

THE OKLAHOMA BAR **Journal**

Volume 91 — No. 4 — 2/28/2020

Court Issue



FRIDAY,
MARCH 13, 2020
9 A.M. - 12 P.M.

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

MCLE 3/3



PROGRAM PRESENTER:

Kathleen B. Nalty, Esq.,
Pres., Kathleen Nalty Consulting, LLC



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INTERRUPT YOUR UNCONSCIOUS BIASES AND MAKE BETTER DECISIONS

In this interactive session, attendees will create their own personal action plans after learning about the following:

- How unconscious biases are formed. The ways that implicit cognitive biases can show up in the legal workplace.
- How to recognize and interrupt your own biases.
- How to successfully navigate any hidden barriers caused by unintentional bias.
- How law offices can institute systemic changes to interrupt bias and foster a more inclusive environment that will allow diversity to thrive.

TUITION: Early-bird registration by March 6, 2020 is \$75.00. After March 6th, registration is \$100 and \$125 for walk-ins. Continental breakfast included. Registration for the live webcast is \$150. No other discounts available. All programs may be audited (no materials or CLE credit) for \$25 by emailing ReneeM@okbar.org to register.

THIS PROGRAM WILL NOT BE AVAILABLE ON-DEMAND

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THE OKLAHOMA BAR Journal

Volume 91 – No. 4 – February 28, 2020

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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.



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Opinions of Supreme Court

Manner and Form of Opinions in the Appellate Courts;

See Rule 1.200, Rules — Okla. Sup. Ct. R., 12 O.S. Supp. 1996 (1997 T. 12 Special Supplement)

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 Edu-

cation. “Rules” referred to shall mean and are the Rules of the Supreme Court of the State of Oklahoma for Mandatory Continuing Legal Education.

Regulation 2.

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

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

Regulation 3.

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

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

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

3.4 Credit may also be earned through teaching a course in an ABA accredited law school or a course in a paralegal or legal assistant

program accredited by the ABA. The Commission will award six (6) hours of CLE credit for each semester hour of academic credit awarded by the academic institution for the course.

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

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

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

PROGRAM GUIDELINES FOR LEGAL ETHICS AND PROFESSIONALISM CLE.

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

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

Mental Health and Substance Use Disorders programs will address issues such as attorney wellness and the prevention, detection and/or treatment of mental health disorders and/or

substance use disorders which can affect a lawyer's ability to provide competent and ethical legal services.

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

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

Regulation 4.

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

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

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

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

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

Exhibit A

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

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

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

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

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

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ed 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.

2020 OK 2

RE: Rate for Transcripts Paid by the Court Fund

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

ORDER

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

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

/s/ Noma D. Gurich
CHIEF JUSTICE

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

Colbert, J., Absent.

2020 OK 3

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

SCAD-20-5. January 13, 2020

ORDER ADOPTING AMENDMENTS AND NEW OKLAHOMA UNIFORM CIVIL JURY INSTRUCTIONS

¶1 The Court has reviewed the recommendations of the Oklahoma Supreme Court Committee for Uniform Civil Jury Instructions to

adopt recommended amendments to existing instructions and proposed new instructions. The Court finds that the amendments and new instructions should be adopted.

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

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

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

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

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

/s/ Noma D. Gurich
CHIEF JUSTICE

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

¶7 Winchester, J., not voting.

Instruction No. 1.12A

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

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

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

Notes on Use

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

Instruction No. 1.13A

Instruction No. 1.13A Directions for Verdict Form for Counterclaim

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

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

Notes on Use

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

Instruction No. 3.11A

Inference from Spoliation of Evidence

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

Notes on Use

This Instruction may be used if the court has imposed a sanction for spoliation of evidence. In order to give this Instruction,

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

Committee Comments

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

Instruction No. 6.4

Instruction No. 6.4

Employer and Employee — Defined

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

Comments

See Mistletoe Express Serv. v. Britt, 405 P.2d 4, 7 (Okla. 1965) (distinguishing an employee from an independent contractor). *Bouziden v. Alfalfa Elec. Coop., Inc.*, 2000 OK 50, ¶ 29, 16 P.3d 450, 459 (“The decisive test for determining whether one is an employee or an independent contractor is the right to control which the employer is entitled to exercise over the physical details of the work.”); *Keith v. Mid-Cont. Petroleum Co.*, 1954 OK 196, ¶ 15, 272 P.2d 371, 377 (“[T]he decisive test for determining whether one party is a servant or an independent contractor is to ascertain whether the employer has the right to control or purports and attempts to control, the mode and manner of doing the work.”).

Instruction No. 6.7

Instruction No. 6.7

Scope of [Agent/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 principal.

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, 714 748 (Syllabus by the Court) (1936). The principal is not bound by any act of the agent outside the scope of authority. *Continental 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 Princi-**

pal] 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 there-

on 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 ~~for 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 ~~for 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 Inflic-
tion of Emotional
Distress**

Instruction No. 20.1A **Elements of Liability
– Negligent Infliction
of Emotional Distress**

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

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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 in-

terference 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 con-

tract 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
Instruction No. 33.	Nuisance – Elements
Instruction No. 33.3	Nuisance – Public Nuisance
Instruction No. 33.1	

Nuisance — Introduction

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

Instruction No. 33.2

Nuisance — Elements

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

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

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

OR

Offended decency;

OR

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

OR

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

AND

2. The nuisance caused damages to [Plaintiff].

Comments

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

Instruction No. 33.3

Nuisance – Public Nuisance

A public nuisance is a nuisance that affects at the same time [an entire community/neighborhood]/[large number of persons], even though the amount of the [annoyance/damage] may be different for different people. In order to bring an action for a public nuisance,

[Plaintiff] must show by the greater weight of the evidence that **[Plaintiff]** has suffered a specific injury on account of the nuisance.

Notes on Use

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

Comments

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

2020 OK 12

State of Oklahoma ex rel. Oklahoma Bar Association, Complainant. v. George William Wiland, III, Respondent.

SCBD-6895. February 24, 2020

ORDER

¶1 The State of Oklahoma, ex rel. Oklahoma Bar Association (Complainant) by and through its Assistant General Counsel Katherine M. Ogden, has presented this Court with an application to approve the resignation of George William Wiland, III, (Respondent), OBA No. 20943, from membership in the Oklahoma Bar Association. Respondent seeks to resign pending disciplinary proceedings and investigation into his alleged misconduct, as provided in Rule 8, Rules Governing Disciplinary Proceedings (RGDP), 5 O.S. 2011, ch. 1, app. 1-A which provides in Rule 8.2:

Upon receipt of the required affidavit, the Commission shall file it with the Clerk of the Supreme Court and the Supreme Court may enter an order approving the resignation pending disciplinary proceedings.

Upon consideration of the Complainant's application and Respondent's affidavit in support of resignation, we find:

- 1) On February 10, 2020, following the Complainant's investigation of multiple professional misconduct allegations, Respondent submitted his written affidavit of resignation from membership in the Oklahoma Bar Association pending investigation of a disciplinary proceeding.
- 2) Respondent's affidavit of resignation reflects that:

a) the affidavit was freely and voluntarily rendered;

b) he was not subjected to coercion or duress; and

c) he was fully aware of the consequences of submitting the resignation.

Respondent states that although he is aware that the resignation is subject to the approval of the Oklahoma Supreme Court, he will treat it as effective on the date of filing his resignation.

3) Respondent states in his affidavit of resignation that he is aware of formal complaints filed against him and under investigation by Complainant as follows:

DC 17-101: Grievance by Walter Haskins: alleges that I attached Dr. Luker's signature to an affidavit prepared by me for use in my children's custody matter. Dr. Luker states that he never gave final permission to use his signature because he was not comfortable with the language of the affidavit.

DC 17-135 and DC 17-146 by Carrie Luelling and Bri'Anne Wiland: Carrie Luelling represented my former spouse, Bri'Anne Wiland, in our divorce and custody matter. Both parties filed a grievance against me alleging that I 'modified' a medical release to improperly request my wife's medical records. The original release was signed by my former spouse to allow a current physician to obtain her records from a previous physician. I allegedly altered the medical release so that the records would be sent to my attorney. I admit that I altered the authorization as a husband, father, and litigant, but not as an attorney.

DC 19-94: Grievance by Complainant's Office of General Counsel: alleges that I repeatedly failed to attend hearings, missed a deposition of my client and was held in contempt for using abusive language in the courtroom.

4) Respondent is aware that, if proven, the allegations concerning his conduct as set forth in the above-stated grievances, would constitute violations of Rule 1.3 of the Rules Governing Disciplinary Proceedings (RGDP), 5 O.S. 2011, ch. 1, app. 1-A and Rules 1.15 and 8.4(a)(c) and (d) of the Oklahoma Rules of Professional Conduct (ORPC), 5

O.S. 2011, ch.1, app. 3-A, and his oath as an attorney.

5) Respondent is aware that the burden of proof regarding the allegations asserted rests with Complainant but, Respondent waives any and all rights to contest the allegations.

6) An attorney, who is the subject of an investigation into, or a pending proceeding involving allegations of misconduct, may resign membership in the Oklahoma Bar Association by complying with the prerequisites for resignation set forth in Rule 8.1, Rules Governing Disciplinary Proceedings, 5 O.S.2011, Ch. 1, App. 1-A. In response, the Supreme Court may enter an order approving the resignation or, in the alternative, may refuse to approve the resignation and allow the Professional Responsibility Commission to proceed.

7) Respondent's resignation pending disciplinary proceedings is in compliance with all of the requirements set forth in Rule 8.1, Rules Governing Disciplinary Proceedings, 5 O.S.2011, Ch. 1, App. 1-A, and it should be approved.

8) The official roster address of Respondent as shown by the Bar Association records is: 7927 East 77th Place, Tulsa, Oklahoma 74133.

9) Respondent is unable to locate his Oklahoma Bar Association membership card, but offers to immediately tender the same should he find it.

10) Respondent acknowledges that Complainant has incurred costs in the investigative pursuit of this matter in the amount of \$13.36 and agrees to reimburse said costs within 30 days from the date of this order.

11) Respondent acknowledges that:

a) his actions may result in claims against the Client Security Fund and agrees to reimburse the Fund for any disbursements made because of his actions prior

to the filing of any application for reinstatement; and

b) he has familiarized himself with Rule 9.1, Rules Governing Disciplinary Proceedings, 5 O.S.2011, Ch. 1, App. 1-A with which he agrees to comply within twenty (20) days following the date of his resignation.

¶2 IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the resignation of George William Wiland, III, pending disciplinary proceedings, be approved with costs imposed in the amount of \$13.36 which will be paid within 30 days.

¶3 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED THAT the name of George William Wiland, III, be stricken from the roll of attorneys. Because resignation pending disciplinary proceedings is tantamount to disbarment, the Respondent may not make application for reinstatement prior to the expiration of five (5) years from the date of this order. Pursuant to Rule 9.1, Rules Governing Disciplinary Proceedings, 5 O.S.2011, Ch. 1, App. 1-A, the Respondent shall notify all of his clients having legal business pending with him within twenty (20) days, by certified mail, of his inability to represent them and of the necessity for promptly retaining new counsel. Repayment to the Client Security Fund for any monies expended because of the malfeasance or nonfeasance of the Respondent shall be a condition of reinstatement. No additional costs are imposed.

¶4 DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 24th DAY OF FEBRUARY, 2020.

/s/ Noma D. Gurich
CHIEF JUSTICE

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

CONCUR IN RESULT: Kauger, J.

NOT VOTING: Kane, J.

NOTICE OF INVITATION TO SUBMIT OFFERS TO CONTRACT

THE **OKLAHOMA INDIGENT DEFENSE SYSTEM BOARD OF DIRECTORS** gives notice that it will entertain sealed Offers to Contract ("Offers") to provide non-capital trial level defense representation during **Fiscal Year 2021** pursuant to 22 O.S. 2001, '1355.8. The Board invites Offers from attorneys interested in providing such legal services to indigent persons during **Fiscal Year 2021** (July 1, 2020 through June 30, 2021) in the following counties: **100% of the Oklahoma Indigent Defense System caseloads in THE FOLLOWING COUNTIES:**

**CRAIG, GARFIELD, GARVIN, GRANT, KAY, LATIMER
MCCLAIN, MCINTOSH, NOWATA, PITTSBURG, ROGERS**

Offer-to-Contract packets will contain the forms and instructions for submitting Offers for the Board's consideration. Contracts awarded will cover the defense representation in the OIDS non-capital felony, juvenile, misdemeanor, traffic, youthful offender and wildlife cases in the above counties during **FY-2021** (July 1, 2020 through June 30, 2021). Offers may be submitted for complete PISSBURG, coverage (100%) of the open caseload in any one or more of the above counties. Sealed Offers will be accepted at the OIDS offices Monday through Friday, between 8:00 a.m. and 5:00 p.m.

The deadline for submitting sealed Offers is 5:00 PM, Thursday, March 12, 2020.

Each Offer must be submitted separately in a sealed envelope or box containing one (1) complete original Offer and two (2) complete copies. The sealed envelope or box must be clearly marked as follows:

FY-2021 OFFER TO CONTRACT
_____ COUNTY / COUNTIES

TIME RECEIVED:
DATE RECEIVED:

The Offeror shall clearly indicate the county or counties covered by the sealed Offer; however, the Offeror shall leave the areas for noting the time and date received blank. Sealed Offers may be delivered by hand, by mail or by courier. Offers sent via facsimile or in unmarked or unsealed envelopes will be rejected. Sealed Offers may be placed in a protective cover envelope (or box) and, if mailed, addressed to OIDS, FY-2021 OFFER TO CONTRACT, P.O. Box 926, Norman, OK 73070-0926. Sealed Offers delivered by hand or courier may likewise be placed in a protective cover envelope (or box) and delivered during the above-stated hours to OIDS, at 111 North Peters, Suite 500, Norman, OK 73069. **Please note that the Peters Avenue address is NOT a mailing address; it is a parcel delivery address only.** Protective cover envelopes (or boxes) are recommended for sealed Offers that are mailed to avoid damage to the sealed Offer envelope. **ALL OFFERS, INCLUDING THOSE SENT BY MAIL, MUST BE PHYSICALLY RECEIVED BY OIDS NO LATER THAN 5:00 PM, THURSDAY, March 12, 2020 TO BE CONSIDERED TIMELY SUBMITTED.**

Sealed Offers will be opened at the OIDS Norman Offices on Friday, March 13 2020, beginning at 9:30 AM, and reviewed by the Executive Director or his designee for conformity with the instructions and statutory qualifications set forth in this notice. Non-conforming Offers will be rejected on Friday, March 13, 2020, with notification forwarded to the Offeror. Each rejected Offer shall be maintained by OIDS with a copy of the rejection statement.

NOTICE OF INVITATION TO SUBMIT OFFERS TO CONTRACT

Copies of qualified Offers will be presented for the Board's consideration at its meeting on **Friday, March 27th, 2020, at a place to be announced.**

With each Offer, the attorney must include a résumé and affirm under oath his or her compliance with the following statutory qualifications: presently a member in good standing of the Oklahoma Bar Association; the existence of, or eligibility for, professional liability insurance during the term of the contract; and affirmation of the accuracy of the information provided regarding other factors to be considered by the Board. These factors, as addressed in the provided forms, will include an agreement to maintain or obtain professional liability insurance coverage; level of prior representation experience, including experience in criminal and juvenile delinquency proceedings; location of offices; staff size; number of independent and affiliated attorneys involved in the Offer; professional affiliations; familiarity with substantive and procedural law; willingness to pursue continuing legal education focused on criminal defense representation, including any training required by OIDS or state statute; willingness to place such restrictions on one's law practice outside the contract as are reasonable and necessary to perform the required contract services, and other relevant information provided by attorney in the Offer.

The Board may accept or reject any or all Offers submitted, make counter-offers, and/or provide for representation in any manner permitted by the Indigent Defense Act to meet the State's obligation to indigent criminal defendants entitled to the appointment of competent counsel.

FY-2021 Offer-to-Contract packets may be requested by facsimile, by mail, or in person, using the form below. Offer-to-Contract packets will include a copy of this Notice, required forms, a checklist, sample contract, and OIDS appointment statistics for FY-2016, FY-2017, FY-2018 FY-2019 and FY-2020 together with a 5-year contract history for each county listed above. The request form below may be mailed to **OIDS OFFER-TO-CONTRACT PACKET REQUEST, P.O. Box 926, Norman, OK 73070-0926, or hand delivered to OIDS at 111 North Peters, Suite 500, Norman, OK 73069 or submitted by facsimile to OIDS at (405) 801-2661.**

REQUEST FOR OIDS FY-2021 OFFER-TO-CONTRACT PACKET

Name: _____

OBA #: _____

Street Address: _____

Phone: _____

City, State, Zip: _____

Fax: _____

County / Counties of Interest: _____

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Opinions of Court of Civil Appeals

2020 OK CIV APP 5

**OAK TREE PARTNERS, LLC, an Oklahoma
Limited Liability Company, Plaintiff/
Counterclaim Defendant/Appellee/Counter
Appellant, vs. TRACY WILLIAMS,
Defendant/Counterclaim Plaintiff/Appellant/
Counter Appellee, and JEFFREY O.
BOLDING, Third-Party Defendant/
Appellee.**

Case No. 115,853. November 26, 2018

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

HONORABLE ALETIA HAYNES TIMMONS,
TRIAL JUDGE

**AFFIRMED IN PART AND REVERSED
IN PART**

William A. Johnson, Matthew W. Brockman,
Michael A. Furlong, HARTZOG CONGER
CASON & NEVILLE, Oklahoma City, Oklaho-
ma, for Plaintiff/Counterclaim Defendant/
Appellee/Counter Appellant and Third-Party
Defendant/Appellee

Kiran A. Phansalkar, CONNER & WINTERS,
LLP, Oklahoma City, Oklahoma, and

Matthew L. Warren, WARREN LAW OFFICE
PLLC, Tulsa, Oklahoma, for Defendant/Coun-
terclaim Plaintiff/Appellant/Counter Appellee

P. THOMAS THORNBURGH, CHIEF JUDGE:

¶1 Tracy Williams appeals a combination of summary judgments, directed verdicts, and a jury verdict in this case that arose from a failed land deal. Oak Tree Partners, LLC (OTP), also appeals two judgments of the district court. On review, we reach the following conclusions:

1. Williams was not entitled to the remedy of “specific performance with abatement” in this case, and the district court did not err in granting summary judgment against him.
2. The status of the contractual disclaimer of warranty in this case is not determined by the question of whether this was a “per acre” sale, nor is it determined by case law involving residential real estate sales. The district court did not err in granting sum-

mary judgment against Williams’ contract claims.

3. Williams’ fraud claims failed to demonstrate the element of detrimental reliance, and the district court did not err in granting summary judgment against Williams’ fraud claims.

4. In this case, the relevant section of the Oklahoma Real Estate License Code (ORELC), 59 O.S.2011 §§ 858-101 through 858-515.2, creates no heightened duty or independent cause of action separate from common law fraud, and the district court did not err in granting summary judgment against Williams’ ORELC claims.

5. OTP’s slander of title cause of action failed as a matter of law because the filing of a petition and *lis pendens* in these circumstances is privileged, and the district court erred in submitting this claim to the jury.

6. As a result, OTP was not entitled to damages for slander of title.

7. OTP was, therefore, not entitled to fees as prevailing party in a slander of title action; in addition, the quiet title judgment was not fee-bearing because the provisions of the Nonjudicial Marketable Title Procedures Act were not followed.

8. The district court did not err in granting judgment against OTP’s claim of fraudulent inducement by Williams.

9. The district court did not err in granting judgment against OTP’s claim of “breach of warranty” by Williams.

BACKGROUND

¶2 An abbreviated history of this case is as follows: On April 1, 2014, Williams and OTP entered into a “uniform purchase contract,” which Williams drafted with the following terms:

Uniform Purchase Contract

I, or we, the undersigned hereby agree to purchase hereinafter described, to-wit:

All Property owned by Oak Tree Partners LLC located on the west side of Kelly within Oak Tree as described by the Oklahoma County Assessor R168590155, R1685-90150, additional acreage "A" in the NW corner of the Paddocks. See legal and map attached on Oklahoma County Assessor Real Property Detail Sheet.

Subject, however, and on condition that seller thereof has good and valid title, in fee simple, and agrees to furnish abstract to date of payoff and convey said premises by special warranty deed. On the following terms:

The total price to be Five Million One Hundred Fifty Thousand and NO/100 Dollars (\$5,150,000.00), of Which Fifty Thousand and NO/100 Dollars (\$50,000.00) is to be paid in cash in accordance with the terms of this agreement, the balance to be on the following terms, to-wit:

\$50,000.00 hereby acknowledged. The remaining principal balance of \$5,100,000.00 to be paid in cash by Friday August 1, 2014.

"All Property" includes ALL Land known as Tract G 44.12ac, Paddocks NW/C 16.8 acres, Paddocks Lots (2) 4.82 acres, FF 16.23 acres, FN 17.74 acres. – Refer to attached 2 page email from Jeff Bolding on 3/21/14.

Seller to pay for a boundary and alta survey for the above parcels.

Seller to pay Doc Stamps and abstracting. Buyer to pay for title insurance. All other closing costs to be split equally by buyer and seller.

Buyer has been granted a due diligence period until May 30, 2014. The \$50,000 earnest money is to go "hard" and non-refundable after May 30, 2014.

Buyer is a licensed realtor. No commission will be paid.

¶3 Among the documents Williams attached to the purchase contract were two printouts from the county assessor's website,¹ two rough hand-drawn diagrams, and an extract from an email to Williams from Third-party Defendant Jeffrey Bolding, as follows:

On Mar 21, 2014, at 9:43 AM, Jeff Bolding jbolding@blantonproperty.com wrote:

G (Kelly)	44.12	\$70,000.00	\$3,088,400.00
Paddocks NW/C	16.8	\$70,000.00	\$1,175,000.00

Paddocks Lots (2)	4.82	\$250,000. ea	\$500,000.00
FF	16.23	\$70,000.00	\$1,085,700.00
FN	17.74	\$70,000.00	\$1,241,800.00

Adding the totals, this attachment appeared to identify 99.71 acres of property. However, a part of the tracts identified in the contract had, in fact, already been sold by OTP to a third party. The stated purchase prices add up to \$7,090,900, not the \$5,150,000 + \$50,000 earnest money stated in the purchase contract.

¶4 OTP also drafted an addendum that was made a part of the contract and included the following language:

PURCHASER ACKNOWLEDGES AND AGREES THAT SELLER HAS NOT MADE, AND SPECIFICALLY NEGATES AND DISCLAIMS, ANY REPRESENTATIONS, WARRANTIES, COVENANTS OR AGREEMENTS OF ANY KIND OR CHARACTER, ORAL OR WRITTEN PAST, PRESENT OR IN THE FUTURE, REGARDING ANY ASPECT OF ANY OF THE PARCELS BEING SOLD (THE "PROPERTY").

ADDITIONALLY, NO PERSON ACTING ON BEHALF OF SELLER IS AUTHORIZED TO MAKE, AND BY EXECUTION HEREOF PURCHASER ACKNOWLEDGES THAT NO PERSON HAS MADE, ANY REPRESENTATION, WARRANTY, COVENANT OR AGREEMENT REGARDING THE PROPERTY OR THE TRANSACTIONS CONTEMPLATED IN THE AGREEMENT. PURCHASER ACKNOWLEDGES THAT, HAVING BEEN GIVEN THE OPPORTUNITY TO INSPECT THE PROPERTY, PURCHASER IS RELYING SOLELY ON ITS OWN INVESTIGATIONS AND NOT ON ANY INFORMATION PROVIDED OR TO BE PROVIDED BY SELLER.

¶5 The contract provided for a 60-day due diligence period.

¶6 On July 21, 2014, after the due diligence period had expired, but before the August 1, 2014 payment date, Williams, through counsel, sent a letter to OTP alleging the following:

1. The 44.12 acre tract contained only 39.69 acres;
2. The 17.74 acre tract contained only 15.79 acres;

3. The 16.8 acre tract actually contained 17.43 acres.

Williams alleged a shortfall of 6.47 acres, and requested a reduction of \$335,205 (*i.e.*, \$51,500 per acre) in the purchase price. OTP responded that the shortfall was only 4.28 acres,² and invoked the warranty disclaimer and the end of the due diligence period. On that basis, OTP stated that Williams was not entitled to a price reduction or to rescind the contract.

¶7 On July 28, Williams responded with a settlement offer that claimed fraud by OTP and Bolding, and offered to settle for performance of the contract and a credit of \$483,000. The latter amount apparently consisted of \$380,000 for a lot known as Paddock 16 that was included in the original contract but not owned by OTP, and damages to compensate Williams for the “benefit of the bargain.” OTP rejected this offer. On August 11, 2014, OTP filed a petition for declaratory judgment, quiet title, and money damages. On August 12, Williams filed a petition against OTP and Bolding seeking “specific performance with abatement,” lost profit damages for breach of contract and/or for fraud, and damages for “breach of real estate license obligations” by Bolding. Williams also filed a *lis pendens* against the property. OTP moved to dismiss Williams’ petition, or in the alternative, to consolidate the cases filed by OTP and Williams. The court denied the motion to dismiss and consolidated the two cases.

¶8 On November 14, 2014, OTP moved for summary judgment on Williams’ claims against OTP. On January 6, 2015, the district court granted this motion. A prolonged and contentious exchange among counsel followed regarding the details of a journal entry.³ A journal entry was eventually filed on March 6. Meanwhile, OTP filed a motion to amend its petition to add new claims against Williams, including fraudulent inducement, tortious interference, and slander of title. These claims were based on the argument that Williams had intentionally signed, then reneged, on the warranty disclaimer, and had deliberately brought meritless claims and filed a *lis pendens* to block the sale of the property to a willing third-party buyer. The court allowed the amendment. On March 16, 2015, OTP filed a motion for partial summary judgment on several issues, including whether Williams was entitled to “specific performance with abatement.” The court denied this motion on March 30.

¶9 On May 26, 2015, Bolding filed a motion for summary judgment on Williams’ claims against him. This motion was eventually granted in August 2016.⁴ In January 2016, OTP filed a motion for partial summary judgment on Williams’ affirmative defense of fraud, which the court granted. In January 2016, Williams filed a motion to reconsider the January 2015 summary judgment disposing of his claims against OTP. He also filed a motion seeking summary judgment against OTP’s claims for breach of warranty, fraudulent inducement, and slander of title. The court granted summary judgment against OTP’s claims for fraudulent inducement. It denied the motion to reconsider.

¶10 In August 2016, OTP dismissed (over Williams’ objection) the remainder of its declaratory judgment claims, leaving its claims for quiet title, tortious interference, and slander of title. These matters were set for trial in February 2017. At trial, the jury found for Williams on OTP’s tortious interference claim and for OTP on its slander of title claim in the amount of \$250,000. The jury also made a first stage finding of intentional and malicious conduct by Williams, and considered second stage punitive damages, but awarded \$0. OTP then moved for triple damages pursuant to 16 O.S.2011 § 79, and the court sustained the motion. The court later awarded attorney fees to OTP pursuant to the same statutory section. Both parties now appeal various aspects of the proceedings.

STANDARD OF REVIEW

¶11 This case includes claims determined by a jury trial, claims determined by summary judgment, and claims sounding in equitable theories of recovery. The appellate standard of review of summary judgment is *de novo*. *Boyle v. ASAP Energy, Inc.*, 2017 OK 82, ¶ 7, 408 P.3d 18. Matters of equitable cognizance require the application of two standards of review. *Hall v. Galmor*, 2018 OK 59, ¶¶ 11-13, 427 P.3d 1052. “We will not reverse the trial court’s factual findings or ultimate decision unless they are clearly against the weight of the evidence.” *Id.* ¶ 12. “Issues of law, however, are reviewable by a *de novo* standard.” *Id.* ¶ 13. Williams’ argument regarding the jury verdict is that it is tainted by fundamental error because, as a matter of law, a slander of title cannot be based on the filing of an accurate *lis pendens*. The trial court’s duty is to state the law correctly, and as noted, questions of law are reviewed *de novo*.

De novo review is plenary, independent, and non-deferential. *Pina v. Am. Piping Inspection, Inc.*, 2018 OK 40, ¶ 14, 419 P.3d 231.

ANALYSIS – WILLIAMS' ALLEGATIONS OF ERROR

¶12 Williams briefs seven propositions of error, as follows:

I. The district court erred by granting OTP summary judgment on Williams' counterclaim for specific performance and/or breach of contract.

II. The district court erred by granting OTP summary judgment on Williams' counterclaim for fraudulent misrepresentation.

III. The district court erred by granting Bolding summary judgment on Williams' third-party claim for fraudulent misrepresentation.

IV. The district court erred by granting Bolding summary judgment on Williams' third-party claim for breach of obligations under the OREL.

V. The district court erred by denying Williams' motions for directed verdict and judgment notwithstanding verdict on OTP's slander of title cause of action.

VI. The district court erred by granting OTP's motion for entry of judgment on quiet title claim and for treble damages pursuant to 16 O.S. § 79.

VII. The district court erred by granting OTP's amended and corrected motion for award of attorney fees and costs pursuant to 16 O.S. § 79.

I. SUMMARY JUDGMENT ON WILLIAMS' CLAIMS FOR SPECIFIC PERFORMANCE AND/OR BREACH OF CONTRACT

A. Specific Performance

¶13 Williams argues that the court erred in granting summary judgment against his claim for specific performance of the contract. As we noted in our prior opinion in Appeal No. 115,427, Williams did not seek "specific performance" as it is generally understood in Oklahoma jurisprudence, but sought "specific performance with an abatement of purchase price," *i.e.*, a court-ordered performance involving less property at a court-imposed lower price. A canvass of the published Oklahoma decisions reveals only three cases mentioning this remedy in the last

85 years.⁵ *Hales v. Rasmussen*, 1932 OK 255, ¶ 9, 9 P.2d 944, states, "We have such a thing as a decree in specific performance with abatement of price," but the Rasmussen Court did not apply the remedy, or state any standards by which it must be judged.

¶14 In *Tickel v. Felton*, 1959 OK 206, 345 P.2d 901, the plaintiff signed a contract to buy land from two brothers who were tenants-in-common, but one brother didn't sign the contract. Plaintiff sought to enforce the contract for half the property, at half the price. The trial court found in favor of plaintiff but then granted a new trial. Plaintiff appealed the grant of new trial. The *Tickel* Court appeared to contradict *Hales*, noting that "the question of whether partial specific performance may be had, with abatement of consideration . . . , has never been decided in this jurisdiction," and upheld the grant of a new trial without further comment on this claimed remedy. *Id.* ¶ 9.

¶15 Finally, in *In re Hayhurst's Estate*, 1970 OK 224, 478 P.2d 343, the Supreme Court apparently recognized the remedy using two legal encyclopedias as a basis. This decision is difficult to interpret, however, because the *Hayhurst's Estate* Court did not actually apply the remedy it recognized.

¶16 The Court first stated, at 1970 OK 224, ¶ 20:

It is a general rule that where the vendor is unable to convey the property which he has agreed to convey because of a defect in the quality or quantity of the estate which he possesses and the vendee has entered into the contract without knowledge or notice of the deficiency or defect in the vendor's title, the vendee may have specific performance of the contract as to whatever interest the vendor has with such restitution or abatement as to the purchase price as may be determined by the court. 81 C.J.S. Specific Performance s 21b(2)(a), p. 448. *See also* 49 Am.Jur. Specific Performance, s 105, p. 123; *Bellamah v. Schmider*, 68 N.M. 247, 360 P.2d 656; Annotation 154 A.L.R. 767, 768; *Hart v. Honrud*, 131 Mont. 284, 309 P.2d 329, 333.

It then heavily qualified the remedy, at ¶¶ 21-22, as follows:

There are limitations and qualifications to this general rule granting specific performance with abatement of a portion of the

purchase price. Specific performance cannot be invoked by the purchaser who, at the time of making the contract, had notice of the fact that the vendor had a limited interest in the land, or that his title was defective. 49 Am.Jur. Specific Performance, s 106, pp. 125, 126; 81 C.J.S. Specific Performance s 21b(2)(a), p. 450; *Bellamah v. Schmider*, *supra*; *Caveny v. Asheim*, 202 Or. 195, 274 P.2d 281, 293.

Another qualification to such general rule is that specific performance should not be granted where to do so **would in effect make a new contract between the parties**. 81 C.J.S. Specific Performance s 21b(2)(a) p. 449; *Bellamah v. Schmider*, *supra*; *Waldeck v. Hedden*, 89 Cal.App. 485, 265 P. 340, 342; *Merritz v. Circelli*, 361 Pa. 239, 64 A.2d 796, 7 A.L.R.2d 1325, 1329. (Emphasis added).

The Court then went on to find that the remedy was *not applicable in that case* because, “It is our conclusion that [Plaintiff] knew of the defect in the title, and of the hazards of establishing a marketable title.” 1970 OK 224 at ¶ 24.

¶17 Consequentially, the Court did not explain how to resolve the potential conflict between ¶ 20, allowing a court to equitably change fundamental contract terms such as quantity and price, and ¶ 22, forbidding a court from making a “new contract between the parties.” *Aequitas sequitur legem* (equity follows law), and the principle that a court may not re-write a contract is well-established. See *Oxley v. General Atlantic Resources, Inc.*, 1997 OK 46, ¶ 14, 936 P.2d 943; *Mercury Inv. Co. v. F.W. Woolworth Co.*, 1985 OK 38, 706 P.2d 523. The Supreme Court noted in *Atkinson v. Barr*, 1967 OK 103, ¶ 35, 428 P.2d 316, that proof that a contract was established is a pre-requisite to a right to specific performance and the general rule that there must be a “meeting of the minds of the contracting parties upon all the material terms and provisions” before a contract is formed. See *Roads W., Inc. v. Austin*, 2004 OK CIV APP 49, ¶ 15, 91 P.3d 81, citing *Niagara Fire Ins. Co. v. Aebischer*, 1934 OK 684, 44 P.2d 5.

¶18 The answer to this dilemma may lie in the very unusual facts of *Hayhurst’s Estate*, in which a probate was filed in 1932 and remained open for 33 years. During this period, Fannie Hayhurst agreed to sell Doyle Westfall 240 acres in Lincoln County for \$15,000, plus the expense of a “title suit.” *Id.* ¶ 5. The title suit was necessary because of the open probate

question as to whether Fannie had actually inherited the 240 acres. Before this claim was resolved, Fannie filed a probate election to take a statutory *one-third* share of the property. *Id.* ¶ 7. This left Westfall with a contract to buy 240 acres from Fannie, who had renounced her right to 160 of those acres.

¶19 It was at this point that the *Hayhurst’s Estate* Court raised the question of “performance with abatement,” *i.e.*, whether Westfall was entitled to enforce a contract for one-third of the property at one-third of the price. The court held that he was not, because Westfall knew of the “hazards of establishing a marketable title, and that to grant specific performance as to the one-third interest would in effect make a new contract between the parties.”⁶ *Id.* ¶ 24.

¶20 Even assuming (without holding) that such a remedy may be considered in this case, the question is whether the holding of *Hayhurst’s Estate* acts as Williams argues – to invalidate a disclaimer of warranty with an accompanying due diligence period – in a modern commercial real estate transaction. Applying “specific performance with abatement” in such a case could fundamentally alter the nature of commercial contracts. Absent fraud, a commercial buyer who discovers a deficit in the stated acreage or other representation during the due diligence period has three options: to continue the transaction without complaint; to withdraw from the transaction within the due diligence period; or to *negotiate* a new price with the seller. If the buyer does not take advantage of this due diligence period, the defect is generally waived.

¶21 This system would be fundamentally altered if a buyer were permitted to ignore these contractual paths and options and courts were to routinely impose new purchase prices for property whenever an inaccuracy or defect is discovered. Indeed, there would be little purpose in a contractual due diligence period if the courts will later correct any failure of a buyer to inspect or verify representations and conditions.⁷

¶22 Key to the *Hayhurst’s Estate* decision was the finding that Westfall knew of the “hazards of establishing a marketable title, and that to grant specific performance as to the one-third interest would in effect make a new contract between the parties.” *Id.* We are not inclined to read this statement as holding that a disclaimer

of warranty in a commercial real estate contract is invalidated by the doctrine of specific performance with abatement, or that courts may fundamentally re-write contracts. The opposite conclusion appears more likely true, *i.e.*, that a disclaimer puts a buyer on notice of the “hazard” of inaccurate size and that abatement is not available. In the context of this case, we find no error in the district court’s decision regarding “specific performance with abatement of price.”

B. Breach of Contract

¶23 Williams next argues that the district court erred in granting summary judgment against his breach of contract claim. The fundamental question presented here is whether the disclaimer of warranty contained in the purchase contract is effective in this case. First, however, Williams argues that the district court made irreconcilable decisions which, in turn, demonstrate the existence of a question of fact as to his breach of contract claim.

1. “Irreconcilable Decisions”

¶24 The court granted summary judgment *against* Williams’ claims for specific performance with abatement and breach of contract. It also denied OTP’s motion seeking judgment that Williams was not entitled to an abatement of the purchase price. Williams argues that the court thereby found that there was a question of fact as to whether Williams was entitled to abatement, and also found that there was not a question of fact whether Williams was entitled to abatement. Therefore, he argues, the court’s own decisions show a dispute of fact.

¶25 This argument, however, ignores another possibility – *that one decision was wrong*. It further does not take into account the appellate standard of review of a summary judgment as part of a final order. We review these decisions as merged into the final judgment *de novo* based on the record, and give no deference to the district court’s conclusions of law. If the decisions were truly inconsistent, our task is to determine which was correct, not to simply return the matter to the district court. *As discussed above, we find no error in the district court’s summary judgment against Williams’ claim for “specific performance with abatement.”* Thus, any contrary finding by the district court is a nullity.

2. The Disclaimer of Warranty

¶26 The parties executed an addendum to the Uniform Purchase Contract that stated as follows:

PURCHASER ACKNOWLEDGES AND AGREES THAT SELLER HAS NOT MADE, AND SPECIFICALLY NEGATES AND DISCLAIMS, ANY REPRESENTATIONS, WARRANTIES, COVENANTS OR AGREEMENTS OF ANY KIND OR CHARACTER, ORAL OR WRITTEN PAST, PRESENT OR IN THE FUTURE, REGARDING ANY ASPECT OF ANY OF THE PARCELS BEING SOLD (THE “PROPERTY”).

ADDITIONALLY, NO PERSON ACTING ON BEHALF OF SELLER IS AUTHORIZED TO MAKE, AND BY EXECUTION HEREOF PURCHASER ACKNOWLEDGES THAT NO PERSON HAS MADE, ANY REPRESENTATION, WARRANTY, COVENANT OR AGREEMENT REGARDING THE PROPERTY OR THE TRANSACTIONS CONTEMPLATED IN THE AGREEMENT. PURCHASER ACKNOWLEDGES THAT, HAVING BEEN GIVEN THE OPPORTUNITY TO INSPECT THE PROPERTY, PURCHASER IS RELYING SOLELY ON ITS OWN INVESTIGATIONS AND NOT ON ANY INFORMATION PROVIDED OR TO BE PROVIDED BY SELLER.

¶27 Williams argues that the disclaimer applies only to “extra contractual” representations. This interpretation is at odds with the contractual language that Williams “acknowledges that, having been given the opportunity to inspect the property, purchaser is relying **solely** on its own investigations and not on **any** information provided or to be provided by seller.” (Emphasis added). The plain language of the addendum is not limited to extra-contractual representations (which, regardless, would not be a part of the contract at common law).

¶28 Williams further argues that the disclaimer of warranty is ineffective because the sale was made on “per acre” basis instead of a “tract” basis, relying on a line of cases typified by *Hickman v. Hight*, 1923 OK 537, 217 P. 878. Williams argues that, because the total acreage could be calculated from the attachments to the purchase agreement, and a total purchase price was stated, a “per acre” price can be calculated. He contends that if a per acre price can be cal-

culated, the contract becomes a “per acre” contract and its legal status changes. Williams essentially argues that *Hickman* invalidates *disclaimers of warranty as to size* in a “per acre” contract, and that delivery of the exact stated acreage (or damages) is required.

¶29 In a state that uses a grid survey system to make legal descriptions, however, many “tract” descriptions clearly convey certain acreages that can be used to calculate a per acre price. A quarter-section is known by any competent purchaser to contain 160 acres, a quarter/quarter to contain 40 acres, etc. Further, any commonly shaped tract with dimensions stated in feet can quickly be calculated as acreage. Therefore, by Williams’ interpretation, all land sales are “per acre” unless the contract mentions neither acreage nor dimensions nor a portion of a section. The ability to calculate acreage by a simple mathematical process affords an unlikely ground on which to substantially change the effect of a contractual disclaimer.

¶30 We also note that, in his interlocutory appeal in Appeal No. 115,427, concerning the *lis pendens* issue, Williams argued that the shortage of acreage came from “the three most valuable parcels of land,”⁸ thus suggesting that each acre was not of equal value, which is a salient feature of a “per acre” contract. Fundamentally, however, we do not agree that the result of *Hickman*, or the status of a contractual disclaimer of warranty, turns on this *per acre vs. tract distinction*.

¶31 In *Hickman*, the plaintiff contracted to purchase land for \$5,850, and was given a deed for:

All that part of the southeast quarter of the southeast quarter of the southwest quarter, lying east and south of the Poteau river, * * * and all that part of the northwest quarter of the northwest quarter of section twenty-three (23) lying west of James Fork creek, all in township eight (8) north and range twenty-five (25) east, of the Indian base and meridian, containing 117 acres more or less

Id. ¶ 2

¶32 The plaintiff later sued, alleging a shortage in the amount of land actually conveyed, and the jury agreed, finding a shortage of 15.4 acres and ordering damages of \$50 per acre for breach of the warranty deed. The defendant seller appealed. The Supreme Court concen-

trated *not on an acreage versus tract analysis* but on whether the phrase “117 acres more or less” in the deed was merely an approximate description of the property or a warranted transfer of 117 acres. The Court held that “the words ‘more or less’ apply only to small excesses or deficiencies” and “imply that there is no considerable difference in quantity[.]” *Id.* ¶ 10.

¶33 The rule of *Hickman* appears to be two-fold: 1) the purchaser of land described without measurement should expect a greater variation in estimated-versus-actual size than should the purchaser of a specifically defined acreage; and 2) a description of an acreage as “more or less” waives only “unimportant inaccuracies” in size.

¶34 Applying the foregoing to the instant case, even if the approximately 16 percent shortage in *Hickman* can be equated to the 7.1 (or 6.6, or 4) percent shortage here, *Hickman* and similar cases involve only the mildest type of disclaimer – *i.e.*, that a tract is of a certain size “more or less,” meaning that these words are “intended to cover some unimportant inaccuracy.” We find no indication that *Hickman*, or any similar case, invalidates a much more explicit disclaimer of warranty in a commercial real estate contract that contains a due diligence period and a purchaser’s agreement that it “is relying solely on its own investigations.”

¶35 We further note that, in *Hickman* and similar cases, the plaintiff *actually purchased* the undersized tract at full price, and equity therefore demanded the court’s intervention. Here, Williams did not purchase the purported 99.71 acres and then discover a shortage. *He did not purchase it at all* and then attempted to apply *Hickman* to a form of “anticipatory breach.” We find no error in the district court’s grant of summary judgment against Williams’ breach of contract claims.

II. FRAUDULENT MISREPRESENTATION BY OTP

A. Residential cases such as *Bowman* and *Lopez* do not control in this case

¶36 Aside from the question of breach of contract, Williams argues that OTP committed independently actionable fraud by representing that the property consisted of 99.71 acres when, in fact, it was some four acres less. Williams’ claim is one of fraud in the inducement, which is defined as “a misrepresentation as to the terms, quality or other aspects of a contractual relation, venture or other transaction that

leads a person to agree to enter into the transaction with a false impression or understanding of the risk, duties or obligation she has undertaken.” *Harkrider v. Posey*, 2000 OK 94, ¶ 11, 24 P.3d 821.⁹ Case law recognizes the general principle that a party may not contractually disclaim his or her own representation if the representation is fraudulent.

¶37 Williams cites *Bowman v. Presley*, 2009 OK 48, 212 P.3d 1210, and *Lopez v. Rollins*, 2013 OK CIV APP 43, 303 P.3d 911, as holding that the disclaimers of warranty and reliance here are invalidated by case law, and that for purposes of his fraud claim, he reasonably relied on the inaccurate statement of acreage as a matter of law despite the disclaimer.

¶38 *Bowman* dealt with a residential property that was discovered, after purchase, to be 700 square feet (25 percent) smaller than was presented in the realtor’s materials. The sales contract contained the following disclaimer:

15. DISCLAIMER AND INDEMNIFICATION: It is expressly understood by Seller and Buyer that [Broker and licensees] do not warrant the present or future value, **size by square footage**, condition, structure, or structure systems of the Property or any building . . .

Id. n.7 (emphasis in original).

Despite this disclaimer, the Court held:

Buyers of real property may rely on positive representations made by realtors and sellers about the property’s size. Representations of the size of real property are statements of material fact, not expressions of opinion, and a buyer need not conduct a separate investigation to ascertain their truth.

Id. ¶ 31.

¶39 It is this paragraph on which Williams primarily relies, arguing that it overcomes the contractual disclaimer here that no representations were warranted and that “purchaser is relying solely on its own investigations and not on any information provided or to be provided by seller.” Although the conclusion of the *Bowman* case is clear, the Court’s legal basis for its ruling in *Bowman* requires further inquiry.

¶40 A court generally lacks the power to revise or strike clauses from an unambiguous contract. *Bowman* discusses the doctrine of

caveat emptor, holding that this common law doctrine does not reach situations where a purchaser of real property has relied upon a positive representation of material fact. However, an express *contractual disclaimer* of warranty does not rely on *caveat emptor*, but on a specific written agreement between the parties. Parties are largely free to ‘contract around’ common law and statutory requirements, unless to do so would offend the public policy embodied in the common law or a statute.¹⁰ We can only assume, therefore, that the Court in *Bowman* found the disclaimer to be invalid because it was unconscionable and offended public policy.

¶41 The reason for such a rationale in *Bowman* is not hard to divine. Buyers of a residential home typically are not skilled in real estate transactions and are in no position to carry out a substantial verification of the exact square footage of a residential property before purchase. The imbalance of power between, on one side, a real estate professional who drafts a contract of adhesion disclaiming warranty, and, on the other side, an average residential buyer, is clear.

¶42 It is far less clear whether the freedom of sophisticated and equally-situated commercial parties to negotiate a contractual disclaimer of warranty should be restricted by the same public policy. The size inaccuracy in *Bowman* was on the order of 25 percent, rather than the 4-5 percent in this case, and this differential may have been a significant factor, but the *Bowman* decision does not appear to condition its application on the magnitude of the inaccuracy involved. Only two possible rules, therefore, may be derived from *Bowman*: either all contractual disclaimers of representations of the size of a property are invalid, or the holding of *Bowman* is generally restricted to residential real estate contracts of adhesion and unsophisticated residential buyers. We find the latter rule to be correct.

B. Fraud and Disclaimers of Warranty Generally

¶43 Although *Bowman* and *Lopez* do not *compel* a conclusion that the warranty disclaimer of the type presented here is invalid as a matter of law in a commercial real estate contract, this fact is not dispositive. The common law may still regard representations made by a party in one clause and simultaneously disclaimed in another clause, as a form of fraudulent inducement.

¶44 Williams cites *Murray v. D & J Motor Co., Inc.*, 1998 OK CIV APP 69, 958 P.2d 823, for the principle that “a disclaimer of warranties is not material to a fraud action.” *Id.* ¶ 35. *Murray* involved a consumer transaction in goods.¹¹ As we noted in our discussion of *Bowman*, however, consumer contracts for goods often operate on different UCC-based rules, and present different public policy questions.

¶45 Williams also cites a commercial case, *Thrifty Rent-A-Car Sys., Inc. v. Brown Flight Rental One Corp.*, 24 F.3d 1190 (10th Cir. 1994), for this principle. *Thrifty* dealt with an affirmative defense of fraud in the inducement against the enforcement of a franchise contract Brown had signed.¹² The 10th Circuit found that a jury question existed as to fraudulent inducement, despite a contractual disclaimer of a promise that vehicles would be timely delivered.

¶46 Neither *Murray* nor *Thrifty* ruled, as Williams appears to argue, that the involved disclaimers were invalid *as a matter of law*; rather, they held that a jury question may be presented in those circumstances and other facts may overcome the disclaimer. However, we will assume that these cases apply in the current situation and that a jury question thereby existed as to whether the disclaimer was effective against a fraud claim. Therefore, the trial court properly could not have relied on it as the basis for summary judgment against Williams’ fraud claim.

C. Damages for Fraud

¶47 “In an action for fraud damages are rooted in the natural and probable consequences of the acts charged, not by the stand-alone fact that fraud was perpetrated.” *Bowman*, 2009 OK 48 at ¶ 12. Even if the disclaimer is invalidated, the questions of reliance and detriment have some unusual twists in this case. Here, detection of the alleged fraud occurred before the date that payment was due, and no payment was made. This situation does appear to be covered by long-standing law in a number of jurisdictions, including Oklahoma. In *Reger v. Henry*, 48 Okla. 759, 150 P. 722, (1915),¹³ the Court held that where a purchaser has been induced by the fraud of the owner through a third person to make a purchase, “she could pursue one of two remedies, rescind the contract, and restore, or offer to restore, the consideration, or affirm the contract and sue for damages.”

¶48 In *Thrower v. Brownlee*, 12 S.W.2d 184, 185 (Tex. Ct. App. 1929), Thrower entered into a

contract to sell Brownlee some lots in the city of Houston. Brownlee subsequently found that Thrower was unable to convey the lots. Brownlee sued for fraud. The court stated that “the undisputed facts show that, before the purchase was consummated, Brownlee had full notice that Thrower would not perform his promise” and noted that “[t]he rule is well recognized that a person induced to enter into a contract by fraud practiced upon him has a choice of remedies; that is, to rescind or to waive the right to rescind and to sue the wrongdoer for damages.” *Id.* at 186. The same principle is noted in *Harmony Homes Corp. v. Cragg*, 390 A.2d 1033, 1035 (Me. 1978): “Ordinarily, a party may not affirm, or make use of, a contract to recover damages for breach thereof consistently with treating the contract as having been disaffirmed.”

¶49 Bowman notes that “Buyers, while affirming their contract despite the misrepresentation, seek to recover the benefit of the bargain to which they believe they are entitled.” *Id.* ¶ 14 (emphasis added). Various other cases collected at 13 A.L.R.2d 807 § 4[a], “*Fraud on purchasers, lessees, bailees, etc – Purchases of land; exchanges*,” illustrate the same principle. If a buyer has made part payment before the discovery of the fraud, the buyer may *repudiate and recover this part payment, or affirm and sue for the benefit of the bargain*. Although the doctrine of election of remedies prior to judgment has largely been overcome in modern Oklahoma common law (see e.g., *Howell v. James*, 1991 OK 47, ¶ 14, 818 P.2d 444), these cases do not involve a genuine election of remedies, but condition the available damages in a fraud claim on *when the fraud was discovered and what action the party subsequently took*.

¶50 The record is clear that, no later than May 30, 2014, Williams knew of the size discrepancy. Therefore, the alleged fraud was discovered before performance by Williams was due. Payment was not due until August 1, 2014, and closing was extended until August 12. On August 12, Williams’ counsel refused to close without OTP reducing the price by \$480,000 and paying “attorney fees.” Williams testified that he was not willing to close the deal for the contract price after the discrepancy was discovered.

¶51 This behavior is clearly a repudiation of the contract rather than an affirmation. See e.g., *EKE Builders, Inc. v. Quail Bluff Associates*, 1985 OK CIV APP 46, 714 P.2d 604. Applying *Reger*

and similar law, Williams' fraud damages were therefore limited to any partial payment or other detriment incurred before that date. Williams was not entitled to both repudiate the contract and seek "benefit of the bargain" damages that would have accrued after that time.

D. Damages Before the Alleged Fraud Was Discovered

¶52 Although Williams was not entitled to "benefit of the bargain" damages after repudiation, the sum of case law indicates that a buyer who discovers fraud before a contract is consummated, and repudiates on that basis, may recover any partial payment or other detriment that has already accrued. Williams did pay \$50,000 in "earnest money" that would be applied to the price if the contract was completed. The next question is, therefore, whether Williams could recover this amount as damages in a fraud claim.

¶53 If the \$50,000 was a simple down payment, the situation would mirror that in *Reger* and similar cases. A down payment made before the discovery of the fraud and subsequent repudiation would be recoverable as damages. However, the \$50,000 in this case was characterized as "earnest money" that "is to go 'hard' and non-refundable after May 30, 2014" (the end of the due diligence period). This complicates the situation and illustrates yet another reason why the general common law of contracts is difficult to apply in commercial real estate transactions, which have developed an independent contractual framework, custom, and practice.

¶54 The contract contained a due diligence period for Williams to verify the size of the various tracts and conduct other feasibility studies. It stated that OTP was to pay for surveying, but we find no record that this process was obstructed or delayed by OTP. Williams did not complete the contractual due diligence to verify the acreage until the last day of the due diligence period, and then waited some six weeks to raise the issue of the size discrepancy. *Absent fraud, i.e., if the size discrepancy was a simple mistake, Williams would have still lost his earnest money.* The loss of earnest money was therefore caused by Williams' own failure to complete due diligence, not by the misrepresentation of size.

¶55 In total, Williams' fraud case fails for a lack of demonstrated detriment, *i.e.*, damages. His main claim was for lost profits he could

have made on the development if the contract had gone through. The case law we have examined indicates that "benefit of the bargain" damages are available only if the plaintiff discovers the fraud after performance, or discovers the fraud before performance but affirms. If the plaintiff discovers the fraud before performance is due, and repudiates the contract, damages are limited to the detriment already incurred, but, as noted above, any loss of earnest money was caused by Williams' failure to complete due diligence. Therefore, we find no error in the court's summary judgment disallowing Williams' fraud claim against OTP.

E. Procedural Errors

¶56 Williams also argues the summary judgment process was marred by two procedural errors that require reversal. On November 14, 2014, OTP filed its motion for summary judgment on Williams' counterclaims as two separate documents, "statement of undisputed material facts" and a "brief in support." Williams responded in kind, concurrently filing a "response to plaintiff's statement of undisputed material facts" and a "response and brief in opposition to plaintiff's motion for summary judgment" on December 2.

¶57 In a March 6 order, the court, *sua sponte*, struck Williams' "response to plaintiff's statement of undisputed material facts" because "defendant has neither sought leave of court, nor do the rules allow the filing of two response briefs," and because the court would "not permit this disjointed approach to the summary judgment motion." We find this ruling inexplicable. Rule 13 for the district courts provides for a "motion" that is "accompanied by a concise written statement" of undisputed material fact. The rule then provides for the non-movant to file "a concise written statement of the material facts as to which a genuine issue exists and the reasons for denying the motion." The trial judge evidently discerned a crucial legal difference between a *statement of facts accompanied by argument*, and a *statement of facts and argument*. Even if such a dichotomy is intended by Rule 13, the sanction of striking Williams' response to the statement of undisputed facts was clearly an excessive and unwarranted use of the court's discretion.

¶58 The question is, therefore, whether this error is one that requires reversal of this case. We think not, for the following reasons: First, the fault in Williams' fraud case was a failure to

show detriment, as we explained in detail above. Second, the decision was interlocutory, and Williams filed a motion to reconsider it after the first trial judge departed for a federal magistrate position. Williams' arguments against summary judgment were therefore heard a second time by another judge, who reached the same conclusion as the first judge.

¶59 Williams also argues that the court erred in refusing to grant a continuance in the summary judgment hearing pursuant to Rule 13(d). Williams sought a continuance to conduct discovery regarding the fraudulent intent of OTP and/or Bolding. Our decision above does not rely on fraudulent intent, however, but on Williams' failure to show detriment. Therefore, further discovery in this matter would not have affected the outcome. We find no procedural error that requires reversal of the trial court's summary judgment.

III. CLAIMS AGAINST BOLDING PURSUANT TO THE OKLAHOMA REAL ESTATE LICENSE CODE

¶60 Williams argues that the Oklahoma Real Estate License Code, 59 O.S. Chapter 20 (ORELC), provides an independent cause of action against Bolding, and that the court erred in granting summary judgment on this issue. Williams relies primarily on ORELC § 858-353 – "Broker Duties and Responsibilities," which states:

A broker shall have the following duties and responsibilities to all parties in a transaction, which are mandatory and may not be abrogated or waived by a broker:

1. Treat all parties with honesty and exercise reasonable skill and care

¶61 Williams argues that this section creates a statutory tort against a real estate licensee for "failure to treat all parties with honesty and exercise reasonable skill and care," and that such is a private right of action separate and independent from the law of fraud (perhaps akin to contractual bad faith by an insurer). Williams states that this private right of action was established by *Bowman*. *Bowman* (commenting on an earlier version of the ORELC) noted that the Code requires a licensee to "treat all parties with honesty," and that the Code authorized "professional disciplinary action" for the making of, among other things, "substantial misrepresentations or false promises." *Bowman* also noted that "Buyers have **not**

brought actions against Broker and Realtor for professional negligence, but **rather for fraud** and violations of a Code whose provisions are defined by a responsibility to **avoid fraudulent conduct**." (Emphasis added).

¶62 If the claim against Bolding was one of conventional fraud, we have already determined that Williams' fraud claim failed. Therefore, any fraud claim based in ORELC § 858-353 similarly fails, unless some additional heightened duty and additional cause of action exists. *Bowman* distinctly declined to address the question of any heightened duty created by ORELC where the allegations were based on conventional fraud.¹⁴ In the same paragraph, *Bowman* further appeared to limit any application of a heightened duty to residential transactions with lay buyers. "A licensee may incur liability for failure to uphold that duty when lay persons such as Buyers rely upon their representations made as licensed professionals." *Id.* ¶ 27. We find no heightened duty created by ORELC in the circumstances of this case.

IV. WILLIAMS' MOTIONS FOR DIRECTED VERDICT AND JNOV ON OTP'S SLANDER OF TITLE CLAIM

¶63 Williams argues that OTP's claim of slander of title failed as a matter of law, and hence the court erred in submitting it to the jury over Williams' motion for directed verdict, and then in denying his motion for JNOV. An appellate court reviews a trial court's ruling on a motion for judgment notwithstanding the verdict by the same standard used by the trial court; the appellate court considers as true all evidence favorable to the non-moving party together with all inferences that may be reasonably drawn therefrom, and it disregards all conflicting evidence favorable to the moving party. *First Nat'l Bank v. Honey Creek Entertainment Corp.*, 2002 OK 11, ¶ 8, 54 P.3d 100.

A. Procedural Questions

¶64 OTP first raises a procedural argument. It contends that Williams made a motion for directed verdict on OTP's slander of title claims after the presentation of OTP's case, *but did not re-urge the motion after Williams presented his defense*. Therefore, OTP argues, Williams could not file for JNOV because such a motion is not allowed unless a motion for directed verdict is presented "at the close of **all** the evidence." 12 O.S. 2011 § 698 (emphasis added). Therefore, OTP argues, the matter is beyond appellate review.

¶65 *Myers v. Missouri Pac. R. Co.*, 2002 OK 60, ¶ 41, 52 P.3d 1014 states, however, that:

Our refusal to grant review of a denial of summary adjudication does not preclude post-trial appellate review of the contention that a party was entitled to judgment as a matter of law. Procedural mechanisms for pressing the issue after a trial commences or has concluded include a demurrer to the evidence, a motion for a directed verdict and a motion for judgment notwithstanding the verdict, the denial of any of which produces after trial a reviewable ruling.

¶66 *Myers* appears clear that a claim of fundamental legal error is not waived by the failure to re-urge a previously made motion for directed verdict at the close of the defendant's evidence. Here, we find that such error exists.

B. A *Lis Pendens* is a Privileged Publication

¶67 The elements of slander of title include: 1) publication; 2) a false statement in the publication; 3) malice in the publication; 4) special damage resulting from the publication; and 5) ownership or possession of the property that is the subject of the publication. *Grasz v. Discover Bank ex rel. SA Discover Fin. Servs., Inc.*, 2013 OK CIV APP 113, ¶ 10, 315 P.3d 406; *see also Morford v. Eberly & Meade, Inc.*, 1994 OK CIV APP 92, 879 P.2d 841; *Borison v. Bank Leumi Tr. Co. of New York*, 1998 OK CIV APP 196, ¶ 5, 972 P.2d 1188. In this case, the claimed publication was either Williams' petition or the *lis pendens* Williams filed.

¶68 Oklahoma law is clear that a publication cannot constitute a slander of title if it is privileged. Statements made in judicial pleadings normally are absolutely privileged. *Kirschstein v. Haynes*, 1990 OK 8, 788 P.2d 941. "This absolute privilege applies to slander of title actions." *Pryor v. Findley*, 1997 OK CIV APP 74, ¶ 3, 949 P.2d 1218, (citing 12 O.S.1991 § 1443.1, and *Bennett v. McKibben*, 1996 OK CIV APP 22, 915 P.2d 400 and the *Restatement of the Law (Second), Torts*, §§ 623A, 624, and 635.)

¶69 The cases of *Scott-Kinnear, Inc. v. Eberly & Meade, Inc.*, 1994 OK CIV APP 91, 879 P.2d 838, *Morford v. Eberly & Meade, Inc.*, 1994 OK CIV APP 92, 879 P.2d 841; and *Bennett v. McKibben*, 1996 OK CIV APP 22, 915 P.2d 400, make an extensive inquiry into this rule as it specifically concerns a *lis pendens*. Finding the *lis pendens* in that case "absolutely privileged," the Scott-

Kinnear opinion stated that "the recordation of a notice of *lis pendens* is in effect a republication of the pleadings." *Id.* ¶ 5. "The publication of the pleadings is unquestionably clothed with absolute privilege, and we have concluded that the republication thereof by recording a notice of *lis pendens* is similarly privileged." *Id.* Similarly, *Morford* held that "Notice of Pending Litigation is cloaked with the same privilege attaching to the issues in litigation." *Id.* ¶ 5. These cases are clear that the remedy in such a situation is as follows:

A party dissatisfied with the notice of *lis pendens* may ask the equity court for a discharge or release of the notice which may be granted after a hearing. *White v. Wensauer*, 702 P.2d 15, 18 (Okla.1985). If the notice is not a fair reflection of the litigation, a party may ask for sanctions. 12 O.S.1991 § 2011. A notice of pending litigation, however, serves to protect potential buyers of the property which is the subject of the unfinished litigation.

Morford at ¶5.

¶70 The matter seems quite clear. If a *lis pendens* contains a "fair statement of the issues," it is privileged. *Id.* ¶ 6.

C. The Effect of the Marketable Record Title Act

¶71 OTP argues that the case law discussed above is either overcome by or incompatible with the provisions of the Oklahoma Marketable Record Title Act (MRTA), 16 O.S. §§ 71 through 85. The "notice" provision of the MRTA is found in § 74, and states:

(a) Any person claiming an interest in land may preserve and keep effective such interest by filing for record during the thirty-year period immediately following the effective date of the root of title of the person whose record title would otherwise be marketable, a notice in writing, duly verified by oath, setting forth the nature of the claim.

Section 79 of the MRTA goes on to state, "No person shall use the privilege of filing notices hereunder for the purpose of slandering the title to land."

¶72 OTP argues that the filing of a *lis pendens* is a "notice" pursuant to § 74, and can therefore constitute a slander of title pursuant to § 79. Despite the three cases noted above, all of which were decided while the MRTA was in

force and clearly hold that a proper *lis pendens* is privileged, OTP cites *Ely v. Bowman*, 1996 OK CIV APP 87, 925 P.2d 567, as holding the opposite. OTP argues that *Ely* tacitly recognized that a *lis pendens* is a “notice” pursuant to the MRTA because it upheld a damages award for slander of title apparently based on the filing of a *lis pendens*.

¶73 We note, however, that *Ely* was an appeal from the *denial of a motion for new trial*, and there is no indication that the issue of whether a *lis pendens* is “notice” pursuant to the MRTA was raised in the motion for new trial.¹⁵ Therefore, any error below was waived on appeal. The “notice” issue was not before the *Ely* Court, and the Court could not raise it *sua sponte*.¹⁶ We further note that *Ely* was decided by the *same panel* that, four months earlier, had made a twelve-paragraph analysis of this issue in *Bennett* and concluded that a *lis pendens* is privileged. We find it highly unlikely that the same panel would overrule the substantive decision it made earlier that year in *Bennett*, as well as the earlier *Scott-Kinnear* and *Morford* decisions, without any reference to those cases. It is clear to us that *Ely* did not consider this issue. We reject OTP’s contention that the result of *Ely* contains a holding that an otherwise proper *lis pendens* constitutes a “notice” that can slander title pursuant to the MRTA.

¶74 More fundamentally, a “notice” pursuant to the MRTA acts as a *claim of existing title or interest in the subject property*, while a *lis pendens* “operates to bind third parties with notice that any interest they may acquire in the property pending litigation will be subject to the outcome of the action.” *Wells Fargo Credit Corp. v. Selby*, 2001 OK CIV APP 78, ¶ 12, 26 P.3d 774 (emphasis added). Notice pursuant to the MRTA serves a different purpose than a *lis pendens*, and asserts different claims.

¶75 Given the principle that a bona fide purchaser for value, without notice, takes free of a prior, unrecorded claim, the filing of a *lis pendens* performs a valuable public function in providing constructive notice to potential third-party buyers of pending litigation. To accept that such a filing constitutes a “notice” under the MRTA and could support a slander of title claim would potentially expose a plaintiff filing a proper *lis pendens* to a slander of title claim and triple damages, and would discourage parties from filing a *lis pendens* at all.

¶76 We reject the argument the Oklahoma Legislature intended the filing of a *lis pendens* to constitute “notice” pursuant to the MRTA, or to allow a slander of title claim based merely on the filing of a *lis pendens*. OTP notes that other states have interpreted their own versions of the MRTA differently. We find, however, no basis to disregard the entirety of Oklahoma common law on the subject because of those interpretations.

D. The Accuracy of the *Lis Pendens*

¶77 This finding alone does not invalidate OTP’s slander of title claim, however. *Morford* indicates that the *lis pendens* is privileged if it contains a “fair statement of the issues.” 1994 OK CIV APP 92 at ¶ 6. If a *lis pendens* states claims against property that are not fairly the subject of pending litigation, it may slander title. *See also Ruggles v. First Nat. Bank of Carmen*, 1976 OK CIV APP 40, 558 P.2d 419 (recovery of damages for slander of title is dependent upon proof of the malicious recording of an *unfounded claim* against the property).

¶78 OTP argues that the *lis pendens* was not an accurate record or re-publication of the pleadings because it included a 2.19 acre “outlot” that was not mentioned in the original contract. (*See* footnote 2, *supra*). This is certainly a bridge too far. First, we find no evidence that OTP had any desire or made any attempt to sell the “outlot” separately, or that OTP suffered any damage by its inclusion in the *lis pendens*. OTP obviously based its damage claim on the *lis pendens* hampering the *transfer of the same 99.71/93.24 acres it had tried to sell to Williams*, not an inability to sell the “outlot.”

¶79 Second, OTP made no request for a modification of the *lis pendens* to remove the “outlot,” a request the court easily could have granted if the 2.19 acres was not truly involved in the litigation, and hence OTP failed to mitigate its damages. Third, at various times in the litigation, OTP has argued that the shortfall was not 6.47 acres but 4.28 acres. The shortfall is reduced to 4.28 acres by *subtracting* the 2.19 acre “outlot” from the property Williams would receive under the agreement. (*See* footnote 2, *supra*). OTP is thereby estopped by this behavior from claiming on appeal that the “outlot” was never legitimately at issue in the litigation.¹⁷

E. Malice

¶80 OTP also appears to argue that, provided it can show that Williams acted with “malice”

or “bad faith” in filing and maintaining his suit, it can seek damages for slander of title. The trial judge appeared to agree with this theory. (Trial Tr. Vol III, pp. 556-57). However, malice alone is not a basis for a slander suit. A true statement may be publicized with the most malicious intent, but it will not constitute slander because truth is an absolute defense in that context. Likewise, a pleading is privileged, at least to the extent that it is not entirely unfounded, even if the plaintiff may bear ill will, hatred, or malice toward its target. Simple malice against an opponent does not render an *otherwise viable claim or suit illegitimate or slanderous*. *Ruggles* is clear that it is the malicious recording of an *unfounded claim* that gives rise to slander of title, not mere malice. 1976 OK CIV APP 40at ¶ 13.¹⁸

¶81 Although, after extended analysis, we have found Williams’ legal theories wanting, his claims and theories were not unfounded, illegitimate, abusive, or frivolous. In total, we find that the filing of the petition and *lis pendens* in this case was not unfounded, and, therefore, was privileged under Oklahoma law. We find no indication that the Legislature intended to alter this situation or subject the filer of a legally justified and accurate *lis pendens* to damages pursuant to the MRTA. Williams’ motivation in such a situation is irrelevant. As such, the district court erred in submitting OTP’s slander of title claim to the jury.

V. THE DISTRICT COURT’S ENTRY OF JUDGMENT PURSUANT TO 16 O.S. 2011 § 79

¶82 The district court tripled the jury award for slander of title pursuant to 16 O.S.2011 § 79. Williams argues that this was in error.

A. Triple damages

¶83 Section 79 states:

A. No person shall use the **privilege of filing notices hereunder for the purpose of slandering the title to land** and, in any action brought for the purpose of quieting title to land, **if the court shall find that any person has filed a claim for that reason**, he shall award the plaintiff all the costs of such action, including such attorney fees as the court may allow to the plaintiff, and, **in addition**, shall decree that the defendant asserting such claim **shall pay to plaintiff three times the damages** that plaintiff may have **sustained as the result of such notice**

of claim having been so filed for record. (Emphasis added).

¶84 We find it entirely clear that § 79 does not grant “three times the damages” simply because a party prevails in a quiet title action. The filing of a notice *for the purposes of slandering title* is a prerequisite to triple damages. We have previously determined that no *prima facie* case was presented for slander of title, because the petition and *lis pendens* were privileged in this case. Hence, neither damages for slander of title nor triple damages for the same were available. We therefore reverse the award of damages for slander of title.

VI. OTP’S AMENDED AND CORRECTED MOTION FOR AWARD OF ATTORNEY FEES AND COSTS PURSUANT TO 16 O.S. § 79.

¶85 Section 79 is clear that “if the court shall find that any person has filed a claim for that reason, [i.e., slandering title] he shall award the plaintiff all the costs of such action, including such attorney fees as the court may allow to the plaintiff.” As there was no basis to submit a slander of title claim to the jury, there is no basis for a fee pursuant to §79. Fees are available in a quiet title action if the notice and curative instrument procedure of the Nonjudicial Marketable Title Procedures Act, 12 O.S. §§ 1141.1-1141.5, is followed. We find no record of such a procedure, however. The fee award is reversed.

ANALYSIS – OTP’S ALLEGATIONS OF ERROR

¶86 OTP also alleges error by the district court, arguing 1) summary judgment against OTP’s claim of fraudulent inducement by Williams was inappropriate, and 2) the district court should have directed a verdict against Williams on OTP’s breach of warranty claim.

I. FRAUD/FRAUDULENT INDUCEMENT

¶87 OTP’s fraudulent inducement claim has a somewhat novel basis. Like other fraud-based actions, a claim for fraudulent inducement must allege all the elements of common law fraud. These are: (1) a material misrepresentation; (2) known to be false at the time made; (3) made with specific intent that a party would rely on it; and (4) reliance and resulting damage. *Key Fin., Inc. v. Koon*, 2016 OK CIV APP 27, ¶ 13, 371 P.3d 1133, citing *Bowman v. Presley*, 2009 OK 48, ¶ 13, 212 P.3d 1210.

¶88 OTP proposes that a jury question of fraud or fraudulent inducement *must result* from Williams signing the disclaimer because: 1) if Williams signed the disclaimer in good faith, he committed fraud by later claiming to rely on the acreage stated in the contract; and 2) if Williams always intended to rely on the statement of acreage, he committed fraud when he signed the disclaimer. OTP proposes that “to claim otherwise is absurd” (OTP Brief-in-Chief at p. 37). Even at the risk of absurdity, however, we disagree that the dichotomy OTP presents controls the outcome here. OTP proposes that, if a contract includes a disclaimer of warranty, a subsequent claim alleging a deficiency in the goods or property the seller provides will establish a counterclaim for “fraudulent inducement” on the part of the buyer. We do not agree that the common law generally acts in this manner.¹⁹

¶89 “The mere fact that fraud is claimed will not justify the submission of that issue unless facts are produced from which an irresistible deduction of fraud reasonably arises.” *Silk v. Phillips Petroleum Co.*, 1988 OK 93, ¶ 13, 760 P.2d 174. The two scenarios raised by OTP do not lead to an irresistible deduction of fraud. Williams may have interpreted the disclaimer as not covering the representations made in the contract; or believed it was effective at the time but later realized that the common law might invalidate it; or, as OTP alleges, he may have signed it with the intent of refusing to comply with its terms.

¶90 The evidence in a fraud case is usually circumstantial. Fraud may not be presumed by the jury from circumstances, but may be proved by circumstantial evidence. *Silk* at ¶ 13. *Downs v. Longfellow Corp.*, 1960 OK 10, ¶ 25, 351 P.2d 999, notes that “circumstantial evidence is not sufficient to establish a conclusion where . . . the circumstances give equal support to inconsistent conclusions, or are equally consistent with contradictory hypotheses.” Therefore, OTP may not rely on Williams’ actions in later refusing to consummate the contract as evidence of fraud. His actions are equally consistent with each of these contradictory hypotheses.

¶91 To avoid summary judgment, OTP was required to bring some evidence that could lead to a reasonable deduction by a juror that Williams intended to breach the disclaimer at the time he signed it, and that he did so with the specific intent that OTP would rely on this disclaimer to its detriment. We find no evi-

dence sufficient to meet this burden, and thus affirm the trial court’s decision.

II. BREACH OF WARRANTY

¶92 OTP’s second claim has the same root. OTP’s argument is that Williams’ signing of the addendum containing the disclaimer was a *warranty to OTP* that he would abide by the disclaimer,²⁰ and Williams breached this buyer’s “warranty” by filing suit alleging a deficiency in the acreage. The trial court expressed some skepticism toward the theory that a buyer creates an express warranty by signing a seller’s disclaimer, and we agree.²¹

¶93 In *Scovil v. Chilcoat*, 1967 OK 20, ¶ 19, 424 P.2d 87, the Court, citing *International Harvester Co. v. Lawyer*, 1916 OK 142, 155 P. 617, defined a warranty as follows:

After a careful examination of the above-cited authorities, we conclude that warranty is a matter of intention. A decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion, or his judgment, upon a matter of which the vendor has no special knowledge, and on which the buyer may also be expected to have an opinion and to exercise his judgment. In the former case there is a warranty; in the latter case there is not[.]

¶94 This statement encompasses the traditional view of an express warranty – an *assertion of fact* by a *seller* of which the *buyer* is ignorant. *Maupin v. Nutrena Mills, Inc.*, 1963 OK 183, ¶ 10, 385 P.2d 504, repeats that “a warranty is a statement or representation made by the seller of goods.” Although it appears possible for a buyer to make a warranty to a seller under limited circumstances, we find no case law indicating that signing a disclaimer of warranty inserted in a contract by a seller *creates a warranty by the buyer*. We find no error in the court’s directed verdict.

III. APPELLATE FEES

¶95 In section V of its brief, OTP requests appellate fees. Since 2013, a motion for an appeal-related attorney’s fee must be made by a separately filed and labeled motion in the appellate court prior to issuance of mandate. The motion must state the statutory and decisional authority allowing the fee. *See* Supreme Court Rule 1.14. If either party wishes to apply

for appellate fees, they must comply with this procedure.

CONCLUSION

¶96 We reach the conclusions noted and numbered at the beginning of this opinion. The decisions of the court are affirmed in part and reversed in part consistent with these conclusions.

¶97 AFFIRMED IN PART AND REVERSED IN PART.

WISEMAN, P.J., and FISCHER, J., concur.

P. THOMAS THORNBRUGH, CHIEF JUDGE:

1. The purpose of the printout from the assessor's records is unclear. It appears to total more than 116 acres of described property or possibly 88 acres, depending on interpretation.

2. Recalculating the numbers given by Williams in his demand letter, he alleges differences of -4.43, -1.95, -.72 and +.63 = 6.47 acres while OTC's counsel calculates the shortfall as 4.28 acres. There is a lack of correlation throughout the record as to the exact amount of property missing, with the shortage being described at various parts of the record as 7.1, or 6.6, or 4 percent. This confusion largely revolves around whether a 2.19 acre "outlot" that was not specifically identified in the contract but was included in the sale, should be considered. The "outlot" becomes significant later in this opinion.

3. This argument occurred because the court struck Williams' response to OTP's statement of undisputed facts, and concerned whether the journal entry could accurately state that the court had reviewed the facts and pleadings under those circumstances. See Section II. E., *infra*.

4. In August 2015, for reasons not relevant here, a new judge was assigned to this case.

5. Williams' briefing claims that *Bowman v. Presley*, 2009 OK 48, 212 P.3d 1210, and *Lopez v. Rollins*, 2013 OK CIV APP 43, 303 P.3d 91, invoke this remedy. They do not. Both cases involve "benefit of the bargain" damages when discrepancies were discovered after a contract was consummated rather than specific performance of an unconsummated contract.

6. *Hayhurst's Estate* is a rather odd decision because the 160 acres was not actually lost due to the "hazards of establishing a marketable title" but by Fannie's decision to take a statutory share.

7. Given that this doctrine is purely equitable, it further raises the possibility that, if the acreage is found to be larger than believed, the seller could demand the courts set a higher purchase price than that agreed to. This re-writing of contracts is clearly an area the district courts should avoid, if possible.

8. See Appellants' Brief in Chief in companion Appeal No. 115,427, p. 3.

9. The other option is described by Harkrider as "fraud in *esse contractus*" or fraud in the *factum* which goes to fraud in the execution itself rather than the contract's details. Harkrider notes, "A classic example of fraud in *esse contractus* is that of a celebrity who, while signing autographs, unknowingly signs a promissory note slipped in among the papers." *Id.* n. 20.

10. *Compare Nat'l Am. Ins. Co. v. Gerlicher Co., LLC*, 2011 OK CIV APP 94, ¶ 21, 260 P.3d 1279 (parties to an insurance contract may contract out of the efficient proximate cause doctrine) with *Ross v. City of Owasso*, 2017 OK CIV APP 4, ¶ 8, 389 P.3d 396 (allowing public bodies to contract to keep public records secret would offend the policy embodied in the Oklahoma Open Records Act).

11. A vehicle that was in known poor mechanical condition was contractually sold "as is" but the seller made verbal assurances that the engine had been replaced, the vehicle would provide reliable transportation, had been inspected by a mechanic, and "there's nothing wrong with it." Murray found that a jury question as to fraud/breach existed, despite the "as is" disclaimer. *Id.* ¶¶ 5-10.

12. In that case, Thrifty promised Brown Flight Rental a supply of Chrysler vehicles for its rental business if Brown became a Thrifty licensee. Thrifty did not reveal that Chrysler's history of delivery delays and order cancellations during 1990 had had a "devastating impact on Thrifty licensees." *Id.* at 1196. This same problem continued

into 1991, and Brown was unable to obtain many vehicles it had ordered. Brown defaulted on its franchise lease payments, and Thrifty sued. Brown raised a fraud defense to the franchise agreement. The agreement contained a disclaimer that "THRIFTY shall not be responsible to LESSEE . . . for any loss of business or other damage caused by an interruption of the supply of goods [vehicles] or services to be furnished hereunder by THRIFTY . . ." *Id.* at 1194.

13. Although cited by the Oklahoma Supreme Court at least eleven times, this case does not appear in OSCN, but is found in the Pacific Reporter and is available on Westlaw.

14. "Because Buyers' arguments are anchored in an action for fraud, we do not today reach the question of whether a real estate licensee bears a heightened duty independently to ascertain the size of a [residential] property represented to potential purchasers[.]" *Bowman*, ¶ 27.

15. "Bowman moved for a new trial on the ground that the 'Big House' transaction was a bona fide debt as conclusively proven by the writing; that awarding \$2,500.00 as attorney fees was error because Ely failed to prove damages in her slander of title action; and finally because the court abused its discretion by taking the case under advisement for 21 months." *Id.* ¶ 4.

16. It is well settled that appellate courts are not free to raise issues *sua sponte* and address claims or defenses that the parties did not present in the court below. *Jordan v. Jordan*, 2006 OK 88, 151 P.3d 117. The exception concerns questions going to appellate jurisdiction. *Spencer v. Wyrick*, 2017 OK 19, ¶ 1, 392 P.3d 290.

17. The estoppel doctrine's purpose is "to protect the integrity of the judicial process" by "prohibiting parties from deliberately changing positions according to the exigencies of the moment." *Bank of the Wichita v. Ledford*, 2006 OK 73, ¶ 23, 151 P.3d 103.

18. "Recovery of damages for slander of title, in such a case, will be dependent upon proof of the malicious recording of an unfounded claim against the property." *Ruggles* at ¶ 13 (citing *Misco Leasing, Inc. v. Keller*, 10th Cir., 490 F.2d 545; *McKown v. Haught*, 130 Okl. 253, 267 P. 245.).

19. OTP's argument implies that, for example, had the *Bowman* Court not invalidated the disclaimer of size, the realtor in *Bowman* would have a *prima facie* fraudulent inducement claim against the buyer, despite the fact that it was the realtor's materials that inflated the size of the property by 25 percent, and the buyer had performed. The argument presented would be identical to that which OTP presents here - "the buyer signed a disclaimer of size, but then reneged on his promise and relied on our materials."

20. That is, that Williams made what could be described as a "warranty of no warranty."

21. Returning again to *Bowman*, it is evident, pursuant to OTP's theories, that the unfortunate buyer who received 25 percent less property than advertised would not only be subject to a counterclaim of fraudulent inducement, but also a counterclaim of breach of warranty, but for the lucky fact that the court invalidated the disclaimer.

2020 OK CIV APP 6

IN RE MARRIAGE OF DEGROOT. Bonnie Lee DeGroot, Petitioner/Appellant, vs. Timothy Gerald DeGroot, Respondent/Appellee.

Case No. 116,974. May 23, 2019

APPEAL FROM THE DISTRICT COURT OF PAYNE COUNTY, OKLAHOMA

HONORABLE R.L. HERT, JR., TRIAL JUDGE

REVERSED

Martin S. High, Clemson, South Carolina, for Petitioner/Appellant,

Christopher D. Smith, Roe T. Simmons, Kaitlyn G. Allen, SMITH SIMMONS, PLLC, Oklahoma City, Oklahoma, for Respondent/Appellee.

Kenneth L. Buettner, Judge:

¶1 Petitioner/Appellant Bonnie Lee DeGroot (Wife) appeals the trial court's order denying her motion to reconsider its order on Respondent/Appellant Timothy Gerald DeGroot's (Husband) motion to modify support alimony and child support. The parties entered a settlement agreement dissolving their marriage, but the agreement expressly provided that the trial court retained jurisdiction to modify the alimony and child support provisions. We hold that Husband failed to meet his burden of proving sufficient change of circumstances to justify modifying the support alimony agreed by the parties.

¶2 The parties were married in 1982 and had six children. Wife filed her Petition seeking dissolution of the marriage in March 2012 and the parties filed their Marriage Settlement Agreement September 17, 2013. The agreement noted that at the time of the settlement three of their children were minors. The agreement indicated Husband was then employed in Ohio and earning \$12,930 per month while Wife lived in Oklahoma and earned \$928 per month. The parties agreed Wife would have sole legal and physical custody of the minor children. The agreement further provided the parties agreed Husband would pay child support of \$2,036 per month plus transportation costs for visitation, health insurance, and non-covered medical expenses for the minor children. The settlement included a division of the marital property and debt, including a 50/50 division of a \$31,800 debt to the bankruptcy trustee. The settlement included the following provision on alimony:

13. SPOUSAL SUPPORT/ALIMONY. The parties agree that (Wife) shall receive \$3,700 monthly spousal support for 12 years or until she begins cohabitation with another adult male to be paid on the 15th of each month. This amount will increase by half the current payment to [the bankruptcy trustee] when that debt is retired and by 5/14 the current payment to the U.S. Department of Education for student loans when that debt is retired. The parties further agree the Court will retain jurisdiction of the matter of spousal support, maintenance or alimony, once incorporated in a final decree of divorce.

The parties also agreed that future disagreements about the terms of the agreement would be decided either by mediation or by the court.

¶3 The Decree of Dissolution of Marriage, largely following the parties' settlement agreement, was entered March 27, 2014. Pertinent to this appeal, the provision on support alimony included the statement that "(t)he parties further agree the Court will retain jurisdiction of the matter of spousal support, maintenance or alimony."

¶4 Husband sought to modify support alimony in September 2016. He asserted that, since the parties settled, there had been a substantial and continuing change in his income such that he was no longer able to pay the support alimony award. He asked the court to reduce or terminate his alimony obligation. Husband later added a request that the trial court enforce the reduced child support the parties agreed to in 2015. Wife objected, arguing that Husband had voluntarily caused his income to change and that Husband "engages in other income producing activities not disclosed to" the court.

¶5 Following a hearing, the trial court entered its Order November 29, 2017, in which it noted that the parties' original agreement on alimony was not based on evidence of need or ability to pay and that the agreement left the alimony award subject to modification. The court found that at the time of the divorce proceedings, the parties were emerging from bankruptcy and the parties agreed to each pay half of the \$31,800 owed to the bankruptcy trustee and agreed that the monthly alimony payment would increase by half of the payment once the debt to the trustee was paid off. The trial court noted the parties' agreement that the alimony award also would increase by 5/14 of the student loan payment once it was fully paid, though the agreement did not specify who would pay the student loan debt. The court found the evidence showed the student loan balance was \$137,181, with unpaid interest of \$28,916 and that Husband was not paying any of the principal nor keeping current on the interest due. The court found that if the support alimony provision had not been entered by agreement, it would be void for uncertainty.

¶6 The trial court found Husband had shown a substantial and continuing change in the financial circumstances of both parties: Wife's income increased from under \$1,000 to over \$3,000 per month while Husband's income decreased from under \$13,000 to under \$11,000 per month. The court determined that because the original agreement was not based on evi-

dence of need, and because Husband had shown a substantial and continuing change in circumstances, it would treat the case as an original proceeding for support alimony; therefore Wife had the burden of showing a need for support alimony.

¶7 The trial court found Husband was guilty of indirect contempt for failing to pay amounts due under the consent decree before it was modified and awarded Wife a judgment against Husband for unpaid support alimony and child support. The trial court ordered both parties to pay their own attorney fees except for fees Wife incurred enforcing child support. The trial court denied Wife's motion to reconsider.

¶8 Wife appeals the trial court's modification of support alimony. "An award of support alimony and hence its modification are matters of equitable cognizance." *Wilson v. Wilson*, 1999 OK 65, ¶3, 987 P.3d 1210. Accordingly, we will affirm the trial court's decision unless it is against the clear weight of the evidence or an abuse of discretion. *Id.*

¶9 Wife first asserts the trial court erred in placing the burden on her to show the need for support alimony. The statute relating to modification of support alimony provides:

. . . the provisions of any dissolution of marriage decree pertaining to the payment of alimony as support may be modified upon proof of changed circumstances relating to the need for support or ability to support which are substantial and continuing so as to make the terms of the decree unreasonable to either party. Modification by the court of any dissolution of marriage decree pertaining to the payment of alimony as support, pursuant to the provisions of this subsection, may extend to the terms of the payments and to the total amount awarded; provided however, such modification shall only have prospective application.

43 O.S. 2011 §134(D).

¶10 In this case, the trial court noted the parties entered their settlement agreement without any evidence of need or ability to pay. As such, the trial court determined that it would "treat the hearing as an original hearing on the issue of support alimony and the burden is shifted to the [Wife] to show a need for support alimony and the amount." Wife argues the trial court's shift of the burden of proof from Hus-

band to Wife was improper because the proceeding was one for modification, in which the burden is upon the movant. We agree.

¶11 A party seeking modification of an award of alimony bears the burden of proof in establishing that a substantial and continuing change has occurred warranting the modification. *Wilson*, 1999 OK 65, ¶ 8, 987 P.2d 1210. A consent decree may only be modified by the consent of both parties, which consent may be evidenced by a reference in the decree allowing future modification according to Oklahoma law. *Stuart v. Stuart*, 1976 OK 107, ¶ 14, 555 P.2d at 615; *Whitehead v. Whitehead*, 1999 OK 91, ¶ 11, 995 P.2d 1098.

¶12 Here, the consent decree stated that the trial court "will retain jurisdiction of the matter of the spousal support, maintenance or alimony." Neither party disputes that the consent decree permitted modification of the decree according to Oklahoma law. As such, it was within the trial court's jurisdiction to modify the award of alimony. Nothing in either the consent decree or in Oklahoma law, however, indicates the trial court had jurisdiction to enter a new order of alimony, therefore completely disregarding the award to which both parties had previously agreed.

¶13 By allowing parties to enter consent decrees regarding the dissolution of marriage, and by allowing such decrees to include even provisions otherwise unavailable to trial courts in a non-consent decree, the Oklahoma Legislature has indicated an intent to allow parties to freely contract for the "disposition of their property and alimony for support." *Id.* (citing *Perry v. Perry*, 1976 OK 57, ¶ 8, 551 P.2d at 258). As such, we hold that it is not within a trial court's discretion to disregard a consent decree and begin anew in crafting an award of support alimony. Instead, where a consent decree allows for the modification of the award in accordance with Oklahoma law, a trial court may modify support alimony only in accordance with the procedure in § 134(D).

¶14 In this case, therefore, it was the duty of the trial court to determine whether Husband had proved a substantial and continuing change in circumstances warranting modification under § 134(D). The trial court found that Husband "established a substantial and continuing change in the financial circumstances of both [parties]."¹ Husband's only cited grounds for modification in his Motion to

Modify was his recent change in income. As such, Section 134(D) required Husband to prove changed circumstances relating to his ability to support.

¶15 At the time of the divorce, the parties stipulated that Husband's income was \$12,930 per month as a professor at Cleveland State University. At the hearing, the parties stipulated that Husband's newly reduced income was \$10,858.67 per month, approximately a 16% reduction. Testimony indicated, however, that although Husband's salary was paid on a semi-monthly basis (24 payments per year), Husband actually taught only nine months out of the year. As such, Wife argues Husband was intentionally underemployed because he did not work or seek work for the other three months of the year. Wife also argues that Husband worked for his girlfriend's company for various benefits not counted as income, time which could have been used pursuing additional paid employment.²

¶16 Testimony indicates that while Husband admits to teaching only nine months out of the year, he claims that his position as a professor requires that he produce research during the three summer "off months." Husband testified that if he chose not to use the summer to do his research that he would be required to teach a greater course load during the academic year, all while maintaining his current salary. Still, Husband also admitted that if he were to teach summer courses in addition to conducting his research in the summer, he would receive an additional \$6,000 on top of his current salary. Husband also admits to performing some unpaid work for his girlfriend's various businesses. In addition, Husband's child support obligations were reduced, which reduced the impact of the cut in pay.

¶17 Because the trial court was only empowered to modify the award of alimony according to §134(D), and did not have authority to start afresh treating the order as an original decree, we hold it was an abuse of discretion to reduce the agreed-upon support alimony by 76%. Where Husband's income has been reduced by only 16%, his child support obligations have been reduced, the alimony payment has not increased under the terms of the agreement, and where Husband has admitted to the availability of an opportunity to increase his current income by about 5%, the weight of the evidence is against changed circumstances sufficient to justify any modification of alimony

support according to Section 134(D). We therefore hold it was an abuse of discretion to overrule Wife's motion to reconsider, and we vacate the modification of support alimony.

¶18 REVERSED.

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

Kenneth L. Buettner, Judge:

1. Husband presented an aid to the court, as Exhibit 3, showing his monthly gross income before the divorce was \$14,328.08 and his gross after the divorce was \$9,017.34. The parties stipulated that as of January 1, 2017, Wife's gross monthly income was \$3,141.41 and Husband's gross income was \$10,858.67.

2. It is also noted that the agreement of the parties provided for the increase in Husband's alimony payments upon the satisfaction of student loan and bankruptcy trustee obligations, without regard to any other factors. Thus the settlement agreement contemplated changes would occur in the parties' financial circumstances without triggering a change in the alimony payments.

2020 OK CIV APP 7

**IN RE THE GUARDIANSHIP OF A.N.A.,
Minor Child, ROBYN HELTON, Petitioner/
Appellee, vs. THOMAS ADEY, Respondent/
Appellant.**

Case No. 117,578. January 17, 2020

**APPEAL FROM THE DISTRICT COURT OF
CRAIG COUNTY, OKLAHOMA**

HONORABLE JESS B. CLANTON JR., JUDGE

AFFIRMED IN PART; REVERSED IN PART

**Blake M. Feamster, HENRY + DOW, Tulsa,
Oklahoma, for Petitioner/Appellee,**

**Brian L. Jackson, GARDNER & JACKSON,
PLLC, Vinita, Oklahoma, for Respondent/
Appellant.**

ROBERT D. BELL, PRESIDING JUDGE:

¶1 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's 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.

¶2 The child was born out of wedlock as the result of a romantic relationship between the child's natural mother and Father. During mother's lifetime, child lived with her mother and Aunt and had little to no contact with Father. Mother died November 7, 2017. Aunt initiated guardianship proceedings to continue caring for child. Father sought custody of the child through the guardianship.

¶3 On December 15, 2017, the trial court granted Aunt guardianship and ordered incrementally increasing visitation between Father and child. Father filed a motion to terminate the guardianship *instantly*. The trial court denied the motion but ordered the guardianship to expire December 15, 2018. Upon expiration, Father was granted full custody of the child. The trial court stated Father a "fit person" but held it was "not in [child's] best interests to have the Guardianship dismissed *instantly*, since she has always lived with aunt/guardian, and has exhibited issues noted above, but that it is in her best interest for it to be dismissed after a transitional period, involving increased overnight stays with her father and his spouse and other children, and increased bonding." *Trial Court Minute of September 27, 2018*.

¶4 Father filed a second motion to terminate the guardianship *instantly* which was denied. The trial court's order of October 15, 2018, specifically stated termination of the guardianship *instantly* was not in the child's best interest and that its prior order continued in full force and effect. Additionally, the trial court ordered a minimum visitation schedule for the child and Aunt. Father appeals from the order of October 15, 2018.

¶5 On appeal, Father asserts the visitation order must be reversed because the trial court lacked the authority to grant visitation to the maternal aunt. While Father does not specifically argue that the trial court lacked subject matter jurisdiction to render the order, we raise this question *sua sponte* and hold this question disposes of this appeal. "[T]his Court is duty-bound to inquire into the jurisdiction of the court from whence the decision came." *Muskogee Fair Haven Manor Phase I, Inc. v. Scott*, 1998 OK 26, ¶13, 957 P.2d 107. "Subject matter jurisdiction exists when a court has power to proceed in a case of the character presented, or power to grant the relief sought in a proper

cause." *Oklahoma Dep't of Sec. ex rel. Faught v. Blair*, 2010 OK 16, ¶19, 231 P.3d 645. "Subject matter jurisdiction is invoked by the pleadings filed with the court." *Id.* "Where the pleadings state a cause over which the court's jurisdiction extends, jurisdiction attaches and the court has the power to hear and determine the issues involved." *In re A.N.O.*, 2004 OK 33, ¶9, 91 P.3d 646.

¶6 Here, the trial court had the subject matter jurisdiction to order and administer the guardianship proceeding and retained that jurisdiction "until termination of the proceeding." 30 O.S. 2011 §1-113(B). The guardianship may be terminated when the court determines the guardianship "is no longer necessary." 30 O.S. 2011 §4-804. There is no dispute the guardianship was no longer necessary as evident from the trial court's order granting Father full custody of his child. Thus, the court's jurisdiction concluded upon its entry of the order terminating the guardianship and the trial court had no authority to order Father to submit the child to visitation against Father's wishes.

¶7 Aunt argues Father waived his objection to the court's exercise of jurisdiction to order visitation. This argument lacks legal merit. "Since subject matter jurisdiction concerns the competency of the court to determine the particular matter, it cannot be waived by the parties or conferred upon the court by their consent and it may be challenged at any time in the course of the proceedings." *In re A.N.O.*, 2004 OK 33 at ¶9.

¶8 Aunt next argues the visitation order should be upheld because the Oklahoma Supreme Court has recognized that third-party visitation is based upon equitable considerations. Aunt cites *In re Bomgardner*, 1985 OK 59, 711 P.2d 92, as support. This case is inapplicable to this intra-family visitation dispute. *In re Bomgardner* pertained to a request for grandparent visitation which arose before the Oklahoma Legislature enacted the statute permitting grandparental visitation rights.

¶9 Aunt also insists the visitation order should be upheld because visitation was in the child's best interest. Aunt maintains Father had virtually no contact with the child prior to Aunt's request for guardianship, and the child had lived her entire life with her mother, now deceased, and Aunt. We are sympathetic to Aunt's arguments. We are also aware Aunt's evidence supported a finding that the child's best interest may be served by Aunt's visitation

with child. However, Aunt has no constitutional right to visit her minor niece, nor does Aunt have any statutory visitation rights under Oklahoma law. See *K.R. v. B.M.H.*, 1999 OK 40, ¶17, 982 P.2d 521. While this may seem unfair or counter to the child's best interest, "the wisdom of choices made within the Legislature's law-making sphere are not our concern, because those choices – absent constitutional or other recognized infirmity – rightly lie within the legislative domain." *Head v. McCracken*, 2004 OK 84, ¶13, 102 P.3d 670. This Court may only interpret the laws as we find them. For these reasons, equity cannot be invoked to create such visitation rights.

¶10 As alluded above, Oklahoma law does provide grandparents with court-compelled, statutory visitation rights under certain circumstances. See 43 O.S. Supp 2016 §109.4. It is possible Aunt could have secured access to the child *vis a vis* the maternal grandparents' statutory visitation rights. See, e.g., *K.R. v. B.M.H.*, 1999 OK 40 at ¶17. But, the maternal grandparents did not petition for such visitation rights under §109.4, and the court's subject matter jurisdiction was not invoked by proper pleadings to hear and determine a cause under §109.4. Consequently, to the extent the trial court relied on §109.4 to exercise "continuing" subject matter jurisdiction over the child to grant Aunt visitation, this was error. However, our decision herein does not prevent the maternal grandparents from petitioning for such statutory visitations rights pursuant to §109.4.

¶11 Father contends §109.4 is unconstitutional. Because the trial court's lack of subject matter jurisdiction decides this appeal, we decline to address Father's constitutional challenge to §109.4. "Courts, of course, will pass upon the constitutionality of a statute only when it is necessary to a determination on the merits." *In re A.N.O.*, 2004 OK 33 at ¶14, quoting *Schwartz v. Diehl*, 1997 OK 115, 568 P.2d 280.

¶12 We also reject Father's arguments challenging the trial court's continuation of the underlying guardianship proceeding over his objection. The guardianship terminated December 15, 2018. Thus, this issue is moot. "It is a long-established rule that this court will not consume its time by deciding 'abstract propositions of law' or moot issues." *State ex rel. Oklahoma Firefighters Pension & Ret. Sys. v. City of Spencer*, 2009 OK 73, ¶4, 237 P.3d 125.

¶13 The child's best interest is the paramount consideration of the trial court when determining visitation. *Daniel v. Daniel*, 2001 OK 117, ¶21, 42 P.3d 863. It is presumed that a minor child's best interest "is served by placement with its natural parent in the absence of clear and convincing evidence establishing that the parent is unfit." *Guardianship of M.R.S.*, 1998 OK 38, ¶14, 960 P.2d 357. "In considering the welfare of a child, the natural love and affection of a parent is of great importance." *Id.* at ¶15. Father's fitness to raise and care for his child is not contested. For these reasons, we find the portion of the trial court's order granting visitation to Aunt, over Father's objection, is contrary to law, and that portion of the order is reversed. The remainder of the order terminating the guardianship is affirmed.

¶14 AFFIRMED IN PART; REVERSED IN PART.

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

2020 OK CIV APP 8

JAMES LAWSON, d/b/a LAWSON BAIL BONDS, Plaintiff/Appellant, vs. VICKI BEATY, SEQUOYAH COUNTY DISTRICT COURT CLERK, Defendant/Appellee.

Case No. 116,939. January 23, 2020

APPEAL FROM THE DISTRICT COURT OF SEQUOYAH COUNTY, OKLAHOMA

HONORABLE MIKE NORMAN, JUDGE

AFFIRMED IN PART AND REVERSED IN PART

S. Stephen Barnes, BARNES LAW OFFICE, Wewoka, Oklahoma, and Brendon Bridges, BRIDGES LAW FIRM, Eufaula, Oklahoma, for Plaintiff/Appellant,

N. Jack Thorp, District Attorney, Jacob Howell, Assistant District Attorney, SEQUOYAH COUNTY DISTRICT ATTORNEY'S OFFICE, Sallisaw, Oklahoma, for Defendant/Appellee.

ROBERT D. BELL, PRESIDING JUDGE:

¶1 Plaintiff/Appellant, James Lawson, appeals from the trial court's order granting in part and denying in part his petition for injunctive relief against Defendant/Appellee, Vicki Beaty, the District Court Clerk of Sequoyah County. For the reasons set forth below, we affirm in part and reverse in part.

¶2 Plaintiff is the owner/manager of Lawson Bail Bonds, located in Poteau, LeFlore County. He is licensed by the Oklahoma Insurance Commission as a “Multicounty Agent Bondsman.” In August 2017, Plaintiff filed the instant action for injunctive relief, alleging Defendant wrongfully (1) refused to publish Plaintiff’s name and telephone number with the list of other bondsmen doing business in Sequoyah County, and (2) requires each Multicounty Agent Bondsman who does not have an office situated in Sequoyah County to file a letter of good standing from their home county each time the bondsman executes a bond in Sequoyah County. Plaintiff asserts any letter of good standing is considered by Defendant to be valid for only forty-eight (48) to seventy-two (72) hours after issuance. Because a letter of good standing can only be obtained during the business hours of his “home county” court clerk, Plaintiff urges his Sequoyah County clients are forced to either stay in jail until Plaintiff’s “home county” court clerk’s office opens or retain the services of another bondsman.

¶3 Central to Plaintiff’s claims is §1306.1(D) of the Oklahoma Bail Bondsmen Act, 59 O.S. 2011 §1301 et seq. Pursuant to that subsection, a Multicounty Agent Bondsman is authorized “to execute bail bonds within any county in the State of Oklahoma.” Furthermore, nothing in the Act or Insurance Commission regulations require a Multicounty Agent Bondsman to submit a letter of good standing from his/her own county before executing a bond in any other county. Finally, Plaintiff asserts the Oklahoma Insurance Commission maintains a list of bondsmen who are in good standing and authorized to execute bonds state-wide that can be accessed via the internet twenty-four (24) hours a day, seven (7) days a week.

¶4 Defendant testified at the injunction hearing that she relies on a court clerk handbook issued by the Oklahoma Administrative Office of the Courts (AOC) in requiring a letter of good standing from the bondman’s home county. The handbook specifically states, “The Court Clerk is urged to require a Letter of Good Standing from the ‘mother’ county in which the bondsman is registered before allowing a bondsman to write bonds in the county.” Defendant conceded that her office had the capability to access bondsman information from the Insurance Commissioner’s website.

¶5 At the conclusion of the hearing, the trial court granted in part and denied in part Plain-

tiff’s requested relief. The trial court granted Plaintiff’s request that his name and telephone number be published with the list of local bondsmen. However, the court denied Plaintiff’s request for injunctive relief prohibiting Defendant from requiring a letter of good standing from Multicounty Agent Bondsmen at the time of executing each bond in Sequoyah County. From the denial of his latter request, Plaintiff now appeals. This appeal proceeds as an appeal from an interlocutory order appealable by right pursuant to 12 O.S. Supp. 2013 §993(A)(2) (order denying injunction) and Oklahoma Supreme Court Rule 1.60, 12 O.S. Supp. 2013, Ch. 15, App. 1.

¶6 In *Sharp v. 251st St. Landfill, Inc.*, 1996 OK 109, 925 P.2d 546, the Court reiterated the standard of review to be utilized here:

Granting or denying injunctive relief is generally within the sound discretion of the trial court and a judgment issuing or refusing to issue an injunction will not be disturbed on appeal unless the lower court has abused its discretion or the decision is clearly against the weight of the evidence. In reviewing the matter, we are not bound by the findings or reasoning of a trial court, but we must consider, examine and weigh all the evidence.

Id. at ¶4 (citations and parentheticals omitted).

¶7 As Plaintiff correctly points out, the AOC handbook relied upon by Defendant is outdated. The handbook page at issue stated not only that court clerks should require a Letter of Good Standing each time an out-of-county bondsman writes a bond, it also advises court clerks that a bondsman can write no more than ten (10) bonds per county per year outside of his or her home county. According to a notation at the bottom of the subject handbook page, the handbook – or at least that particular page – was last revised in September 2007. The statutory classification of a Multicounty Agent Bondsman was created by the Oklahoma Legislature in 2014. *See, e.g.*, Laws 2014, c. 53, §1, eff. July 1, 2014 (adding 59 O.S. Supp. 2014 §1301(13) to define “Multicounty agent bondsman”), and Laws 2014, c. 53, §3, eff. July 1, 2014 (adding §1306.1 to Title 59 regulating such bondsmen). As previously stated, nothing in the Act requires a Multicounty Agent Bondsman to submit a letter of good standing from his/her own county before executing a bond in any other county. Further, Multicounty Agent Bonds-

men were specifically exempted from the ten (10) bond out-of-county limit with the enactment of §1306.1(D).¹

¶8 The Court in *Dowell v. Pletcher*, 2013 OK 39, 304 P.3d 735, held:

The legislature has granted to the Insurance Commissioner the power and authority to administer the Bail Bondsmen Act, which regulates bail bondsmen. Title 59 O.S. § 1302(A) provides:

“The Insurance Commissioner shall have full power and authority to administer the provisions of this act, which regulates bail bondsmen and to that end to adopt, and promulgate rules and regulations to enforce the purposes and provisions of this act. The commissioner may employ and discharge such employees, examiners, counsel, and other such assistants as shall be deemed necessary . . .”

* * *

The legislature has implemented a detailed procedure for the regulation and enforcement of bail bondsmen in Oklahoma, granting broad powers to the Insurance Commissioner to enforce violations of the Bail Bondsmen Act. The role of the Court Clerk in the process has been specified throughout the Act.

Dowell, 2013 OK 39 at ¶¶10 and 15.

¶9 Neither the Act nor Insurance Commission regulations require Plaintiff to submit a letter of good standing from the LeFlore County District Court Clerk before he executes a bond in Sequoyah County. Defendant’s imposition of such a policy is unauthorized by law. Accordingly, we reverse that portion of the trial court’s judgment that denied Plaintiff’s request for an injunction prohibiting Defendant from requiring a letter of good standing from Multicounty Agent Bondsmen at the time of executing a bond in Sequoyah County. The remainder of the trial court’s judgment is affirmed.

¶10 AFFIRMED IN PART AND REVERSED IN PART.

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

ROBERT D. BELL, PRESIDING JUDGE:

1. Bondsmen who are not licensed as a Multicounty Agent Bondsmen continue to be limited to ten (10) out-of-county bonds per county per year. 59 O.S. Supp. 2017 §1320(B).

2020 OK CIV APP 9

**MARIAH ARCHIE, AS PARENT AND
NEXT FRIEND OF H.G., A MINOR CHILD,
Plaintiff/Appellant, vs. CLARYSSA
SCHONLAU AND JESSICA SCHONLAU,
Defendants/Appellees.**

Case No. 117,007. June 20, 2019

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

HONORABLE PATRICIA G. PARRISH,
TRIAL JUDGE

AFFIRMED

Nathan D. Rex, Larry E. Finn, PARRISH DE-
VAUGHN, PLLC, Oklahoma City, Oklahoma,
for Plaintiff/Appellant,

Elizabeth D. Oglesby, ANGELA D. AILLES &
ASSOCIATES, Oklahoma City, Oklahoma, for
Defendants/Appellees.

BRIAN JACK GOREE, CHIEF JUDGE:

¶1 A former foster child sued his former foster parents under Oklahoma’s dog-bite statute. The child was in his foster parents’ home when the family dog bit him in the face. The court below granted foster parents summary judgment and the child appealed. The appellate standard of review is *de novo*. We affirm because parental immunity applies to foster parents’ discretionary decisions which do not amount to willful and wanton intent to harm, including a decision to have a dog in the home.

Background

¶2 Mariah Archie, as parent and next friend of H.G. (H.G. or Child), Plaintiff/Appellant, sued Claryssa and Jessica Schonlau, Defendants/ Appellees, for damages based on 4 O.S. §42.1, Oklahoma’s dog-bite statute.

¶3 Defendants were contracted foster parents with the Oklahoma Department of Human Services. H.G. was placed in Defendants’ home by DHS. While in the Defendants’ care, he was bitten by the family dog, Jaxon, a blood hound. Jaxon had lived at the home around other children prior to the biting accident without incident. The dog bit H.G. in the face without provocation or warning.

¶4 Originally Defendants filed a motion for summary judgment and were denied when the trial court determined the doctrine of parental immunity did not bar a strict liability claim

brought under 4 O.S. §42.1. In response to the trial court's ruling, Defendants filed a motion to reconsider the motion for summary judgment. The trial court then sustained the motion for summary judgment on the basis that §42.1 did not apply to members of the dog owner's household. H.G. appeals asserting Defendants are strictly liable for their dog's attack without provocation while he was lawfully present in Defendants' home. The issue is whether the trial court properly granted Defendants summary judgment.

Standard of Review

¶5 The appellate standard of review for summary judgment is *de novo*. *Carmichael v. Beller*, 1996 OK 48, ¶2, 914 P.2d 1051. *De novo* review involves a plenary, independent and non-deferential examination of the trial court's rulings of law. *In re Estate of Bell-Levine*, 2012 OK 112, ¶5, 293 P.3d 964. "Summary judgment is proper only when the pleadings, affidavits, depositions, admissions or other evidentiary materials establish that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law." *Moore v. Warr Acres Nursing Center, LLC*, 2016 OK 28, ¶4, 376 P.3d 894. *See also* 12 O.S. §2056(C); Okla. Dist. Ct. R. 13(e), 12 O.S. Supp. 2013, ch. 2, app.

Analysis

¶6 H.G. argues damages are recoverable based on 4 O.S. §42.1. This case presents the question of whether parental immunity bars Plaintiff's strict liability claim.¹ Section 42.1 provides: "The owner or owners of any dog shall be liable for damages to the full amount of any damages sustained when his dog, without provocation, bites or injures any person while such person is in or on a place where he has a lawful right to be." 4 O.S. §42.1.

¶7 Oklahoma's dog-bite statute is derived from the common law and is liberally construed. *Nickell v. Sumner*, 1997 OK 101, ¶13, 943 P.2d 625. *See also* 12 O.S. §2; 25 O.S. §29. It imposes liability without regard to fault. *Nickell* at ¶5. "The elements of strict liability under §42.1 consist of (1) ownership of the dog, (2) lack of provocation, (3) a bite or other injury to the plaintiff by the dog, and (4) the plaintiff's lawful presence at the place where the attack occurs." *Id.* at ¶14 citing *Hampton By and Through Hampton v. Hammons*, 1987 OK 77, 743 P.2d 1053; *Hood v. Hagler*, 1979 OK 163, 606 P.2d 548.

¶8 The dog-bite statute is silent concerning the common law doctrine of parental immunity. Parental immunity is the common law tradition designed to preserve family harmony by forbidding a minor child to sue a parent for personal injuries suffered at the hands of the parent. *Tucker v. Tucker*, 1964 OK 89, ¶¶3-6, 13, 395 P.2d 67. A person is not literally required to be the child's natural parent to receive parental immunity. Instead, Oklahoma requires that a person stand in loco parentis to the injured child.² *Van Wart v. Cook*, 1976 OK CIV APP 39, ¶3 citing *Wooden v. Hale*, 1967 OK 69, 426 P.2d 679. A foster parent stands in loco parentis to a foster child. *See Matter of B.C.*, 1988 OK 4, ¶¶18-20, 749 P.2d 542. Therefore, parental immunity applies to foster parents. *Van Wart v. Cook*, 1976 OK CIV APP 39, 557 P.2d 1161.

¶9 By statutory mandate, the common law remains in full force unless some legislative enactment explicitly provides otherwise. 12 O.S. §2; 25 O.S. §29; *see also* *Watson v. Gibson Capital, L.L.C.*, 2008 OK 56, ¶12, 187 P.3d 735. In determining whether the statute imposes liability regardless of parental immunity, we are bound by state statutes and case law which mandate that the common law remains in full force unless a statute explicitly provides to the contrary. *Tate v. Browning-Ferris, Inc.*, 1992 OK 72, ¶11, 833 P.2d 1218 citing 12 O.S. §2.³ ("By statutory mandate *the common law remains in full force in this state, unless a statute explicitly provides to the contrary*. Oklahoma law does not permit legislative abrogation of the common law by implication; rather, its alteration must be clearly and plainly expressed. An intent to change the common law will not be presumed from an ambiguous, doubtful or inconclusive text.") (Emphasis in original). Section §42.1 is silent concerning immunity.

¶10 The Oklahoma Supreme Court has recognized and adhered to parental immunity since its decision in *Tucker*. Among the justifications for parental immunity, preservation and protection of family harmony is the rationale most frequently cited. *See Unah By and Through Unah v. Martin*, 1984 OK 2, ¶6, 676 P.2d 1366.⁴ Oklahoma case law has generally described the scope of immunity to extend to cases of "ordinary negligence." *See, e.g., Tucker, Unah, Wooden, Hampton. Cf. Sixkiller v. Summers*, 1984 OK 14, 680 P.2d 360.⁵ While the Court has articulated parameters for immunity in the context of negligence and, to a limited extent, intentional tort, it has not yet determined whether

immunity bars an action in strict liability pursuant to 4 O.S. §42.1; this case presents an issue of first impression.

¶11 Since *Tucker*, the Court has partially abrogated the immunity rule in two limited circumstances: for a “negligence action brought on behalf of an unemancipated minor child against a parent to the extent of the parent’s automobile liability insurance”;⁶ and for cases involving “willful misconduct.”⁷

¶12 First, the Court in *Unah* partially abrogated the parental immunity rule when a child is injured as a result of their parent’s negligent operation of a motor vehicle. *Unah*, ¶11. That compulsory liability coverage was the law in Oklahoma was a significant factor in the Court’s decision because the policy argument to preserve family harmony was hollow where such insurance existed. *Id.*, ¶7. Later in *Sixkiller*, a child sued his parent for ordinary and gross negligence when the child was shot in the eye with an arrow as a result of the father’s negligent supervision. *Sixkiller*, ¶3. The court cited the rationale that parental immunity preserves family harmony in support of its decision to bar the child’s claims. *Id.*, ¶7. In doing so, the court was mindful not to intrude on the exercise of parental authority and care of a child. *Id.* The “limited abrogation of parental immunity in *Unah* [would] not be extended to cases involving negligent supervision short of willful misconduct.” *Id.*, ¶12. These cases make clear that the goal of parental immunity is to protect family harmony, but not excuse parents who intentionally harm their children. *Id.*

¶13 In this case, a claim brought under the dog-bite statute differs from the negligence theories of recovery in *Unah* and *Sixkiller*. Courts have interpreted §42.1 as a strict liability statute, meaning the Legislature in certain circumstances intended to impose liability on dog owners without regard to fault.

¶14 For strict liability statutes, a person could be liable under the terms of a statute, but such liability is not necessarily equivalent to willful misconduct or an intentional tort,⁸ or a failure to use even slight care.⁹ Accordingly, a statute which purports to impose strict liability does not automatically disqualify a parent’s common law immunity. Whether immunity applies must be determined according to the nature of the conduct and not merely based upon whether the liability is strictly imposed by statute.

¶15 In cases other than vehicular negligence, there has been no suggestion to abrogate parental immunity short of willful misconduct. *Sixkiller*, ¶12. In this case, the foster family had the family dog in the home for one and a half years prior to H.G.’s arrival. The foster parents introduced the dog and H.G. through a gate and later in the living room prior to the dog biting him without warning or provocation. There is no evidentiary material presented in the record to demonstrate a material fact question, or even an inference, that the Defendants’ conduct could be anything more than ordinary negligence. Defendants’ decision to keep and expose children to the family dog in this case was at most a negligent act involving ordinary parental discretion and supervision. See *Squeglia v. Squeglia*, 234 Conn. 259, 661 A.2d 1007 (Conn. 1995) (holding that parental immunity barred a child’s statutory strict liability claim for a dog bite where the parents’ decision to have a dog in the home is within the parental supervisory function and therefore falls directly within the scope of claims that the doctrine is intended to bar.) Foster parents’ decision to keep Jaxon as a family pet and around foster children is the type of decision that does not rise to the level of conduct identified in *Sixkiller*.

¶16 Therefore Defendant-foster parents were immune from liability based on common law parental immunity. Summary judgment for Defendants was correct as a matter of law.

¶17 AFFIRMED.

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

BRIAN JACK GOREE, CHIEF JUDGE:

1. Defendants urged in the alternative that the Legislature did not intend §42.1 to apply to a child who is a household member. Because we conclude parental immunity bars the claim, it is unnecessary to address this question.

2. A person “in loco parentis” is “one who has assumed the status and obligations of a parent without formal adoption.” *Workman v. Workman*, 1972 OK 74, ¶10, 498 P.2d 1384.

3. 12 O.S. §2 provides:

The common law, as modified by constitutional and statutory law, judicial decisions and the condition and wants of the people, shall remain in force in aid of the general statutes of Oklahoma; but the rule of the common law, that statutes in derogation thereof, shall be strictly construed, shall not be applicable to any general statute of Oklahoma; but all such statutes shall be liberally construed to promote their object.

4. Other justifications include:

(1) disturbance of domestic harmony and tranquility; (2) interference with parental care, discipline, and control; (3) depletion of family assets in favor of the claimant at the expense of other children in the family; (4) the possibility of inheritance by the parent of the amount received in damages by the child; and (5) the danger of fraud and collusion between parent and child.

5. In *Sixkiller*, the Plaintiff sought to recover under theories of ordinary negligence and gross negligence. *Sixkiller*, ¶3. Oklahoma recognizes three degrees of negligence: slight, ordinary and gross. 25 O.S. §5.

Ordinary negligence is the lack of ordinary care and diligence while gross negligence is the lack of slight care and diligence. 25 O.S. §6.

6. *Unah By and Through Unah v. Martin*, 1984 OK 2, ¶¶10-12, 676 P.2d 1366.

7. *Sixkiller v. Summers*, 1984 OK 14, ¶¶7-12, 680 P.2d 360.

8. See *Sixkiller*, 1984 OK 14, 680 P.2d 360.

9. See 25 O.S. §6, which defines gross negligence as the “want of slight care and diligence.”

ORDER

Case No. 117,007. January 21, 2020

Certiorari is denied; the June 20, 2019 opinion by the Court of Civil Appeals, Division I, is ordered to be published and given precedential effect.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 21st DAY OF JANUARY, 2020.

/s/ Noma D. Gurich
CHIEF JUSTICE

For denial of certiorari:

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

Kauger and Colbert, JJ., dissent.

For publication of the opinion and giving that pronouncement precedential effect:

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

Darby, V.C.J., Kauger, Colbert and Rowe, JJ., dissent.

2020 OK CIV APP 10

EDITH BUTLER, Petitioner, vs. MULTIPLE INJURY TRUST FUND and THE WORKERS' COMPENSATION COMMISSION, Respondent.

Case No. 117,403. July 26, 2019

PROCEEDING TO REVIEW AN ORDER OF THE WORKERS' COMPENSATION COMMISSION EN BANC

REVERSED AND REMANDED

John R. Colbert, COLBERT COOPER HILL ATTORNEYS, Ardmore, Oklahoma, for Petitioner

Lori R. Whitworth, LATHAM, WAGNER, STEELE & LEHMAN, P.C., Tulsa, Oklahoma, for Respondent

P. THOMAS THORNBRUGH, JUDGE:

¶1 Petitioner, Edith Butler (Claimant), seeks review of an order of the Workers' Compensa-

tion Commission en banc (Commissioners or WCC) reversing an award of permanent total disability (PTD) benefits made by an Administrative Law Judge (ALJ) against the Multiple Injury Trust Fund (MITF). Following review, we reverse the decision of the WCC, reinstate and affirm the decision of the ALJ, and remand for further proceedings consistent with this opinion.

BACKGROUND

¶2 The essential background facts are not disputed. From July 24, 1991, through August 22, 2007, Claimant received PTD benefits from MITF's predecessor, the Special Indemnity Fund (SIF), for a combination of adjudicated work-related injuries to Claimant's legs. Benefits were discontinued because Claimant, born in 1942, reached age 65 in August 2007.¹

¶3 Claimant was later adjudicated by the workers' compensation court as having undergone a change in condition for the better. She previously had returned to work, and in May 2010 sustained an injury to her left shoulder and left hand, for which she received a permanent partial disability (PPD) award in October 2011. In May 2014, she sustained work-related injuries to her right knee, right shoulder, right hip, right arm, and right hand. She settled her claim for those injuries in November 2016 and received PPD as part of that agreement.

¶4 Claimant filed a claim against MITF, seeking PTD benefits due to the combination of her injuries. MITF admitted Claimant was PTD due to a combination of injuries, but denied liability for PTD. MITF asserted that because the SIF had paid PTD benefits for more than 16 years, until Claimant reached age 65, MITF's statutory obligation had been fulfilled, and that a “second award”² of PTD to Claimant against MITF was beyond the court's jurisdiction. MITF relied heavily on *Special Indemnity Fund v. Baker*, 1995 OK CIV APP 74, 900 P.2d 465 (approved for publication by the Oklahoma Supreme Court). In *Baker*, the Court held that a claimant could not recover PTD benefits from the SIF after he had already received PTD benefits from his last employer based on the same injury. The Court found the award against SIF constituted a collateral attack on the first award and contravened SIF statutes because it allowed the claimant to receive payment twice for the same PTD determination. *Id.*, ¶ 12.

¶5 An ALJ heard Claimant's case in April 2018. The ALJ rejected MITF's argument and awarded Claimant PTD pursuant to § 32 of the

Administrative Workers' Compensation Act (AWCA)³ and the Supreme Court's opinion in *Multiple Injury Trust Fund v. Mackey*, 2017 OK 75, 406 P.3d 564.⁴ In *Mackey*, the Court allowed a second award of PTD against the Fund by a claimant who received a separate set of injuries after he returned to work following a previous PTD adjudication against MITF. *See Mackey* at ¶ 14. Applying *Mackey* to the instant case, and noting Claimant's date of birth in 1942, the ALJ awarded PTD benefits to Claimant "for a period of 15 years or until [Claimant] . . . reaches the age of 65, whichever shall come later" pursuant to 85A O.S. Supp. 2014 § 32(B).⁵

¶6 MITF appealed to the WCC en banc. While stating they agreed with the ALJ that an individual may be PTD "more than once if more than one injury is involved," the Commissioners reversed the ALJ's award. Without expressly saying so, they also apparently rejected the reasoning of *Mackey*. Instead, they found that an "additional," "first impression" issue in this matter is whether § 32(B) establishes "a maximum limit for PTD awarded in a single claim or in a claimant's lifetime," and, reasoning as follows, found Claimant had reached the limit of what she could recover from MITF:

The statute [§ 32(B)] does not expressly limit *all* awards against the MITF to fifteen years of PTD benefits, but the plural use of "awards" suggests that both the age-based and fifteen-year limitations apply to the sum of all PTD awarded against the MITF in a claimant's lifetime. In addition, we find that the age-based limitation evinces legislative intent to provide compensation until a claimant becomes eligible for Social Security disability benefits. . . . [and] in light of the purpose and history of the MITF, we find no evidence the Legislature intended to allow a claimant to receive multiple fifteen-year PTD awards against the MITF. . . .

In sum, we conclude that the purpose of [§ 32(B)] is to establish the outer limit of the Fund's liability for the lifetime of a claimant. In this case, additional PTD benefits are barred by both the age-based and fifteen-year limitations in 85A O.S. § 32(B)....

¶7 The Commissioners, finding the ALJ's order against the clear weight of the evidence and contrary to law, reversed the award and denied Claimant benefits as against MITF. Claimant filed this appeal.

STANDARD OF REVIEW

¶8 Because Claimant's date of injury was in May 2014, the AWCA governs the law applicable to this case, including our standard of review. *Brown v. Claims Mgmt. Res., Inc.*, 2017 OK 13, ¶ 9, 391 P.3d 111. Under the AWCA, appellate review is governed by 85A O.S. Supp. 2014 § 78(C), under which this Court may modify, reverse, remand for rehearing, or set aside a WCC order if it was:

1. In violation of constitutional provisions;
2. In excess of the statutory authority or jurisdiction of the Commission;
3. Made on unlawful procedure;
4. Affected by other error of law;
5. Clearly erroneous in view of the reliable, material, probative and substantial competent evidence;
6. Arbitrary or capricious;
7. Procured by fraud; or
8. Missing findings of fact on issues essential to the decision.

Statutory construction presents a question of law, which we review *de novo*, i.e., without deference to the lower tribunal. *Arrow Tool & Gauge v. Mead*, 2000 OK 86, ¶ 6, 16 P.3d 1120.

ANALYSIS

¶9 As noted above, MITF admits Claimant is PTD due to a combination of injuries. The sole issue for review is whether Claimant is entitled to receive PTD benefits from MITF when she previously received PTD benefits for the full time statutorily allowed on a claim involving other injuries. MITF argues that she can recover such PTD benefits from it only once. The statute that the WCC found determinative, 85A O.S. Supp. 2014 § 32(B),⁶ states:

B. Permanent total disability awards from the Multiple Injury Trust Fund shall be payable in periodic installments for a period of fifteen (15) years or until the employee reaches sixty-five (65) years of age, whichever period is longer.

¶10 In *Multiple Injury Trust Fund v. Mackey*, 2017 OK 75, 406 P.3d 564, though not specifically addressing the age- and time-based provisions of an identical statute in the now-repealed Workers' Compensation Code, the Court addressed the same argument by MITF against a claimant

who had received a PTD award against the Fund for the second time. The Court stated:

The crux of MITF's position is that a claimant cannot be permanently and totally disabled more than once or, at least, cannot receive MITF compensation more than once. MITF reasons that MITF has already paid for the permanent and total effect of [the claimant's] previous adjudications of disability and to award additional compensation based on these same disabilities is an unauthorized extension of the statutory liability the Legislature created for MITF. MITF further reasons that even if [the claimant] could be permanently and totally disabled more than once, the prior adjudication of his condition is final and binding, unless there is a further adjudication that he sustained a change of condition for the better. We disagree.

It has long been recognized that the extent of a claimant's previous permanent disability, at the time of a subsequent injury, is a question of fact and a prior adjudication of permanent disability is not conclusive on this issue. A factor that is conclusive is a PTD claimant's return to work; this factor conclusively establishes he or she is no longer [PTD] and is not entitled to further PTD compensation.

A claimant who returns to work can sustain permanent total disability from a subsequent injury and may be [PTD] more than once if more than one injury is involved. . . . Despite the award of PTD in two different orders, the workers' compensation court was determining Claimant's condition at two different points in time, as a result of two separate injuries.

In [*Ball v. Multiple Injury Trust Fund*, 2015 OK 64, 360 P.3d 499], this Court took note of the obvious legislative intent over the last twenty years to decrease and limit the Fund's liability. **In light of this policy, if the Legislature had wanted to change this longstanding view of permanent total disability, we believe the Legislature would have either drafted new provisions to do so or would have expressly limited claimants to only one award for permanent total disability. The Legislature did not do so by enactment and neither will we by construction.**

Id., ¶¶ 12-15 (citations and internal quotation marks omitted) (emphasis added). The Court affirmed the lower court's award as the result of the combined effect of previously adjudicated disabilities and his last job-related injury in 2013 to his left shoulder.

¶11 We find *Mackey* dispositive of MITF's contention that Claimant cannot receive a second PTD award against MITF based solely on the fact that she received a previous PTD award for which MITF (or its predecessor) paid benefits. It is undisputed here that the second award to Claimant was not for the same combination of injuries that were the subject of her previous award. Thus, MITF cannot escape liability simply because it paid a PTD award to Claimant once.

¶12 Unlike the WCC, however, we find the reasoning of *Mackey* important when applied to a proper construction of § 32(B). WCC's construction has created what amounts to a jurisdictional or limitations bar to Claimant's request for relief here.⁷ Inasmuch as the Legislature expressly put a limitations provision for MITF claims in 85A O.S. Supp. 2014 § 33,⁸ we find no intent expressed within § 32(B) to impose a separate and additional set of limitations.

¶13 Moreover, the WCC's construction of the statute leaves Claimant essentially without a remedy. The WCC did not address, and its construction of § 32(B) appears to directly contradict, the language within 85A O.S. Supp. 2014 § 32(A) that states, without restriction, that an employee "shall receive compensation for permanent total disability if the combination of injuries renders the employee permanently and totally disabled." (Emphasis added). Furthermore, because 85A O.S. § 32(A) also expressly limits an employer's liability to only "the degree of percent of disability which would have resulted from the subsequent injury if there had been no preexisting impairment," the Commissioners' decision leaves Claimant without compensation for PTD whatsoever, which, again, contravenes the legislative intent expressed in § 32(A).

¶14 Finally, the WCC interpretation finds legislative intent in a presumption for which we fail to find support in the law or the evidence presented here. Without citation to legal authority or evidence that Claimant is in fact receiving benefits of any other type, the Commissioners found that the Legislature's inclusion of the age 65 limitation in § 32(B) "evinces

legislative intent to provide compensation until a claimant becomes eligible for Social Security disability benefits.” The statement is, at best, inaccurate, and at worst, wrong, in its implication that a person receiving PTD against the Fund automatically becomes eligible for Social Security Disability Income (SSDI) benefits when he or she reaches age 65. The statement also would be erroneous if the Commissioners intended to refer to “retirement benefits” rather than “disability” benefits, as well, since no one born after 1937 becomes entitled to full Social Security retirement benefits until after the age of 65.⁹ We refuse to read into the statute a legislative “intent” that is inaccurate legally and factually and is grounded in the invalid presumption that all persons, including Claimant, receive Social Security benefits of some type at the age of 65.

¶15 “In construing statutes, [t]he general rule is that nothing may be read into a statute which is not within the manifest intention of the legislature as gathered from the act itself” *Multiple Injury Trust Fund v. Garrett*, 2017 OK 62, ¶ 20, 408 P.3d 169 (quoting *Huffman v. Oklahoma Coca-Cola Bottling Co.*, 1955 OK 76, ¶ 18, 281 P.2d 436).

¶16 We find nothing in the language of the statutes governing MITF awards, 85A O.S. §§ 30 through 34, suggesting the legislature intended § 32(B) to impose a “once in a lifetime” restriction barring a “physically impaired person” who timely files a claim – regardless of the claimant’s age or prior awards – from receiving PTD benefits. Though ignored in part by the WCC in its decision, the Supreme Court’s observation at ¶ 15 of the Mackey opinion guides our conclusion here that, given the “obvious legislative intent over the last twenty years to decrease and limit the Fund’s liability,” if the Legislature had wanted to change the long-standing view of PTD that a worker can be PTD more than once based on multiple injuries, then the Legislature “would have either drafted new provisions to do so or would have expressly limited claimants to only one award for permanent total disability. The Legislature did not do so by enactment and neither will we by construction.” That statement remains true today.

¶17 Accordingly, we reject the WCC’s interpretation of the meaning, intent and effect of § 32(B) and find it affected by error as a matter of law. We reverse its decision, reinstate and affirm the decision of the ALJ awarding PTD benefits to Claimant against MITF, and remand for further proceedings consistent with this opinion.

CONCLUSION

¶18 The WCC’s interpretation and construction of 85A O.S. Supp. 2014 § 32(B) as barring Claimant from a PTD award against MITF is affected by error of law, and is reversed. The decision of the ALJ awarding PTD benefits against the Fund to Claimant is reinstated and affirmed, and this matter is remanded for further proceedings consistent with this opinion.

¶19 REVERSED AND REMANDED.

FISCHER, P.J., and GOODMAN, J., concur.

P. THOMAS THORNBRUGH, JUDGE:

1. Since 1978, state law has stated that PTD awards from the funds are payable for a set number of years or until the employee reaches age 65, “whichever period is longer.”

2. MITF Trial Brief, record at pp. 288-91.

3. Title 85A O.S. Supp. 2014 §§ 1 through 125.

4. The ALJ found *Baker* distinguishable and therefore inapplicable to Claimant’s case.

5. By amendment effective May 28, 2019, § 32(B) was modified to provide for PTD awards from the MITF to be paid in periodic installments for eight years or until the employee reaches 65 years of age, whichever period is longer.

6. See note 5 above for the latest version of this provision.

7. MITF asserts on appeal, as it did in the trial court, that neither the court nor the WCC is “authorized” to make a PTD award against MITF under the circumstances presented.

8. The applicable version of § 33 expressly provides that the right to claim compensation for MITF benefits “shall be forever barred” unless a claimant files a “Notice of Claim . . . within two (2) years of the date of the last order for permanent partial disability from the latest claim against the employer.” It also expressly imposes a time limit of three years for a claimant to request a hearing and final determination of a filed notice or “the same shall be barred.” Section 33 was amended in 2019, and now imposes a one-year limitations period for filing the Notice of Claim and a two-year limitations period for seeking a hearing and final determination of a claim. See Okla. Sess. Laws 2019 c. 476 § 62 (HB 2367).

9. According to the Social Security Administration, if an individual is receiving Social Security “disability” benefits when they reach “full retirement age, [the] disability benefits automatically convert to retirement benefits, but the amount remains the same.” <https://www.ssa.gov/planners/disability/qualify.html>. “Full retirement age is the age at which a person may first become entitled to full or unreduced [Social Security] retirement benefits,” and anyone born after 1937 will have a “full retirement age” that is older than age 65. <https://www.ssa.gov/planners/retire/retirechart.html> (last accessed July 25, 2019).

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

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Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS Thursday, February 6, 2020

J-2019-620 — On March 28, 2019, Appellant C.G., was charged as an adult with First Degree Murder and First Degree Burglary in Oklahoma County Case No. CF-2019-1347. C.G. was subsequently charged with Second Degree Burglary. On August 16, 2019, the District Court of Oklahoma County, the Honorable David McCormick, Special Judge, denied C.G.'s request for reverse certification as either a juvenile or youthful offender. C.G. appeals. The District Court's order denying C.G.'s motions for reverse certification as either a juvenile or youthful offender is **AFFIRMED**. Opinion by: Lumpkin, J.; Lewis, P.J., Dissent; Kuehn, V.P.J., Dissent; Hudson, J., Concur; Rowland, J., Concur.

F-2018-888 — Appellant, Justin William Dunlap, was tried by the court and convicted of Count 1, First Degree Rape by Instrumentation of a Victim under the Age of Fourteen, in Creek County District Court, Case No. CF-2017-71. The trial court sentenced Appellant to ten years imprisonment. From this judgment and sentence Appellant appeals. The judgment and sentence are **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 in Results.

F-2018-113 — Appellant, Brenda Marie Huff, was tried by jury and convicted of four counts of Child Neglect (Counts 1-4), and one count of Enabling Child Sexual Abuse (Count 5), in the District Court of Lincoln County, Case Number CF-2016-172A. The jury recommended as punishment twenty-five years imprisonment on each count. The trial court sentenced Appellant accordingly and ordered the sentences to run concurrently to one another. It is from this judgment and sentence that Appellant appeals. The Judgment and Sentence is hereby **AFFIRMED**. Opinion by: Lumpkin, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur in Result; Hudson, J., Concur; Rowland, J., Concur.

F-2018-1267 — Shelley Jo Duncan, Appellant, was tried by jury for the crime of Lewd Acts

with a Child in Case No. CF-2017-31 in the District Court of Johnston County. The jury returned a verdict of guilty and set as punishment six years imprisonment. The trial court sentenced accordingly. From this judgment and sentence Shelley Jo Duncan has perfected his appeal. **AFFIRMED**. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs.

F-2018-114 — Appellant, Andrew Huff, was tried by jury and convicted of four counts of Child Neglect (Counts 1-4), and one count of Child Sexual Abuse (Count 5), in the District Court of Lincoln County, Case Number CF-2016-172. The jury recommended as punishment twenty-five years imprisonment on Counts 1-4 and thirty years imprisonment on Count 5. The trial court sentenced Appellant accordingly and ordered the sentences to run concurrently to one another. It is from this judgment and sentence that Appellant appeals. The judgment and sentence is **AFFIRMED**. Opinion by: Lumpkin, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur in Part Dissent in Part; Hudson, J., Concur; Rowland, J., Concur.

F-2018-1072 — D'Angelo Keiyawn Threatt, Appellant, was tried by jury for the crime of Felon in Possession of a Firearm, After Former Conviction of Two or More Felonies, in Case No. CF-2017-6899, in the District Court of Oklahoma County. The jury returned a verdict of guilty and recommended as punishment eight years imprisonment. The Honorable Cindy H. Truong, District Judge, sentenced accordingly and further imposed various costs and fees. From this judgment and sentence D'Angelo Keiyawn Threatt has perfected his appeal. **AFFIRMED**. Opinion by: Hudson, J.; Lewis, P.J., Concurs in Results; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs; Rowland, J., Specially Concurs.

RE-2018-1287 — Darryn Lamar Chandler, Jr., Appellant, appeals from the revocation in full of his concurrent four year suspended sentences in Case Nos. CF-2015-2683 and CF-2016-534 in the District Court of Oklahoma County, by the Honorable Glenn Jones, District Judge. **AFFIRMED**. Opinion by: Hudson, J.; Lewis, P.J.,

Concurs; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs in Results; Rowland, J., Concurs.

Thursday, February 13, 2020

F-2018-901 — Najee Jamall Cox appeals from the acceleration of his deferred judgment and sentencing in Case No. CF-2014-5486 in the District Court of Oklahoma County, by the Honorable Ray C. Elliott, District Judge. **AFFIRMED**. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs in results; Lumpkin, J., concurs; Hudson, J., concurs; Rowland, J., concurs.

F-2018-308 — Deondrea Deshawn Thompson, Appellant, was tried by jury and found guilty of Counts 1, 2, 4, 5, 8, and 9, robbery with a firearm; Counts 3 and 10, attempted robbery with a firearm; Count 6, felon in possession of a firearm; and Count 7, engaging in a pattern of criminal offenses in two or more counties, all after former conviction of a felony in Case No. CF-2016-6831 in the District Court of Oklahoma County. The jury set punishment thirty-five (35) years imprisonment on each of Counts 1 through 5 and 8 through 10, and seven (7) years imprisonment on each of Counts 6 and 7. The trial court sentenced accordingly and ordered the sentences to run consecutively. From this judgment and sentence Deondrea Deshawn Thompson has perfected his appeal. The judgment and sentence is **AFFIRMED**. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs; Rowland, J., concurs.

F-2018-1004 — On April 18, 2017, in the District Court of Oklahoma County, Appellant Shannon Sheree Johnson entered a plea of guilty in Case No. CF-2015-8771 and the trial court delayed Appellant's sentencing in Case No. CF-2015-8771 and suspended the probation requirements in Oklahoma County District Court Case Nos. CF-2013-2846, CF-2014-1596, and CM-2015-1832 pending successful completion of the Oklahoma County Mental Health Court Program. On August 15, 2018, the State filed an application seeking to terminate Appellant's participation in the mental health court program. Following an August 16, 2018, hearing on the State's application, the Honorable Geary Walke, Special Judge, terminated Appellant's participation in mental health court and sentenced Appellant pursuant to her mental health court plea agreement. The termination of Appellant's participation in mental health court is **AFFIRMED**. Opinion by: Kuehn, V.P.J.; Lewis, P.J.: concur; Lumpkin, J.: concur; Hudson, J.: concur; Rowland, J.: concur.

RE-2019-155 — On February 13, 2017, Appellant Michelle Marie Mesplay stipulated to an application to accelerate in Ottawa County District Court Case No. CF-2015-134. The trial court accelerated Appellant's deferred sentence to a conviction and sentenced Appellant to ten years imprisonment, with all ten years suspended. On May 3, 2018, the State filed a Motion to Revoke Suspended Sentence. Following a revocation hearing, the trial court revoked seven and a half years of Appellant's remaining suspended sentence. The revocation is **AFFIRMED**. Opinion by: Hudson, J.; Lewis, P.J.: concurs; Kuehn, V.P.J.: concurs; Lumpkin, J.: concurs; Rowland, J.: concurs.

F-2019-224 — Joseph Eugene Dean, Appellant, was tried by jury for the crime of Endangering Others While Eluding or Attempting to Elude Police Officer, After Former Conviction of Two or More Felonies (Count 2), in Case No. CF-2017-1030, in the District Court of Muskogee County. The jury returned a verdict of guilty and recommended as punishment twenty years imprisonment and a \$2,500.00 fine. The Honorable Bret A. Smith, District Judge sentenced accordingly and imposed various costs and fees. From this judgment and sentence Joseph Eugene Dean has perfected his appeal. **AFFIRMED**. Opinion by: Hudson, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs; Rowland, J., Concurs.

Thursday, February 20, 2020

RE-2019-126 — Appellant, Ricky Glen Jones, Jr., entered a plea of guilty to Performing Lewd Act in Presence of Minor, a felony, in Creek County District Court Case No. CF-2008-78. He was sentenced to twenty-five years with all except the first ten years suspended. Appellant was fined \$10,000.00 with \$9,500.00 suspended. Appellant was also required to successfully complete sex offender treatment. The State filed a motion to revoke Appellant's suspended sentence on August 21, 2018. Following a revocation hearing on February 20, 2019, the Honorable Douglas W. Golden, District Judge, granted the State's application. Appellant was sentenced to fifteen years with all except the first ten years suspended. 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.

RE-2018-1289 — Appellant Glenn Horton III entered a guilty plea to Possession of a Controlled Dangerous Substance in Oklahoma County District Court Case No. CF-2013-8288. He was sentenced to sixteen (16) years imprisonment with all but the first six (6) years suspended. The State filed an Amended Application to Revoke Suspended Sentence, alleging that Horton violated the terms of his probation by committing the crimes alleged in Oklahoma County District Court Case Nos. CM-2017-3849, CF-2018-0662, CF-2018-1570 and CF-2018-5128. Following a hearing on the State's motion, the District Court of Oklahoma County, the Honorable Bill Graves, ordered that Horton's suspended sentence be revoked in full. Horton appeals. The revocation of Horton's suspended sentence is **AFFIRMED**. Opinion by: Lumpkin, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur; Hudson, J., Concur; Rowland, J., Concur.

F-2018-585 — Appellant Maurice Deandre Harding was tried by jury for the crimes of Counts 1 and II – Discharging a Weapon into Dwelling or Public Place, Count V – Trafficking in Illegal Drugs (Methamphetamine), Count VI – Unlawful Possession of Controlled Drug (Cocaine) with Intent to Distribute, Count VII – Possession of Firearm After Former Conviction of a Felony and Count VIII – Possession of a Firearm While in the Commission of a Felony, after former conviction of two or more felonies in Tulsa County District Court Case No. CF-2016-6876. In accordance with the jury's recommendation the trial court sentenced Appellant to life imprisonment on Counts I, II, VI, VII and VIII, to life imprisonment without the possibility of parole and a \$25,000 fine on Count V, to be served concurrently, with one year post imprisonment supervision. From this judgment and sentence Maurice Deandre Harding 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-2018-530 — Ruth Ann Lewis, Appellant, was tried by jury for the crimes of Count 1: Child Abuse Murder and Counts 2 and 3: Child Neglect, in Case No. CF-2016-2804, in the District Court of Tulsa County. The jury returned a verdict of guilty and recommended as punishment life imprisonment and an \$8,000.00 fine on Count 1; ten years imprisonment on Count 2; and three years imprisonment on Count 3. The Honorable William D. LaFortune, District Judge, sentenced accordingly ordering both

credit for time served and that the sentences for all three counts run consecutively. From this judgment and sentence Ruth Ann Lewis has perfected her appeal. **AFFIRMED**. Opinion by: Hudson, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur; Lumpkin, J., Concur; Rowland, J., Specially Concur.

COURT OF CIVIL APPEALS
(Division No. 1)
Friday, February 14, 2020

116,582 — In Re Marriage of Diacon: Glen E. Diacon, Jr., Petitioner/Appellee, v. Melissa Diacon, Respondent/Appellant. Appeal from the District Court of Pontotoc County, Oklahoma. Honorable Timothy L. Olson, Judge. Respondent/Appellant Melissa Diacon (Mother) appeals the denial of her motion for new trial filed in response to the trial court's order terminating joint custody and awarding custody of the parties' minor children to Petitioner/Appellee Glen E. Diacon, Jr. (Father). We have reviewed the record and find no abuse of discretion in the denial of a new trial. Both parties sought to terminate joint custody and the record clearly shows it was not working. The decision to award custody to Father is supported by the clear weight of the evidence. **AFFIRMED BY SUMMARY OPINION UNDER SUPREME COURT RULE 1.202(d) OR (e)**. Opinion by Buettner, J.; Bell, P.J., and Goree, J., concur.

116,699 — In Re The Marriage of: Melia Gale Igo, Petitioner/Appellee, v. Erwin Earl Igo, Respondent/Appellant. Appeal from the District Court of Caddo County, Oklahoma. Honorable S. Wyatt Hill, Judge. In this proceeding for the dissolution of marriage, Respondent/Appellant, Erwin Earl Igo (Husband), and Petitioner/Appellee, Melia Gale Igo (Wife), both appeal from portions of the trial court's decree valuing and dividing marital assets and debts, determining separate property, and denying support alimony and attorney fees. We hold the trial court did not abuse its discretion when it valued the cattle business based on an appraisal instead of the subsequent auction/sale of the cattle. The trial court also did not abuse its discretion when it treated Husband's post-petition cattle operating loan and labor caring for the cattle as Husband's separate debt. The trial court did not abuse its discretion when it awarded Husband separately acquired retirement and when it denied Wife's claim for attorney fees and costs. Additionally, the trial court did not abuse its discretion when it refused to recapture and award Husband an equitable por-

tion of \$20,000.00 in marital funds gifted by Wife to her daughters in close proximity to Wife's petition for divorce. The evidence showed both parties withheld and secreted marital property from the other. With respect to support alimony, we hold the trial court abused its discretion when it failed to award Wife a reasonable amount of transitional support alimony. The trial court's order is **AFFIRMED IN PART AND REVERSED IN PART AND THIS MATTER IS REMANDED** to the trial court to award Wife a reasonable amount of transitional support alimony. Opinion by Bell, P.J.; Buettner, J., and Goree, J., concur.

116,875 — Austin Hingey, Claimant/Appellant, v. State of Oklahoma, ex rel., Tim Harris, D.A., Plaintiff/Appellee. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Caroline Wall, Judge. In this civil forfeiture action, Claimant/Appellant, Austin Hingey, appeals from the trial court's judgment entered upon a jury verdict that ordered Appellant to forfeit \$300,000.00 discovered in a storage unit. Tulsa police officers served search warrants at Appellant's home, at a house where Appellant worked and at a storage unit. This appeal concerns only the storage unit, where several pounds of marijuana, mushrooms and \$325,080.00 in cash were seized. Appellant denied the money was drug-related, but argued it was the result of years of work and his frugality. The jury found in favor of Appellant as to \$25,080.00 and determined the remaining \$300,000.00 should be forfeited. Because the testimony of the police officer who executed the now-lost search warrant affidavit was uncontroverted, we hold Appellant failed to satisfy his burden of proving the search warrant was invalid. The trial court's limitations placed on counsel's arguments did not result in a miscarriage of justice or constitute a substantial violation of Appellant's rights. Title 63 O.S. Supp. 2014 §2-503(A)(7) merely required the State to prove the seized cash was found in close proximity to a forfeitable substance; it did not require proof the money was obtained through illegal drug sales. The admission of the lab report, if error, was harmless. No reversible error concerning the admission of any post-arrest statements has been shown. Because Appellant failed to show he had any legitimate expectation of privacy in his brother's mail, he cannot complain about the officers' use of information obtained therefrom. Finally, the trial court properly denied Appellant's summary judgment motion because the State made a *prima*

facie case for the forfeiture of the money. **AFFIRMED**. Opinion by Bell, P.J.; Buettner, J., and Goree, J., concur.

117,253 — The Bank of New York Mellon f/k/a, The Bank of New York, as Trustee, Plaintiff/Appellee, v. Bobbie J. Potts & Wanda L. Potts, Defendants/Appellants. Appeal from the District Court of Muskogee County, Oklahoma. Honorable Mike Norman, Judge. In this action to collect on a promissory note and foreclose a mortgage, Defendants/Appellants, Bobbie J. Potts and Wanda L. Potts, appeal the trial court's grant of summary judgment to Plaintiff/Appellee, The Bank of New York Mellon f/k/a The Bank of New York, as Trustee. We hold the evidentiary materials attached to Plaintiff's motion for summary judgment reveal there is no controversy of material fact which would preclude the summary adjudication of Plaintiff's claims. The trial court's summary judgment in favor of Plaintiff is affirmed. Defendants also appeal the trial court's order denying their motion to dismiss with prejudice and their response to Plaintiff's motion for summary judgment. We hold the trial judge did not abuse his discretion in disallowing Defendants' untimely filed response and motion. The trial court's order denying the untimely filed pleadings is **AFFIRMED**. Opinion by Bell, P.J.; Buettner, J., and Goree, J., concur.

117,630 — Miller Valve and Controls, Inc., Plaintiff/Counter-Defendant/Appellee, v. Jedson Engineering, Inc., Defendant/Cross-Claimant/Cross-Defendant/Third-Party Plaintiff/Appellant, and CP Kelco U.S., Inc., Defendant/Counter-Claimant/Cross-Defendant, and Rexel, Inc., Elliott Roofing, LLC, Nabholz Industrial Services, and Himic Sales Corporation, Defendants/Counter-Claimants/Cross-Claimants/Cross-Defendants and Logan and Company, Inc., and Elliott Electric Supply, Inc., Defendant/Counter-Claimants/Cross-Claimants/Cross-Defendants/Counter-Defendant/Third-Party Plaintiff, and Rachid Abdallah, John Vignale Lighthouse Electric, Inc., Fischer Pump & Valve Company, d/b/a/ Fischer Process Industries, Spirax Sarco, Inc., Shelby McDonald, and John H. Carter Co., Inc., Third-Party Defendants, and Young's Sheet Metal, Inc., and Brazeal Masonry, Inc., Intervenor. Appeal from the District Court of Okmulgee County, Oklahoma. Honorable Kenneth Adair, Judge. Defendant/Appellant Jedson Engineering, Inc. appeals the trial court's order granting partial summary judgment in favor of Plaintiff/Appellee Miller

Valve and Controls, Inc. The trial court certified the order for immediate appeal. The record shows no dispute of material fact and we AFFIRM. Opinion by Buettner, J.; Bell, P.J., and Goree, J., concur.

117,704 — (Comp. w/117,705) Steven C. Anagnost, M.D., Plaintiff/Appellant, v. Oklahoma Spine and Brain Institute, L.L.P.; Tulsa Spine & Specialty Hospital, L.L.C., Clint Baird, M.D.; Chris M. Boxell, L.L.C.; Christopher M. Boxell, M.D.; Frank J. Tomecek, M.D., P.L.L.C.; Frank J. Tomecek, M.D.; State of Oklahoma, ex rel. Medical Licensure and Supervision Board; Lyle Kelsey; Eric Frische, M.D.; Gayla Janke; Gary L. Brooks; S. Randall Sullivan; and Daniel B. Graves, Defendants/Appellees. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Trevor S. Pemberton, Judge. Plaintiff/Appellant Steven C. Anagnost, M.D. (Anagnost) brought this action in 2013 against Tulsa Spine & Specialty Hospital, L.L.C., Oklahoma Spine and Brain Institute, L.L.P. and a group of individual neurosurgeons. In 2014, Anagnost amended his petition to add claims against the Oklahoma Medical Licensure and Supervision Board (the Board) and a group of Board employees (Board Defendants) for claims arising from Defendants' actions relating to the Board's investigation of Anagnost. In September 2018, the Board and Board Defendants moved to dismiss the claims against them as sanctions for Anagnost's alleged stealing and copying of privileged records related to the Board's investigation of Anagnost from the Oklahoma Bar Association. The trial court granted the dismissal. The remaining Defendants moved for identical sanctions, which the trial court granted. Anagnost appeals. We AFFIRM under Okla. Sup.Ct.R. 1.202(d) and (e). Opinion by Buettner, J.; Bell, P.J., and Goree, J., concur.

117,705 — (Comp. w/117,704) Steven C. Anagnost, M.D., Plaintiff/Appellant, Counter-Appellee, v. Tulsa Spine & Specialty Hospital, L.L.C., Defendant/Appellee/Counter-Appellant, Oklahoma Spine and Brain Institute, L.L.P.; Clint Baird; Chris M. Boxell, L.L.C.; Christopher M. Boxell; Frank J. Tomecek, M.D., P.L.L.C.; Frank J. Tomecek; State of Oklahoma, ex rel. Medical Licensure and Supervision Board; Lyle Kelsey; Eric Frische, M.D.; Gayla Janke; Gary L. Brooks; S. Randall Sullivan; and Daniel B. Graves, Defendants. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Trevor S. Pemberton, Judge. Plaintiff/Appellant/Counter-Appellee Steven

C. Anagnost, M.D. (Anagnost) brought this action against Defendant/Appellee/Counter-Appellant Tulsa Spine & Specialty Hospital, L.L.C. (Hospital), Oklahoma Spine and Brain Institute, L.L.P., a group of individual neurosurgeons (Defendant Neurosurgeons), the Oklahoma Medical Licensure and Supervision Board (the Board), and a group of employees of the Board (Board Defendants) (collectively "Defendants") for claims arising from Defendants' actions relating to the Board's investigation of Anagnost. Anagnost asserted claims of tortious interference with business and/or economic advantage, infliction of emotional distress, negligence, conspiracy, and defamation. Hospital moved to dismiss Anagnost's claims against it, or in the alternative, sought summary judgment. Finding the conduct of CEO, Terry Woodbeck (Woodbeck) not actionable under Anagnost's theories of liability, the trial court granted summary judgment in favor of Hospital only with regard to Woodbeck's conduct. Finding that material facts remained concerning Hospital's liability for Defendant Neurosurgeon's conduct, however, the trial court overruled Hospital's motion with regard to all other issues. Anagnost appeals and Hospital counter-appeals. This case was made a companion case to another appeal, Case No. 117,704, in which Anagnost appealed the dismissal of all of his claims as sanctions for willful and wrongful conduct. Because we affirm the dismissal of all of Anagnost's remaining claims via our decision in the companion case, this appeal is rendered moot and we dismiss it for lack of jurisdiction. DISMISSED. Opinion by Buettner, J.; Bell, P.J., and Goree, J., concur.

117,812 — In The Matter of the Avery Family Trust: John Neel Zink, Petitioner/Appellant, v. Etta May Avery, Nancy Ann McGill, Mickey G. Shackelford and Henry G. Will, Respondents/Appellees. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Kurt Glassco, Judge. Petitioner/Appellant, John Neel Zink, seeks review of the District Court's February 4, 2019 order awarding attorney fees of \$112,229.50 and costs of \$2,348.30 in favor of the Respondents/Appellees, The Avery Family Trust as Amended and the Trustees of the Avery Family Trust as Amended, Etta May Avery, Nancy Ann McGill, Mickey G. Shackelford and Henry G. Will. The attorney fee and cost request was made by motion March 19, 2018, pursuant to the terms of 60 O.S. 2011 §175.57(D). Hearing on the motion was conducted January 30, 2019. The District Court granted Appellees' attorney

fees and costs motion by order dated February 4, 2019. We hold the District Court did not abuse its discretion in awarding attorneys fees and costs in the appealed from order. There was evidence in the record to support the District Court's order. **AFFIRMED.** Opinion by Buettner, J.; Bell, P.J., and Goree, J., concur.

(Division No. 2)

Thursday, February 13, 2020

117,760 — In re the adoption of B.L.W.: Brandon R. Woods, Defendant/Appellant, vs. John Paul and Heather K. Harding, Plaintiffs/Appellees. Appeal from Order of the District Court of Custer County, Hon. Donna L. Dirickson, Trial Judge. Appellant Brandon Woods appeals the district court's order adjudicating minor child BLW eligible for adoption without consent. We find that the district court applied the correct standard of proof to this case and we affirm the district court's order determining BLW to be eligible for adoption without consent. The district court did not err in finding clear and convincing evidence that Brandon failed to maintain a substantial and positive relationship with BLW and willfully failed or refused to provide support for BLW for twelve of the fourteen months prior to filing of the petition for adoption. **AFFIRMED.** Opinion from the Court of Civil Appeals, Division II, by Fischer, P.J.; Reif, S.J. (sitting by designation), and Thornbrugh, J., concur.

116,614 — Housing Authority of the Kaw Tribe of Indians in Oklahoma, Jason Murray, Elaine Huch, and Patti Kramer, Plaintiffs/Appellees, vs. Jacque Secondine Hensley and Jerry Evans, Defendants/Appellants. Appeal from Order of the District Court of Kay County, Hon. David R. Bandy, Trial Judge. Appellants Jacque Secondine Hensley and Jerry Evans appeal the district court's issuance of a temporary injunction against them. We find that the district court is without jurisdiction to issue a temporary injunction which infringes upon the sovereignty of the Kaw Tribe and its elected officials to take official action regarding the appointment of Housing Authority commissioners or directing legislative action regarding the Housing Authority which is otherwise lawful. However, we affirm the district court's finding that the Housing Authority is a state agency. Consequently, the temporary injunction is vacated and the matter is remanded for further proceedings consistent with this Opinion. **AFFIRMED IN PART, VACATED IN PART, AND REMANDED FOR FURTHER**

PROCEEDINGS. Opinion from the Court of Civil Appeals, Division II, by Fischer, P.J.; Reif, S.J. (sitting by designation), and Thornbrugh, J., concur.

Friday, February 14, 2020

116,898 — Terrie Wollard, Plaintiff/Appellee, vs. Brent L. Hajek, individually; Mud Operations, Inc.; and Brent's Tank Trucks, Inc., Defendants/Appellants, and Brent Hajek and Terrie Hajek as Trustees, and Successor Trustees of the Hajek Revocable Trust Dated June 7, 1994, Defendants. Appeal from the District Court of Major County, Hon. Timothy D. Haworth, Trial Judge. Brent L. Hajek, individually, Mud Operations, Inc., and Brent's Tank Trucks, Inc. (collectively "Appellants") appeal an order denying their Motion to Reconsider or for New Trial to Correct and/or Modify a final order. They further appeal an order granting Terrie Wollard (Wollard) an attorney's fee and costs. Based on our review of the record and applicable law, we find the trial court erred in denying Appellants' motion to vacate its order finding the right of first refusal violated the rule against perpetuities, in entering an order of ejectment, and awarding Wollard her fees and costs. With respect to the remaining issues raised, the trial court acted within its discretion in denying Appellants' motion to vacate. Accordingly, the order denying Appellant's motion to vacate is affirmed in part, reversed in part, and the matter remanded to the trial court for further proceedings. The order awarding Wollard attorney's fees and costs is also reversed and the matter is remanded to the trial court for further proceedings. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS.** Opinion from the Court of Civil Appeals, Division II by Barnes, P.J.; Rapp, J., and Fischer, J., concur.

Tuesday, February 18, 2020

118,428 — Oklahoma Grocers Association, Inc., Plaintiff/Appellant, v. Kenneth W. Delozier, Jr., Defendant/Appellee, v. Bank of Commerce, Garnishee. Appeal from an Order of the District Court of Oklahoma County, Hon. April D. Collins, Trial Judge. The Plaintiff, Oklahoma Grocers Association, Inc. (OGA) appeals an Order summarily granting the defendant's, Kenneth W. Delozier, Jr. (Delozier), Motion to Enforce Payment Installment Agreement and Claim of Exemption of Garnishment. Bank of Commerce is the garnishee and is not involved

here. OGA asserts that the first default occurred on July 15, 2018. OGA claims a second default on July 15, 2019. Delozier argued that there was no second default in a twelve month period because the first day, July 15, 2018, is not counted pursuant to *Winn v. Nilsen*, 1983 OK 91, 670 P.2d 588. In other words, the two defaults occurred in separate twelve month periods. Therefore, OGA could not terminate the Amended Agreement. The trial court correctly ruled that the day of the first default was excluded when ascertaining whether two defaults occurred in a twelve month period. Because the day of the first default is excluded, the defaults occurred in two different twelve month periods. Therefore, OGA cannot terminate the Amended Agreement and the trial court correctly sustained Delozier's motion to enforce the Amended Agreement and correctly terminated the garnishment. **AFFIRMED.** Opinion from Court of Civil Appeals, Division II, by RAPP, J.; BARNES, P.J., and FISCHER, J., concur.

(Division No. 3)

Friday, February 7, 2020

117,594 — In the Matter of A.T., C.A., T.A., Deprived Children: Vanessa Alsup, Appellant, vs. State of Oklahoma, Appellee. Appeal from the District Court of Pittsburg County, Oklahoma. Honorable Mindy Beare, Trial Judge. Vanessa Alsup (Appellant) appeals from an order terminating her parental rights as to minor children, A.T., C.A. and T.A. (Minor Children). Appellant argues that active efforts were not made to provide her with services to complete her treatment plan for reunification with the Minor Children, and that Appellee State of Oklahoma failed to present sufficient evidence supporting termination of Appellant's parental rights beyond a reasonable doubt. We **AFFIRM.** Opinion by Swinton, V.C.J.; Mitchell, P.J., and Goree, J. (sitting by designation), concur.

117,653 — The State of Oklahoma, ex rel., Department of Transportation, Plaintiff/Appellee, vs. Brock W. Maroney and Terri M. Maroney, husband and wife, Defendants/Appellants, and F&M Bank; U.S. Bank National Association; and the Logan County Board of Commissioners, Defendants. Appeal from the District Court of Logan County, Oklahoma. Honorable Louis A. Duel, Associate District Judge. In this condemnation case, Defendants/Appellants Brock and Terri Maroney seek review of the trial court's order denying their

exceptions to the commissioners' report, which authorized the State of Oklahoma's taking of a portion of their homestead by eminent domain. Defendants argue generally that the trial court erred in denying their exceptions and that the order denying the report was insufficient under the statute. More specifically, Defendants complain that they were wrongfully denied a hearing. We find the court's order is sufficient under the statute and that the Defendants' failure to request a hearing below forecloses that argument on appeal. **AFFIRMED.** Opinion by Mitchell, P.J.; Swinton, V.C.J., and Goree, J. (sitting by designation), concur.

117,701 — (Cons. w/117,702, 117,703) In the Matter of the Estate of Joe L. Norton, Jr.: Shane Lewis, Plaintiff/Appellee, vs. Frances G. Norton, Defendant/Appellant. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Kurt G. Glassco, Judge. In this consolidated appeal concerning the administration and interpretation of a trust, Defendant/Appellant Frances G. Norton (Frances) seeks review of three separate rulings granting summary judgment to Plaintiff/Appellee Shane Lewis (Lewis). Lewis, an employee of Frances' late husband, filed this action seeking an accounting of the trust, the suspension or removal of Frances as trustee, and damages for breach of the trust. The court granted summary judgment to Lewis on Frances' counterclaims (1) alleging the trust amendment her husband made before his death was void due to undue influence exerted by Lewis and (2) seeking declaratory judgments that (a) because Frances had established the presumption of undue influence, the burden shifted to Lewis to prove the amendment was not the result of undue influence; (b) the marital trust, rather than the bypass trust, was funded; and (c) Lewis had violated the trust's in terrorem clause and had forfeited any benefit to which he claimed entitlement. After *de novo* review, we find the court did not err. We **AFFIRM.** Opinion by Mitchell, P.J.; Swinton, V.C.J., and Goree, J. (sitting by designation), concur.

117,782 — Robert Crawford Scott, Petitioner, vs. Multiple Injury Trust Fund and The Workers' Compensation Court of Existing Claims, Respondents. Proceeding to Review an Order of The Workers' Compensation Court of Existing Claims. Honorable Brad L. Taylor, Judge. Petitioner Robert Crawford Scott (Claimant) appeals from an order of the Workers' Compensation Court of Existing Claims, finding that he was not permanently totally disabled

(PTD) and thus could not recover PTD benefits from Respondent Multiple Injury Trust Fund (MITF). On appeal, Claimant contends the court erred by finding he was not PTD. More specifically, Claimant argues the court erred by relying on the deposition testimony of the court-appointed independent medical examiner (IME) because the IME's opinion was based on additional facts about Claimant's past revealed through questioning by MITF's counsel. We find the denial of PTD benefits is supported by competent evidence. Accordingly, we SUSTAIN. Opinion by Mitchell, P.J.; Swinton, V.C.J., and Goree, J. (sitting by designation), concur.

Friday, February 14, 2020

116,870 — Lanitra Huffman, Plaintiff/Appellee, vs. Eddie McVea, Defendant/Appellant. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Donald L. Easter, Trial Judge. Defendant/Appellant Eddie McVea (Defendant) appeals from an order denying his motion for new trial in a small claims action filed by Plaintiff/Appellee Lanitra Huffman (Plaintiff). Plaintiff filed a claim against Defendant for the loss of her property after Defendant, Plaintiff's landlord, cleared her residence of its property and left it out to be taken as trash. Defendant's counsel was not present at the hearing when judgment was entered for Plaintiff, and Defendant now argues that he was denied the opportunity to have counsel of his choosing assert arguments on his behalf at the hearing. Defendant also argues that the court erred in its award of damages, that there was insufficient evidence to support Plaintiff's damages, and that the trial court improperly applied the Oklahoma Residential Landlord-Tenant Act. We AFFIRM. Opinion by Swinton, V.C.J.; Mitchell, P.J., and Goree, J. (sitting by designation), concur.

117,208 — Lana Patricia Bermel, Plaintiff/Appellee, vs. Colton Bradley Horton, Defendant/Appellant. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Martha Rupp-Carter, Trial Judge. Defendant/Appellant Colton Bradley Horton (Horton) appeals from the trial court's order granting Plaintiff/Appellee Lana Patricia Bermel (Bermel) a protective order against Horton. He argues that the trial court erroneously granted a five year protective order, and that the trial court's findings were against the clear weight of the evidence. AFFIRMED. Opinion by Swinton, V.C.J.; Mitchell, P.J., and Goree, J. (sitting by designation), concur.

(Division No. 4)

Wednesday, February 12, 2020

116,666 — J. Matheson, Petitioner/Appellant, vs. H. Matheson, Respondent/Appellee. Appeal from an order of the District Court of Tulsa County, Hon. Owen T. Evans, Trial Judge, granting John Matheson's (Husband) motion to modify child support and support alimony. Husband contends the trial court erred in imputing \$85,000 annual income to him for child support and support alimony purposes. Husband cites as undisputed the evidence of his sincere and consistent efforts to locate employment and the lack of any evidence to suggest he could earn \$85,000. He argues that the trial court should have imputed minimum wage to him. Although he pursued significant efforts to find work, evidence in the record supports as reasonable the conclusion reached by the trial court, that Husband was willfully and voluntarily unemployed. Accordingly, we find no abuse of discretion in the trial court's decision to impute this income for purposes of child support and support alimony, and this portion of the trial court's order is affirmed. Husband further contends the trial court erred by failing to modify his child support obligation as of the date he filed his motion to modify, noting the oldest child had turned eighteen and graduated from high school. Based on the record, we agree with Husband that the modification as to the oldest child should have been effective as of the date the motion to modify was filed. This portion of the trial court's order is therefore reversed and the case is remanded to the trial court with instructions to make the order effective on May 20, 2016, and to adjust accordingly the amount of Husband's credit. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, C.J.; Reif, S.J. (sitting by designation), and Thornbrugh, P.J., concur.

ORDERS DENYING REHEARING

(Division No. 2)

Thursday, February 13, 2020

117,124 — Judith H. Rogers and Alana L. Risinger, Plaintiffs/Appellants, vs. Tommy Lee Fisher, individually and Tommy Lee Fisher, Personal Representative of the Estate of Wynona Jane Nelson, Deceased, Defendant/Appellee. Having considered the Appellant's Petition for Rehearing and the Substitute Petition for Rehearing filed on January 3, 2020, rehearing is hereby DENIED.

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SMALL OFFICE AVAILABLE – NW 59th & May in Oklahoma City – internet, WiFi, copy, fax, scan, conference room available, kitchen and other amenities. \$430 per month. Please call Shawn at 405-343-2453 for inquiries.

50 PENN LAW SUITE OFFICE SPACE. One to 5 offices available with optional furnishings, phones, copy machine, kitchen and conference rooms if desired. This is a great opportunity for a solo practitioner or small firm to limit expense within an ideal law office setting. \$750-\$1,500 based on provisions. Contact chris@superiusventures.com to schedule viewing or to obtain more information.

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Please call 405-943-3001 M-F from 8-5 for additional information or appointment to tour our facilities

POSITIONS AVAILABLE

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

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

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

MEDIUM SIZE AV-RATED DOWNTOWN TULSA FIRM IS SEEKING AN ATTORNEY with at least 12 years of business and civil litigation experience. The candidate must have jury trial experience. The ideal candidate will have solid litigation experience, excellent communication skills and be well-organized. Candidates seeking a firm with a team approach to litigation and a firm characterized by an environment encouraging faith and family will be interested in this unique opportunity. The compensation package is commensurate with level of experience and qualifications. Having some book of business is preferred. An exceptional benefit package includes bonus opportunity, health insurance, life insurance and 401K with match. Applications will be kept in strict confidence. Please send resume to resumereplies06@gmail.com.

POSITIONS AVAILABLE

COFFEY, SENER & MCDANIEL SEEKS EXPERIENCED ATTORNEY for our high-volume practice. Preferred candidate will have 5-7 years of experience in areas of transportation and insurance defense. Research, corporate, construction and health care law are a plus. Excellent benefits. Salary is based on experience. Send resumes to amy@csmlawgroup.com.

NORMAN BASED FIRM IS SEEKING A SHARP AND MOTIVATED ATTORNEY to handle HR-related matters. Attorney will be tasked with handling all aspects of HR-related items. Experience in HR is required. Firm offers health/dental insurance, paid personal/vacation days, 401(k) matching program and a flexible work schedule. Members of our firm enjoy an energetic and team-oriented environment. Position location can be for any of our Norman, OKC or Tulsa offices. Submit resumes to justin@polstontax.com.

NORTHERN OKLAHOMA LAW FIRM SEEKING ATTORNEY WITH EXPERIENCE in the area of Social Security disability. Competitive salary, health insurance, and 401K available. Send resume to "Box P," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

LITIGATION FIRM IS SEEKING A SENIOR PARTNER LEVEL RESEARCH & WRITER for their OKC or Tulsa office. Preferred candidate will have 10+ years of experience in the insurance defense business and a need for good oral argument skills. Insurance coverage experience is a plus. We handle a variety of interesting cases that challenge a lawyer's skill and creativity. We expect the best, and we pay among the best for the proven best. Forward your resume as well as your formal written opinions and court decisions on your cases to hr@holdenlitigation.com.

DeWITT PARUOLO & MEEK IS SEEKING AN ATTORNEY with a minimum of 1 year's experience in civil trial practice, insurance defense litigation and insurance coverage. Please submit your resume, cover letter and a writing sample to Derrick Morton, P.O. Box 138800, Oklahoma City, OK 73113 or by email to morton@46legal.com.

SHAWNEE LAW FIRM SEEKING MATURE LEGAL SECRETARY applicants with law firm experience. Email resume to deanna@shawneelaw.com.

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

POSITIONS AVAILABLE

THE LAW FIRM OF PIERCE COUCH HENDRICKSON BAYSINGER & GREEN LLP is accepting resumes for civil litigation defense associates at both the Tulsa and Oklahoma City offices. Preferred qualifications: civil litigation defense experience within the state of Oklahoma, including all phases of pretrial civil litigation, including drafting pleadings, written discovery, taking and defending depositions and court appearances. Three-5 years of experience preferred, however all attorneys submitting resumes will receive full consideration. Competitive compensation and benefits, including health insurance and 401(k). For Tulsa consideration, please submit cover letter, resume and references to P.O. Box 239, Tulsa, OK 74101 or by email to kwolfe@piercecouch.com. For Oklahoma City consideration, please submit cover letter, resume and references to P.O. Box 26350, Oklahoma City, OK 73126-0350 or by email to kluster@piercecouch.com.

THE KAW NATION IS TAKING APPLICATIONS FOR THE POSITION OF ATTORNEY GENERAL. The successful applicant will have a Juris Doctorate degree from an accredited law school along with an additional three years' experience representing Indian tribes; have the ability to appraise, interpret and apply legal principles and precedents to difficult legal problems; concisely and accurately communicate, both orally and in writing; learn tribal laws and customs unique to the Kaw Nation; be able to establish and maintain an effective working relationship with others; shall be a member in good standing of the bar of the Supreme Court of the United States, or of any United States court of appeals, or of any district court of the United States, or a member in good standing of the bar of the highest court of any state of the United States; and must be able to serve an elected term of office for three years. Deadline for applications is March 6, 2020. To apply, send email to iwilliams@kawnation.com for application packet.

TULSA SMALL LAW FIRM IS SEEKING SHARP, MOTIVATED ATTORNEY for workers' compensation, social security and personal injury trial work. Candidates must be licensed and in good standing with the Oklahoma Bar Association, have excellent research and writing skills and be proficient with technology. Ideal candidate will have three or more years of experience in a complimentary practice area, comfortable in the court room, have former litigation and deposition experience and good interpersonal skills including a heart for social justice. We offer health insurance, vacation and a 401K matching program. Please send writing sample, resume and salary requirements to TulsaLawyerOffice@gmail.com.

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

POSITIONS AVAILABLE

GROWING MID-TOWN TULSA FIRM IS SEEKING TWO SENIOR ASSOCIATES in the areas of 1) family law, guardianships and adoptions; and 2) estate planning and probate law. Firm has excellent reputation and more work than it currently can handle, though a book of business is also welcome. Please submit cover letter and resume by replying to "Box K," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152. Please indicate which of the two areas you would like to be considered for in your cover letter.

CLASSIFIED INFORMATION

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

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DO NOT STAPLE BLIND BOX APPLICATIONS.

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 post-marked **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

THURSDAY,
APRIL 23, 2020
9 A.M. - 2:50 P.M.

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

MCLE 6/1

PROGRAM PLANNER:

Sonja Porter, "The DUI Diva"
Sonja Porter Attorney at Law, PLLC

THIS PROGRAM WILL NOT BE LIVE WEBCAST

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DEFENDING THE DUI-DRUG CASE

PROGRAM DESCRIPTION:

DUI-drug cases, especially those involving prescription drugs or medical marijuana, pose different challenges for the defense attorney. Our speakers will talk about Field tests, DRE's, blood tests, saliva tests, and what it actually means to be "under the influence" of a particular drug, especially in a "per se" state. Finally, we will talk about the latest in driver's license issues and any pending legislation.

TOPICS INCLUDE:

- The A, B, C's of SFTS, ARIDE, & DRE
- Drugs in the Blood Analysis Explained
- Understanding the Effects of Drugs in the Blood
- Defending the DUI Drug case
- DUI Law Updates
- Ethics

TUITION: Early-bird registration by April 17, 2020 is \$150.00. Registrations received after April 17th is \$175.00 and walk-ins are \$200.00. Registration includes continental breakfast and lunch. All programs may be audited (no materials or CLE credit) for \$50 by emailing ReneeM@okbar.org to register.

oba cle
continuing legal education

FRIDAY,
APRIL 3, 2020
9 A.M. - 2:50 P.M.

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

MCLE 6/0



FEATURED SPEAKER:

Amber E. Bass,
*Vice President Contracts,
Compliance & Commercial,
Integreon*

THIS PROGRAM WILL NOT BE LIVE WEBCAST

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CREATE YOUR CORPORATE CONTRACTS PLAYBOOK:

**Critical Tools to Transform Corporate
Legal Departments**

LEARNING OBJECTIVES:

This seminar will delve into the importance of the new and emerging field of legal operations. It will discuss what legal operations is and the importance of metrics & playbooks.

1. Legal operations: What is it and how do I sign up?

2. I'm a Lawyer so why do I need analytics?

Learn to develop analytic tools that will maximize efficiencies and provide much needed data to help with workflow and planning. These tools will also provide critical data to the business and executive teams so that there is more transparency as to why "legal is not the holdup" and will identify where the bottlenecks are in order to create more efficiencies;

3. Create the perfect template and playbook

4. Playbook workshop: Bring your favorite contract clause!

TUITION: Early registration by March 28, 2019 is \$150. Registration received after March 28th is \$175 and walk-ins are \$200. Registration includes continental breakfast and lunch. Members licensed 2 years or less may register for \$75 for the in-person program (late fees apply) and \$100 for the webcast. All programs may be audited (no materials or CLE credit) for \$50 by emailing ReneeM@okbar.org to register.