *Id.* at 373.

¶30 In 2018 the voters of Michigan passed a constitutional amendment creating Michigan's Independent Citizens Redistricting Commission for State Legislative and Congressional Districts. *Daunt v. Benson*, 2019 WL 6271435, *2 (W.D. Mich. Nov. 25, 2019). The Michigan Commission includes similar restrictions on commissioners as those found in IP 420. *Id.* at *3. Following its passage, several plaintiffs challenged the constitutional amendment and sought an injunction to prevent the selection of the commissioners. They asserted the qualification criteria prevented them from being eligible to be a commissioner in violation of their First Amendment rights. *Id.* at *7. The Court found the plaintiffs framed their claim within the context of "conditional hiring decisions," as in the present case, but the better framework to use for examining the constitutionality of the criteria for membership on a state redistricting commission was found in "election law cases." *Id.* at *13-14. In denying the injunction, the Court used the *Anderson-Burdick* framework and concluded the eligibility provisions did not impose severe burdens on the plaintiffs' First Amendment rights and the burdens imposed were not permanent. *Id.* at 14-15.

¶31 The *Anderson-Burdick* framework is based upon two United States Supreme Court decisions; *i.e., Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Burdick v. Takushi,* 504 U.S. 428 (1992). In *Timmons v. Twin Cities Area New Party*, the Supreme Court explained this framework:

> When deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the

> character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions. **No bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms. No litmus-paper test separates those restrictions that are valid from those that are invidious.** The rule is not self-executing and is no substitute for the **hard judgments that must be made.** (Emphasis added).

520 U.S. 351, 358-359 (citations and internal quotation marks omitted). The *Daunt* Court broke this down into three steps: 1) the court considers the severity of the restriction[16], 2) the court identifies and evaluates the state's interests in and justifications for the regulation, and 3) the court will assess the legitimacy and strength of those interests and determine whether the restrictions are constitutional. Daunt, 2019 WL 6271435, *14.

¶32 In 1993, an initiative petition was filed that would create term limits for Oklahoma's U.S. Representatives and Senators. *In re Initiative Petition No. 360, State Question No. 662,* 1994 OK 97, 879 P.2d 810. Protestants challenged its legal sufficiency. *Id.* ¶8. They alleged IP 360 was facially unconstitutional because it restricted voters' rights to make their own choices as to who should represent them in Congress in violation of their free speech and associational rights under the First Amendment. *Id.* We held such constitutional challenge was not appropriate for determination at the pre-election stage. *Id.* The right of the people to engage in the initiative process is precious and must be guarded; all doubt as to the construction of an initiative's pertinent provisions are to be resolved in its favor. *Id.* at ¶9. The authority to review such challenges at the pre-election stage is **discretionary** and such authority should only be used to "reach clear and manifest facial constitutional challenges at the pre[-]election stage if, in our opinion, to do so will prevent the holding of a costly and unnecessary election." *Id.* at ¶10. It should not be used to "reach challenges to the interpretation, implementation or application of an initiative proposal because such challenges present only abstract questions which will not be reviewed at a pre-election stage." *Id.* Before exercising this discretionary authority, we must always keep in mind, "the fundamental basis of the people's right to institute change and express their will through the initiative process." *Id.* at ¶11. We held the alleged constitutional infirmity was neither clear nor manifest nor were we convinced that a review on the merits would prevent a costly or unnecessary election. *Id.* In arriving at this conclusion we reiterated:

> Only in the clearest cases do we believe it is essential to use the discretionary authority, and only in the clearest cases do we believe it is warranted to interfere with the people's basic right to vote on important issues by a holding of constitutional infirmity.

Id.

¶33 The Petitioners bear the burden of demonstrating the proposed initiative petition contains clear or manifest facial constitutional infirmities. Although, it is clear some people could be affected by the temporary restrictions on membership as a commissioner, special master or secretary, it is not shown that such restrictions constitute clear or manifest facial constitutional infirmities. As the Supreme Court determined in *Timmons,* there is no bright line that separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms. 520 U.S. 351, 359 (citing *Storer v. Brown*, 415 U.S. 724, 730 (1974)). Nor is it clear at this stage what basis for review is appropriate, *i.e.*, one based upon conditional hiring decisions or one based upon the *Anderson-Burdick* framework. Petitioners' First Amendment challenge constitutes the very type of scenario in which this Court should refrain from using its discretionary authority. Accordingly, we decline to reach this challenge at the pre-election stage.[17]

III. CONCLUSION

¶34 The people's right to propose law and amendments to the Constitution through the initiative process is precious and any doubt as to the legal sufficiency of an initiative petition should be resolved in its favor. The provisions of IP 420 are germane to the one general subject of redistricting and therefore it does not violate

Okla. Const. art. 24, § 1. Nor have the Petitioners met their burden to prove it contains other clear or manifest facial constitutional infirmities. We hold, on these grounds, IP 420 is legally sufficient for submission to the people of Oklahoma.

INITIATIVE PETITION NO. 420, STATE QUESTION NO. 804 IS LEGALLY SUFFICIENT FOR SUBMISSION TO THE PEOPLE OF OKLAHOMA

¶35 Gurich, C.J., Darby, V.C.J., Kauger, Winchester, Edmondson, Combs, Kane and Rowe, JJ., Reif, S.J., concur.

¶36 Colbert, J., recused.

COMBS, J.:

1. The Petitioners assert, unlike redistricting of the State Legislature, redistricting of the U.S. House of Representatives does not appear in the Oklahoma Constitution. Authority for establishing the Time, Places and Manner of Elections of U.S. Senators and Representatives is found in the Elections Clause of the U.S. Constitution, Article I, § 4. This section provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

Note: the words "chuse" and "chusing" are common alternate spellings in the U.S. Constitution.

Although the Elections Clause might indicate only a state legislature may amend congressional districts, the Supreme Court of the United States has ruled the clause does not preclude a state's people from creating a commission operating independently of the legislature to establish congressional districts. *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n,* 135 S. Ct. 2652, 2671, 192 L. Ed. 2d 704 (2015).

The Oklahoma Statutes currently provide for the establishment of congressional districts. Title 14 O.S. 2011, § 6.1 - 6.5.

2. Section 6 of IP 420 repeals Sections 9A, 10A, and 11A-11E of Article V of the Oklahoma Constitution. Sections 9A and 10A provide for the apportionment of State Senators and State Representatives, respectively. Sections 11A-11E grant authority to the Legislature for apportionment of the Legislature. If apportionment is not accomplished within the parameters set in these sections, then the existing Bipartisan Commission on Legislative Apportionment will fulfill this task. Qualified electors are authorized to seek review in the Oklahoma Supreme Court of any apportionment order made by the Commission. The powers of review of this Court include the approval of the apportionment order or the remanding of the matter to the Commission with directions to modify the Commission's apportionment order. If the Commission fails to timely make an apportionment order, this Court is also authorized to compel the Commission to make an apportionment.

3. The Petitioners assert under Okla. Const. art. 5, § 1 only "act[s] of the Legislature" are subject to the referendum process.

4. Article 5, Section 57 of the Oklahoma Constitution provides in pertinent part, "[e]very act of the Legislature shall embrace but one subject. . . . "

5. "A statute must be read to render every part operative and to avoid rendering parts thereof superfluous or useless." *Moran v. City of Del City*, 2003 OK 57, ¶8, 77 P.3d 588.

6. Note: I use the word "suggested" which is how we referred to this language in *In re Initiative Petition No. 319*, 1984 OK 23, ¶10, 682 P.2d 222.

7. A summary of the topics in that initiative petition are as follows:

> Section 1 provides for the creation of the Alcoholic Beverage Laws Enforcement Commission, providing for the appointment of its membership, the powers of the Commission and tenure of its members. It also prohibited members of the Commission from holding a license authorized under the new article;
> Section 1A provides transition procedures from the Alcoholic Beverage Control Board;
> Section 2 excludes 3.2% beer and cereal malt beverages from its provisions;
> Section 3 requires alcohol manufacturers to sell their products to every licensed wholesaler in the state;
> Section 4 provides for restrictions on the sale of retail alcoholic beverages and also authorizes the retail sale of alcoholic beverages for on-premises consumption;
> Section 5 prohibits the sale of alcohol to certain persons and restricts alcohol advertising;
> Section 6 prohibits the sale of alcohol on certain days;
> Section 7 provides for the taxation of alcoholic beverages and the distribution of such tax;
> Section 8 prohibits state and political subdivisions from engaging in any phase of the alcoholic beverage business but authorizes, upon legislative approval, the sale of alcohol on-premises at state lodges;
> Section 9 allows incorporated cities and towns to levy an occupation tax related to alcoholic beverages;
> Section 10 restricts the types of entities that may hold a retail package store or wholesaler distributor license; and
> Section 11 repeals art. 1, § 7 and all of art. 27 of the Oklahoma Constitution.

8. See ¶17 of this opinion, *supra; In re Initiative Petition No. 342,* 1990 OK 76, ¶4; *In re Initiative Petition No. 344*, 1990 OK 75, ¶8.

9. *In re Initiative Petition No. 342*, 1990 OK 76, ¶10; *In re Initiative Petition no. 344,* 1990 OK 75, ¶10.

10. *See In re Initiative Petition No. 403*, 2016 OK 1, ¶9, 367 P.3d 472.

11. The proposed amendment by article in *In re Initiative Petition 363* included: the creation of four locations immediately eligible for authorized gaming, prohibited casino gaming in counties not specifically authorized for a period of five years, created a seven-member state gaming commission with authority to provide regulation and enforcement of casino gambling, provided criminal penalties for violation of gaming laws, legalized obligations incurred in the course of authorized gaming, authorized the commission to collect gaming fees from each licensed gaming facility operator, retaining the legislatively approved amount of its budget and initial operations cost, earmarked the remaining receipts for specific computer-related educational purposes, local governments, and correctional institutions. *Id.*

12. In *In re Initiative Petition No. 271, State Question No. 408*, an initiative petition concerning reapportionment of the legislature was challenged for violating Okla. Const. art. 24, § 1. 1962 OK 178, 373 P.2d 1017. We held the proposal contained one general subject *i.e.*, the reapportionment of the legislature. *Id.* ¶11. We determined the provisions on setting up a committee for enforcement and provisions on filings of candidates for legislative office were supplemental and incidental to this one general subject and did not violate Okla. Const. art. 24, § 1. *Id.*

13. *See* ¶4 of this opinion, *supra,* for a complete listing of the proposed qualifications. Those same qualifications are made applicable to the special master and secretary in Sections 4 (B)(4)(a) and 4 (C)(1)(a) of IP 420, respectively.

14. IP 420 does not specify an amount of compensation for the special master or secretary.

15. *Elrod v. Burns*, 427 U.S. 347, 357 (1976) (quoting *Buckley v. Valeo,* 424 U.S. 1, 15 (1976).

16. The Court determined this to be the most critical step. *Daunt v. Benson,* 2019 WL 6271435, *14.

17. Although we choose not to address the Petitioners' First Amendment challenge, it is troubling that the proposed petition would appear to prohibit a person from serving as a commissioner if that person had changed their party affiliation within the last four years preceding the appointment. The appointment, by its terms, would exclude anyone who might have changed their party affiliation well prior to the enactment of the proposed amendment thus applying a retroactive restriction.

2020 OK 10

IN RE: INITIATIVE PETITION No. 420, STATE QUESTION No. 804 LAURA NEWBERRY and ELDON MERKLIN, Petitioners, v. ANDREW MOORE, JANET ANN LARGENT and LYNDA JOHNSON, Respondents.

Case No. 118,406. February 4, 2020

ORIGINAL PROCEEDING TO DETERMINE THE SUFFICIENCY OF THE GIST OF INITIATIVE PETITION NO. 420, STATE QUESTION NO. 804

¶0 This is an original proceeding to determine the legal sufficiency of the gist statement in Initiative Petition No. 420, State Question No. 804. The petition seeks to create a new article to the Oklahoma Constitution, Article V-A, for the purpose of establishing the Citizens' Independent Redistricting Commission. The Petitioners filed this protest alleging the gist of the petition is insufficient. Upon review, we hold the gist of the petition does not fairly describe the proposed constitutional amendment and is invalid.

INITIATIVE PETITION NO. 420, STATE QUESTION NO. 804, IS DECLARED INVALID AND ORDERED STRICKEN FROM THE BALLOT

Robert G. McCampbell and Travis V. Jett, GableGotwals, Oklahoma City, Oklahoma, for Petitioners.

D. Kent Meyers, Alison M. Howard, and Melanie Wilson Rughani, Crowe & Dunlevy, Oklahoma City, OK, for Respondents.

COMBS, J.:

I. FACTS AND PROCEDURAL HISTORY

¶1 On October 28, 2019, the Respondents/Proponents, Andrew Moore, Janet Ann Largent, and Lynda Johnson (Respondents), filed Initiative Petition No. 420, State Question No. 804 (IP 420), with the Secretary of State of Oklahoma. The initiative measure proposes for submission to the voters the creation of a new constitutional article, Article V-A, which would create the Citizens' Independent Redistricting Commission (Commission). IP 420 would vest the power to redistrict the State's House of Representatives and Senatorial districts, as well as Federal Congressional Districts, in this newly created Commission. IP 420 would also repeal current constitutional provisions concerning state legislative apportionment. Notice of the filing was published on October 31, 2019. Title 34 O.S. Supp. 2015, § 8(b). The Petitioners, Laura Newberry and Eldon Merklin (Petitioners), timely brought this original proceeding to protest the sufficiency of IP 420's gist statement. This matter was assigned to this office on December 17, 2019.

II. STANDARD OF REVIEW

¶2 "The first power reserved by the people is the initiative...." Okla. Const. art. 5, § 2; *In re Initiative Petition No. 409, State Question No. 785,* 2016 OK 51, ¶2, 376 P.3d 250; *In re Initiative Petition No. 403, State Question No. 779*, 2016 OK 1, ¶3, 367 P.3d 472. With that reservation comes "the power to propose laws and amendments to the Constitution and to enact or reject the same at the polls independent of the Legislature, and also reserve power at their own option to approve or reject at the polls any act of the Legislature." Okla. Cost. art. 5, § 1; *In re Initiative Petition No. 409*, 2016 OK 51, ¶2; *In re Initiative Petition No. 403*, 2016 OK 1, ¶3. "The right of the initiative is precious, and it is one which this Court is zealous to preserve to the fullest measure of the spirit and the letter of the law." *In re Initiative Petition No. 382, State Question No. 729*, 2006 OK 45, ¶3, 142 P.3d 400. *See In re Initiative Petition No. 349, State Question No. 642*, 1992 OK 122, ¶35, 838 P.2d 1. We have repeatedly emphasized both how vital the right of initiative is to the people of Oklahoma, as well as the degree to which we must protect it:

> Because the right of the initiative is so precious, **all doubt as to the construction of pertinent provisions is resolved in favor of the initiative. The initiative power should not be crippled, avoided, or denied by technical construction by the courts.**

In re Initiative Petition No. 403, 2016 OK 1, ¶3 (quoting *In re Initiative Petition No. 382*, 2006 OK 45, ¶3).

¶3 However, while the fundamental and precious right of initiative petition is zealously protected by this Court, it is not absolute. Any citizen can protest the sufficiency and legality of an initiative petition. *In re Initiative Petition No. 409*, 2016 OK 51, ¶2; *In re Initiative Petition No. 384, State Question No. 731*, 2007 OK 48, ¶2, 164 P.3d 125. "Upon such protest, this Court must review the petition to ensure that it complies with the 'parameters of the rights and restrictions [as] established by the Oklahoma Constitution, legislative enactments and this Court's jurisprudence.'" *In re Initiative Petition No. 384,* 2007 OK 48, ¶2 (quoting *In re Initiative Petition No. 379, State Question No. 726*, 2006 OK 89, ¶16, 155 P.3d 32).

¶4 The gist of an initiative petition is required by 34 O.S. 2011, § 3, which provides in pertinent part: "[a] simple statement of the gist of the proposition shall be printed on the top

margin of each signature sheet." The gist is required to be in "simple language" and should inform "a signer of what the measure is generally intended to do." *In re Initiative Petition No. 363, State Question No. 672,* 1996 OK 122, ¶20, 927 P.2d 558. Each signature sheet is attached to a copy of the initiative petition and is therefore available for review by any potential signatory. *Id.* The two combined form what is called the "pamphlet." *Id.* The gist must be short and because it will appear at the beginning of every page of the petition it can contain "no more than a shorthand explanation of a proposition's terms." *In re Initiative Petition No. 362, State Question No. 669*, 1995 OK 77, ¶10, 899 P.2d 1145. It need not contain the more extensive requirements for ballot titles contained in 34 O.S. Supp. 2018, § 9. *Id.* This Court described the importance of the gist and ballot title, as well as the requirements, in *In re Initiative Petition No. 344, State Question No. 630*, where we explained:

> [T]he statement on the petition [the gist] and the ballot title must be brief, descriptive of the effect of the proposition, not deceiving but informative and revealing of the design and purpose of the petition. The limitations ... are necessary to prevent deception in the initiative process.... The voters, after reading the statement on the petition and the ballot title, should be able to cast an informed vote.

1990 OK 75, ¶14, 797 P.2d 326.

This Court further explained in detail how the gist of an initiative petition should be evaluated in *In re Initiative Petition No. 409,* where we stated:

> This Court has long held that the purpose of the gist, along with the ballot title, is to "prevent *fraud, deceit, or corruption* in the initiative process." The gist "'should be sufficient that the signatories are at least put on notice of the changes being made,'" and the gist must explain the proposal's effect. The explanation of the effect on existing law "does not extend to describing policy arguments for or against the proposal." The gist "need only convey the practical, not the theoretical, effect of the proposed legislation," and it is "'not required to contain every regulatory detail so long as its outline is not incorrect.'" "We will approve the text of a challenged gist if it is 'free from the taint of misleading terms or deceitful language.'"

2016 OK 51, ¶3 (footnotes omitted) (quoting primarily *In re Initiative Petition No. 384, State Question No. 731*, 2007 OK 48, 164 P.3d 125). Because the purpose of the gist is to prevent fraud, deceit or corruption in the initiative process, any alleged flaw created by an omission of details in the gist must be reviewed to determine whether such omission is critical to protecting the initiative process. *In re Initiative Petition No. 363,* 1996 OK 122, ¶¶18-20. "The sole question ... is whether the absence of a more detailed gist statement ... without more, perpetuates a fraud on the signatories." *Id.* ¶19.

III. ANALYSIS

¶5 The gist statement of IP 420 is as follows:

> This measure adds a new Article V-A to the Oklahoma Constitution. This new Article creates the Citizens' Independent Redistricting Commission and vests the power to redistrict the State's House of Representative and Senatorial districts, as well as its Federal Congressional Districts, in the Commission (rather than the Legislature). The Article sets forth qualifications and a process for the selection of Commissioners, a Special Master and a Secretary. It also sets forth a process for the creation and approval of redistricting plans after each Federal Decennial Census. In creating the redistricting plans, the Commission must comply with certain criteria, including federal law, population equality, and contiguity, and must seek to maximize compliance with other criteria, including respect for communities of interest, racial and ethnic fairness, respect for political subdivision boundaries, political fairness, and compactness. The Article creates a fallback mechanism in the event that the Commission cannot reach consensus on a plan within a set timeframe. It also sets forth procedures for funding and judicial review, repeals existing constitutional provisions involving legislative districts, codifies the number of state House of Representative and Senatorial districts, and reserves powers to the Commission rather than the Legislature.

Petitioners' Appendix to Application and Petition to Assume Original Jurisdiction and Review the Gist of Initiative Petition No. 420, Ex. B.

¶6 The Petitioners challenge the legal sufficiency of the gist statement. Their arguments focus mainly on its omissions, some more conspicuous than others, and to an alleged flaw in the actual petition itself concerning selection of the Panel that will select the commissioners. They claim these omissions prevent a potential signatory from being informed of the **true nature**[1] of the petition. The Petitioners assert the petition's purpose is about more than just redistricting. Although the Petitioners' briefs have expressed the supposed purpose of the petition in several ways, they appear to believe the true nature of the petition concerns the elimination of partisanship in the redistricting process. The Respondents assert the purpose is to "safeguard against and combat improper partisan gerrymandering." Respondents' Response Brief at 11. Both interpretations are essentially the same, but we agree the gist does not adequately reflect this intent.

¶7 Certain alleged omissions need to be addressed in the gist to sufficiently inform a potential signatory that this measure is intended to curtail partisan gerrymandering. First, a shorthand explanation in simple language should convey the selection process and composition of the commissioners.[2] The petition requires a Panel to be designated by the Chief Justice consisting of retired Justices and appellate judges. Sections 4(A) (7) and 4(B)(4)(b) of IP 420. The Panel will review the applications for the Commission and select some of the commissioners. Section 4(B)(4)(b) of IP 420 also states that the Panel will be selected by random drawing. We agree with the Petitioners that this creates an inconsistency in the petition and should be clarified.[3] The Panel shall then identify three pools of applicants, each containing twenty applications. Section 4(B)(f) of IP 420. The three pools are composed as follows: 1) applicants affiliated with the state's largest political party, 2) applicants affiliated with the state's second largest political party, and 3) applicants not affiliated with the state's two largest political parties. *Id.* From these pools the Panel will select six commissioners randomly by lot; two from each pool. Section 4(B)(g) of IP 420. Then the six commissioners shall appoint one commissioner from each pool to complete the nine-member Commission. Section 4(B)(i) of IP 420. Without any mention of the selection process and composition of the Commission in the gist, a potential signatory is not informed of the intentional nonpartisan balancing of the Commission. Although the selection process need not be detailed, a simple statement concerning the selection and composition of the Commission is critical here to inform a potential signatory of the true nature of the petition.

¶8 Second, the gist fails to provide enough information concerning the qualifications of the commissioners[4] and it conspicuously omits a key limitation in its consideration of redistricting plans. The petition provides many restrictions on who may be a commissioner.[5] A detailed description of each need not be made part of the gist; however, a simple statement behind the purpose for these qualifications is necessary to inform potential signatories about the nonpartisan nature of the petition's redistricting design.[6] Additionally, the gist explains in great length what criteria the Commission must follow in creating redistricting plans but omits any mention of what criteria it must avoid. Section 4(D)(2)(b) of IP 420 removes from consideration "[t]he political party affiliation or voting history of the population of a district." Petitioners contend this provision is noticeably absent from the gist and its inclusion is necessary to reveal the purpose of the petition. We agree. Because this criterion is especially representative of the underlying purpose of the petition it should be, albeit briefly, mentioned.

¶9 We disagree with the Petitioners' assertion that the gist must state: 1) the commissioners are not elected or accountable to the voters, and 2) the Commission's composition underrepresents Republicans and Democrats and overrepresents unaffiliated electors based upon the makeup of the State's electorate. The first assertion should be resolved, as previously discussed, by a succinct description of the selection process in the gist and the second assertion is a policy argument which is beyond the necessary scope of the gist. A gist's explanation of its effect does not extend to policy arguments for or against the proposal. *In re Initiative Petition No. 384, State Question No. 731,* 2007 OK 48, ¶8, 164 P.3d 125. The gist need only convey the practical and not the theoretical effect of the proposed legislation. *Id.*

¶10 Lastly, the Petitioners argue the gist falls short of notifying potential signatories of the "true effect" of the petition by inadequately mentioning what sections of the Oklahoma Constitution are being repealed. We disagree. The gist states the petition "repeals existing constitutional provisions involving legislative

districts." These repealed provisions are summarized as follows:

> Section 6 of IP 420 repeals Sections 9A, 10A, and 11A-11E of Article V of the Oklahoma Constitution. Sections 9A and 10A provide for the apportionment of State Senators and State Representatives, respectively. Sections 11A-11E grant authority to the Legislature for apportionment of the Legislature. If apportionment is not accomplished within the parameters set in these sections, then the existing Bipartisan Commission on Legislative Apportionment will fulfill this task. Qualified electors are authorized to seek review in the Oklahoma Supreme Court of any apportionment order made by the Commission. The powers of review of this Court include the approval of the apportionment order or the remanding of the matter to the Commission with directions to modify the Commission's apportionment order. If the Commission fails to timely make an apportionment order, this Court is also authorized to compel the Commission to make an apportionment.

Although the gist does not specify the details of the repealed provisions, it provides enough information to a potential signatory that the petition will create a new system of redistricting. The gist also covers the broad subjects found in the repealed provisions, e.g., criteria for legislative districts, judicial review and fallback mechanisms. A potential signatory would understand the purpose is to repeal the current system of redistricting and replace it with a new one. Here, adding more detail would not be critical to protecting the initiative process from fraud. The underlying purpose is conveyed.

IV. CONCLUSION

¶11 A gist statement is a shorthand explanation of a proposition's terms written in simple language. It need not include every regulatory detail so long as its outline is not incorrect. However, the gist should be descriptive of the proposal's effect and sufficiently informative to reveal its design and purpose. *In re Initiative Petition No. 384*, 2007 OK 48, ¶7. We do not judge the wisdom, fairness, or logic of the proposed petition. *See Gladstone v. Bartlesville Indep. Sch. Dist.*, 2003 OK 30, ¶12, 66 P.3d 442. For the above stated reasons, we find the gist fails to alert potential signatories about the true nature of the proposed constitutional amendment. The gist is not subject to amendment by this Court, and as a result, the only remedy is to strike the petition from the ballot. *In re Initiative Petition No. 409*, 2016 OK 51, ¶7.

INITIATIVE PETITION NO. 420, STATE QUESTION NO. 804, IS DECLARED INVALID AND ORDERED STRICKEN FROM THE BALLOT

¶12 Gurich, C.J., Darby, V.C.J., Kauger **(by separate writing)**, Winchester **(by separate writing)**, Combs, Kane and Rowe **(by separate writing)**, JJ., concur.

¶13 Edmondson, J., concur in part; dissent in part.

¶14 Reif, S.J., dissent.

¶15 Colbert, J., recused.

KAUGER, J., with whom DARBY, V.C.J., joins concurring:

Just as the gist in No. 118,209, Institute for Alcohol Policy v. State ex rel. ABLE Commission did not inform voters that the Legislature would be barred from requiring alcohol wholesalers to sell the most popular, consumer desired brands to everyone without discrimination, this gist is defective for failure to inform the voters of the role of the Chief Justice in the selection of the redistricting panel.

Winchester, J., with whom Darby, V.C.J. and Kauger, J. join, concurring specially:

¶1 I concur, but I write separately to address glaring omissions in the gist. As the Court's opinion mentions, it is our duty to determine whether any omission of details in the gist is critical to protecting the initiative process – whether such omission prevents a potential signatory from being informed of the true nature of the petition. *See In re Initiative Petition No. 384, State Question No. 73*1, 2007 OK 48, ¶ 12, 164 P.3d 125, 130; *In re Initiative Petition No. 363, State Question No. 672*, 1996 OK 122, ¶¶ 18-20, 927 P.2d 558, 567. Although the proposed gist states that the constitutional amendment will move the power to redistrict from the Legislature to the Commission, it omits another substantial change in where that power vests. IP 420 shifts power in the redistricting process from the Legislature to the Oklahoma Supreme Court, something the gist ignores. The gist also omits the extensive restrictions on who can serve on the Commission.

¶2 IP 420 vests power to the Court in that (1) the Chief Justice of the Supreme Court will

select the Special Master to oversee the application process and training of the commissioners; (2) the Chief Justice will "designate" a panel consisting of a group of retired Judges or Justices who will oversee the creation of the Commission; and (3) the Supreme Court will be the fallback decision maker if the Commission cannot reach consensus on a plan within a set timeframe. The gist as written does not mention the Court, and from the gist alone, a potential signatory will not know that the Court will significantly be involved in redistricting.

¶3 The name Citizens' Independent Redistricting Commission gives the impression that the Commission will be formed independently by the citizens with no involvement from any branch of government. It is imperative that a potential signatory is informed from the gist that IP 420 may transfer the power to redistrict from one branch of government to another. The Chief Justice will not only have involvement in the creation of the Commission, but the Court could be the ultimate decision maker on redistricting. Merely stating that IP 420 "sets forth … a process for the selection" of commissioners or "creates a fallback mechanism" is insufficient. The gist as written will not allow the people of Oklahoma to cast an informed vote.

¶4 Further, IP 420's proposed qualifications without question severely restrict who may be a commissioner, Special Master, and Secretary of the Commission. The qualifications would restrict an individual from holding these positions if they or their immediate family members (e.g., father, stepfather, mother, stepmother, son, stepson, daughter, stepdaughter, brother, stepbrother, sister, stepsister, husband, wife, father-in-law, or mother-in-law) (1) hold a partisan office, (2) run for office, (3) serve as a lobbyist, (4) work for a political party, or (5) work for the Legislature. Further, an individual who desires to serve on the Commission cannot have changed his or her registered political affiliation in the four years prior to appointment.

¶5 Oklahoma certainly has an interest to prevent individuals with undue partisan influence and conflicts of interest in drawing the districts from which its citizens elect their representatives. Respondents argue IP 420's proposed qualifications serve that interest. However, a potential signatory should be informed from the gist of the broad restrictions for those seeking to serve on the Commission. Then, he or she can decide whether the qualifications serve Oklahoma's interest or burden potential applicants. Without including this information, the gist does not adequately notify potential signatories about the nonpartisan nature of IP 420's redistricting design.

Rowe, J., concurring specially:

¶1 I concur that the gist fails to alert potential signatories about the true nature of the proposed constitutional amendment. I write separately to explain why the gist should state that the commissioners are not elected nor accountable to the voters.

¶2 The purpose of the Citizens' Independent Redistricting Commission is to vest what is currently a partisan political process – legislative redistricting – in a supposed non-partisan, unelected commission. Thus, the crux of the commission's purpose is ostensibly to depoliticize the redistricting process, or in other words, the elimination of partisanship appears to be the primary intent of the commission's creation and purpose.

¶3 In Oklahoma, all political power is inherent in the people. Okla. Const. art. II, §1. Removing elected officials from the redistricting process, in effect, removes the people from the redistricting process.

¶4 The gist's statement that the commission must comply with "political fairness" is insufficient to notify signatories that its purpose is to remove elected officials from influencing the redistricting process. The elimination of partisan power over redistricting is the primary aim of the commission. This is accomplished by divesting elected representatives with the right to redistrict and vesting that right into the hands of commission members who are not elected and who are not accountable to the voters. Accordingly, it should be explicitly stated.

COMBS, J.:

1. In *In re Initiative Petition No. 384, State Question No. 731*, we held a petition should be stricken from the ballot because "a potential signatory, looking at the gist, did not have sufficient information to make an informed decision about the **true nature** of the proposed legislation" (emphasis added) and therefore it did not satisfy the requirements of "title 34, section 3." 2007 OK 48, ¶12, 164 P.3d 125.

2. The gist only states the new Article "sets forth ... a process for the selection of Commissioners."

3. The Petitioners argue the provision requiring the Chief Justice to designate the Panel is inconsistent with the provision that provides the Panel will be selected by random drawing.

4. The gist only states the new Article "sets forth qualifications... of Commissioners."

5. Section 4(B)(2)(a-f) of IP 420 provides for the qualifications of the commissioners. A member of the Commission shall have been continuously domiciled in this State for the five years immediately preceding the date of appointment and shall not have changed their registered political affiliation in the four years prior to such date. In addition, in the five years immediately preceding the date of appointment to the

Commission, the commissioner shall not: 1) have held, or have an immediate family member who has held, a partisan elective office at the federal, state, or political subdivision level in this State, 2) have registered, or have an immediate family member who has registered, as a federal, state or local lobbyist, 3) have held office or served, or has an immediate family member who has held office or served, as a paid staff member for a political party, 4) have been nominated, nor have an immediate family member who has been nominated, as a candidate for elective office by a political party, and 5) have been an employee of the state legislature. The term "immediate family member" is defined in Section 4(A)(9) as a father, stepfather, mother, stepmother, son, stepson, daughter, stepdaughter, brother, stepbrother, sister, stepsister, husband, wife, father-in-law, or mother-in-law. Section 4(B)(6) also prohibits members from running for an elective office in a district created while they served on the Commission.

6. The Respondents assert in their brief that the purpose behind these qualifications is to "simply prevent certain individuals with clear conflicts of interest from serving as Commissioners." Respondents' Response Brief at 9.

2020 OK 11

State of Oklahoma ex rel. Oklahoma Bar Association, Complainant, v. Keegan K. Harroz, Respondent.

Rule 6.2A. SCBD 6876. February 10, 2020

ORDER OF IMMEDIATE INTERIM SUSPENSION

¶1 On November 27, 2019, the Complainant Oklahoma Bar Association (OBA) filed a verified complaint against the respondent, Keegan K. Harroz, pursuant to Rule 6 of the Rules Governing Disciplinary Proceedings (RGDP), 5 O.S.2011, ch. 1, app. 1-A. The OBA, with the concurrence of the Professional Responsibility Commission, requests an emergency interim suspension of Respondent from the practice of law pursuant to Rule 6.2A of the RGDP.

¶2 In support, the Complainant states that Respondent was arrested on September 13, 2019 on a warrant for Intimidating a State's Witness out of Okmulgee County. Respondent bonded out of jail on September 27, 2019, and was then charged in the U.S. District Court of the Western District of Oklahoma, Case No. M-19-521-P, with violations of 18 U.S.C. § 922 (g)(8) (Prohibited Person in Possession of Ammunition) and 18 U.S.C. § 922(d) (Selling or Otherwise Disposing of a Firearm to a Prohibited Person). A detention hearing was held on October 2, 2019, and Respondent was ordered to remain in detention pending trial. On October 16, 2019, an Indictment was filed against Respondent in the U.S. District Court for the Western District of Oklahoma, Case No. CR-19-325-SLP, charging Respondent with violations of 18 U.S.C. § 922(g)(8), 18 U.S.C. § 922(d)(1), and 18 U.S.C. § 922(d)(8). Respondent is currently being held at the Logan County De-tention Center in federal custody.

¶3 Complainant states that the Office of the General Counsel of the Oklahoma Bar Association has received three grievances against Respondent since she was incarcerated involving failure to appear for a court proceeding, failure to prepare documents, and failure to return fees so that the clients could obtain alternative counsel. Complainant alleges that the current number of clients that Respondent represents is unknown, but that the amount of money in her trust account indicates there are multiple clients that are not presently being represented. Complainant alleges Respondent's conduct poses an immediate threat of substantial and irreparable public harm and requests an emergency interim suspension. Complaint also seeks an Order for Respondent to cease withdrawals from her client trust account and to permit an audit to determine what fees should be returned to clients, as well as an Order directing Respondent to assist Complainant in returning client files.

¶4 This Court ordered Respondent to show cause why an Order of Immediate Interim Suspension, and the other requested Orders, should not be entered. On January 13, 2020, Respondent answered and denied any professional misconduct, denied she committed any crime, and denied she has done anything improper regarding her trust account. Respondent requested that this Court deny the Complainant's request for interim suspension. The issue was set for hearing on February 6, 2020. On February 4, 2020, Respondent filed a Consent to the Entry of an Order of Immediate Interim Suspension and Waiver of Hearing to Show Cause. Respondent states that it would be in the best interests of justice for an Order of Emergency Interim Suspension to be entered at this time. Respondent specifically waives her right to a hearing but states that the waiver should not be construed as an admission of the truth of the allegations. Respondent reserves the right to contest the allegations and/or to present evidence in mitigation of the alleged professional misconduct at any future hearings to determine the merits of the allegations. Respondent states that client documents and files are being returned and that the process is expected to be completed in the near future. Respondent also states that an audit of the client trust account has been performed, that unearned fees are being returned, and that the process of returning unearned client funds is expected to be completed in the near future. The hearing on February 6, 2020 was then stricken.

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

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

¶7 Respondent Keegan K. Harroz is further ordered to file a status report no later than March 17, 2020, regarding the status of the return of documents, files, and unearned client funds.

¶8 Respondent Keegan K. Harroz is ordered to give written notices by certified mail, within 20 days from the date of this order, to all of her clients having legal business then pending of her inability to represent them and the necessity for promptly retaining new counsel. If Keegan K. Harroz is a member of, or associated with, a law firm or professional corporation, such notice shall be given to all clients of the firm or professional corporation, which have legal business then pending with respect to which the Respondent had substantial responsibility. Respondent shall also file a formal withdrawal as counsel in all cases pending in any tribunal. Respondent must file, within 20 day from the date of this Order, an affidavit with the Commission and with the Clerk of the Supreme Court stating that she has complied with this Order, together with a list of the clients so notified and a list of all other State and Federal courts and administrative agencies before which the lawyer is admitted to practice. Proof of substantial compliance by Respondent with this Order shall be a condition precedent to any petition for reinstatement.

¶9 DONE BY ORDER OF THE SUPREME COURT in conference on February 10, 2020.

/s/ Noma D. Gurich
CHIEF JUSTICE

ALL JUSTICES CONCUR.

Notice of Judicial Vacancy

The Judicial Nominating Commission seeks applicants to fill a vacancy for the position of Judge for the Oklahoma Court of Civil Appeals, District 4, Office 2. This vacancy is created by the retirement of the Honorable Larry Joplin.

To be appointed to the office of Judge of the Court of Civil Appeals, one must be a legal resident of the respective district at the time (s)he takes the oath of office and assumes the duties of office. Additionally, prior to appointment, such appointee shall have had a minimum of four years' experience in Oklahoma as a licensed practicing attorney, a judge of a court of record, or both.

Application forms can be obtained online at www.oscn.net (click on "Programs," then "Judicial Nominating Commission," then "Application") or by contacting Tammy Reaves at (405) 556-9300. Applications must be submitted to the Chairman of the JNC **no later than 5:00 p.m., Friday, March 6, 2020**. Applications may be hand-delivered or mailed. If mailed, they must be postmarked **on or before March 6, 2020** to be deemed timely. Applications should be delivered/mailed to:

Jim Webb, Chairman
Oklahoma Judicial Nominating Commission
c/o Tammy Reaves — Administrative Office of the Courts
2100 N. Lincoln Blvd., Suite 3 • Oklahoma City, OK 73105

Professional Responsibility Tribunal Annual Report

January 1, 2019 – December 31, 2019
SCBD No. 6889

Introduction.

The Professional Responsibility Tribunal (PRT) was established by order of the Supreme Court of Oklahoma in 1981, under the Rules Governing Disciplinary Proceedings, 5 O.S. 2011, ch. 1, app. 1-A (RGDP). The primary function of the PRT is to conduct hearings on complaints filed against lawyers in formal disciplinary and personal incapacity proceedings, and on petitions for reinstatement to the practice of law. A formal disciplinary proceeding is initiated by written complaint filed with the Chief Justice of the Supreme Court. Petitions for reinstatement are filed with the Clerk of the Supreme Court.

Composition and Appointment.

The PRT is a 21-member panel of Masters, 14 of whom are lawyers and 7 whom are non-lawyers. The lawyers on the PRT are active members in good standing of the Oklahoma Bar Association (OBA). Lawyer members are appointed by the OBA President, with the approval of the Board of Governors. Non-lawyer members are appointed by the Governor of the State of Oklahoma. Each member is appointed to serve a three-year term, and limited to two terms. Terms end on June 30th of the last year of a member's service.

Pursuant to Rule 4.2, RGDP, members are required to meet annually to address organizational and other matters touching upon the PRT's purpose and objective. They also elect a Chief Master and Vice-Chief Master, both of whom serve for a one-year term. PRT members receive no compensation for their services, but they are entitled to be reimbursed for travel and other reasonable expenses incidental to the performance of their duties.

The lawyer members of the PRT who served during all or part of 2019 were: Angela Ailles-Bahm, Oklahoma City; William J. Baker, Stillwater; Melissa G. DeLacerda, Stillwater; John B. Heatly, Oklahoma City; Gerald L. Hilsher, Tulsa; Douglas Jackson, Enid; Jody R. Nathan, Tulsa; Lane R. Neal, Oklahoma City; Linda M. Pizzini, Yukon; Rodney D. Ring, Norman; Theodore P. Roberts, Norman; Jeffery G. Trevillion, Jr., Oklahoma City; Linda G. Scoggins, Oklahoma City; Michael E. Smith, Oklahoma City; Noel K. Tucker, Edmond; Roy D. Tucker, Muskogee; and D. Kenyon Williams, Jr., Tulsa.

The non-lawyer members who served during all or part of 2019 were: Nicole Beam, Edmond; Matthew Burns, Edmond; James W. Chappel, Norman; Jennifer Ellis, Medicine Park; Linda C. Haneborg, Oklahoma City; Donald Lehman, Tulsa; Kevin Martin, Woodward; Kirk V. Pittman, Seiling; Michael Sumaruk, Tulsa; and Clarence Warner, Norman.

The annual meeting was held on June 27, 2019, at the OBA offices. Agenda items included a presentation by Gina Hendryx, General Counsel[1] of the OBA, recognition of new members and members whose terms had ended, and discussions concerning the work of the PRT. D. Kenyon Williams, Jr. was elected Chief Master and Theodore P. Roberts was elected Vice-Chief Master, each to serve a one-year term.

1. The General Counsel of the OBA customarily makes an appearance at the annual meeting for the purpose of welcoming members and to answer any questions of PRT members. Given the independent nature of the PRT, all other business is conducted in the absence of the General Counsel.

Governance.

All proceedings that come before the PRT are governed by the RGDP. However, proceedings and the reception of evidence are, by reference, governed generally by the rules in civil proceedings, except as otherwise provided by the RGDP.

The PRT is authorized to adopt appropriate procedural rules which govern the conduct of the proceedings before it. Such rules include, but are not limited to, provisions for requests for disqualification of members of the PRT assigned to hear a particular proceeding.

Action Taken After Notice Received.

After notice of the filing of a disciplinary complaint or reinstatement petition is received, the Chief Master (or Vice-Chief Master if the Chief Master is unavailable) selects three (3) PRT members (two lawyers and one non-lawyer) to serve as a Trial Panel. The Chief Master designates one of the two lawyer-members to serve as Presiding Master. Two of the three Masters constitute a quorum for purposes of conducting hearings, ruling on and receiving evidence, and rendering findings of fact and conclusions of law.

In disciplinary proceedings, after the respondent's time to answer expires, the complaint and the answer, if any, are then lodged with the Clerk of the Supreme Court. The complaint and all further filings and proceedings with respect to the case then become a matter of public record.

The Chief Master notifies the respondent or petitioner, as the case may be, and General Counsel of the appointment and membership of a Trial Panel and the time and place for hearing. In disciplinary proceedings, a hearing is to be held not less than 30 days nor more than 60 days from date of appointment of the Trial Panel. Hearings on reinstatement petitions are to be held not less than 60 days nor more than 90 days after the petition has been filed. Extensions of these periods, however, may be granted by the Presiding Master for good cause shown.

After a proceeding is placed in the hands of a Trial Panel, it exercises general supervisory control over all pre-hearing and hearing issues. Members of a Trial Panel function in the same manner as a court by maintaining their independence and impartiality in all proceedings. Except in purely ministerial, scheduling, or procedural matters, Trial Panel members do not engage in exparte communications with the parties. Depending on the complexity of the proceeding, the Presiding Master may hold status conferences and issue scheduling orders as a means of narrowing the issues and streamlining the case for trial. Parties may conduct discovery in the same manner as in civil cases.

Hearings are open to the public and all proceedings before a Trial Panel are stenographically recorded and transcribed. Oaths or affirmations may be administered, and subpoenas may be issued, by the Presiding Master, or by any officer authorized by law to administer an oath or issue subpoenas. Hearings, which resemble bench trials, are directed by the Presiding Master.

Trial Panel Reports.

After the conclusion of a hearing, the Trial Panel prepares a written report to the Oklahoma Supreme Court. The report includes findings of facts on all pertinent issues, conclusions of law, and a recommendation as to the appropriate measure of discipline to be imposed or, in the case of a reinstatement petitioner, whether it should be granted. In all proceedings, any recommendation is based on a finding that the complainant or petitioner, as the case may be, has or has not satisfied the "clear and convincing" standard of proof. The Trial Panel report further includes a recommendation as to whether costs of investigation, the record, and proceedings should be imposed on the respondent or petitioner. Also filed in the case are all pleadings, transcript of proceeding, and exhibits offered at the hearing.

Trial Panel reports and recommendations are advisory. The Oklahoma Supreme Court has exclusive jurisdiction over all disciplinary and reinstatement matters. It has the constitutional and non-delegable power to regulate both the practice of law and legal practitioners. Accordingly, the Oklahoma Supreme Court is bound by neither the findings nor the recommendation of action, as its review of each proceeding is *de novo*.

Annual Reports.

Rule 14.1, RGDP, requires the PRT to report annually on its activities for the preceding year. As a function of its organization, the PRT operates from July 1 through June 30. However, annual reports are based on the calendar year.

Therefore, this Annual Report covers the activities of the PRT for the preceding year, 2019.

Activity in 2019.

At the beginning of the calendar year, six (6) disciplinary and three (3) reinstatement proceedings were pending before the PRT as carryover matters from a previous year. Generally, a matter is considered "pending" from the time the PRT *receives notice* of its filing until the Trial Panel report is filed. Certain events reduce or extend the pending status of a proceeding, such as the resignation of a respondent or the remand of a matter for additional hearing. In matters involving alleged personal incapacity, orders by the Supreme Court of interim suspension, or suspension until reinstated, operate to either postpone a hearing on discipline or remove the matter from the PRT docket.

In regard to new matters, the PRT received notice of the following: Nine (9) Rule 6, RGDP matters; One (1) Rule 7, RGDP matter; Four (4) Rule 8, RGDP matters; and Three (3) Rule 11, RGDP reinstatement petitions. Trial Panels conducted a total of sixteen (16) hearings; eleven (11) in disciplinary proceedings and five (5) in reinstatement proceedings.

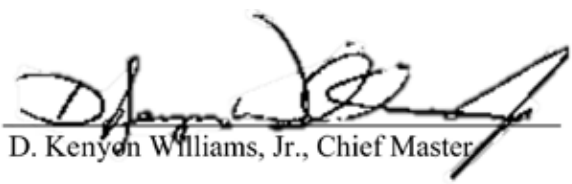
On December 31, 2019, a total of seven matters, five disciplinary and two reinstatement proceedings, were pending before the PRT

Conclusion.

Members of the PRT demonstrated continued service to the Bar and the public of this State, as shown by the substantial time dedicated to each assigned proceeding, The members' commitment to the purpose and responsibilities of the PRT is deserving of the appreciation of the Bar and all its members, and certainly is appreciated by this writer.

Dated this 7th day of February, 2020.

PROFESSIONAL
RESPONSIBILITY TRIBUNAL

By: 
D. Kenyon Williams, Jr., Chief Master

Proceeding Type	Pending Jan. 1, 2019	New Matters In 2019	Hearings Held 2019	Trial Panel Reports Filed	Pending Dec. 31, 2019
Disciplinary	6	14	11[2]	9	5
Reinstatement	3	3	5[3]	3	2

2: In 2019, five (5) disciplinary hearings were held over a total of twelve (12) days

3: In 2019, five (5) reinstatement hearings were held over a total of six (6) days

2020 OK CR 1

JASON DEAN CROSS, Appellant, v. THE STATE OF OKLAHOMA, Appellee.

Case No. F-2019-256. January 28, 2020

ORDER DENYING STATE'S MOTION TO DISMISS APPEAL AND RE-SETTING BRIEFING SCHEDULE

¶1 The State of Oklahoma has filed a motion to dismiss this appeal from Appellant's Judgment and Sentence, pronounced January 2, 2019, in Case No. CF-2017-15 in the District Court of Lincoln County. On the same day, Appellant filed a motion for new trial claiming the verdict was contrary to the law or evidence.[1] On April 2, 2019, the District Court overruled Appellant's motion for new trial. On April 11, 2019, within ten days of the order denying the motion for new trial, Appellant filed in the District Court a Notice of Intent to Appeal and Designation of Record. On June 5, 2019, Appellant filed his Petition in Error in this Court.

¶2 The State contends Appellant's Petition in Error was due to be filed in this appeal by April 2, 2019, but was not filed until June 5, 2019, and thus this appeal should be dismissed. The State argues that Rules 2.1(A)(1) and (A)(2), which discuss motions for new trial and their effect on appeal proceedings, do nothing to extend the time for filing a Petition in Error.[2] Rules 2.1(A)(1) and (A)(2), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2020). The State argues that Rule 3.1(C) thus controls this matter and required that Appellant's Petition in Error be filed by April 2, 2019, within ninety days of the date his Judgment and Sentence was imposed. Rule 3.1(C), *Rules, supra.* Case law cited by the State in support of its arguments includes *Walker v. State*, 1963 OK CR 14, 378 P.2d 783, and not for publication opinions issued by this Court.

¶3 The State is correct that this Court's Rules do not currently specify if or how a motion for new trial affects the timing of the filing of the Petition in Error. However, Section 1054.1 of Title 22 of the Oklahoma Statutes specifically provides that "in the event a motion for new trial is filed in the trial court . . . no appeal to the Court of Criminal Appeals may be taken until subsequent to the ruling by the trial court on the motion for new trial." 22 O.S.2011, § 1054.1; *see also Steffey v. State,* 1996 OK CR 17, ¶ 4, 916 P.2d 263, 263 ("When a motion for new trial, on grounds other than newly discovered evidence, is timely filed in the District Court, the Judgment and Sentence shall not be considered imposed for purposes of an appeal and this Court's Rules until the motion for new trial is ruled on by the District Court."). The State's reliance on *Walker v. State*, 1963 OK CR 14, 378 P.2d 783, is misplaced as that opinion was issued before Section 1054.1 of Title 22 of the Oklahoma Statutes was enacted, effective May 28, 1985. Appellant's Petition in Error was timely filed in this appeal on June 5, 2019, within ninety days from the date the District Court overruled Appellant's motion for new trial on April 2, 2019. Therefore, the State's motion to dismiss this appeal should be, and is hereby, **DENIED**.

¶4 Appellant's brief was filed in this appeal on October 23, 2019. The State has filed a request to hold its briefing time in abeyance pending this decision on its motion to dismiss. The State's answer brief in this appeal shall be due to be filed within sixty days from the date this order is filed with the Clerk of this Court.

¶5 **IT IS SO ORDERED**.

¶6 **WITNESS OUR HANDS AND THE SEAL OF THIS COURT** this 28th day of January, 2020.

/s/ DAVID B. LEWIS,
Presiding Judge

/s/ DANA KUEHN,
Vice Presiding Judge

/s/ GARY L. LUMPKIN, Judge

/s/ ROBERT L. HUDSON, Judge

/s/ SCOTT ROWLAND, Judge

ATTEST:
John D. Hadden
Clerk

1. *See* 22 O.S.2011, § 952 (Sixth).

2. The State doesn't challenge the timeliness of Appellant's filing of the Notice of Intent to Appeal and Designation of Record on April 11, 2019.

2020 OK CR 2

THE STATE OF OKLAHOMA, Appellant, v. JESSEN EVANN HODGES, Appellee.

No. S-2019-269. January 30, 2020

SUMMARY OPINION

KUEHN, VICE PRESIDING JUDGE:

¶1 Jessen Hodges, Appellee, was charged with Misdemeanor Manslaughter in violation of 21 O.S.2011, § 711, in the District Court of Grant County, Case No. CF-2017-29.[1] After a hearing on April 12, 2019, the Honorable Paul K. Woodward granted Appellee's Motion to Suppress. The State timely appealed this decision under 22 O.S.2011, § 1053(5).

¶2 Appellee raises three propositions of error in support of the appeal:

I. Does the Oklahoma Administrative Code 40:20-1-3(C) violate the separation of powers between the executive branch and judicial branch, when the administrative code that was created by the executive branch defines competent evidence in a DUI as being two vials of blood when a core power of the judicial branch is to determine what competent evidence in a DUI proceeding is?

II. Can the Oklahoma Administrative Code 40:20-1-3(C) jump over the Oklahoma state line into Kansas and tell a Kansas Highway Patrol officer to follow Oklahoma law instead of his own jurisdiction's law in how to draw blood in a DUI wreck, when a defendant in a DUI wreck that involves death to another human being in Oklahoma was transported to Kansas for emergency medical care and the blood draw was performed by a Kansas trooper at the request of the Oklahoma Highway Patrol?

III. Does the Oklahoma Administrative Code 40:20-1-3(C) require a Kansas Highway Patrol trooper to ignore Kansas law and follow Oklahoma law in the state of Kansas when a defendant in a DUI wreck that involves death to another being in Oklahoma was transported to Kansas for emergency medical care and the blood draw was performed at the request of the Oklahoma Highway Patrol?

¶3 After thorough consideration of the entire record before us, including the original record, transcripts, exhibits and briefs, we reverse and remand for further proceedings. We review a trial court's decision to grant or deny a motion to suppress for abuse of discretion; "we accept the district court's factual findings supported by evidence, and review the legal conclusions *de novo." State v. Hovet*, 2016 OK CR 26, ¶ 4, 387 P.3d 951, 953. "An abuse of discretion is any unreasonable or arbitrary action made without proper consideration of the relevant facts and law, also described as a clearly erroneous conclusion and judgment, clearly against the logic and effect of the facts." *Id.*

¶4 The State's argument on appeal is very similar to those it raised below. Essentially, the State argues that we can't expect Kansans to follow Oklahoma law, and because the Kansas law was followed, the test results should have been admitted. There are two problems with this argument. The first reflects a basic misunderstanding of the law; the second fails on the facts.

¶5 First, the issue here is not, as the State argues, whether Oklahoma can force Kansas employees to follow Oklahoma law, nor is it whether Kansas law is comparable to Oklahoma law in this area. The question is which law governs admissibility of evidence in an Oklahoma prosecution – Oklahoma's or Kansas's. The answer, of course, is Oklahoma law.

¶6 There is no dispute about the Oklahoma law. The Legislature created the Board of Tests to oversee collection of a person's blood, breath, saliva, or urine to test alcohol content, for use as evidence in Oklahoma courts. The Legislature further required that the Board prescribe uniform standards, conditions, methods, procedures, techniques, devices, equipment and records for such collection and use; and required those uniform standards, etc., to be used by persons collecting or withdrawing blood. 47 O.S.Supp.2015, § 759; 47 O.S.2011, § 752.[2] "Before admitting the results of a breath or blood test in a prosecution for driving under the influence, the State must show that the collection and analysis of blood complied with rules adopted by the Board." *Hovet*, 2016 OK CR 26, ¶ 6, 387 P.3d at 953. Taken together, the statutes, case law, and Board of Tests rules set forth specific requirements and procedures that must be followed before a blood test is admissible in an Oklahoma prosecution. These include but are not limited to specific written notification of consent, certifications for medical personnel, and specific test kit require-

ments. While there is very little in the record regarding the Kansas law concerning blood draws, evidence showed significant differences in the requirement of written notice of consent and the number of vials to be taken.

¶7 The State admits that Oklahoma law was not followed in the collection of Appellee's blood. In three propositions, the State argues that this omission should not matter. These propositions, which are addressed below, are not persuasive. The statutes and Board of Tests rules, combined, do not permit admission of a blood test where the blood was not taken in accordance with Oklahoma law. Given this, we cannot find the trial court abused its discretion in suppressing the evidence for this reason. *Hovet*, 2016 OK CR 26, ¶ 4, 387 P.3d at 953.

¶8 However, this does not mean that test results from another jurisdiction may never be admitted in an Oklahoma court on the issue of intoxication. There will be times, as occurred here, where a person arrested in Oklahoma is treated in a different state, and will undergo a blood test for alcohol content in furtherance of the Oklahoma investigation. It is not only likely but probable that out-of-state testing will be conducted according to that state's laws, rather than the laws of Oklahoma. Nothing in the statutory scheme suggests that the Legislature did not intend results from those tests to be admissible in a subsequent Oklahoma court proceeding. As part of the statutes governing admission of chemical tests, the Legislature provided:

> The provisions of Sections 751 through 761 of this title do not limit the introduction of *any other competent evidence* bearing on the question of whether the person was under the influence of alcohol or any other intoxicating substance, or the combined influence of alcohol and any other intoxicating substance.

47 O.S.2011, § 757 (emphasis added). Clearly, a blood test taken in accordance with another state's laws, and admissible in a comparable court proceeding in that state, would be competent evidence under Section 757. As with tests offered under Oklahoma law, the State has the burden to show that tests from another state comply with that state's laws and would be admissible in that state's courts. *See Hovet*, 2016 OK CR 26, ¶ 6, 387 P.3d at 953. If that burden is met, the results of a blood test from another state should be admissible as competent evidence under Section 757. In making that determination, the parties and the trial court are not undertaking a comparison between Oklahoma's laws and the laws of another state. The question is not whether the procedures or tests are comparable to and meet the requirements of Oklahoma law. Rather, to admit evidence of an out-of-state test under Section 757, an Oklahoma court may consider evidence that the out-of-state test was conducted according to that state's procedures, and whether it would be admissible under that state's law.

¶9 The record shows that the trial court did not consider whether the evidence below met the threshold for admissibility under Section 757. Although the parties agreed that the Oklahoma Board of Tests standards were not met, the evidence below focused on whether the evidence was comparable to evidence which would be properly admitted under those standards. The trial court's ruling here was limited to that issue. Consequently, the trial court did not determine whether the blood draw was conducted according to Kansas procedures and would have been admissible in Kansas under Kansas law. The trial court thus was unable to use that determination to consider whether this evidence would be admissible as "competent evidence" under Section 757. We remand the case for that determination and consideration.

¶10 We turn briefly to the State's propositions of error. Rather than attempt to work within Oklahoma law, the State argues in Proposition I that the law should be overturned. The State claims that the Legislature's exercise of its authority to direct the Board of Tests to make rules regarding blood alcohol testing violates the separation of powers, because it amounts to the Legislature telling the judiciary what evidence is admissible in DUI proceedings. As a general proposition this makes no sense. The Legislature, after all, enacted the evidence code specifically to govern admissibility of evidence in criminal proceedings; in addition, the Legislature defines elements of each crime through statute, thus restricting what may be used to prove a crime.

¶11 And as Appellee notes, this Court has already decided the State's specific question of the Legislature's ability to delegate authority. Delegation of rules or regulations "governing a matter highly technical and scientific is perhaps the clearest example of what is properly

an administrative and delegable function." *Synnott v. State,* 1973 OK CR 426, ¶ 19, 515 P.2d 1154, 1157-58, *overruled on other grounds by Harris v. State*, 1989 OK CR 15, 773 P.3d 1273. We held explicitly that delegation of rulemaking authority to the Board of Tests was not unconstitutional. *Id.* at ¶ 20, 515 P.2d at 1158. The State offers no persuasive argument or authority otherwise. In this proposition, the State also appears to argue that Section 759 and the Board of Test rules conflict with the rules of evidence regarding expert testimony under 12 O.S.2011, § 2702 and *Taylor v. State*, 1995 OK CR 10, 889 P.2d 319. This argument is not persuasive. Proposition I is denied.

¶12 In Propositions II and III, the State asks this Court to determine whether a Kansas trooper must follow Oklahoma law when conducting an investigation at the request of an Oklahoma law enforcement officer, and whether Section 759 conflicts with other law. As we discuss above, out-of-state test results which are "competent" are admissible under Section 757. Our resolution of this issue renders these propositions moot.

DECISION

¶13 The decision by District Court of Grant County granting the Motion to Suppress is **REVERSED**. The case is **REMANDED** for further proceedings. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch.18, App. (2020), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT
OF GRANT COUNTY
THE HONORABLE PAUL K. WOODWARD,
DISTRICT JUDGE

ATTORNEYS AT HEARING ON MOTION TO SUPPRESS

Richard A. Johnson, Holmes and Yates, PLLC, P.O. Box 750, Ponca City, OK 74602, Counsel for Defendant

Steven A. Young, Asst. District Attorney, Grant Co. Courthouse, 112 E. Guthrie, Rm. 201, Medford, OK 73759, Counsel for the State

ATTORNEYS ON APPEAL

Steven A. Young, Asst. District Attorney, Grant Co. Courthouse, 112 E. Guthrie, Rm. 201, Medford, OK 73759, Counsel for Appellant/State

Richard A. Johnson, Holmes and Yates, PLLC, P.O. Box 750, Ponca City, OK 74602, Counsel for Appellee

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

LUMPKIN, JUDGE: CONCURRING IN RESULTS:

¶1 I concur in reversing the trial court's grant of the motion to suppress. I write separately to reiterate that it is the responsibility of the trial court to initially determine the admissibility of blood evidence.

¶2 Trial courts determine the admissibility of evidence. Instruction No. 1-8A, OUJI-CR(2d) ("It is my responsibility as the judge to insure the evidence is presented according to the law . . ."). In carrying out this responsibility, trial courts routinely make pre-trial admissibility determinations regarding various types of evidence. *See Bench v. State*, 2018 OK CR 31, ¶¶ 37-58, 431 P.3d 929, 948-52 (pre-trial determination of the admissibility of the appellant's statements); *Terry v. State,* 2014 OK CR 14, ¶ 5, 334 P.3d 953, 954 (pre-trial determination of the admissibility of evidence discovered during a law enforcement search of a closet). Once evidence is admitted, the jury determines the weight it will give the evidence. *See* Instruction No. 1-8A, OUJI-CR(2d) ("It is your responsibility as jurors to determine the credibility of each witness and the weight to be given the testimony of the witness."). In this case, the law provides that certain procedures mandated by the Board of Tests for collection and testing of blood for purposes of determining its alcohol content must be followed before the trial court can find blood evidence admissible. 47 O.S. Supp.2015, § 759(B). Accordingly, the State bore the burden to show the collection and testing of the blood evidence herein complied with the Board of Tests' requirements. The provisions of Section 759(B) providing for the admissibility of blood evidence are similar to those of 12 O.S.Supp.2013, § 2803.1, which require the trial court to make certain determinations about the child's statement before finding the statement admissible.

¶3 The record shows that the State did not comply with the procedures set forth by the Board of Tests regarding collection of blood evidence. However, a failure to comply with

those procedures does not mean that blood evidence is automatically inadmissible, as alluded to by the State. The Legislature provided as follows in 47 O.S.2011, § 757: "The provisions of Sections 751 through 761 of this title do not limit the introduction of any other competent evidence bearing on the question of whether the person was under the influence of alcohol or any other intoxicating substance, or the combined influence of alcohol and any other intoxicating substance."

¶4 The Oklahoma Legislature has properly enacted the Oklahoma Evidence Code at 12 O.S.2011, § 2101, *et. seq.* The Evidence Code provides the framework for trial courts to determine the admissibility of evidence in any particular case. I question the authority of an independent State agency to *ipso facto* determine the admissibility of pieces of evidence in a criminal proceeding in contravention of the judicial branch of the government's duty, i.e., the trial court's duty, under the Evidence Code to perform that task. While certain procedures in the taking of blood or breath samples may go to the weight and credit of that evidence, the ultimate decision as to admissibility of that evidence is vested in the trial courts of this State.

HUDSON, J., SPECIALLY CONCURS

¶1 I concur in today's decision but write separately to emphasize that the misdemeanor manslaughter charge filed against Appellee alleged two alternative predicate crimes, namely, driving under the influence and reckless driving. The record shows reckless driving is potentially a viable predicate crime based on the facts shown here. Appellee apparently drove his pickup truck down a dead-end dirt road at speeds reaching between 45 and 65 miles per hour, drove up a steep embankment, flew over various obstructions and crashed into a creek bed. Earlier in the night, Appellee had been drinking beer and texting his girlfriend. The State on these facts appears to have a viable option to pursue the misdemeanor manslaughter charge against Appellee using reckless driving as a predicate crime regardless of the district court's ultimate ruling on the State's blood evidence in this case.

¶2 I observe too this Court has approved for nearly 46 years the current statutory scheme in which the Legislature has tasked the Board of Tests with promulgating rules and regulations concerning the collection and analysis of breath and blood test evidence used in DUI prosecutions. *See Westerman v. State*, 1974 OK CR 151, 525 P.2d 1359; *Synnott v. State*, 1973 OK CR 426, 515 P.2d 1154, *overruled on other grounds*, *Harris v. State*, 1989 OK CR 15, 773 P.2d 1273. Consistent with our prior decisions, we recently reaffirmed in *State v. Hovet*, 2016 OK CR 26, 387 P.3d 951, "[i]t is clear that law enforcement is required to rely on and comply with existing Board rules and regulations, in order to successfully use test results in prosecuting cases alleging driving under the influence." *Id.* at ¶ 6, 387 P.3d at 953. Nothing has changed to call into question the validity of this statutory mandate or our previous holding on this issue.

¶3 As today's decision shows, the district court retains authority under 47 O.S.2011, § 757 to admit "any other competent evidence" bearing on the question of whether the defendant was intoxicated. I therefore concur with today's decision remanding the case for further proceedings on the admissibility under Section 757 of the Kansas blood draw evidence.

KUEHN, VICE PRESIDING JUDGE:

1. Appellee was charged with misdemeanor manslaughter in the alternative: driving under the influence, or reckless driving. Suppression of the evidence of Appellee's blood test would not affect a prosecution on the second alternative, and the case was not dismissed.

2. The Legislature has also provided for a person's implied consent to a blood or breath test for alcohol concentration under certain circumstances, along with specific procedures which include compliance with Board of Tests rules. 47 O.S.2011, § 751. Sections 751 and 752 have been amended since Appellee was charged, but the amendments do not affect the analysis of this claim.

2020 OK CR 3

M.C.T., Appellant, v. THE STATE OF OKLAHOMA, Appellee.)

Case No. J-2019-618. February 6, 2020

SUMMARY OPINION

KUEHN, VICE PRESIDING JUDGE:

¶1 M.C.T. appeals the decision of the Honorable Scott Brockman, Special Judge, in Cleveland County District Court Case No. CF-2019-470 certifying him for trial as an adult for the crimes of Assault and Battery with a Deadly Weapon and Unlawful Use of a Computer. Pursuant to Rule 11.2(A)(1), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2020), this appeal was automatically assigned to the Accelerated Docket of this Court. The propositions or issues were presented to this Court in oral argument December 5, 2019, pursuant to Rule 11.2(F). At the

conclusion of oral argument, the parties were advised of the decision of this Court.

¶2 The appeal turns on statutory interpretation and therefore the district court's decision is reviewed *de novo. Smith v. State*, 2007 OK CR 16, ¶ 40. 157 P.3d 1155, 1169.

¶3 Appellant committed crimes in Oklahoma County before he committed the crimes in the instant case. The Oklahoma County prosecution concluded while the prosecution in this case remained ongoing. The district court, noting that Appellant had previously stipulated to adult status and pled guilty as an adult in Oklahoma County, found Appellant to be an adult by operation of law.

¶4 In his sole proposition of error, Appellant contends that because he committed the crimes in the instant case prior to his adjudication as an adult in Oklahoma County, it was error to find him an adult in the instant case without first holding a certification hearing. We disagree and affirm the decision of the district court.

¶5 The district court based its determination to certify Appellant as an adult on 10A O.S.2018 § 2–5–204(H)(1) which states:

> H. A child or youthful offender shall be tried as an adult in all subsequent criminal prosecutions, and shall not be subject to the jurisdiction of the juvenile court as a juvenile delinquent or youthful offender processes in any future proceedings if:
>
> 1. The child or youthful offender has been certified to stand trial as an adult pursuant to any certification procedure provided by law and is subsequently convicted of the alleged offense or against whom the imposition of judgement and sentence has been deferred[.]

¶6 Appellant relies on *D.J.B. v. Pritchett*, 2005 OK CR 31, 134 P.3d 147, to support his position. In *D.J.B.*, petitioner was adjudicated a delinquent child and placed in the custody of the Office of Juvenile Affairs (OJA) by the district court of Kingfisher County. Subsequently, he was certified as an adult by the district court of Garfield County and placed on a deferred sentence. Petitioner sought a writ of habeas corpus claiming Garfield County's certification of him as an adult divested Kingfisher County of jurisdiction to retain him in the custody of OJA. This Court disagreed. Interpreting similar language from an earlier version of what is now Section 2–2–403(C) of Title 10A, we noted: "The general thrust of these provisions is to permit automatic adult prosecution of juveniles who commit further felonies after having been previously certified and convicted as adults." *D.J.B.*, 2005 OK CR 31, ¶ 7, 134 P.3d at 149. *D.J.B.* was narrowly tailored to the specific facts before the Court. It is thus distinguishable and inapplicable here.

¶7 Appellant stipulated to adult status and then pleaded guilty as an adult in the Oklahoma County case before the certification proceeding in Cleveland County. That is sufficient for us to find the Cleveland County proceeding to be a "subsequent criminal prosecution" for purposes of Section 2–5–204(H)(1).

¶8 The plain language and intent of the statute is clear. Upon being adjudicated as an adult, the child or youthful offender maintains adult status in subsequent criminal prosecutions. Once a defendant is adjudicated as an adult, OJA loses jurisdiction and the defendant loses status as a child or youthful offender.

¶9 Appellant's agreed adult sentence in Oklahoma County is a "certification procedure provided by law" and, upon conviction for that offense, he maintained adult status. 10A O.S. 2018 § 2–5–204(H)(1). Not only does the statute provide that Appellant maintain his adult status in subsequent proceedings, it also provides that Appellant is not to be adjudicated as a juvenile nor youthful offender again. The district court's certification of Appellant as an adult is therefore correct.

DECISION

¶10 The certification of Appellant in Cleveland County District Court Case No. CF-2019-470 is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2020), the **MANDATE** is **ORDERED** issued upon the filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF CLEVELAND COUNTY THE HONORABLE SCOTT BROCKMAN, SPECIAL JUDGE

APPEARANCES AT TRIAL

M. Karla Tankut, Jasmine Johnson, Indigent Defense System, P.O. Box 926, Norman, OK 73070, Counsel for Defendant

Kristi Johnson, Asst. District Attorney, 201 S. Jones, Norman, OK 73069, Counsel for State

APPEARANCES ON APPEAL

Danny Joseph, Indigent Defense System, P.O. Box 926, Norman, OK 73070, Counsel for Appellant

Suanne Carlson, Asst. District Attorney, 201 S. Jones, Norman, OK 73069, Counsel for Appellee

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

LEWIS, PRESIDING JUDGE, SPECIALLY CONCUR:

¶1 I commend my colleague on a well written opinion. I write separately to address trial counsel's conduct. This Appellant had separate cases in two different counties being adjudicated at the same time. Apparently, counsel for Appellant did not fully appreciate the consequences of entering a plea as an adult offender in the Oklahoma County case while the Cleveland County case was still pending. Counsel's conduct, however, did not affect the outcome of Appellant's cases as he is obviously not an appropriate candidate for youthful offender status.

¶2 The holding of a youthful offender certification hearing in the Cleveland County case after he had already been convicted as an adult in Oklahoma County, regardless of the timing of the commission of the offences, would be a waste of judicial resources. Moreover, *D.J.B. v. Pritchett,* is clearly distinguishable, as pointed out in the opinion. I, therefore, specially concur.

Notice of Judicial Vacancy

The Judicial Nominating Commission seeks applicants to fill a vacancy for the position of District Judge for Osage County, Tenth Judicial District, Office 1. This vacancy is created due to the appointment of the Honorable M. John Kane to the Supreme Court.

To be appointed to the office of District Judge, one must be a legal resident of Osage County at the time (s)he takes the oath of office and assumes the duties of office. Additionally, prior to appointment, such appointee shall have had a minimum of four years' experience in Oklahoma as a licensed practicing attorney, a judge of a court of record, or both.

Application forms can be obtained online at www.oscn.net (click on "Programs", then "Judicial Nominating Commission", then "Application") or by contacting Tammy Reaves at (405) 556-9300. Applications must be submitted to the Chairman of the JNC **no later than 5:00 p.m., Friday, March 6, 2020**. Applications may be hand-delivered or mailed. If mailed, they must be postmarked **on or before March 6, 2020** to be deemed timely. Applications should be delivered/mailed to:

Jim Webb, Chairman
Oklahoma Judicial Nominating Commission
c/o Tammy Reaves — Administrative Office of the Courts
2100 N. Lincoln Blvd., Suite 3 • Oklahoma City, OK 73105

Calendar of Events

February

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

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

20 **OBA Diversity Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Telana McCullough 405-522-9528

OBA Awards Committee meeting; 2:30 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Kara Smith 405-923-8611

OBA Professionalism Committee meeting; 4 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Nathan Richter 405-376-2212

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

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

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

March

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

5 **OBA Member Services Committee meeting;** 1:30 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Peggy Stockwell 405-321-9414

OBA Women in Law Committee meeting; 4 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Shannon Panach 405-556-9500 or Bevan Stockdell 918-441-1333

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

Opinions of Court of Civil Appeals

2020 OK CIV APP 2

ROBERT KIRK WAITS, individually, Plaintiff/Appellee, vs. VIERSEN OIL & GAS CO., an Oklahoma corporation, Defendant/Appellant.

Case No. 117,192. December 20, 2019

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

HONORABLE DAMAN H. CANTRELL, TRIAL JUDGE

AFFIRMED

Gary L. Richardson, Charles L. Richardson, Jason C. Messenger, RICHARDSON RICHARDSON BOUDREAUX, Tulsa, Oklahoma, for Plaintiff/Appellee

Craig E. Hoster, Susan E. Huntsman, CROWE & DINLEVY, A PROFESSIONAL CORPORATION, Tulsa, Oklahoma, for Defendant/Appellant

P. THOMAS THORNBRUGH, JUDGE:

¶1 Viersen Oil and Gas Co. appeals a decision of the district court denying prevailing party fees after Plaintiff Robert Waits dismissed his claims. On review, we affirm the decision of the district court.

BACKGROUND

¶2 This is the third time this case has reached the appellate courts. It springs from a compensation dispute between Waits and Vierson. In early 2011, Waits was fired from his position as vice president of Viersen. In August 2011, Waits filed suit against Viersen, alleging, among other issues, that he had been fired without cause, and was therefore contractually entitled to a severance payment equivalent to five percent of the value of all issued and outstanding shares of Viersen. Waits sought a doubling of this "wage" claim pursuant to 40 O.S.2011 § 165.3, alleging there was no *bona fide* dispute as to his entitlement to the severance payment.

¶3 In November 2013, Viersen filed a motion for partial summary judgment arguing, in part, that there was a *bona fide* dispute whether Waits had been fired for cause, and hence Waits was not entitled to a doubling of his claim pursuant to § 165.3. The district court granted this motion. Waits then dismissed his remaining claims without prejudice, and Viersen dismissed its counterclaims.

¶4 Waits appealed in April 2015, as Appeal No. 113,970. On May 26, 2015, while this first appeal was pending Viersen filed a motion in the district court seeking attorney fees, which the district court stayed pending appeal. In July 2015, this Court found that an order deciding if a damages *enhancement* is available is not an independently appealable order in the absence of a damages judgment. Nor did it become one simply because the underlying damages claim was dismissed. As such, we found no appealable order, and no jurisdiction to hear the first appeal.

¶5 The same month, Waits re-filed his case in the district court as CV-2015-67, in the form of a petition to compel arbitration. This petition was dismissed by the district court in March 2016, and the case journeyed to the appellate courts for a second time. In April 2017, Division I of this Court agreed that, by filing his 2011 petition and litigating the case up to and including the appellate level, Waits had engaged in acts that waived his contractual right to arbitrate.[1] At the conclusion of this appeal, the district court then considered Viersen's 2015 request for over $800,000 in fees. In June 2018, the district court issued an order denying Viersen's fee request. Viersen now appeals this denial of fees.

STANDARD OF REVIEW

¶6 When the appeal raises an issue of the reasonableness of an attorney's fee awarded by the trial court, then the standard of review is whether there has been an abuse of discretion by the trial judge. *State ex rel. Burk v. Oklahoma City*, 1979 OK 115, ¶ 22, 598 P.2d 659. However, the question here, whether a party is entitled to an award of attorney fees and costs, presents a question of law subject to the *de novo* standard of review. *Hastings v. Kelley*, 2008 OK CIV APP 36, ¶ 8, 181 P.3d 750.

ANALYSIS

¶7 The question presented here is whether Viersen became a "prevailing party" entitled to fees after Waits' dismissal. Previous case law has indicated that a party becomes a potential "prevailing party" at the time that party receives some form of "affirmative relief." If the suit is later dismissed by the opponent, and the party obtained affirmative relief before the dismissal, he or she may become the prevailing party for fee purposes. The details of this rule are far from well defined, however.

I. THE BASIS OF THE "AFFIRMATIVE RELIEF" OR "SUCCESS" RULE

¶8 In *Professional Credit Collections, Inc. v. Smith,* 1997 OK 19, 933 P.2d 307, the last Supreme Court decision to fully analyze this question, the Court provides an analysis based on the 1991 version of 12 O.S. § 684, which at the time of *Professional Credit*, had remained unchanged since 1910, and stated:

> A plaintiff may, on the payment of costs and without an order of court, dismiss any civil action brought by him at any time before a petition of intervention or answer praying for affirmative relief against him is filed in the action. A plaintiff may, at any time before the trial is commenced, on payment of the costs and without any order of court, dismiss his action after the filing of a petition of intervention or answer praying for affirmative relief, but such dismissal shall not prejudice the right of the intervenor or defendant to proceed with the action.

¶9 Analyzing this statute, *Professional Credit* stated that "The test for an effective cost-escaping § 684 voluntary dismissal does not depend on whether a prevailing party has yet been determined. Instead, the key is whether, before plaintiff's voluntary dismissal, the defendant has requested affirmative relief against the plaintiff." *Id.*, ¶ 9. The Court went on to note that "Because [plaintiff's] plea for affirmative relief was invoked before her dismissal from the action, there was no impediment to the trial court's post-dismissal consideration of her request for attorney's fees." *Id.*, ¶ 11. Thereby, *Professional Credit* held that, although she had not prevailed on the merits of her case, defendant was a prevailing party for fee purposes because she had obtained the "affirmative relief" of vacating a default judgment before the plaintiff dismissed its suit.

II. THE EXTENT OF THE RULE OF *PROFESSIONAL CREDIT* IS UNCERTAIN

¶10 *Professional Credit* is an opinion that states at least three bases for its holding, and, to date, had not been positively applied in a prevailing party fee question outside of one factual situation – a dismissal by the plaintiff after a default judgment was vacated. In *Professional Credit*, a collection agency brought action against a former husband and wife to recover on open account for medical charges incurred by husband. Wife was served by publication, and did not answer. The court awarded a default judgment against wife on an open account claim for a specific sum, which would constitute a final money judgment. Wife later succeeded in vacating this default judgment. The collection agency then voluntarily dismissed the action against wife.[2]

¶11 Wife sought attorney fees as the "prevailing party" in an action to collect on an open account pursuant to the open account fee statute, 12 O.S. § 936. Both the trial court and the COCA held that the dismissal of the case against her did not make her a prevailing party pursuant to § 936. The Supreme Court reversed, and held the wife was a prevailing party. *Professional Credit* cites several different rationales for this holding.

A. Reading a Fee Statute "In Conjunction" with the Dismissal Statute, 12 O.S.§ 684

¶12 The holding of *Professional Credit* mentioned the "affirmative relief" language of the then-current dismissal statute, 12 O.S. 1991 § 684, which stated:

> A plaintiff may, on the payment of costs and without an order of court, dismiss any civil action brought by him at any time before a petition of intervention *or answer praying for affirmative relief* against him is filed in the action. (Emphasis added).

This language was removed in 2013 and the revised version states:

> An action may be dismissed by the plaintiff without an order of court by filing a notice of dismissal *at any time before pretrial.* After the pretrial hearing, an action may only be dismissed by agreement of the parties or by the court. (Emphasis added).

"Costs" are now payable only upon re-filing:

> If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

¶13 The reference to payment of costs if a case is dismissed after a "prayer for affirmative relief" is filed was noticeably removed by the Legislature in this subsequent version. "Where the meaning of a statute has been the subject of judicial determination, the subsequent amendment thereof reasonably indicates the legislative intention to change the law." *Tom P. McDermott, Inc. v. Bennett*, 1964 OK 197, ¶ 12, 395 P.2d 566.

¶14 Waits argues that this change in the statutory language removed the foundations of *Professional Credit*. If this was the sole language relied on by *Professional Credit*, the legislature likely intended to change that decision. *Professional Credit* cited, however, at least two bases for its decision that are independent of § 684. If the statutory change has any significance, it is that *praying* for affirmative relief, as opposed to *obtaining* affirmative relief, is no longer a basis for fees pursuant to *Professional Credit. (See Asset Acceptance, LLC v. Smith*, 2010 OK CIV APP 26, ¶ 7, 229 P.3d 1287, and *Fentem v. Knox*, 2013 OK CIV APP 50, ¶ 8, 305 P.3d 1043, both rejecting the theory that a prayer for relief entitles a party to fees under *Professional Credit*.) The current case is not based upon praying for affirmative relief, however, but on the granting of relief. The change to § 684 is not, therefore immediately significant.

B. Equal Access and Asymmetric Fees

¶15 *Professional Credit's* second rationale was that a different result would violate equal access to the courts because it would treat, for attorney's fee purposes, a victorious plaintiff differently from a successful defendant. A statute violates equal access to the courts when it treats – for attorney's fee purposes – the victorious plaintiff differently from a successful defendant. *Thayer v. Phillips Petroleum Co.*, 1980 OK 95, 613 P.2d 1041. The argument that either § 684, or § 936 acted asymmetrically if wife was not allowed a prevailing party fee is difficult to immediately credit, because both statutes provides symmetrical remedies. If wife had finally prevailed on the merits she could have added the cost of the vacation proceeding to her fees, just as the collection agency could do so if it had prevailed on the merits. There was no evident unconstitutional asymmetry in either § 684, or § 936, that required correction. This raises the question of why the *Professional Credit* Court felt that § 936 acted asymmetrically. This can only be answered by examining the second theory cited by *Professional Credit.*

C. "Wiping the Slate Clean of Prior Orders"

¶16 The *Professional Credit* Court further relied on the rule that "the statutory power to dismiss an action does not include the authority to wipe the slate clean of prior orders in the case" from the case of *Kelly v. Maupin*, 1936 OK 344, 58 P.2d 116. This principle is well-established, but *Kelly* involved the jurisdiction of the court to enforce an existing fee award after a dismissal, not the question of who was the prevailing party for fee purposes.

¶17 In *Kelly,* the court ordered the defendant to pay $1,500 as a temporary attorney's fee. The plaintiff then filed a dismissal. The attorney for the dismissing plaintiff later filed an application for a contempt citation, arguing that the fee award had not been pa*id.* Defendant responded that the court had no jurisdiction to hear the contempt citation because of the dismissal. The *Kelly* Court held that "regardless of whether the dismissal was effective or not in disposing of the action" it was "certainly ineffective to destroy the previous order requiring the payment of counsel fee." *Id.* ¶ 14.

¶18 This principle is of long standing, and we must assess *Professional Credit* in the light of that well established rule. It is clear that the *Professional Credit* Court found the situation in that case to be similar to that in *Kelly.* In many ways it was. Both cases involved a dismissal after a judgment by the Court. The only difference is that in *Kelly* the judgment was ordered, and in *Professional Credit* the judgment was vacated. The court appears to have regarded these acts as being legally identical, and equivalent to a judgment for fee purposes. This fact also fits with, and explains, the *Professional Credit* Court's concern with *asymmetric application of § 936*. Simply put, the Court appears to have reasoned that, if the debt collector was entitled to a fee because the last action in court was the award of a money judgment, the wife was symmetrically entitled to a fee if the last action in court was the vacation of a money

judgment. These appear to be the foundations of the *Professional Credit* opinion.

III. HOW FAR DOES THE RULE OF *PROFESSIONAL CREDIT* EXTEND BEYOND ITS FACTS?

¶19 Both *Kelly* and *Professional Credit* dealt with an otherwise final order regarding a money judgment that was obtained before dismissal. Viersen argues that this principle extends to *any form of interlocutory affirmative relief* granted to the non-dismissing party before dismissal. In this case, Viersen gained an interlocutory order regarding an available remedy which became moot after the underlying wage claim was dismissed. Viersen argues that the *Professional Credit* court would view this event as a litigation "success" in the underlying wage case that renders Viersen a prevailing party for fee purposes.

¶20 We find it evident that there are limits to the reach of *Professional Credit*. If the legislature intended that *any* form of relief granted before dismissal of a fee-bearing case, however minimal, makes the non-dismissing party a "prevailing party" entitled to full statutory attorney fees, it has had numerous opportunities to state so. Instead, the amendment of § 684 in 2013 required only that a party who dismisses after pretrial must pay *costs upon refiling*. If the Legislature intended the more punitive regime that an unrestricted application of *Professional Credit* would create (dismissal after any affirmative relief require the dismissing party to pay prevailing party fees) it had a perfect opportunity to do so when it amended § 684. It did not do so.

¶21 To examine the limits of *Professional Credit*, a survey of subsequent cases is helpful. The cases citing *Profession Credit* are as follows:

A. Cases Interpreting or Relying on *Professional Credit*

¶22 *Alford v. Garzone,* 1998 OK CIV APP 105, ¶ 12, 964 P.2d 944, *Truelock v. City of Del City*, 1998 OK 64, ¶ 4, 967 P.2d 1183; *Batman v. Metro Petroleum, Inc.*, 2007 OK CIV APP 121, ¶ 35, 174 P.3d 578; *Avens v. Cotton Elec. Coop., Inc.*, 2016 OK CIV APP 39, 377 P.3d 163, all cite *Professional Credit* for its statement that an asymmetric fee provision may violate equal-access protections, not its affirmative relief/prevailing party rule.

¶23 *Payne v. Dewitt,* 1999 OK 93, ¶ 1, 995 P.2d 1088, involved the question of whether a party could be barred by court order from a subsequent damages hearing after the court ordered default judgment as a sanction.

¶24 *Stroud Nat. Bank v. Owens*, 2006 OK CIV APP 37, ¶ 36, 134 P.3d 870, did not involve a dismissal, and held that a final judgment in an action decided by summary process is a judgment for fee purposes.

¶25 *Hastings v. Kelley*, 2008 OK CIV APP 36, ¶ 13, 181 P.3d 750, involved a dismissal, and held that obtaining a temporary injunction before dismissal was not "affirmative relief" pursuant to *Professional Credit*.

¶26 *Capital One Bank, N.A. v. Parsons*, 2009 OK CIV APP 71, ¶ 5, 217 P.3d 636, involves the same factual situation as *Professional Credit* (success in vacating the default judgment in a debt action, followed by a voluntary dismissal of the case).

¶27 *Asset Acceptance, LLC v. Smith,* 2010 OK CIV APP 26, ¶ 7, 229 P.3d 1287, held that a mere request for affirmative relief in a petition or answer did not constitute "affirmative relief" for the purposes of *Professional Credit*.

¶28 *Twin Creek Estates, L.L.C. v. Tipps*, 2011 OK CIV APP 53, ¶ 2, 251 P.3d 756, did not involve a dismissal.

¶29 *McKiddy v. Alarkon*, 2011 OK CIV APP 63, ¶ 25, 254 P.3d 141, did not involve a dismissal, and determined whether statutory provisions existed in support of the trial court's journal entry awarding attorney's fees to Mother in a domestic case.

¶30 *Fentem v. Knox*, 2013 OK CIV APP 50, ¶ 8, 305 P.3d 1043 held that, when the Homeowners' case was dismissed prior to any order granting the sellers' motion for summary judgment there was no "affirmative relief" to the seller for the purposes of *Professional Credit*.

¶31 *Mill Creek Lumber & Supply Co. v. Bichsel*, 2015 OK CIV APP 26, 347 P.3d 295, held that, despite a litigation history lasting some 4 years, and the denial of mutual summary judgment motions, that the non-dismissing party "had not prevailed on any issue prior to dismissal."

¶32 *Austin Place, L.L.C. v. Marts*, 2015 OK CIV APP 2, ¶ 17, 341 P.3d 693, held that the district court did not enter final judgment on a forcible entry and detainer claim, nor grant any affirmative relief before dismissal.

¶33 This history puts the *Professional Credit* decision into some perspective. Of fifteen cases citing *Professional Credit* as authority, only six cases involve a prevailing party claim following a dismissal after alleged affirmative relief. Of those six cases, only one, *Capital One Bank, N.A. v. Parsons*, 2009 OK CIV APP 71, actually awarded fees to the non-dismissing party. The facts in *Capital One Bank* were essentially identical to those in *Professional Credit* – the defendant in a credit card collection case succeeded in vacating a default judgment, followed by the card company's dismissal of the case.

¶34 We find no evident expansion of the rule of *Professional Credit* beyond its immediate facts in the twenty-two years it was decided. Indeed, the negative cases indicate some restriction.[3] This is likely because a broad reading of *Professional Credit* would contradict a number of other established principles. Prior to *Professional Credit,* the Oklahoma Supreme Court stated in *General Motors Acceptance Corp. v. Carpenter,* 1978 OK 39, 576 P.2d 1166 that: "Our decisions in cases defining 'prevailing party' hold that a prevailing party is one who finally prevails upon the merits. In this case, defendant in trial court had not prevailed prior to dismissal." *Id.*, ¶ 7. The Supreme Court reiterated in *Underwriters at Lloyd's of London v. North Am. Van Lines*, 1992 OK 48, 829 P.2d 978: that "[t]he essence of the question involves whether a defense, though successful in limiting plaintiff's damages, but not resulting in a judgment for the defendant, entitles the defendant to prevailing party status under 12 O.S.1981 § 940. Under the facts submitted, we answer in the negative." *Id.*, ¶ 11.

¶35 COCA has reiterated these principles without Supreme Court objection since *Professional Credit*. As a general rule, a "prevailing party" in a lawsuit "is the one who successfully prosecutes the action or successfully defends against it, prevailing on the merits of the main issue; in other words, the prevailing party is the one in whose favor the decision or verdict is rendered and the judgment entered." *Hastings v. Kelley*, 2008 OK CIV APP 36, ¶ 10, 181 P.3d 750. "Coinciding with its ordinary meaning, 'prevailing party,' as a legal term of art, means the successful party who has been awarded some relief on the merits of his or her claim." *Sooner Builders & Inv., Inc. v. Nolan Hatcher Constr. Serv., L.L.C.*, 2007 OK 50, ¶ 17, 164 P.3d 1063.

¶36 These cases show a general requirement that a party prevails on the *merits* of a claim before becoming a prevailing party for fee purposes. *Underwriters at Lloyd's of London* was explicit that a defendant's success in limiting a plaintiff's damages, while it may be characterized as affirmative relief, is not a success on the merits, and does not make the defendant a prevailing party for fee purposes. These rules are entirely compatible with the facts and results of *Kelly* and *Professional Credit. Professional Credit* gave no indication that it intended to overrule numerous prior cases and the long-standing consensus on this issue. Rather it appears to have created an exception to the general rule in certain circumstances.

B. We Find That Professional Credit is Not Applicable In this Case

¶37 We need not define the exact parameters of *Professional Credit* in this opinion.[4] We only need decide if the relief obtained here, an interlocutory decision restricting the plaintiff's available remedies, falls under the rule of *Professional Credit* rather than that of *Underwriters at Lloyd's of London.* We find it quite clear that the current case falls under the rule of *Underwriters at Lloyd's of London* – a defendant's success in limiting a plaintiff's damages is not a success on the merits, and does not make the defendant a prevailing party for fee purposes. The various "affirmative reliefs" that can potentially be granted in a complex case are myriad. To interpret *Professional Credit* as creating a prevailing party if any form of positive decision is obtained before a dismissal would undermine the substantial bulk of case law on this issue. If *Professional Credit* had intended such a substantial and far-reaching revision of the prevailing party rules, we would expect the decision to have made some reference to this change. We find that the facts of the current case do not fall under the rule of *Professional Credit.*

C. Viersen Has No Other Judgment That Could Provide a Basis for Fees

¶38 Viersen argues that, notwithstanding the validity of the "affirmative relief" doctrine of *Professional Credit,* it still had a statutory or common law basis for a fee award. Viersen first argues that it is entitled to fees because it made an offer of judgment pursuant to 12 O.S. § 1101.1 prior to the dismissal. *Boston Ave. Mgmt., Inc. v. Associated Res., Inc.*, 2007 OK 5, ¶ 15, 152 P.3d 880, notes that "In our view the plain lan-

guage of § 1101.1(B)(3) provides that there must be some type of final adjudication" before the fee shifting provisions of § 1101.1 become operative. We find no case law indicating that a voluntary dismissal without prejudice constitutes a final adjudication. If it did, there would be little need to rely upon the rule of *Professional Credit* at all.

¶39 Viersen further argues that the court had discretion to award fees after a dismissal pursuant to the unpaid wages statute, 40 O.S. § 165.9. The fee provision of § 165.9 states: "The court . . . may, in addition to any judgment awarded to the plaintiff or plaintiffs, defendant or defendants, allow costs of the action, including costs or fees of any nature, and reasonable attorney's fees." Viersen argues that the "in addition to any judgment" language of § 165.9 is disjunctive, allowing fees irrespective of whether a judgment is rendered. The Supreme Court reached an opposite conclusion, however, in *Parkhill Truck Co. v. Reynolds,* 1961 OK 42, 359 P.2d 1064.

> The quoted enactment, when read in its entirety, plainly contemplates an allowance of counsel fee to that party, whether plaintiff or defendant, to whom a judgment is 'awarded." The term 'awarded', as used in the context, should therefore be construed as synonymous with the word 'rendered'.

We find no right to fees pursuant to § 165.9 without the pre-condition of a judgment being rendered.

CONCLUSION

¶40 We find it clear that *Professional Credit* created a specific exemption from the long standing precedent regarding prevailing party fees, rather than displacing the prior precedent and substantially changing the definition of a prevailing party in Oklahoma law. We find no error in the district court's decision.

¶41 **AFFIRMED**.

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

P. THOMAS THORNBRUGH, JUDGE:

1. Waits has filed a third petition, CJ-2016-919, the final fate of which is not known at this time.

2. These facts are only lightly referred to in *Professional Credit*, but Judge Goodman's prior COCA opinion gives considerably more background, including that the collection agency dismissed after confirming with wife's counsel that the couple was divorced prior to the time the debt was incurred. Wife then tried to have this *dismissal* vacated in an attempt to re-open the case for the purpose of seeking sanctions and fees against the collection agency. This request was rejected by the trial court. These additional facts are significant because they indicate that both parties obtained some form of "affirmative relief" in the case, not just one party as implied by the *Professional Credit* opinion.

3. By example, it is difficult to explain how vacating a default judgment (with no subsequent decision on the merits) constituted "affirmative relief" while the temporary injunction obtained in *Hastings v. Kelley* did not. Neither decision had any effect on the merits of the respective cases.

4. At least two other undecided other issues are raised by *Professional Credit*. The first arises because a party dismissing without prejudice has the greater of one year, or the balance of the statute of limitations to re-file the case. It is therefore uncertain whether a "prevailing party" pursuant to *Professional Credit* remains so if the case is refiled. The second is whether relief that may be *independently fee bearing*, such as a motion to compel, should also qualify as "affirmative relief" in the underlying claim.

2020 OK CIV APP 3

CRESTWOOD VINEYARD CHURCH, INC., Plaintiff/Appellant, vs. CITY OF OKLAHOMA CITY, Defendant/Appellee.

Case No. 117,788. June 20, 2019

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE SUSAN STALLINGS, TRIAL JUDGE

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS

Kenyatta R. Bethea, HOLLOWAY, BETHEA & OSENBAUGH, Oklahoma City, Oklahoma, for Plaintiff/Appellant

Sherri R. Katz, Katie Goff, ASSISTANT MUNICIPAL COUNSELORS, Oklahoma City, Oklahoma, for Defendant/Appellee

DEBORAH B. BARNES, PRESIDING JUDGE:

¶1 This case arises from a sewer backup that occurred in a church owned by Crestwood Vineyard Church, Inc. Crestwood now appeals from an order of the trial court granting summary judgment in favor of the City of Oklahoma City (the City). We reverse and remand for further proceedings.

BACKGROUND

¶2 Crestwood filed a petition in September 2017 asserting that "a main that is owned and maintained by [the City] had not been properly maintained or repaired as needed," and that this failure to maintain or repair on the part of the City "allowed raw sewage to back up and flood the basement" of Crestwood's church. Crestwood alleged in its petition that as a direct result of the City's negligence, its church "was exposed to Category 3 water," and that "[d]ue to the level of contamination, all porous surfaces such as sheet rock, wood casing trims, lower cabinets, shelves and glue-down carpets

will require removal and replacement based on the level of exposure." Crestwood asserted the City owed it a duty "to exercise reasonably prudent and ordinary care in maintaining its sewer lines," and that it violated this duty, resulting in "toxic contamination" of its church building.

¶3 The City filed an answer in which it admitted Crestwood provided written notice pursuant to the Governmental Tort Claims Act (GTCA).[1] However, the City denied Crestwood's allegations pertaining to negligence.

¶4 In December 2018, the City filed a motion for summary judgment. The parties agree a sewer backup occurred in Crestwood's church on January 22, 2017, and that soon after, employees of the City "worked to clean the rooms [of the church] affected by the backup utilizing wet-vacs." It is also undisputed that the City "conducts maintenance on its utility lines[.]" However, the City argues that a duty arises for a municipality "to use reasonable diligence and care to see" that its municipal sewer lines are "not clogged with refuse and is liable for negligence to a property owner injured thereby" only "*after reasonable notice* of a clogged sewer condition and its failure to maintain and repair its system properly." The City has attached evidentiary materials to its summary judgment motion in support of its contention that during the five years prior to the sewage backup in question, no customer notified the City of any problems with the sewer lines in the vicinity of Crestwood's church. The City argues that because it received no complaints in the area prior to the backup, it did not have reasonable notice and therefore cannot be found to have been negligent. On this basis, as well as on the basis that, according to the City, Crestwood contributed to the sewage backup into its church by "violat[ing] [its] own duty of care by having a non-compliant basement floor drain," the City requests that summary judgment be granted in its favor.[2]

¶5 In an order filed in February 2019, the trial court sustained the City's motion for summary judgment. Crestwood appeals.

STANDARD OF REVIEW

¶6 This Court has previously set forth the applicable standard of review as follows:

> An order sustaining summary judgment in favor of a litigant presents solely a legal matter. *Feightner v. Bank of Oklahoma, N.A.*, 2003 OK 20, ¶ 2, 65 P.3d 624. Questions of law mandate application of the *de novo* standard of review, which affords this Court with plenary, independent, and non-deferential authority to examine the issues presented. *Martin v. Aramark Servs., Inc.*, 2004 OK 38, ¶ 4, 92 P.3d 96.
>
> Examination of an order sustaining summary judgment requires Oklahoma courts to determine whether the record reveals disputed material facts or whether reasonable minds could draw different conclusions from undisputed facts. *Cranford v. Bartlett*, 2001 OK 47, ¶ 3, 25 P.3d 918. All facts and inferences must be viewed in the light most favorable to the party opposing summary adjudication. *Estate of Crowell v. Bd. of Cnty. Comm'rs of Cnty. of Cleveland*, 2010 OK 5, ¶ 22, 237 P.3d 134. If the essential fact issues are in dispute, or reasonable minds might reach different conclusions in light of the inferences drawn from undisputed facts, summary judgment should be denied. *Schovanec v. Archdiocese of Okla. City*, 2008 OK 70, ¶ 39, 188 P.3d 158.

Spane v. Cent. Okla. Cmty. Action Agency, 2015 OK CIV APP 29, ¶¶ 8-9, 346 P.3d 437.

ANALYSIS

¶7 The City asserts that in *Oklahoma City v. Romano*, 1967 OK 191, 433 P.2d 924, the Oklahoma Supreme Court "specifically addressed when a municipality's duty to a homeowner for sewer back-ups arises." In *Romano*, the Court stated:

> When a municipal corporation assumes the control and management of a sewer system which has been constructed by it and under its supervision, it is bound to use reasonable diligence and care to see that such sewer is not clogged with refuse and is liable for negligence in the performance of such duty to a property owner injured thereby after reasonable notice of the clogged condition of such sewer.

Id. ¶ 0 (Syllabus by the Court). The *Romano* Court adopted this language from *City of Holdenville v. Moore*, 1956 OK 34, 293 P.2d 363.

¶8 The City appears to interpret the phrase "reasonable notice" in *Romano* in a manner limited to notice or complaints received by a municipality from property owners. To determine the correct interpretation of this language

from the syllabus of *Romano*, the body of that decision should also be examined. The Oklahoma Supreme Court has explained elsewhere that while "the law of a case is contained in the syllabus,"

> the facts and reasoning of the court in the body of a decision is an aid to a correct interpretation of the law as announced in the syllabus. In interpreting the law as announced in a syllabus by this court this court may not close its eyes to the facts as shown in the body of the opinion . . . .

Okla. Tax Comm'n v. McInnis, 1965 OK 204, ¶ 22, 409 P.2d 355 (citations omitted). In the body of the *Romano* Opinion, the Court states that

> the plaintiffs pleaded that the city permitted the sewer line in question to become stopped up and clogged with refuse; *that the city knew, or should have known, of the clogged condition of the sewer, but neglected to properly clean and keep said line in usable condition*; and that such clogged condition of the sewer line constituted a nuisance, and was the direct and proximate cause of the damages sustained by the plaintiffs. So, . . . the allegations of the plaintiffs' amended petition came within the principles of law applied by this court in *City of Holdenville*….

Romano, ¶ 11 (emphasis added).

¶9 The Supreme Court's reasoning in the body of the *Romano* Opinion teaches that a municipality may obtain notice of a clogged condition of a municipal utility line as a result of the municipality's own regular maintenance in "properly clean[ing] and keep[ing] said line in usable condition," and that this notice may be actual or constructive – i.e., it may be the case that "the city knew, or should have known, of the clogged condition[.]" *Id.* As summarized by a division of this Court in *Spencer v. City of Bristow,* 2007 OK CIV APP 67, 165 P.3d 361, a case cited by Crestwood:

> The Oklahoma Supreme Court has stated, "The maintenance and repair of its sewers is a corporate or proprietary function of a city, and the city is liable for injuries sustained because of its failure to maintain and repair sewers properly." *City of Holdenville v. Moore*, 1956 OK 34, ¶ 8, 293 P.2d 363, 366 (quoting *City of Altus v. Martin*, 1954 OK 9, ¶ 0, 268 P.2d 228, 229); *see also Davis v. Town of Cashion*, 1977 OK 59, ¶ 7, 562 P.2d 854, 856; *Oklahoma City v. Romano,* 1967 OK 191, ¶ 6, 433 P.2d 924, 926.

Spencer, ¶ 12. *The Spencer* Court concluded by stating:

> We must conclude that a controversy exists as to whether [the municipality] had knowledge, actual or constructive, of a defect in the sewer lines to [the property owner's] residence before [the] overflows. "Whether the municipal corporation had actual notice of the defective condition, or whether it had existed for a sufficient period of time for the municipal corporation to be advised of its existence by the exercise of ordinary care, are questions of fact for the jury under proper instructions from the court." *City of Tulsa v. Pearson*, 1954 OK 298, ¶ 9, 277 P.2d 135, 137. "The existence of facts or circumstances sufficient to put one on inquiry [for purposes of constructive notice] presents a question of fact inappropriate for summary disposition." *Manokoune v. State Farm Mut. Auto. Ins. Co.*, 2006 OK 74, ¶ 18, 145 P.3d 1081, 1085-86. On the record before this Court, in a case with substantial controversies about [the municipality's] operation, maintenance, and repair of its sewer lines, summary judgment is not appropriate.

Spencer, ¶ 21.

¶10 Although we agree with the City that it may be possible for reasonable notice to take the form of complaints from property owners, *Romano* does not support the argument that a municipality has no duty to undertake any maintenance or inspection of particular municipal sewer lines merely because no property owners have lodged complaints in an area for a certain period of time. It bears repeating that, as quoted in *Spencer,* the Oklahoma Supreme Court has long held that "[t]he maintenance and repair of its sewers is a corporate or proprietary function of a city, and the city is liable for injuries sustained because of its failure to maintain and repair its sewers properly." *City of Altus*, 1954 OK 9, ¶ 0 (Syllabus by the Court).[3] The City even acknowledges that Allen McDonald, the Superintendent of the Line Maintenance Division of the Utilities Department of the City, "testified at length [at his deposition] regarding the extensiveness of [the City's] sanitary sewer preventative maintenance plan and grid work." Mr. McDonald testified at his deposition, "I think that municipalities have to

maintain their sewer system to the best of their ability[.]" Deposition testimony of another employee of the City, Henry Hawthorne Jr., is also found in the summary judgment materials. Mr. Hawthorne also testified regarding the City's maintenance of its sewer lines. Mr. Hawthorne testified that he is part of a team that performs grid work "[t]o keep sewage from overflowing into the streets and residences and businesses" of the area. He testified that if the City does not perform grid work, "[t]hey'll have a bunch of problems."

¶11 Nevertheless, the City emphasizes that, according to the affidavit of Mr. McDonald, there were "no reported blockages or notices of prior problems with the City's sewer main that services [the church building] or the line segments on either side of the segment servicing [the church building] in the five-year period prior to January 22, 2017." Viewing the facts in the light most favorable to the non-moving party, this evidence merely supports the City's contention that it was not provided with reasonable notice *in the form of customer complaints.* Disputes of material fact remain, however, as to whether the City nevertheless knew or should have known of a problematic condition in the pertinent city utility lines as a result of its own maintenance and inspection of those lines, or whether a problematic condition existed for a sufficient period of time for the City to be advised of its existence by the exercise of ordinary care. These are questions of fact which are not resolved in either party's favor in the evidentiary materials attached to the summary judgment filings.

¶12 The City is correct to the extent it asserts that the evidentiary materials presented for purposes of summary judgment are largely silent as to whether the City was or was not negligent in the maintenance of its lines. In the excerpts of the deposition testimony of Mr. Hawthorne, whose team was called upon "to fix the problem" after the backup occurred at the church, he testifies he "wasn't assigned that grid" – i.e., the sewer lines in the vicinity of the church – for purposes of maintenance, and that he is "not sure whose grid it was." Mr. McDonald's deposition testimony is similarly unhelpful regarding the specific maintenance performed on the pertinent sewer lines during the time period preceding the backup at the church building.[4]

¶13 No additional evidence has been presented at this stage pertaining to whether or not the City, during the time period preceding the sewer backup at the church, "maintain[ed] and repair[ed] its sewers properly." *City of Altus*, 1954 OK 9, ¶ 0 (Syllabus by the Court). In the face of this evidentiary gap regarding the relevant acts or omissions of the City,[5] the City, as the moving party, nevertheless stresses that Crestwood "has simply not provided any support for its allegations that the City had prior notice of a defect or obstruction in the sewer main servicing the Property nor does [Crestwood] provide any evidence the City was negligent in the maintenance of its lines." Under District Court Rule 13, however, a moving party cannot successfully contend there is no substantial controversy as to a material fact – e.g., here, that the City properly maintained and repaired its sewer lines, *City of Altus,* ¶ 0, or properly cleaned and kept those lines in a usable condition, *Romano,* ¶ 11 – without referencing a particular piece of evidence which supports that contention. Rule 13 states that "[r]eference *shall be made* in the statement to the pages and paragraphs or lines of the evidentiary materials that are pertinent to the motion," Dist. Ct. R. 13(a), 12 O.S. Supp. 2013, ch. 2, app. (emphasis added), and further states that only "material facts set forth in the statement of the movant *which are supported by acceptable evidentiary material* shall be deemed admitted for the purpose of summary judgment or summary disposition unless specifically controverted by the statement of the adverse party which is supported by acceptable evidentiary material," Dist. Ct. R. 13(b) (emphasis added).[6] Apart from showing a lack of customer complaints, the City has not presented any evidence regarding the inspection, maintenance or repair, if any, performed on the municipal sewer lines in question during the time period prior to the January 22 sewer backup.

¶14 Summary judgment

> should only be granted when it is clear there are no disputed material fact issues. This Court has consistently held that summary judgment should be denied where there are controverted material facts or if reasonable minds could reach different conclusions from the undisputed material facts. The facts and inferences therefrom must be viewed in the light most favorable to the non moving party.

Fargo v. Hays-Kuehn, 2015 OK 56, ¶ 12, 352 P.3d 1223 (footnotes omitted). Although, according to the evidence thus far produced, the City did

not timely receive any complaints from property owners in the pertinent area, it is not clear at this time that there are no disputed fact issues regarding whether the City nevertheless had timely knowledge, actual or constructive, of a defect in the sewer lines in question.

¶15 We are also unpersuaded by the City's argument that summary judgment should be awarded in its favor because of possible negligent acts or omissions on the part of Crestwood. In *Johnson v. Hillcrest Health Center, Inc.*, 2003 OK 16, 70 P.3d 811, the Oklahoma Supreme Court noted as follows:

> If a defendant's action contributed to cause a plaintiff's injury, the defendant is liable even though his/her act or negligence alone might not have been a sufficient cause. The proximate or contributing cause of a plaintiff's injury is a question of fact for the jury. It becomes one of law only when there is no evidence from which the jury could reasonably find a causal link between the negligent act and the injury or where the facts are undisputed. Where uncontroverted facts lend support to conflicting inferences, the choice to be made between opposite alternatives also presents an issue of fact for the jury.

Id. ¶ 18 n.25 (citations omitted). *See also Morris v. Sorrells*, 1992 OK 125, ¶ 14 n.2, 837 P.2d 913 ("[T]he common law . . . denied damages to a plaintiff if he was even slightly contributorily negligent. Modern comparative negligence laws have eliminated that harshness."). We therefore conclude summary judgment was inappropriately granted.

CONCLUSION

¶16 We reverse the trial court's order filed in February 2019 sustaining the City's motion for summary judgment. We remand for further proceedings.

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

WISEMAN, V.C.J., and RAPP, J., concur.

DEBORAH B. BARNES, PRESIDING JUDGE:

1. Title 51 O.S. 2011 & Supp. 2018 §§ 151-200. The City also admits Crestwood's claim was deemed denied on September 6, 2017. *See* 51 O.S. §§ 156 & 157.

2. We note that the City has set forth various affirmative defenses in its Answer, including that the City "is exempt from liability . . . pursuant to the [GTCA]," but does not argue at this stage of the proceedings that it should be granted summary judgment on the basis that an applicable exemption from liability exists under the GTCA.

3. We note that in *Richards v. City of Lawton*, 1981 OK 62, 629 P.2d 1260, the Oklahoma Supreme Court noted: "The concept of municipal immunity from liability for a 'governmental' function, if still viable, could not afford the [municipality] a shield in this case. The maintenance of street, sewer and drainage systems is commonly viewed as 'proprietary[.]'" *Id.* ¶ 9 n.5 (Memorandum Opinion) (citing, inter alia, *Romano* and *City of Altus). See also Valley Vista Dev. Corp. v. City of Broken Arrow*, 1988 OK 140, ¶ 13 n.11, 766 P.2d 344 ("Operation of a sewer system is proprietary and not governmental in nature. Therefore, this is not a situation where the municipality is engaged in a governmental function . . . ." (citations omitted)).

4. Mr. McDonald did testify that the maintenance that does occur is, in his words, "more complaint based[.]" *See also* Mr. McDonald's Affidavit at ¶ 8 ("When the City receives notice regarding problems with its sanitary sewer system, this notice is documented, and work orders are created, prioritized, and effectuated through normal scheduling."). Viewing the facts thus far developed in the light most favorable to Crestwood for purposes of determining the appropriateness of summary judgment, Mr. McDonald's testimony, when combined with the City's emphasis that it received no customer complaints during the five-year period preceding the sewage backup, if anything supports at least one reasonable inference favorable to Crestwood – e.g., that the City performed no maintenance or upkeep in the relevant area during that time.

5. We note that in February 2019 Crestwood filed a motion to defer consideration of the City's motion for summary judgment under 12 O.S. § 2056(F) on the basis that "certain discovery" had not yet been completed and "[the City] refuses to provide [Crestwood] with documentation that evidences its prior notice of a blockage in its sewer system." In addition, in August 2018 Crestwood filed a motion seeking an order compelling discovery from the City. Crestwood asserted in this motion that it had previously requested "a copy of all grid work orders reflecting preventative maintenance performed by the City since January 1, 2007," and "all documents that reflect the implementation of the grid work preventative maintenance program since January 1, 2007," but asserted the City "made it abundantly clear that it would not produce any information in response to either" request. The City filed an objection to Crestwood's motion to compel in September 2018. The documents contained in the appellate record do not appear to disclose any explicit resolution of these filings.

6. *See also* 12 O.S. 2011 § 2056(C) & (E) ("The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law," and "A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated.").

2020 OK CIV APP 4

DEVON ENERGY PRODUCTION COMPANY, L.P., an Oklahoma Limited Partnership, Plaintiff/Appellant, vs. CAROLYN J. WYCKOFF, and THE HAROLD B. GRIFFITH and SONYA GRIFFITH REVOCABLE TRUST dated June 16, 2015, HAROLD B. GRIFFITH and SONYA GRIFFITH as Co-Trustees, Defendants/Appellees.

Case No. 117,242. December 31, 2019

APPEAL FROM THE DISTRICT COURT OF MAJOR COUNTY, OKLAHOMA

HONORABLE TIMOTHY HAWORTH, JUDGE

REVERSED AND REMANDED

David A. Elder, Erin L. O'Roke, HARTZOG CONGER CASON & NEVILLE, Oklahoma City, Oklahoma, for Appellant,

Chaille Walraven, Mark E. Walraven, GRAFT & WALRAVEN, PLLC, Clinton, Oklahoma, for Appellees.

Larry Joplin, Presiding Judge:

¶1 Appellant, Devon Energy Production Company, L.P., seeks review of the trial court's July 25, 2018 Journal Entry of judgment in which it granted Defendants', Wyckoff, et al., 12 O.S. 2001 §2012(B)(6) Motion to Dismiss Devon's cause of action for failure to state a claim on which relief could be granted.[1] For the reasons provided, we reverse and remand this cause to the district court for further proceedings.

¶2 Devon filed its Petition on October 11, 2017 asserting Defendants' attorney approached Devon about entering into a lease with his two clients regarding lease holdings that had recently been released from Chesapeake Exploration, L.L.C. The attorney said his two clients had approximately 400 nma (net mineral acres) in Sec 3-20N-17W in Woodward County and if Devon was still active in this area, would Devon be interested in the leases. The parties entered into a lease agreement in which the Defendants gave no warranty of title and Devon was to assume responsibility for the title search.[2] In consideration for the two leases, Devon paid $792,807.75 to each of the Defendants for the Wyckoff lease and the Griffith Trust lease, totaling $1,585,615.50. In July 2017, Devon learned Chesapeake's only interest in the section at issue was a wellbore-only interest in the Wyckoff #2-3 well located in Section 3. A 1956 lease covering lands in multiple sections, including the sections Devon understood it was leasing in, were still active due to production by one or more wells; this meant neither Wyckoff nor Griffith Trust had any mineral acres available for lease at the time it entered into the lease agreement with Devon.

¶3 In its Petition, Devon asserted four causes of action, count 1) breach of implied covenant of quiet enjoyment, count 2) actual and/or constructive fraud, count 3) rescission, and count 4) unjust enrichment. We review subject to a *de novo* standard of review:

> An order dismissing a case for failure to state a claim upon which relief can be granted is subject to *de novo* review. When reviewing a motion to dismiss, the Court must take as true all of the challenged pleading's allegations together with all reasonable inferences which may be drawn from them. The purpose of a motion to dismiss is to test the law that governs the claim in litigation, not the underlying facts. A pleading must not be dismissed for failure to state a legally cognizable claim unless the allegations indicate beyond any doubt that the litigant can prove no set of facts which would entitle the plaintiff to relief. The burden to show the legal insufficiency of the petition is on the party moving for dismissal. Motions to dismiss are usually viewed with disfavor under this standard, and the burden of demonstrating a petition's insufficiency is not a light one.

Tuffy's, Inc. v. City of Oklahoma City, 2009 OK 4, ¶6, 212 P.3d 1158, 1162-63 (citations and footnotes omitted).

¶4 This case seems to rest on the parties' perceived conflict between *Peabody Coal Co. v. State of Oklahoma ex rel. Comm'rs of the Land Office*, 1992 OK CIV APP 83, 884 P.2d 857 and *French Energy, Inc. v. Alexander,* 1991 OK 106, 818 P.2d 1234. In *Peabody Coal*, the coal company brought a cause of action against the Oklahoma Land Office to recover payment of lease bonuses and royalties paid under a quitclaim mineral lease. *Peabody Coal*, 884 P.2d at 858. The lease in the *Peabody Coal* case was given without a warranty that the lessor was "seized in fee with the right to lease the minerals." *Id.* at 859. In effect, the Land Office did not warrant its title or its right to the lease. The court found this meant the lease was in the nature of a quitclaim, for which the coal company acted at its own risk and the doctrine of *caveat emptor* applied. *Id.* The court found the coal company could not recover the lease bonuses and royalties paid by claiming the Land Office had no right to the coal it purported to lease.[3] Defendants in the present case ask to be similarly treated, because they did not warrant title in their dealings with Devon, and like the Land Office the Defendants should be permitted to keep the lease payments made by Devon since the lessors did not warrant title.

¶5 *French Energy* examined some of the same issues that arose in *Peabody Coal,* wherein the purchaser of an oil and gas lease at a judicial sale brought a cause of action seeking actual and punitive damages on claims for fraud or rescission and restitution. *French Energy,* 818 P.2d at 1235-36. The Oklahoma Supreme Court found the appellant, who had purchased the lease, was entitled to equitable relief, "notwithstanding the doctrine of *caveat emptor.*" *Id.*

¶6 The *French Energy* lease was purchased at a judicial sale, which effectively meant breach of warranty was an "irrelevant defense." *Id.* at

1237. The mineral rights French Energy "thought it was purchasing were being held by production from within the unit" and resulted in there being nothing to convey. *Id.* at 1238. The Oklahoma Supreme Court explained "that, regardless of fault, the oil company was not aware of the prior lease when it paid the bonus money to executor," however, the executor "was aware of the existence of a pre-existing lease," of which the executor may or may not have understood the significance. *Id.* at 1237. "[T]here was at the very least, a mutual mistake that was basic to the parties' bargain in that [lessor] specifically agreed to convey to [lessee] the present right to explore for oil and gas[,]" a situation similar to that which exists in this case. *Id.* The Oklahoma Supreme Court found that to allow the lessors to keep the bonus money in exchange for nothing would result in them being substantially and unjustly enriched.[4]

¶7 With respect to fraud, the *French Energy* court said the following:

> *The doctrine of caveat emptor can never be invoked to perpetrate a fraud*. The purchaser is entitled to receive the title owned by the estate of the decedent at the time of his death or prior to the sale. The estate will never be allowed to retain its title to the property and also retain the purchase price therefor. The law requires the estate to part with whatever title it has in and to the land before it will be permitted to retain the purchase price therefor.

Id. at 1239 (emphasis added). The appellate court found the doctrine of *caveat emptor* would "not shield a seller from purporting to sell that which he does not have." *Id.*

¶8 It is Devon's allegation of fraud that compels this court, at this time, to reverse the decision of the district court. Whether Devon can or will prevail in its allegation of fraud is not before the appellate court at present, but Devon has alleged the Defendants knew or should have known the net mineral acres they purported to lease to Devon were covered by a 1956 lease that was still in production, so that the minerals were not available to be leased to Devon. Devon alleged Defendants should have known they continued to receive royalties tied to the 1956 lease and failed to disclose this to Devon and intended Devon to rely on their misrepresentations. Devon alleged it in fact relied on Defendants' omissions and misrepresentations to its detriment, and suffered damages as a result.

¶9 On the record provided, this court cannot determine whether any fraud was perpetrated. The §2012(B)(6) motion is not intended to test these underlying facts. However, Devon's pleading does not "indicate beyond any doubt that the litigant can prove no set of facts which would entitle" it to relief. *Tuffy's, Inc.*, 2009 OK 4, ¶6, 212 P.3d at 1163. In moving for this §2012(B)(6) dismissal, the Defendants had the burden to show the legal insufficiency of the petition. In light of the uniquely fact specific fraud claim presented here, Defendants did not meet this burden below.

¶10 The order of the district court, granting the Defendants' §2012(B)(6) motion for failing to state a claim upon which relief can be granted, is REVERSED and this cause is REMANDED for further proceedings.

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

Larry Joplin, Presiding Judge:

1. It should be noted additional materials, including the initial email chain, were included as exhibits with the §12(B)(6) motion. However, the trial court appeared to go to some effort to maintain the motion as a §12(B)(6) and not have it converted into a motion for summary judgment, as the court indicated it would not consider the additional exhibits and matters outside the pleadings. For this reason, we review this appeal as a §12(B)(6) proceeding and not one for summary judgment.

2. The following language was stricken from the leases, but the text could still be read as follows, "~~warrants and agrees to defend the title to the lands herein described and~~". Devon's title search did not reveal an existing 1956 lease at the time the parties entered into the lease agreement.

3. A covenant of warranty in a mineral lease includes the obligation that the lessor is seized in fee with the right to lease the minerals. *Walker & Withrow, Inc., v. Haley,* 653 P.2d 191 (Okl.1982). However, when a lease is given without such a warranty, it is in the nature of a "quitclaim" and leases only such interest as the lessor owns. (*See Schuman v. McLain*, 177 Okla. 576, 61 P.2d 226 (1936) for discussion of the nature of quit claim deeds to real property.) Because Land Office did not warrant its title or its right to lease, Coal Company may not now seek to recover lease bonuses and royalties paid on the grounds that Land Commission had no right to the coal. Since the lease was in the nature of a quitclaim, Coal Company, at its own risk, paid for whatever interest Land Office owned, whether it was 0% or 100% or something in between. The doctrine of *caveat emptor* applies. Compare *Siniard v. Davis,* 678 P.2d 1197 (Okl.App.1984). The lease involved in *Siniard* contained a general warranty of title by the lessor.
Peabody Coal, 884 P.2d at 859.

4. In the present case, the mineral rights French thought it was purchasing were being held by production from within the unit. The contract, in clear and unambiguous terms, purported to convey the present right to explore for oil and gas. However, there was nothing to convey. To allow Appellees to keep the bonus money in exchange for nothing would result in them being substantially and unjustly enriched. We refuse to allow one party to profit by the mistake of another where, as here, both parties can be returned to the position they were in before the transaction. In short, this case is a classic illustration of when, in accordance with general principles of common justice and equity, Appellees will be required to do what it is they promised. Since this is not possible in that the mineral rights are subject to a pre-existing lease, we order the contract be rescinded and Appellant's money refunded.
French Energy, Inc. v. Alexander, 818 P.2d at 1238.

Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS
Thursday, January 16, 2020

F-2018-1082 — Appellant Antonio Deondre Smith was tried by jury for the crime of First Degree Murder and was convicted of Accessory to Murder, After Conviction of Two or More Felonies, in Tulsa County District Court Case No. CF-2015-3477. In accordcance with the jury's recommendation, the trial court sentenced Appellant to life imprisonment. From this judgment and sentence Antonio Deondre Smith has perfected his appeal. AFFIRMED. Opinion by: Kuehn, V.P.J.; Lewis, P.J., concur; Lumpkin, J., concur in results; Hudson, J., concur in results; Rowland, J., concur.

F-2018-1144 — William G. Epperly, Appellant, was tried by jury for the crime of Sexual Abuse of a Child in Case No. CF-2015-7392 in the District Court of Oklahoma County. The jury returned a verdict of guilty and set as punishment five years imprisonment. The trial court sentenced accordingly and further ordered a $100.00 fine and three years of post-imprisonment supervision. From this judgment and sentence William G. Epperly 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-2018-628 — Appellant, Allen Alexander Parks, was tried by jury and convicted of Assault and Battery by Means or Force Likely to Cause Death, in in the District Court of Oklahoma County Case Number CF-2016-7670. The jury recommended punishment of thirty-five years imprisonment. The trial court sentenced Appellant accordingly. It is from this judgment and sentence that Appellant appeals. The judgment and sentence are hereby AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., Concur in Results; Kuehn, V.P.J., Concur in Part Dissent in Part; Hudson, J., Concur; Rowland, J., Concur.

F-2017-963 — Randall Eugene Throneberry, Appellant, was tried by jury for the crime of Lewd Acts with a Child Under 16, After Former Conviction of a Felony (Lewd Acts with a Child), in Case No. CF-2015-6679, in the District Court of Oklahoma County. The jury returned a verdict of guilty and recommended as punishment life imprisonment without the possibility of parole. The Honorable Timothy R. Henderson, sentenced accordingly and imposed various costs and fees. From this judgment and sentence Randall Eugene Throneberry has perfected his appeal. AFFIRMED Opinion by: Hudson, J.; Lewis, P.J., Specially Concurs; Kuehn, V.P.J., Concurs; Lumpkin, J., Specially Concurs; Rowland, J., Concurs.

F-2018-1103 — Appellant, Bert Glen Franklin, was tried by jury and convicted in a consolidated trial of Count 1, First Degree Murder (Child Abuse), in the District Court of Oklahoma County Case Number CF-2016-6318 and of Count 2, Solicitation of First Degree Murder, in the District Court of Oklahoma County Case Number CF-2017-7216. The jury recommended punishment of life imprisonment without parole on Count 1 and life imprisonment on Count 2. The trial court sentenced Appellant accordingly, running the sentences consecutively to one another. The Judgment and Sentence is hereby AFFIRMED. From this judgment and sentence, Appellant appeals. Opinion by: Lumpkin, J.; Lewis, P.J., Concur in Results; Kuehn, V.P.J., Recuse; Hudson, J., Concur; Rowland, J., Recuse.

C-2018-1018 — Spencer Joe Cuccaro, Petitioner, appeals to this Court from an order of the District Court of Kay County, entered by the Honorable David Bandy, Associate District Judge, denying Petitioner's application to withdraw his pleas in Case Nos. CF-2016-561, CF-2011-74 and CF-2008-353. In Case No. CF-2016-561, Petitioner entered a plea of no contest to Count 1: Possession of Controlled Dangerous Substance (Methamphetamine), After Former Conviction of Two or More Felonies; Count 2: Driving With License Cancelled/Suspended/Revoked (misdemeanor); Count 3: Unlawful Possession of Drug Paraphernalia (misdemeanor); and Count 4: Failure to Maintain Insurance or Security (misdemeanor). Petitioner filed his Notice of Intent to Appeal and Designation of Record form with the district court clerk in CF-2016-561, CF-2011-74 and CF-2008-353 on November 6, 2018. Petitioner filed his Petition for Writ of Certiorari with this

Court on December 11, 2018. Petitioner's brief in support of his petition for writ of certiorari was filed with this Court on March 5, 2019. The Petition for Writ of Certiorari is DENIED. The Judgment and Sentence of the District Court is AFFIRMED Opinion by: Hudson, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Specially Concurs; Lumpkin, J., Concurs in Results; Rowland, J., Concurs.

F-2018-1046 — Adam Russell Hemphill, Sr., Appellant, was tried by jury for the crime of Child Neglect in Case No. CF-2017-3841 in the District Court of Tulsa County. The jury returned a verdict of guilty and set as punishment twenty-five years imprisonment. The trial court sentenced accordingly. From this judgment and sentence Adam Russell Hemphill, Sr. has perfected his appeal. AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs in results.

C-2019-329 — Petitioner Andrea Dawnelle Feeling entered a blind plea of guilty in the District Court of Mayes County to Aggravated Assault and Battery (Count 1) and Battery/Assault and Battery on a Police Officer (Count 2), Case No. CF-2017-355. The Honorable Stephen R. Pazzo, District Judge, accepted Feeling's plea and sentenced her in accordance with the plea agreement to five years imprisonment and a $500.00 fine on Count 1 and four years imprisonment and a $500.00 fine on Count 2. Judge Pazzo ordered the sentences to run consecutively. Feeling timely filed a motion to withdraw her plea that was denied following a hearing. Feeling appeals the denial of that motion. Petition for a Writ of Certiorari is DENIED. The district court's denial of Petitioner's motion to withdraw plea is AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs.

Thursday, January 23, 2020

C-2018-1167 — Ronald Fitzgerald Williams, Petitioner, entered a negotiated plea of guilty to Count 1, aggravated trafficking in illegal drugs, Methamphetamine; Count 2, unlawful possession of controlled drug with intent to distribute, marijuana; Count 3, unlawful possession of drug paraphernalia, a misdemeanor; Count 4, failure to yield for emergency vehicle, a misdemeanor; Count 5, speeding in excess of lawful maximum limit, a misdemeanor; and Count 6, failure to maintain insurance or security, a misdemeanor, in Case No. CF-2017-662 in the District Court of Comanche County. The Honorable Irma J. Newburn, District Judge, accepted the plea, found Petitioner guilty after two or more former convictions, and sentenced him pursuant to the agreement to twenty years and a $50,000.00 fine ($49,000.00 suspended) on Count 1, twenty years and a $1,000.00 fine on Count 2, one year and a $500.00 fine on Count 3, and $10.00 fines on Counts 4 through 6, all to be served concurrently, with credit for time served. Petitioner filed a motion to withdraw his guilty plea, which the trial court denied. Petitioner now seeks the writ of certiorari. The petition for writ of certiorari is GRANTED. The trial court's order denying Petitioner's motion to withdraw plea is REVERSED, and this cause is REMANDED to the District Court for a new hearing on the motion to withdraw plea. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs; Rowland, J., concurs.

F-2018-1190 — Appellant Walter Lee Roundtree was tried by jury and found guilty of Violation of the Sex Offender Registration Act (Count I) (57 O.S.2011, § 590) and Failure to Comply with the Sex Offender Registration Act (Count II) (57 O.S.2011, §§ 584 & 587), in the District Court of Oklahoma County, Case No. CF-2017-6557. The jury recommended as punishment four (4) years imprisonment in Count I and five (5) years imprisonment in Count II. The trial court sentenced accordingly, ordering the sentences to be served consecutively. It is from this judgment and sentence that Appellant appeals. The judgment and sentence is AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., Concur in Part Dissent in Part; Kuehn, V.P.J., Recuse; Hudson, J., Concur; Rowland, J., Concur in Result.

F-2018-1023 — Appellant, Cameron Lee Schemmer, was tried by the court and convicted of Count 1, Forcible Sodomy, in violation of 21 0.S.2011, § 888 and Counts 2–4, Lewd Molestation, in violation of 21 0.S.2011, § 1123, in Kingfisher County District Court, Case No. CF-2017-96. The trial court sentenced Appellant to twenty years imprisonment with all but the last five years suspended on Count 1. On Counts 2-4, the court sentenced Appellant to twenty-five years imprisonment on each count. The court ordered the sentences for Counts 2-4 to run concurrently to one another, but consecutively to the sentence in Count 1. From this judgment and sentence Appellant appeals. The

judgment and sentence are AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur in Result; Hudson, J., Concur; Rowland, J., Concur.

F-2018-508 — Daniel Curtis Patterson, Appellant, was tried by jury for the crime of Second Degree Rape (Count 2) and Contributing to the Delinquency of a Minor (Counts 3, 4, and 5) in Case No. CF-2016-528 in the District Court of Kay County. The jury returned verdicts of guilty and set as punishment five years imprisonment on Count 1 and six months imprisonment and a $1,000.00 fine on each of Counts 4, 5, and 6. The trial court sentenced accordingly and ordered the sentences to run consecutively. From this judgment and sentence Daniel Curtis Patterson has perfected his appeal. AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs in results; Lumpkin, J., concurs; Hudson, J., concurs.

RE-2018-932 — Anthony Curtis Creek, Appellant, entered a plea of guilty on March 16, 2015, in Garfield County District Court Case No. CF-2013-393, to the amended charge of Count 1 – Possession of a Controlled Dangerous Substance, a misdemeanor, and Count 2 – Unlawful Possession of Drug Paraphernalia, a misdemeanor. He was sentenced to one year with all suspended except 90 days in the County Jail on Count 1 and one year suspended on Count 2. The sentences were ordered to run consecutive. Appellant was also fined $500.00. The State filed an application to revoke Appellant's suspended sentence on Count 2 on January 20, 2017. Following a revocation hearing on June 2, 2017, before the Honorable Dennis Hladik, District Judge, six months of Appellant's suspended sentence was revoked. Appellant appeals the revocation of his suspended sentence. The revocation of Appellant's suspended sentence is AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs.

Thursday, January 30, 2020

F-2018-1222 — Larry Donelle Brown, Jr., Appellant, entered a blind plea of guilty to first degree murder in the District Court of Tulsa County, Case No. CF-1997-1409. The Honorable Jefferson D. Sellers, District Judge, sentenced Appellant to life imprisonment without the possibility of parole. This Court granted post-conviction relief and remanded for resentencing in *Brown v. State*, No. PC-2017-933. The Honorable Sharon K. Holmes sentenced Appellant to life imprisonment and granted him credit for time served. Appellant appeals his resentencing. The sentence is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs; Rowland, J., concurs.

F-2018-1061 — Joshua Loyd Bullard, Appellant, was charged with one count of Robbery in the Second Degree (Count 1), one count of Assault and Battery on a Police Officer (Count 2), and one count of Aggravated Assault and Battery on a Police Officer (Count 3), in the District Court of Stephens County, Case No. CF-2016-496. Appellant was tried by jury and found guilty of the lesser offense of Petit Larceny (Count 1), the lesser offense of Resisting a Peace Officer (Count 2), and the lesser offense of Assault and Battery on a Police Officer (Count 3). At the close of the second stage of trial, the jury found that Count 3 had been committed after former conviction of a felony and recommended sentences of six months imprisonment on Count 1, one year imprisonment and a $100.00 fine on Count 2, and seven years imprisonment on Count 3. The trial court sentenced accordingly ordering the sentences served consecutively and granting credit for time served. From this judgment and sentence Joshua Loyd Bullard has perfected his appeal. The Judgment and Sentence is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs in results; Lumpkin, J., concurs in results; Hudson, J., concurs; Rowland, J., concurs.

F-2019-99 — On April 30, 2018, Appellant William Alvin Wimbley entered pleas of guilty in McCurtain County District Court Case Nos. CF-2016-103 and CF- 2017-147. Appellant was admitted to the Mc-Curtain County Drug Court Program. On October 3, 2018, the State filed an application to terminate Appellant's participation in drug court. Following a hearing the trial court terminated Appellant's participation in drug court and sentenced Appellant pursuant to his drug court plea agreement. The termination of Ap-pellant's participation in Drug Court is AF-FIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J.: Concur; Lumpkin, J.: Concur; Hudson, J.: Concur; Rowland, J.: Concur.

RE-2019-42 — Appellant Gale Dean Mitchell entered a plea of no contest on April 22, 2013, to Knowingly Concealing Stolen Property. He was convicted and sentenced to five years imprisonment, with all but the first year suspended. The State filed a Supplemental Motion to Revoke Suspended Sentence on December 4,

2017. Following a revocation hearing, the trial court revoked Appellant's remaining suspended sentence. The revocation is AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs.

F-2018-957 — Dustin Scott Patton, Appellant, was tried by jury for the crime of Assault and Battery with a Deadly Weapon, in Case No. CF-2017-258, in the District Court of Kay County. The jury returned a verdict of guilty and recommended as punishment ten years imprisonment. The Honorable David Bandy, District Judge, sentenced accordingly. From this judgment and sentence Dustin Scott Patton has perfected his appeal. AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur; Lumpkin, J., Concur; Rowland, J., Concur.

F-2018-1186 — Appellant, Dominick Javon Smith, was tried by jury and convicted of Child Neglect, After Former Conviction of a Felony, in violation of 21 O.S.Supp.2014, § 843.5(C), 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; Kuehn, V.P.J., Concur; Hudson, J., Concur; Rowland, J., Concur.

F-2018-1161 — Kenneth Allen Day, Appellant, was tried by jury for the crimes of Count 1: Sexual Battery and Counts 2 and 3: Indecent Exposure, in Case No. CF-2017-2586, in the District Court of Oklahoma County. The jury returned a verdict of guilty and recommended as punishment 30 days imprisonment on Count 1 and 1 year imprisonment each on Counts 2 and 3. The Honorable Timothy R. Henderson, District Judge, sentenced accordingly and ordered the sentences to run consecutively to each other, and consecutively to Oklahoma County Case No. CF-2016–6470. The court further granted Appellant credit for 177 days of time served and imposed various costs and fees. From this judgment and sentence Kenneth Allen Day has perfected his appeal. AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs; Rowland, J., Concurs.

RE-2019-57 — Appellant Toni Lynn Cook entered a plea of guilty on February 23, 2018, to Obstructing an Officer in McIntosh County District Court Case No. CM-2016-369. She was convicted and sentenced to one year imprisonment, with the entire year suspended. The State filed a Motion to Revoke Suspended Sentence on November 6, 2018. Following a revocation hearing, the trial court revoked Appellant's suspended sentence. The revocation is AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J.: Concur; Kuehn, V.P.J.: Concur; Rowland, J.: Concur; Hudson, J.: Concur.

F-2018-975 — Appellant Mickey Joe Edward Richardson was tried by jury in the Haskell County District Court Case No. CF-2016-91 for the following crimes: Count 1 - Assault and Battery on a Police Officer, Count 2 - Larceny of an Automobile, Count 4 - Feloniously Pointing a Firearm, Count 5 - Felon in Possession of a Firearm, all After Conviction of a Felony, and Count 8 - Escape from Detention. In accordance with the jury's recommendation the trial court sentenced Appellant to 5 years imprisonment on Count 1, 20 years on Count 2, 30 years on Count 4, a life sentence on Count 5 and one year on Count 8. The sentences were ordered to be served consecutively. From this judgment and sentence Mickey Joe Edward Richardson has perfected his appeal. AFFIRMED. Opinion by: Kuehn V.P.J.: Lewis, P.J.: Concur; Lumpkin, J.: Concur; Hudson, J.: Concur; Rowland, J.: Concur.

F-2018-823 — Appellant Ubaldo Hernandez was tried by jury for the crime of Child Sexual Abuse in Muskogee County District Court Case No. CF-2016-608. In accordance with the jury's recommendation the trial court sentenced Appellant to 30 years imprisonment. From this judgment and sentence Ubaldo Hernandez has perfected his appeal. AFFIRMED. Opinion by: Kuehn, V.P.J.: Lewis, P.J.: Concur; LUMPKIN, J.: Concur in Results; Hudson, J.: Concur; Rowland, J.: Concur.

COURT OF CIVIL APPEALS
(Division No. 1)
Friday, January 10, 2020

116,827 — Jayen Patel, M.D., Plaintiff/Appellant, vs. Tulsa Pain Consultants, Inc., P.C.; Martin Martucci, M.D.; Andrew Revelis, M.D.; Robert Saenz; Alana Campbell; Lam Nguyen, M.D.; Pat McFadden; and Ebondie Titworth, Defendants/Appellees. Appeal from the District Court of Tulsa County, Oklahoma. Honor-

able Jefferson Sellers, Judge. Plaintiff Jayen Patel, M.D. (Patel) appeals from two trial court orders in favor of his prior employer, Defendant Tulsa Pain Consultants, Inc., P.C. (Clinic). First, Patel appeals the trial court's denial of his motion to amend his petition to re-add claims which he previously voluntarily dismissed. Because the trial court did not abuse its discretion in denying Patel's motion to amend, we affirm the denial of Patel's motion. Second, Patel appeals the trial court's grant of a directed verdict in favor of Clinic at the close of evidence at trial. Because Patel was not an at-will employee for the purposes of bringing a wrongful discharge claim, we also affirm the trial court's grant of a directed verdict. AFFIRMED. Opinion by Buettner, J.; Bell, P.J., and Goree, J., concur.

117,264 —Floyd Ramsey, Petitioner/Appellant, vs. Independent School District Tulsa County, Own Risk #11260 and The Workers' Compensation Court of Existing Claims, Respondents/Appellees. Proceeding to Review an Order of a Three-Judge Panel of The Workers' Compensation Court of Existing Claims. Petitioner/Appellant, Floyd Ramsey (Claimant), appeals from an order of a three-judge panel of the Workers' Compensation Court of Existing Claims (Panel) affirming the dismissal of his claim against Respondent/Appellee, Independent School District #1 of Tulsa County, Oklahoma, for cumulative trauma injury to his left knee. According to his Form 3, Form 9 and his own medical evidence, Claimant alleged his last injurious exposure was August 1, 2011. Because Claimant did not file his claim until January 28, 2014, the trial court held his claim was time-barred. The Panel unanimously affirmed. The trial testimony and evidentiary materials in the instant record contain ample competent evidence to support the Panel's decision that Claimant's last injurious exposure was August 1, 2011. Because Claimant did not file his claim within two (2) years of that date, the Panel correctly held the claim was time-barred pursuant to 85 O.S. Supp. 2005 §43(A). SUSTAINED. Opinion by Bell, P.J.; Buettner, J., and Goree, J., concur.

117,687 —Kent G. Savage, Plaintiff/Appellant, vs. Jeffrey Troutt; Tami Grogan; Dan Grogan; Carol Montalvo; Kenya Ares-Vales; Jason Bryant; Buddy Honaker; and Mark Knutson, Defendants/Appellees. Appeal from the District Court of Alfalfa County, Oklahoma. Honorable Loren Angle, Judge. Plaintiff/Appellant Kent G. Savage (Savage) appeals a grant of summary judgment in favor of Defendant/Appellee Dr. Jeffrey Troutt (Dr. Troutt). Savage, an incarcerated person, alleged that Dr. Troutt, a prison physician, deprived him of his constitutional rights through negligent medical care. The trial court granted summary judgment in favor of Dr. Troutt, holding Savage failed to demonstrate Dr. Troutt was acting outside the scope of his employment at the time of the relevant conduct and that Dr. Troutt was therefore an improper plaintiff under the Government Tort Claims Act. AFFIRMED. Opinion by Buettner, J.; Bell, P.J. and Goree, J., concur.

117,919 —Billy J. Schmidt, Petitioner, vs. The Multiple Injury Trust Fund and The Workers' Compensation Commission, Respondents. Proceeding to Review an Order of the Workers' Compensation Commission. Petitioner Billy J. Schmidt seeks review of an order of the Workers' Compensation Commission which affirmed the ALJ's decision denying Schmidt's claim for permanent total disability benefits from Respondent Multiple Injury Trust Fund. Schmidt has experience as a driver and salesman; the record shows he is able to do either of those jobs in some manner. Our review of the record shows that it is supported by substantial evidence and is otherwise free from error. Accordingly, the Commission's order is SUSTAINED. Opinion by Buettner, J.; Goree, J., concurs and Bell, P.J., dissents.

118,095 — In Re the Matter of J.D., Deprived Child: Amanda Dunlap, Appellant, vs. The State of Oklahoma, Appellee. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Trevor Pemberton, Judge. Appellant, Amanda Dunlap (Mother), appeals from the trial court's judgment, entered upon a jury verdict, terminating her parental rights to her minor child, J.D., a deprived child. Appellee, the State of Oklahoma (State), filed a petition to terminate Mother's parental rights to the deprived child pursuant to 10A O.S. Supp. 2015 §1-4-904(B)(5) on the basis that Mother failed to correct the following conditions that led to the deprived child adjudication after having been given at least three (3) months to correct the conditions: Mother's home was unfit and unsafe, substance abuse, threat of harm, and Mother left the child with inappropriate care givers. State also alleged termination of Mother's parental rights was in the child's best interests. After reviewing the record, we find clear and convincing evidence

supports the jury's findings of the grounds for termination of Mother's parental rights pursuant to §1-4-904(B)(5) and the jury's finding that termination of Mother's parental rights is in the child's best interest. The trial court's judgment terminating Mother's parental rights is AFFIRMED. Opinion by Bell, P.J.; Buettner, J., and Goree, J., concur.

Friday, January 17, 2020

117,578 — In Re the Guardianship of A.N.A., minor child, Robyn Helton, Petitioner/Appellee, v. Thomas Adey, Respondent/Appellant. Appeal from the District Court of Craig County, Oklahoma. Honorable Jess B. Clanton Jr., Judge. In this guardianship proceeding, Respondent/Appellant, Thomas Adey (Father), natural father of A.N.A., born January 25, 2014, minor child, appeals from the trial court' order granting visitation rights to Petitioner/Appellee, Robyn Helton, the maternal aunt and former guardian of the child (Aunt). The trial court entered an order of October 15, 2018, terminating Aunt's guardianship of the child effective December 15, 2018, but granting Aunt post-termination visitation with the child. We hold that upon termination of the guardianship, the trial court was without subject matter jurisdiction to enforce the visitation order. Accordingly, the portion of the trial court's order granting Aunt visitation with the child following the termination of the guardianship is reversed. The remainder of the court's order terminating the guardianship is affirmed. AFFIRMED IN PART; REVERSED IN PART. Opinion by: Bell, P.J.; Buettner, J., and Goree, J., concur.

117,474 — Bearwood Native, LLC, Plaintiff/Counter-Defendant/Appellee, v. Tulsa Construction & Management, Inc., Defendant/Counter-Claimant/Appellant. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Rebecca B. Nightingale, Judge. Defendant/Appellant Tulsa Construction & Management, Inc. appeals from a judgment granted to Plaintiff/Appellee Bearwood Native, LLC in Bearwood's breach of contract action. On de novo review, we find the contract was ambiguous as to which party would pay for the counter top material. Competent evidence supports the trial court's finding of the parties' intent based on parol evidence. Competent evidence also supports the trial court's finding that the parties waived the "cost plus" language in the contract. We AFFIRM. Opinion by Buettner, J.; Bell, P.J., and Goree, J., concur.

117,800 — In The Matter of the Adoption of K.M.D., a minor child, Elandre Dutoit, Appellant, v. Roger Dwane Lewis, Appellee. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Richard W. Kirby, Trial Judge. Elandre Dutoit, Appellant and natural father of K.M.D. (Father), filed a petition to vacate the adoption decree wherein Roger Dwane Lewis (Lewis), Appellee and K.M.D.'s stepfather, was adjudicated as K.M.D.'s parent without Father's consent. Father claims defective notice by publication deprived him of due process of law and that the decree is therefore void. In response, Lewis filed a motion to dismiss citing 10 O.S. §7505-7.2 as precluding the trial court's ability to vacate the decree, given that more than 3 months passed after its rendition. The court denied Father's petition to vacate citing *Gee v. Belair*, 2017 OK CIV APP 43, 403 P.3d 1, and its holding that §7505-7.2 is a statute of repose. We hold that the notice by publication did not satisfy the due process clauses of the U.S. and Oklahoma Constitutions and reverse. Opinion by Goree, J.; Bell, P.J., and Buettner, J., concur.

Thursday, January 23, 2020

116,644 — In Re the Marriage of: Ocean Burley now Manning, Plaintiff/Appellant, v. Bryson Burley, Defendant/Appellee. Appeal from the District Court of McCurtain County, Oklahoma. Honorale Marion D. Fry, Trial Judge. This is an appeal of an order modifying child custody. The trial judge concluded there had been a substantial, permanent and material change of circumstances that directly affected the best interests of H.V.B. (Daughter) and H.Z.B (Son). The court entered a permanent change of custody of these minor children from Petitioner/Appellant, Ocean Burley, now Manning (Mother) to Respondent/Appellee, Bryson Burley (Father). Mother appealed and we AFFIRM. Opinion by Goree, J.; Bell, P.J., and Buettner, J., concur.

117,577 — In Re the Matter of C.M. and L.M., Deprived Children: Benjamin and Heidi Wimp, Appellants, v. Mike and Patricia Todd, Appellees. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Cassandra M. Williams, Judge. In this adoption proceeding, Appellants, Benjamin and Heidi Wimp, paternal uncle and aunt of the minor children, C.M. and L.M., appeal from the trial court's order determining it is in the children's best interest to remain in their current foster placement with Appellees, Mike and Patricia Todd, the children's paternal uncle and aunt, and to be

adopted by the Todds. We find the trial court's findings of fact and conclusions of law are supported by the record and governing principles of law and that the trial court's order adequately explains its decision. Based on these findings, we conclude the trial court did not abuse its discretion when it made its best interest determination and affirm the trial court's best interest order pursuant to Rule 1.202, *Oklahoma Supreme Court Rules*, 12 O.S. Supp. 2013, Ch.15, App. The trial court's order denying the motion to reconsider and for new trial is also affirmed. AFFIRMED UNDER SUPREME COURT RULE 1.202. Opinion by Bell, P.J.; Buettner, J., and Goree, J., concur.

118,014 — In The Matter of: T.W.; E.J.; and B.J., alleged deprived children: Brandy Washburn, Appellant, v. State of Oklahoma, Appellee. Appeal from the District Court of Garfield County, Oklahoma. Honorable Tom L. Newby, Trial Judge. The State of Oklahoma, Appellee, filed its amended petition alleging T.W., E.J., and B.J. are deprived. Brandy Washburn, mother of T.W., E.J., and B.J., Appellant, appeals the district court's order adjudicating the children deprived. Because we find competent evidence supporting a finding that parents failed to maintain a safe and/or sanitary home we affirm the trial court's order in part. However, the record lacks competent evidence to support findings of the other causes alleged in the petition. The trial court is directed to enter its order finding that failure to maintain a safe and/or sanitary home is the only condition causing the children to be deprived. AFFIRMED IN PART, REVERSED IN PART. Opinion by Goree, J.; Bell, P.J., and Buettner, J., concur.

(Division No. 2)
Friday, January 17, 2020

118,365 — Marsha Jean Weaver, Plaintiff/Appellant, v. The City of Oklahoma City, Defendant/Appellee. Appeal from an Order of the District Court of Oklahoma County, Hon. Richard C. Ogden, Trial Judge. Weaver sued City claiming that a sewer clean-out situated on a sidewalk was a hazard and she tripped on it with resulting injury. The summary judgment record shows that there is no question of fact regarding the City's position that it does not own and did not install or maintain the clean-out. Likewise, the summary judgment record does not show any fact issue related to City's position that it did not have actual notice of the claimed hazard. Last, the summary judgment record does not contain materials raising an issue of fact about whether City had constructive notice of the claimed hazard. Therefore, the trial court's order awarding City summary judgment is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Rapp, J.; Barnes, P.J., and Fischer, J., concur.

117,973 — Tonkawa Hotel and Casino &/or Hudson Insurance Company, Petitioner, v. Reanna N. Rogers and The Workers' Compensation Commission, Respondents, Hudson Insurance Company, Insurance Carrier. Proceeding to Review an Order of a Three-Judge Panel of The Workers' Compensation Commission, Hon. P. Blair McMillin, Administrative Law Judge. Hudson Insurance Company (Hudson) is the workers' compensation insurer for Tonkawa Hotel and Casino (Casino). Casino was dismissed below by agreement on the ground of sovereign immunity. Hudson appeals The Workers' Compensation Commission's Order Affirming Decision of Administrative Law Judge (ALJ). The ALJ decision determined that the claimant-employee of Casino, Reanna Rogers (Rogers), sustained a compensable, work-related injury to her left knee. This is a worker's compensation case where Hudson's and Rogers' evidence regarding the occurrence of an injury and the medical reports are in complete opposition to each other. The ALJ found Rogers to be a credible and consistent witness and found the issues in her favor. The appellate court gives great deference to the trial court's determinations regarding credibility of witnesses. This Court does likewise, with the result that the ALJ's decision, as affirmed by the Workers' Compensation Commission *en banc* is not against the clear weight of the evidence. Therefore, the Workers' Compensation Commission's Order Affirming Decision of Administrative Law Judge is sustained. SUSTAINED. Opinion from Court of Civil Appeals, Division II, by Rapp, J.; Barnes, P.J., and Fischer, J., concur.

117,669 — In the Matter of Michael Downey, Petitioner/Appellant, v. Velissa Pickens, Respondent/Appellee. Appeal from an Order of the District Court of Carter County, Hon. Thomas Baldwin, Trial Judge. The evidence shows that the parties do not communicate regarding their parental duties. In addition, Mother expressed her inability and unwillingness to communicate with Father regarding their children. Father has established grounds to terminate the joint custody plan and Mother did not present evidence or legal argument to contradict Father's request to terminate the joint custody plan. Therefore, the judgment of the trial court which declined to terminate the

parties' joint custody plan and award legal custody of the parties' children to Father is reversed. Father is awarded legal custody of the children. The cause is remanded for the purpose of preparing and filing the child support calculation and to establish a visitation schedule for Mother. JUDGMENT RETAINING JOINT CUSTODY AND DENYING FATHER SOLE LEGAL CUSTODY REVERSED AND CAUSE REMANDED WITH INSTRUCTIONS. Opinion from Court of Civil Appeals, Division II, by Rapp, J.; Barnes, P.J., and Fischer, J., concur.

Wednesday, January 22, 2020

116,902 — Ron Wade, Plaintiff/Appellant, and Linda Wade, Plaintiff, vs. Lynn Burrow, Jeff Wallen, Chuck Berryhill, David Deere, and Juda Closterman, Defendants/Appellees. Appeal from Order of the District Court of Tulsa County, Hon. Kirsten Pace, Trial Judge. Appellant Ron Wade appeals the district court's order determining that he had lost standing to proceed as a plaintiff in the matter. That order resulted in a denial of his motion to reconsider the previous dismissal of his action. The district court's order fully explains its decision on the issue of Ron Wade's lack of standing to proceed as a plaintiff in this case. Based on the materials of record actually and properly before the district court at the time of its decision, no abuse of discretion has been demonstrated. AFFIRMED UNDER RULE 1.202(d) and (e). Opinion from Court of Civil Appeals, Division II by Fischer, P.J.; Reif, S.J. (sitting by designation), and Thornbrugh, J., concur.

Thursday, January 23, 2020

117,339 — In re the Guardianship of: Tracy Delbert Stanfield, an incapacitated person. Mildred Stanfield, Guardian of the Estate of Tracy Delbert Stanfield, Appellant, v. Loyde H. Warren, Appellee. Appeal from the District Court of Seminole County, Hon. Timothy L. Olsen, Trial Judge. This appeal is one of multiple appeals in this litigation. Appellant Mildred Stanfield, Guardian of the Estate of Tracy Delbert Stanfield, appeals the trial court's judgment awarding attorney fees and costs to Appellee Loyde H. Warren pursuant to a decision by this Court in Case No. 115,280. Ms. Stanfield raises as the issue on appeal whether the trial court followed the law of the case in making that award. Inasmuch as the trial court correctly followed the Oklahoma Supreme Court's Mandate and this Court's Opinion in Case No. 115,280 with regard to the award of attorney fees and costs, we affirm. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Barnes, P.J.; Wiseman, C.J. (sitting by designation), and Thornbrugh, J., (sitting by designation), concur.

Wednesday, January 29, 2020

117,992 — In the Matter of N.W., Alleged Deprived Child, Jennifer Carron, Appellant, v. The State of Oklahoma, Appellee. Appeal from an Order of the District Court of Cleveland County, Hon. Stephen Bonner, Trial Judge. Jennifer Carron (Mother) appeals a judgment entered on a jury verdict which terminated her parental right as to her child, N.W. State has the burden to establish that there was a prior adjudication of N.W. as a deprived child and that the premise for the adjudication was the same condition as the current adjudication. In addition, State had to show that Mother had been afforded an opportunity to correct the condition in the prior case. State also had to show that there is a current adjudication of N.W. as a deprived child and that termination of parental rights is in N.W.'s best interest. State's burden is to prove its case by clear and convincing evidence. State established all elements of proof by the requisite standard of proof. The Record shows that Mother has either not disputed elements or has acknowledged the facts showing the existence of the elements of proof. In addition, State has established its allegation by official court records. There is no basis to overturn the verdict and judgment terminating Mother's parental rights as to N.W. The judgment is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Rapp, J.; Barnes, P.J., and Fischer, J., concur.

117,564 — Shelly Lea Moore, Petitioner/Appellee, v. Monte Ray Moore, Respondent/Appellant. Appeal from an Order of the District Court of Kay County, Hon. Lee Turner, Trial Judge. The respondent, Monte Ray Moore (Husband), appeals the Decree of Dissolution of Marriage entered in an action brought by the petitioner, Shelly Lea Moore (Wife). In his appeal, Husband contests the amount of child support and maintains that the support alimony award is excessive. This is a high income family, due to Husband's salary, and the combined income exceeds the top number in the child support guidelines. The statute permits the trial court to then determine an additional amount of child support, which the trial court did here. The trial court took into consideration the evidence and the relevant criteria when

adjusting the child support. The child support order is not against the clear weight of the evidence or contrary to law and is not an abuse of discretion. The trial court's findings that Wife demonstrated a need for support alimony and that Husband has the ability to pay considered the evidence and all other relevant factors. The award is not against the clear weight of the evidence or contrary to law and is affirmed. The child support computation form conflicts with the Decree in that the form does not state the child support as ordered. The case is remanded to the trial court to correct the child support form to remove the inconsistency between the form and the Decree as to the amount of child support ordered. AFFIRMED AND REMANDED FOR CORRECTION OF THE CHILD SUPPORT COMPUTATION FORM. Opinion from Court of Civil Appeals, Division II, by Rapp, J.; Barnes, P.J., and Fischer, J., concur.

Monday, February 3, 2020

117,205 — James Hughes, Plaintiff/Appellee, vs. John Doe, R.H. Hummer, Jr., Inc., an Iowa Corporation; and Nationwide Insurance Co., Defendants, and Robert T. Keel, Appellant. Appeal from Order of the District Court of Oklahoma County, Hon. Trevor Pemberton, Trial Judge. Appellant Robert Keel appeals the district court's order denying his Motion to Intervene in the underlying personal injury action. After review of the record and relevant case law, we find that Keel's charging lien against the settlement proceeds awarded to his former client is a sufficient interest to sustain an intervention by right. The district court's order is reversed and remanded with directions to enter an order granting Keel's motion to intervene. REVERSED AND REMANDED WITH DIRECTIONS. Opinion from the Court of Civil Appeals, Division II, by Fischer, J.; Barnes, P.J., and Rapp, J., concur.

(Division No. 3)
Friday, January 17, 2020

117,249 — Timothy Griffith, Petitioner/Appellant, vs. Joe Allbaugh, Director, Department of Corrections, Respondent/Appellee. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Lisa Tipping Davis, Trial Judge. Timothy Griffith appeals an order granting the Oklahoma Department of Corrections' motion to dismiss his petition for declaratory judgment concerning the Oklahoma Sex Offenders Registration Act, 57 O.S. §§ 581 through 590.2 ("SORA"). This summary disposition appeal by a prisoner is governed by and follows the procedure set forth in Oklahoma Supreme Court Rule 1.36(d), 12 O.S. 2011, ch. 15, app. 1, without appellate briefing. The trial court found Griffith's petition "is time-barred" and the SORA statutes in effect on his conviction date required him to be designated as an aggravated sex offender and to register for life. Griffith's appeal raises error with both findings. We affirm the dismissal based on other reasons. AFFIRMED. Opinion by Swinton, V.C.J.; Mitchell, P.J., and Buettner, J. (sitting by designation), concur.

117,549 — Matthew K. Fansler, Brett A. Fansler, and Traci Fansler McDougall, Co-Trustees of the Arlyn R. And Linda A. Fansler Revocable Living Trust, Plaintiffs/Appellees, vs. Frankie Louise Humphrey, Defendant/Appellant. Appeal from the District Court of Blaine County, Oklahoma. Honorable Paul Woodward, Trial Judge. Defendant/ Appellant Frankie Louise Humphrey (Appellant) appeals from an order granting summary judgment in favor of Plaintiffs/Appellees Matthew K. Fansler, Brett A. Fansler, and Traci Fansler-McDougall, Co-Successor Trustees of the Arlyn R. And Linda A. Fansler Revocable Living Trust in a quiet title action concerning a real property mineral interest located in Blaine County, Oklahoma. Appellant argues that summary judgment was improperly granted because there was a dispute of material fact concerning the foreclosure action early in the chain of title, and that no minerals were conveyed. We AFFIRM. Opinion by Swinton, V.C.J.; Mitchell, P.J., and Buettner, J. (sitting by designation), concur.

Thursday, January 23, 2020

117,355 — Dianne Digilio Boyd, Plaintiff/Appellant, v. Michael G. Woolley, and Bearleen Woolley, Successor Co-Trustees of the Halford Family Trust, dated September 16, 1996; Patrick H. Woolley; Frank Digilio and Kathie Digilio, Defendants/Appellees. Appeal from the District Court of Murray County, Oklahoma. Honorable Aaron Duck, Trial Judge. Plaintiff below, Dianne Digilio Boyd (Appellant), appeals the trial court's order granting the summary judgment motion filed by Defendants Michael G. Woolley and Bearleen Woolley, as Successor Co-Trustees of the Halford Family Trust dated September 16, 1996, and Patrick H. Woolley (Appellees), in her action for an accounting as a beneficiary of the 1996 Halford Family Trust. After thorough review of the record on accelerated appeal, we find no revers-

ible error of law, and the trial court's findings of fact and conclusions of law adequately explains the decision filed August 14, 2018. The judgment is AFFIRMED under Okla. Sup.Ct. R. 1.202(d). Opinion by Swinton, V.C.J.; Mitchell, P.J., and Buettner, J. (sitting by designation), concur.

(Division No. 4)
Wednesday, January 15, 2020

117,634 — Kelvion, Inc., f/k/a GEA Heat Exchangers, Inc., Own Risk No. 17805, Petitioner, v. Marcus McDonald and the Workers' Compensation Commission, Respondents. Proceeding to review an Order of the Workers' Compensation Commission, Hon. Molly H. Lawyer, Administrative Law Judge. Employer, Kelvion, Inc., seeks review of a December 3, 2018, Order of the three-judge panel of the Workers' Compensation Commission (Commission) affirming the Administrative Law Judge's (ALJ) July 26, 2018, Order awarding Claimant, Marcus McDonald, surgical treatment and temporary total disability (TTD) benefits. After review, this Court finds Employer was not entitled to the appointment of another IME. However, the Commission did not address Employer's properly preserved assertion of error that Claimant was not entitled to TTD benefits. Accordingly, this Court sustains in part the Order under review and remands for further proceedings consistent with this Opinion. SUSTAINED IN PART AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division IV, by Rapp, J.; Barnes, P.J., concurs, and Wiseman, V.C.J., concurs in part, dissents in part.

Friday, January 31, 2020

117,366 — In re the Marriage of: Deana M. Ripperda, Petitioner/Appellee, v. Jeffrey S. Ripperda, Respondent/Appellant. Appeal from the District Court of Comanche County, Hon. Scott D. Meaders, Trial Judge. We are unpersuaded by Respondent's argument that the trial court's division of the marital estate is inequitable. We also reject his argument that the trial court abused its discretion in awarding $2,000 in equitable fees to Petitioner. However, we are persuaded by Respondent's argument seeking reversal of that portion of the decree ordering the parties to file a joint tax return for the years 2016 and 2017. We remand this case to the trial court with directions to vacate that portion of the decree and, if necessary, to equitably adjust the division of property upon taking into consideration the tax consequences of the parties no longer filing their taxes jointly. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS. Opinion from Court of Civil Appeals, Division IV, by Barnes, P.J.; Rapp, J., and Fischer, J., concur.

ORDERS DENYING REHEARING
(Division No. 1)
Wednesday, January 22, 2020

115,590 — Dan Simon, Plaintiff/Appellant/Counter-Appellee, vs. Hickory Ridge Ranch, L.L.C., Defendant/Appellee/Counter-Appellant. Appellant's Petition for Rehearing, filed January 15, 2020, is *DENIED*.

116,822 — FNMC, L.L.C., Plaintiff/Appellant, vs. Brown Realty Investments, L.L.C., Defendant/Appellee. Appellant's Motion for Rehearing, filed January 13, 2020, is *DENIED*.

Tuesday, January 28, 2020

116,790 (Comp. w/116,789, 117,085, 117,231 and 117,246 — Danny's Muffler & Tire, and Accident Fund Insurance Company, Petitioners, vs. Larry James Deckard and the Workers' Compensation Court of Existing Claims, Respondents. Petitioner's Petition for Rehearing, filed January 8, 2020, is *DENIED*.

116,789 (Comp. w/116,790, 117,085, 117,231 and 117,246 — Danny's Muffler & Tire, and Accident Fund Insurance Company, Petitioners, vs. Larry James Deckard and the Workers' Compensation Court of Existing Claims, Respondents. Petitioner's Petition for Rehearing, filed January 8, 2020, is *DENIED*.

(Division No. 4)
Wednesday, January 15, 2020

117,610 — Elbert Kirby, Jr. and Kay Kirby, Plaintiff/Appellants, vs. Legacy Roofing & Construction, LLC, Rana Montgomery, Martin Tyler, et al., Defendants/Appellees. Appellant's Petition for Rehearing is hereby *DENIED.*

Monday, February 3, 2020

118,297 — Melissa Duncan, as Personal Representative of the Estate of Danny Leo Stills, deceased, Plaintiff/Appellant, vs. Scott G. Lilly, M.D., an individual, Cardiology Clinic of Muskogee, Inc., an Oklahoma Corporation, Defendants/Appellees. Appellees Scott G. Lilly, M.D. and Cardiology Clinic of Muskogee, Inc.'s Joint Motion to Dismiss as Untimely, Appellant's Petition for Rehearing and Brief in Support, is hereby GRANTED.

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