

# THE OKLAHOMA BAR **Journal**

Volume 91 — No. 6 — 3/27/2020

## **Court Issue**



FRIDAY,  
MAY 15, 2020  
9 A.M. - 4:30 P.M.

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

MCLE 8/1

**PROGRAM PLANNER/  
MODERATOR:**

**Edward Maguire,**  
*Oklahoma Lawyers for  
America's Heroes Program,  
Oklahoma Bar Association*



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# NEW HORIZONS:

A FORECAST AND GUIDE TO VETERAN AND MILITARY LAW IN THE NEW DECADE

*Cosponsored by the OBA Military & Veterans Law Section*

**PROGRAM DESCRIPTION:**

This program will provide the participant with certified training in veterans' benefits and diversion programs in the new decade. We will look at the new veteran's court and other diversion methods designed to assist the veteran and active duty personnel. In addition, we will review and discuss current veteran's administration law and appeals primers.

Our goal is to fill the back packs of the lawyers seeking to help our veterans and active duty personnel in the new decade.

**TOPICS INCLUDE:**

**Access to Justice (Ethics)**

*Ed McGuire, Oklahoma Lawyers for America's Heroes Program, OBA*

**Judges Panel**

*Honorable Timothy Olsen, Seminole County District Judge*

*Honorable Linda Morrissey, Tulsa County District Judge*

*Honorable Linda Thomas, Washington County District Judge*

*Judge Aletia Timmons, Oklahoma County District Judge*

**Understanding Addiction and Veteran Court Solutions (Ethics)**

*Honorable Kenneth Stoner, Oklahoma County District Judge*

**Military Disability**

*Amy Hart, Hart Law Office PC*

**Working with Veterans with PTSD and Traumatic Brain Injuries**

*Bill Duncan, The Patriot Clinic*

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**TUITION:** Early-bird registration by May 8, 2020, is \$150.00. After May 8th, registration is \$175.00 and walk-ins are \$200.00. Registration includes continental breakfast and lunch. Registration for the live webcast is \$200. 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](mailto:ReneeM@okbar.org) to register.

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# THE OKLAHOMA BAR Journal

Volume 91 – No. 6 – March 27, 2020

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## DEADLINE EXTENDED!

With the interruptions caused by COVID-19, dates for review of applicant materials has been rescheduled. As a result, the search committee is allowing any previous applicants to supplement their applications and allowing new applicants to apply on or by May 1.

# 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 May 1, 2020, to [johnw@okbar.org](mailto:johnw@okbar.org).

All applications will be kept confidential.

The OBA is an equal opportunity employer.



## table of contents

March 27, 2020 • Vol. 91 • No. 6

page

332 INDEX TO COURT OPINIONS

333 OPINIONS OF SUPREME COURT

336 OPINIONS OF COURT OF CRIMINAL APPEALS

340 OPINIONS OF COURT OF CIVIL APPEALS

348 DISPOSITION OF CASES OTHER THAN BY PUBLICATION

## **Index to Opinions of Supreme Court**

SCAD NO. 2020-24 <u>FIRST EMERGENCY JOINT ORDER REGARDING THE COVID-19 STATE OF DISASTER</u> .....	333
SCAD NO. 2020-26 <u>SECOND EMERGENCY ORDER REGARDING THE COVID-19 STATE OF DISASTER</u> .....	334
2020 OK 17 IN RE: Rules Creating and Controlling the Oklahoma Bar Association [Article IV, Sec. 1(b)] SCBD No. 4483 .....	334

## **Index to Opinions of Court of Criminal Appeals**

2020 OK CR 8 VICTOR CHAMPION, Petitioner, v. THE STATE OF OKLAHOMA, Respondent Case No. C-2019-414.....	336
---	-----

## **Index to Opinions of Court of Civil Appeals**

2020 OK CIV APP 11 PAMELA BURNS, an individual, Plaintiff/Appellant, vs. MAUREEN MARKS COMBITES, an individual, Defendant/Appellee. Case No. 116,961 .....	340
2020 OK CIV APP 12 IN RE THE MARRIAGE OF: RICHARD L. GREEN, Plaintiff/Appellant, vs. JANICE GREEN, Defendant/Appellee. Case No. 117,451 .....	344

## **POSTPONEMENT ANNOUNCEMENT**

For Thirty-two years, The Sovereignty Symposium has established itself as the premier gathering for the exchange of legal and scholarly discussions regarding and relating to Native American Law. Because this extraordinary event requires months of planning and relies on the generosity of faculty and attendees from all over the world, we must consider the current circumstances surrounding the COVID 19 virus and the attempts to curtail it as soon as possible.

This uncertain time leads us to conclude that The Sovereignty Symposium currently scheduled for June 10-11, 2020, in Oklahoma City, Oklahoma, be postponed until it is safe to travel and hold public gatherings. Safety and health are our priority. Please check back for an announcement as to when it will be rescheduled. In the meantime, stay safe and healthy.

The Sovereignty Symposium was established to provide a forum in which ideas concerning common legal issues can be exchanged in a scholarly, non-adversarial environment. The Supreme Court espouses no view on any of the issues, and the position taken by the participants are not endorsed by the Supreme Court of Oklahoma.

# 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)*

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**SCAD NO. 2020-24**

**FIRST EMERGENCY JOINT ORDER**  
**REGARDING THE COVID-19**  
**STATE OF DISASTER**

**March 16, 2020**

1. Governor J. Kevin Stitt issued Executive Order 2020-07 on March 15, 2020, declaring an emergency in all 77 Oklahoma Counties caused by the impending threat of COVID-19 to the people of the state. This joint order is issued to clarify the procedures to be followed in all Oklahoma district courts and to encourage social distancing and to avoid risks to judges, court clerks, court employees and the public.
2. All district courts in Oklahoma shall immediately cancel all jury terms for the next 30 days and release jurors from service. No additional jurors shall be summoned without approval of the Chief Justice. All civil, criminal and juvenile jury trials shall be continued to the next available jury dockets.
3. Subject only to constitutional limitations, all deadlines and procedures whether prescribed by statute, rule or order in any civil, juvenile or criminal case, shall be suspended for 30 days from the date of this order. This suspension also applies to appellate rules and procedures for the Supreme Court, the Court of Criminal Appeals, and the Court of Civil Appeals.
4. In any civil case, the statute of limitations shall be extended for 30 days from the date of this order.
5. Subject only to constitutional limitations, assigned judges should reschedule all non-jury trial settings, hearings, and pretrial settings. Emergency matters, arraignments, bond hearings, and required proceedings of any kind shall be handled on a case by case basis by the assigned judge. Judges shall use remote participation to the extent possible by use of telephone conferencing, video conferencing pursuant to Rule 34 of the Rules for District Courts, or other means. The use of email, fax and drop boxes for acceptance of written materials is encouraged, except that the use of email may not be used for appellate filings at this time. If any party or counsel objects to a continuance of any matter, assigned judges are encouraged to hold hearings in the same manner as emergency matters.
6. The following persons are prohibited from entering any courtroom, court clerk's office, judges' offices, jury room or other facility used by the district courts:
  - a. Persons who have been diagnosed with or have direct contact with anyone diagnosed with COVID-19.
  - b. Persons with symptoms such as fever, severe cough, or shortness of breath.
  - c. Persons who have traveled to any country outside of the U.S. in the past 14 days, and those with whom they live or have had close contact.
  - d. Persons who are quarantined or isolated by any doctor or who voluntarily quarantine.
  - e. If you are in one of these categories (a-d) and are scheduled for a court appearance or are seeking emergency relief, contact your attorney, and if you have no attorney, call the court clerk's office in the county where you are required to appear.
7. All courts may limit the number of persons who may enter any courtroom, judges' or clerk's office, jury room or any other facility used by the district courts.
8. This order is subject to extension or modification as necessitated by this emergency.

**IT IS SO ORDERED.**

**DONE BY ORDER OF THE SUPREME COURT  
IN CONFERENCE THIS 16TH DAY OF  
MARCH, 2020.**

**/s/ NOMA D. GURICH  
CHIEF JUSTICE**

WITNESS OUR HANDS AND THE SEAL OF  
THIS COURT THIS 16TH DAY OF MARCH,  
2020.

/s/ DAVID B. LEWIS  
PRESIDING JUDGE

**SCAD NO. 2020-26**

**SECOND EMERGENCY ORDER**  
**REGARDING THE COVID-19**  
**STATE OF DISASTER**

**March 23, 2020**

1. Governor J. Kevin Stitt issued Executive Order 2020-07 on March 15, 2020, declaring an emergency in all 77 Oklahoma Counties caused by the impending threat of COVID-19 to the people of the state.
2. The Oklahoma State School Board on March 16, 2020 ordered all accredited public schools in the state to cease operations for students and educators until April 6 in response to the pandemic COVID-19 novel coronavirus.
3. This SECOND EMERGENCY ORDER is issued to clarify the procedures to be followed in all Oklahoma district courts. This order applies to and clarifies visitation or parenting time schedules in Family/Domestic Relations/Dissolution of Marriage/Paternity/Guardianship and/or any other cases concerning custody and visitation/parenting time of minor children, wherein a school schedule is used to determine visitation and/or custody.
4. For purposes of determining a person's right to custody and visitation/parenting time, the original published school schedule shall control in all instances. Custody and visitation/parenting time shall not be affected by the school's closure that arises from the COVID-19 pandemic.
5. Nothing herein prevents the parties from altering a custody and/or visitation order by written agreement, if allowed by the assigned judge. Written modification agreements will not be enforced unless filed. Based upon courthouse restrictions, it is recommended that the original signed written agreement, including the case number, be mailed to the court clerk's office in the district court which has jurisdiction over the parties.

6. Nothing herein prevents courts from modifying their orders. Courts should use remote access for hearings involving modification of the existing orders, if possible.

**IT IS SO ORDERED.**

DONE BY ORDER OF THE SUPREME COURT  
IN CONFERENCE THIS 23rd DAY OF  
MARCH, 2020.

/s/ NOMA D. GURICH  
CHIEF JUSTICE

**2020 OK 17**

**IN RE: Rules Creating and Controlling  
the Oklahoma Bar Association  
[Article IV, Sec. 1(b)]**

**SCBD No. 4483. March 23, 2020**

**ORDER**

This matter comes on before this Court upon an Application to Amend 5 O.S. Ch. 1, App. 1, Art. IV, Sec.1 (b), Rules Creating and Controlling the Oklahoma Bar Association (hereinafter "Rules") filed on March 6, 2020. This Court finds that it has jurisdiction over this matter and the Rules are hereby amended as set out in Exhibit A attached hereto, effective immediately.

DONE IN CONFERENCE this 23rd day of  
March, 2020.

/s/ Noma D. Gurich  
CHIEF JUSTICE

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

Kane, J., not voting.

**EXHIBIT A**

**Oklahoma Statutes Citationized**  
**Title 5. Attorneys and the State Bar**  
**Chapter 1 - Attorneys and Counselors**  
**Appendix 1 - Rules Creating and Con-**  
**trolling the Oklahoma Bar Association**  
**Article Article IV**  
**Section Art IV Sec 1 - Board of**  
**Governors**

Cite as: O.S. §, — —

The governing body of this Association shall consist of seventeen (17) active members of this Association, designated as the Board of Governors. The authority of the Board of Governors shall be subordinate to these Rules and direction of the House of



Delegates. Said Board shall be selected as follows:

(a) Three (3) members elected At Large, by a majority vote of the House of Delegates or by a plurality of the voting members of the Association, in such manner as may be prescribed by the Bylaws, for a term of three (3) years, one of whom shall be elected annually.

(b) Nine (9) members, one from each Supreme Court Judicial District, as such districts existed prior to January 1, 2020, elected by a majority vote of the House of Delegates or by a plurality of the voting members of the Association in such manner as may be prescribed by the Bylaws, for a term of three (3) years; three (3) of such members shall be elected at the annual election next prior to the expiration of the term of office of the respective predecessor members.

(c) The President and Vice-President of the Association during their terms of office.

(d) The President-Elect of the Association.

(e) The immediate Past-President of the Association during the year immediately following his term as President.

(f) The Chairman of the Young Lawyers Division of the Association duly elected in accordance with the provisions of that organization's Bylaws. The Chairman of the YLD shall serve on the Board of Governors during his term of office as Chairman of the YLD.

(g) A quorum of the Board of Governors shall consist of nine (9) members. A majority of a quorum shall suffice to carry any action of the Board of Governors, unless otherwise provided by the Bylaws of the Association and except that recommendations for any amendment to these rules must receive the affirmative vote of a majority of all members of the Board of Governors.

(h) The President of the Association and the Executive Director of the Association shall act, respectively, as Chairman and Recording Secretary of the Board of Governors.

## 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.

This is the **SECOND** notice of judicial vacancy for the position. The first notice of judicial vacancy resulted in only two applications being received. The Judicial Nominating Commission is constitutionally required to send three nominees to the Governor and Chief Justice of the Supreme Court and based on 2006 OK AG 2, will continue the process until the constitutional requirement of three qualified nominees is met.

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](http://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, April 10, 2020**. Applications may be hand-delivered or mailed. If mailed, they must be postmarked **on or before April 10, 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

# Opinions of Court of Criminal Appeals

2020 OK CR 8

VICTOR CHAMPION, Petitioner, v. THE  
STATE OF OKLAHOMA, Respondent

Case No. C-2019-414. March 19, 2019

## OPINION

LEWIS, PRESIDING JUDGE:

¶1 Victor Champion, Petitioner, pled guilty to Count 1, first degree rape by instrumentation, in violation of 21 O.S.2011, § 1114(A)(6); Count 2, financial abuse or exploitation of a vulnerable adult, in violation of 21 O.S.2011, § 843.3(A); and Count 3, sexual battery, in violation of 21 O.S.Supp.2018, § 1123(B), in the District Court of Tulsa County, Case No. CF-2019-475. The Honorable Kelly Greenough, District Judge, found Petitioner guilty and sentenced him to concurrent terms of five (5) years imprisonment and a \$600.00 fine in Count 1, two (2) years imprisonment and a \$600.00 fine in Count 2, and five (5) years imprisonment and a \$600.00 fine in Count 3, all suspended.

¶2 Petitioner filed a timely motion to withdraw the plea. He now seeks the writ of certiorari from the trial court's denial of his motion to withdraw the plea, in the following propositions of error:

1. The lack of factual basis renders a plea involuntary because the record does not show that there was a factual basis for the charges of rape by instrumentation or sexual battery. Therefore, it was plain error to refuse to let Mr. Champion withdraw his plea;
2. The trial court did not have authority to reinstate a guilty plea. Therefore, the order denying the motion to withdraw plea was a nullity;
3. The trial court did not hold the motion to withdraw hearing within 30 days. Therefore the trial court lost jurisdiction to hear the motion to withdraw plea;
4. A plea that is not knowingly made is not a valid plea. Therefore, it was plain error for the trial judge to not allow Mr. Champion to withdraw his plea;

5. Petitioner was denied the effective assistance of counsel both at the plea hearing and at the plea withdrawal hearing;

6. The accumulation of error in this case deprived petitioner of the due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article II, § 7 of the Oklahoma Constitution.

¶3 We review the trial court's ruling on a motion to withdraw a plea for an abuse of discretion, *Carpenter v. State*, 1996 OK CR 56, ¶ 40, 929 P.2d 988, 998; unless it involves a question of statutory or constitutional interpretation, which we review *de novo*. *Weeks v. State*, 2015 OK CR 16, ¶ 16, 362 P.3d 650, 654. Neither Petitioner's dissatisfaction with the sentence, nor an inaccurate prediction by counsel of the likely sentence to be imposed on a blind plea, is a sufficient ground for withdrawal of a plea. *Lozoya v. State*, 1996 OK CR 55, ¶ 44, 932 P.2d 22, 34; *Estell v. State*, 1988 OK CR 287, ¶ 7, 766 P.2d 1380, 1383.

¶4 In Proposition One, Petitioner challenges the sufficiency of the factual basis for his plea. Petitioner concedes he raised no such claim in his motion to withdraw the plea, forfeiting appellate review of this issue. Rule 4.2 (B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22 O.S., Ch. 18, App. (2020) (no matter may be raised in petition for certiorari unless raised in the application to withdraw the plea); *Weeks*, 2015 OK CR 16, ¶ 27, 362 P.3d at 657. He argues that the trial court's failure to require a factual basis was plain error, and that plea and withdrawal counsel were ineffective in failing to raise the issue.

¶5 Review of such forfeited claims in a certiorari appeal is "even more limited" than review for plain error on direct appeal. *Cox v. State*, 2006 OK CR 51, ¶ 4, 152 P.3d 244, 247, *overruled on other grounds by State v. Vincent*, 2016 OK CR 7, 371 P.3d 1127. Given the procedural posture of this claim, our inquiry is limited to whether the guilty plea was made knowingly and voluntarily, and whether the court had jurisdiction to accept the plea. *Id.* A valid plea "represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). Appellant's ad-

missions in open court and the existing record are sufficient to show that his plea of guilty was voluntary and intelligent given the courses of action open to him. Proposition One is therefore denied.

¶6 In Proposition Two, Petitioner claims the trial court's decision to set aside its original minute order granting his motion to withdraw the plea, and set the motion for evidentiary hearing, amounted to a forced reinstatement of his guilty plea.<sup>1</sup> He reasons that because the evidentiary hearing required by Rule 4.2(B) is solely for the benefit of the Petitioner and the Court in a proceeding where the State has no appeal rights, the State's objection to the lack of a hearing was an insufficient reason to set aside the court's original order.

¶7 Petitioner misunderstands the scope and purpose of the required evidentiary hearing. The Court rejected his view of Rule 4.2(B) in *Anderson v. State*, 2018 OK CR 13, ¶ 3, 422 P.3d 765, 767:

[Rule 4.2(B)] has made the evidentiary hearing on the motion to withdraw plea mandatory upon the filing of an application to withdraw plea, and not discretionary or conditional upon a request of the defendant.

Contrary to Petitioner's argument, the State is an interested party in a certiorari appeal from a plea of guilty, and as such, it has a basic *right to be heard* at the evidentiary hearing on a defendant's request to withdraw his plea. And "in the absence of an evidentiary hearing on the motion to withdraw plea, this Court is unable to review the trial court's denial of Petitioner's motion." *Anderson*, 2018 OK CR 13, ¶ 6, 422 P.3d at 767. By correcting its earlier error and setting aside its order granting the motion without a proper hearing, the trial court did not lose jurisdiction to hear evidence and issue a ruling on Petitioner's motion to withdraw the plea. Proposition Two is denied.

¶8 In Proposition Three, Petitioner argues that the trial court lost jurisdiction to deny his motion to withdraw the plea when it failed to hold the evidentiary hearing within the thirty days required by Rule 4.2(B). He did not raise this objection at the time of the evidentiary hearing, nor did he seek relief from this Court for a hearing within the 30-day limit. He has forfeited review of this claim on the merits.

¶9 Rule 4.2(B) states that if the trial court fails to hold the evidentiary hearing on the motion

to withdraw a guilty plea within thirty days, a petitioner may seek extraordinary relief with this Court to compel the required hearing. The trial court's failure to hold the hearing therefore does not defeat its jurisdiction; it only renders the court subject to this Court's directive that it perform its clear legal duty to promptly conduct the hearing. *Anderson*, 2018 OK CR 13, ¶ 6, 422 P.3d at 767 (reversing order denying motion to withdraw plea and remanding with instructions to conduct evidentiary hearing on the motion). Petitioner has not shown that this error rendered his plea involuntary or defeated the trial court's jurisdiction to accept it. Proposition Three is denied.

¶10 In Proposition Four, Petitioner argues that his plea was not knowing. Petitioner again concedes he raised no such claim in his motion to withdraw the plea. He argues both that his unknowing plea should have been plain or obvious to the trial court, and that plea and withdrawal counsel were ineffective in failing to timely raise the issue. We find that in light of the record, and reasonable inferences drawn from the record, Petitioner's plea of guilty was a voluntary and intelligent choice among the alternative courses of action open to him. *Alford*, 400 U.S. at 31. The plea was therefore both knowing and voluntary. Proposition Four is denied.

¶11 In Proposition Five, Petitioner claims he was denied the effective assistance of counsel at both the plea and the proceedings on his motion to withdraw the plea. To prevail, Petitioner must show both deficient performance by counsel and resulting prejudice to his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *Strickland* prejudice, in the guilty plea context, is a reasonable probability that, but for counsel's errors, the petitioner would not have pled guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). *Strickland* prejudice in the plea withdrawal context is a reasonable probability that, but for counsel's errors, the trial court would have granted the motion.

¶12 Our resolution of these claims is foreshadowed by our resolution of Petitioner's forfeited challenges to his guilty plea and related proceedings. Petitioner entered this plea knowingly and voluntarily. The trial court's errors in initially granting the motion to withdraw the plea before the required evidentiary hearing, and not holding the required evidentiary hearing within thirty days, resulted in no

cognizable *Strickland* prejudice to the Petitioner. We find that he has not shown that plea or withdrawal counsel made errors so serious as to constitute deficient performance, or that he was prejudiced. Proposition Five is denied.

¶13 Finally, in Proposition Six, Petitioner argues that the accumulation of error in this case requires relief. We find no individual errors warranting relief. The two errors already noted caused neither individual harm, nor an accumulation of unfairly prejudicial effect, to Petitioner's defense. *Barnett v. State*, 2011 OK CR 28, ¶ 34, 263 P.3d 959, 970. Proposition Six is therefore denied.

### DECISION

¶14 The petition for the writ of certiorari is **DENIED**. The Judgment and Sentence is **AF-FIRMED**. Pursuant to Rule 3.15, *Rules of the Court of Criminal Appeals*, Title 22, Ch.18, App. (2020), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

**APPEAL FROM THE DISTRICT COURT OF  
TULSA COUNTY  
THE HONORABLE CLIFFORD SMITH,  
DISTRICT JUDGE**

### APPEARANCES AT TRIAL

Sofia Johnson, 423 S. Boulder Ave., Ste. 300,  
Tulsa, OK 74103 (Plea)

Brian Martin, 1331 S. Denver Ave., Tulsa, OK  
74119 (Withdrawal)

Attorneys for Defendant

Heather Anderson, Asst. District Attorney, 500  
S. Denver Ave., Ste. 900, Tulsa, OK 74103,  
Attorney for the State

### APPEARANCES ON APPEAL

Danny Joseph, P.O. Box 926, Norman, OK  
73070, Attorney for Appellant

No Response Necessary

OPINION BY: LEWIS, P.J.

KUEHN, V.P.J.: Concur

LUMPKIN, J.: Concur

HUDSON, J.: Concur in result

ROWLAND, J.: Concur

1. Judge Greenough initially granted the motion to withdraw the plea by minute order, but later vacated that order and transferred the case to the Honorable Clifford Smith, who conducted the evidentiary hearing and denied Petitioner's motion to withdraw the plea.

## NOTICE OF JUDICIAL VACANCY

The Judicial Nominating Commission seeks applicants to fill a vacancy for the position of District Judge for Tulsa County, Fourteenth Judicial District, Office 9. This vacancy is created by the retirement of the Honorable Linda G. Morrissey on April 1, 2020.

Tulsa County District Judge, Office 9 is an at large position. To be appointed to the office of Tulsa County District Judge, Office 9, one must be a legal resident of Tulsa 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](http://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, April 17, 2020**. Applications may be hand-delivered or mailed. If mailed, they must be postmarked **on or before April 17, 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



## TRIAL ADVOCACY INSTITUTE

### Cancellation of OBA/FLS Trial Advocacy Institute

Following the CDC's recommendations regarding the COVID-19 (novel coronavirus) pandemic, along with the recently released Executive Order 2020-07 issued on March 15, 2020 by Governor J. Kevin Stitt; and the guidelines issued by the White House advising avoidance of groups larger than 10 people, limiting travel, and sheltering in place, TAI leadership has made the difficult decision to cancel this year's Trial Advocacy Institute that was scheduled for July 23-25, 2020 at the Bar Center in Oklahoma City, OK.

TAI leadership places a high premium on the health and safety of our colleagues, staff, and participants.

We encourage everyone to familiarize yourselves with the Center for Disease Control website ([www.cdc.gov](http://www.cdc.gov)), as well as the World Health Organization website ([www.who.int](http://www.who.int)), for up-to-date information on COVID-19 (novel coronavirus). Information regarding COVID-19 will continue to evolve rapidly as our government and health officials learn more about how to battle this viral pandemic. It is important to stay informed and be smart about how to best prevent the spread of this virus.

We thank you for your continued support, and look forward to seeing everyone at next year's program.

Be safe, everybody,

Jon Ford  
Phil Tucker  
Shane Henry

## NOTICE OF JUDICIAL VACANCY

The Judicial Nominating Commission seeks applicants to fill a vacancy for the position of District Judge for Okmulgee County, Twenty-fourth Judicial District, Office 3. This vacancy is created by the resignation of the Honorable Ken Adair on January 31, 2020.

To be appointed to the office of District Judge, one must be a legal resident of Okmulgee 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](http://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, April 17, 2020**. Applications may be hand-delivered or mailed. If mailed, they must be postmarked **on or before April 17, 2020** to be deemed timely. Applications should be delivered/mailed to:

Jim Webb, Chairman  
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# Opinions of Court of Civil Appeals

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2020 OK CIV APP 11

**PAMELA BURNS, an individual,  
Plaintiff/Appellant, vs. MAUREEN MARKS  
COMBITES, an individual, Defendant/  
Appellee.**

**Case No. 116,961. December 23, 2019**

APPEAL FROM THE DISTRICT COURT OF  
CLEVELAND COUNTY, OKLAHOMA

HONORABLE SCOTT F. BROCKMAN,  
TRIAL JUDGE

**REVERSED AND REMANDED FOR  
FURTHER PROCEEDINGS**

Noble K. McIntyre, Jordan Klingler, David L. Thomas, MCINTYRE LAW, P.C., Oklahoma City, Oklahoma, for Plaintiff/Appellant

Gerard F. Pignato, RYAN WHALEY COLD-IRON JANTZEN PETERS & WEBBER, PLLC, Oklahoma City, Oklahoma, and

Seth Killman, OFFICE OF MICHAEL H. GITHENS, Oklahoma City, Oklahoma, for Defendant/Appellee

KEITH RAPP, JUDGE:

¶1 Trial court plaintiff, Pamela Burns, appeals the trial court's denial of her motion for new trial after the trial court entered judgment on a jury verdict in favor of Defendant, Maureen Marks Combites, and against Plaintiff.

**BACKGROUND**

¶2 Plaintiff and Defendant were involved in a motor vehicle accident in Norman, Oklahoma, on June 2, 2014. Plaintiff brought this negligence action against Defendant alleging she sustained personal injuries as a result of the motor vehicle accident and seeking damages.

¶3 In her Answer, Defendant admitted there was a motor vehicle accident, but denied Plaintiff's alleged injuries were caused or aggravated by the motor vehicle accident. Defendant alleged Plaintiff's injuries were pre-existing health problems.

¶4 The case proceeded to jury trial on January 29-30, 2018. The evidence and testimony at trial indicated that, on the date of the accident, Plaintiff was driving south in the far right lane of NW 24th Avenue, a four-lane road. Defen-

dant was driving north in the left lane of NW 24th Avenue. After being waved through by a man in the left lane driving south, Defendant began a legal left turn into a parking lot. Plaintiff did not see Defendant and "T-boned" Defendant's vehicle on the passenger side.

¶5 Plaintiff testified that she told her son, who was with her at the time of the collision, her leg was hurting and she was worried about her neck because she had previously had neck surgery. Plaintiff stated she refused medical treatment and an ambulance at the scene. Plaintiff also testified she waited twenty-two days after the accident to seek medical treatment because she thought the pain would go away. The evidence at trial showed that Plaintiff initially said she did not think she was injured, but then specified she needed to have a "couple things checked out."

¶6 Defendant testified Plaintiff and Plaintiff's son told her they were "ok" after the accident. Defendant also stated no one called an ambulance because no one was injured. Defendant also testified Plaintiff made statements at the accident scene that made Defendant think she would be sued by Plaintiff.

¶7 The evidence at trial indicated Plaintiff had an extensive past medical history, including a neck fusion and removal of a synovial cyst to relieve symptoms to her back, hip, and pain radiating down her left leg.

¶8 In 2000 or 2001, Plaintiff was in a motor vehicle accident and broke her neck, which required neck fusion surgery. After complaints of back pain, hip pain and pain radiating into her left leg, Plaintiff had surgery by Dr. Barry to remove a synovial cyst in December 2012. The evidence at trial also showed Plaintiff saw Dr. Barry in February 2013 and August 2013 complaining about right-side radicular leg pain.

¶9 Plaintiff testified she sustained injuries to her back and right leg as a result of the present accident. Plaintiff stated the soreness to her neck and back from the accident subsided. Plaintiff testified that after the accident, she first sought medical treatment on June 24, 2014, with her primary care physician, Dr. Nagode. Plaintiff testified Dr. Nagode referred her for an MRI and to be seen by Dr. Barry,

who previously performed the surgery to remove Plaintiff's cyst. Dr. Barry referred Plaintiff to Dr. Pitman for EMG testing, who determined she had nerve damage in her right leg. Plaintiff stated she then went to Accident Care and Treatment Center and had an MRI on her right hip in an attempt to determine the source of her pain. Plaintiff testified she saw Dr. Mitchell for pain management. Dr. Mitchell subsequently gave Plaintiff three lumbar epidural steroid injections that Plaintiff stated were not helpful. Dr. Mitchell referred Plaintiff to Qualls Stevens, D.O., in May 2015. After examination, Dr. Stevens recommended Plaintiff undergo an anterior lumbar fusion.

¶10 Plaintiff and Defendant presented conflicting medical testimony. Plaintiff's expert, Dr. Qualls Stevens, testified Dr. Mitchell referred Plaintiff to him for low back and right lower extremity pain. Dr. Stevens testified his diagnosis was "intractable back pain with radiating pain" and recommended Plaintiff have an anterior lumbar fusion surgery. He further opined that it was "more likely true than not that [Plaintiff] was injured from the collision."<sup>2</sup> Dr. Stevens stated Plaintiff's pain pattern was different than before and was also to a different extremity. On cross-examination, Dr. Stevens admitted he was unaware of Plaintiff's prior complaints of right leg pain in 2012 and 2013. Dr. Stevens stated Plaintiff told him her right leg pain was new since the accident, but Plaintiff told him of her prior left leg issues. Dr. Stevens also admitted he had not reviewed Plaintiff's medical records prior to 2014.

¶11 Defendant's expert, Stephen Conner, M.D., noted Plaintiff had experienced right side symptoms in 2012 and 2013. Dr. Conner also noted there was a finding that there was no significant change from the 2013 and 2014 MRIs. Dr. Conner testified that since Plaintiff had prior issues with her right side, Plaintiff had an exacerbation of prior right side symptoms. Dr. Conner stressed that Plaintiff told Dr. Stevens she had never experienced right leg pain, when the medical records clearly showed otherwise.

¶12 At trial, Defendant admitted she breached her duty to Plaintiff and caused the accident, but denied the remaining elements of liability, including that Plaintiff's injuries were caused by the motor vehicle accident. At the conclusion of all the evidence, Plaintiff moved for a directed verdict as to liability, which the trial court denied.

¶13 The trial court instructed the jury. The jury received two verdict forms: a blue form for a verdict for Plaintiff and a pink form for a Defendant verdict. The jury returned a pink verdict form unanimously finding in favor of Defendant and awarding Plaintiff no damages. Plaintiff moved for Judgment Notwithstanding the Verdict, which the trial court denied.

¶14 On March 9, 2019, Plaintiff filed a motion for new trial per 12 O.S.2001 § 651(4)(6) and (8). Plaintiff argued the trial court erred in failing to direct a verdict on the issue of liability for Plaintiff and the jury verdict was not supported by the uncontroverted evidence. Plaintiff also argued Defendant admitted liability at trial and, therefore, the trial court should have submitted the case to the jury for a determination of damages only.

¶15 In addition, Plaintiff argued she was entitled to a new trial because the verdict was not supported by the evidence. Plaintiff asserted "it is the law in Oklahoma that in cases of admitted liability, a zero damages verdict cannot stand where there is any uncontroverted evidence of some damages." Plaintiff alleged there was evidence that the injuries she sustained in the automobile accident were causally related to the accident, or were an aggravation of prior injuries.

¶16 After hearing argument, the trial court denied Plaintiff's motion for new trial and entered an Order memorializing the decision, filed on March 27, 2018. Plaintiff appeals the trial court's Order on Plaintiff's Motion for New Trial.

## STANDARD OF REVIEW

¶17 The standard for reviewing the denial of a motion for new trial is abuse of discretion. *Lierly v. Tidewater Petroleum Corp.*, 2006 OK 47, ¶ 15, 139 P.3d 897, 902. "A court abuses its discretion when it uses that standard to an end or purpose that is justified neither by reason nor by evidence. Abuse of discretion lies in a manifestly unreasonable act, supported by untenable grounds or reasons." *Lerma v. Wal-Mart Stores, Inc.*, 2006 OK 84, ¶ 6, 148 P.3d 880, 883 (citation omitted).

¶18 "[T]he standard of review for jury instructions given or refused is whether a probability exists that jurors were misled, thereby reaching a different conclusion than they would have reached *but for* questioned instruction(s)." *Cimarron Feeders, Inc. v. Tri-County Elec. Coop.*,



*Inc.*, 1991 OK 104, ¶ 5, 818 P.2d 901, 902. This Court must consider “the accuracy of the statement of law, the applicability of the instructions to the issues when the instructions are considered as a whole, and above all, whether the probability arose that jurors were misled and reached a different conclusion due to an error in the instruction.” *Id.* at ¶ 6, 818 P.2d at 902. This Court will not reverse a judgment based on misdirection of the jury unless it concludes that the error probably resulted in a miscarriage of justice. 20 O.S.2011 § 3001.1.

### ANALYSIS

¶19 Plaintiff first argues the trial court erred in denying Plaintiff’s Motion for New Trial because the trial court submitted a general verdict form to the jury after Defendant admitted liability. Plaintiff contends the general verdict form the trial court submitted to the jury instructed the jury to determine whether Defendant was liable in this action, an element Defendant admitted. Plaintiff argues the only issue for the jury was to determine if Plaintiff sustained any damages as a result of the accident and, if so, the amount of those damages.

¶20 At trial, Defendant’s attorney stated in his Opening Statement that Defendant admitted she was at fault for the accident.<sup>3</sup> Defendant’s attorney continued, “Where we disagree [with Plaintiff] is injury causation and damages.”<sup>4</sup> Defendant also testified that she did not deny responsibility for the motor vehicle accident, but denied Plaintiff’s injuries were caused by the motor vehicle accident.

¶21 At the conclusion of the evidence, the trial court instructed the jury regarding the issues and applicable law. In Instruction No. 7, concerning the issues involved in the case, the trial court specifically stated that Defendant confessed she caused the motor vehicle collision. Instruction No. 7 stated:

¶22 Instruction No. 7 The Issues in the Case – No Counterclaim

The parties in this case are Pamela F. Burns, the Plaintiff and Maureen Marks Combites, the Defendant.

The parties agree a motor vehicle collision occurred on June 2, 2014, at or near 24th Avenue NW and Main Street in Norman, Oklahoma.

*The Defendant has admitted responsibility for causing the collision.*

The issues in this case to be determined by you are:

1. Whether the Plaintiff was injured; and
2. Whether the injuries were caused by this collision.

If you find both of these issues in favor of Plaintiff, Pamela F. Burns, then you should determine what damages she should recover as a result of the injuries from the collision.<sup>5</sup>

(Emphasis added.)

¶23 The trial court also instructed the jury on the elements of negligence in Instruction No. 13. The trial court correctly instructed the jury that Defendant admitted she was negligent and Plaintiff was not required to prove that element. Instruction No. 13 states:

A party claiming damages has the burden of proving each of the following propositions:

First, that they have sustained injury;

Second, that the party from whom they seek to recover was negligent;

And, third, that such negligence was a direct cause of the injury sustained by the claiming party.

*In this case, the Defendant has admitted the second element, therefore the Plaintiff need only prove the first and third elements.*

(Emphasis added.)

¶24 The trial court also instructed the jury on the definition of negligence and ordinary care in Instruction No. 14<sup>6</sup> and No. 15,<sup>7</sup> respectively.

¶25 In addition, the trial court instructed the jury on the use of the color-coded verdict forms in Instruction Nos. 20 and 21. Instruction No. 20 states:

Instruction No. 20 Blue Verdict Form, for Plaintiff – Directions

*If you find that the occurrence with which this lawsuit is concerned was directly caused by the negligence of Defendant, then you shall use the Blue Verdict Form and find in favor of Plaintiff. If you so find, Plaintiff is entitled to recover the full amount of any damages which you may find she sustained as a result of the occurrence.*



(Emphasis added.) In Instruction No. 21 concerning the Pink Verdict Form, the court instructed the jury:

Instruction No. 21 Pink Verdict Form – Directions

*If you find the occurrence with which this lawsuit is concerned was not directly caused by the negligence of the Defendant or, if you find that Plaintiff has failed to prove she was injured, then you shall use the Pink Verdict Form and find in favor of Defendant.*

(Emphasis added.)

¶26 After the trial court instructed the jury and the jury deliberated, the jury returned a verdict using the Pink Verdict form in favor of Defendant and did not award any damages to Plaintiff.

¶27 “Instructions are explanations of the law of a case which enable a jury to understand its duty and to arrive at a correct conclusion. The instructions need not be ideal, but they must reflect the Oklahoma law regarding the subject at issue.” *Johnson v. Ford Motor Co.*, 2002 OK 24, ¶ 9, 45 P.3d 86, 90-91. “It is the trial court’s duty to instruct on the fundamental issues of a case.” *Taliaferro v. Shahsavari*, 2006 OK 96, ¶ 25, 154 P.3d 1240, 1247. “When reviewing jury instructions, the standard of review require the consideration of the accuracy of the statement of law as well as the applicability of the instructions to the issues.” *Johnson*, 2002 OK 24 ¶ 16, 45 P.3d at 92. “The test of reversible error in giving jury instructions is whether the jury was misled to the extent of rendering a different verdict than it would have rendered had the errors not occurred.” *Taliaferro*, 2006 OK 96 ¶ 25, 154 P.3d at 1248. An instruction susceptible of two constructions is erroneous because it has tendency to confuse and mislead the jury. *Carpenter v. Connecticut Gen. Life Ins. Co.*, 68 F.2d 69, 73 (10th Cir. 1933).

¶28 Here, although Defendant admitted responsibility for the motor vehicle accident, the trial court instructed the jury on the definition of negligence in Instruction No. 14, stating the issue was one “for [the jury] to decide.” The court also instructed the jury on ordinary care in Instruction No. 15, an unnecessary instruction considering Defendant had admitted she caused the accident. The question of whether Defendant was negligent was not properly before the jury because Defendant had admitted she caused the accident.

¶29 Furthermore, Instruction No. 20 and No. 21 gave the jury the option of finding that the motor vehicle accident was not caused by Defendant’s negligence, a fact already admitted by Defendant.

¶30 The only issues that needed to be presented to the jury were whether Plaintiff sustained injury caused by the collision and, if so, the amount of damages for injuries the Plaintiff sustained as a result of the collision. The jury instructions regarding negligence correctly stated the law, but as written were inapplicable to the facts in this case because Defendant had admitted liability for the collision. In addition, Instruction Nos. 20 and 21 incorrectly charged the jury with deciding whether the motor vehicle accident was directly caused by Defendant’s negligence, an element Defendant admitted.

¶31 After deliberations, the jury returned a verdict using the Pink Verdict form in favor of Defendant, without awarding Plaintiff any damages. Based on the language of Instruction No. 21, this Court is unable to determine whether the jury found Defendant was not negligent or found Plaintiff sustained no injuries caused by the accident. Furthermore, by instructing the jury that it was to decide the question of negligence, the trial court erred in placing an additional burden of proof on Plaintiff. This Court finds the jury instructions as given were misleading to the jury and the jury may have reached a different conclusion due to the errors in the jury instructions.

¶32 This Court finds this issue dispositive and, therefore, does not address the remainder of Plaintiff’s allegations of error.

## CONCLUSION

¶33 Based on the foregoing, this Court finds the trial court erred in its giving of instructions to the jury. The instructions given by the trial court gave rise to a probability that the jury was misled. Thus, this Court finds the trial court erred in denying Plaintiff’s Motion for New Trial. The trial court’s Order on Plaintiff’s Motion for New Trial denying Plaintiff’s motion for new trial is reversed and this matter is remanded for further proceedings consistent with this Opinion.

¶34 **REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.**

BARNES, P.J., and WISEMAN, V.C.J., concur.

KEITH RAPP, JUDGE:

1. Statement taken June 16, 2014, Record, Plaintiff's Exhibit 31.  
2. Videotaped Trial Deposition of Qualls E. Stevens, DO, MBA, p. 17.  
3. Transcript, January 29 and 30, 2018, p. 12, lines 1-15.  
4. Transcript, January 29 and 30, 2018, p. 12, lines 11-12.  
5. Record, p. 18.  
6. Instruction No. 14 Negligence – Defined states:  
Since this lawsuit is based on the theory of negligence, you must understand what the terms "negligence" and "ordinary care" mean in the law with reference to this case.  
"Negligence" is the failure to exercise ordinary care to avoid injury to another's person or property. "Ordinary care" is the care which a reasonably careful person would use under the same or similar circumstances. The law does not say how a reasonably careful person would act under those circumstances. *That is for you to decide.* Thus, under the facts in evidence in this case, if a party failed to do something which a reasonably careful person would do, or did something which a reasonably careful person would not do, such party would be negligent.  
(Emphasis added.)

7. Instruction No. 15 Ordinary Care Defined states:

Ordinary care is the care which a reasonably careful person would use under the same or similar circumstances.

## 2020 OK CIV APP 12

### IN RE THE MARRIAGE OF: RICHARD L. GREEN, Plaintiff/Appellant, vs. JANICE GREEN, Defendant/Appellee.

Case No. 117,451. February 12, 2020

APPEAL FROM THE DISTRICT COURT OF CLEVELAND COUNTY, OKLAHOMA

HONORABLE STEPHEN BONNER,  
TRIAL JUDGE

### AFFIRMED

Christopher L. Kannady, Terry M. McKeever,  
FOSHEE & YAFFE, Oklahoma City, Oklahoma,  
for Plaintiff/Appellant

Virginia Henson, PHM LAW GROUP, P.C.,  
Norman, Oklahoma, for Defendant/Appellee

JANE P. WISEMAN, CHIEF JUDGE:

¶1 Husband Richard L. Green appeals the trial court's order denying his motion for a military pension division order. After review, we affirm the trial court's decision.

### FACTS AND PROCEDURAL BACKGROUND

¶2 On January 29, 1996, Husband and Wife Janice C. Green entered into an agreed divorce decree which, among other things, granted her one-half of Husband's military retirement. An agreed "order dividing military retired pay" was entered the same day stating in relevant part:

b. The Court FINDS that the parties have jointly agreed that [Wife] is entitled to her marital interest in the [Husband's] United

States Navy Retirement which should be equitably divided. [Husband] served approximately 23 years and 5 months.

c. The parties hereto were legally married on the 27th day of July, 1970 and legally divorced on January 29, 1996; accordingly, this was a marriage in excess of 20 years duration wherein [Husband] served 19 years of creditable service while married.

d. The parties agree that the Court approves said agreement whereby [Wife] is awarded one-half of [Husband's] retired pay attributable to [his] military service as her sole and separate property, as hereinafter set forth, and [Husband] hereby is divested of all right, title and interest in and to [Wife's] portion of the military retired pay to be calculated as follows: One-half of [Husband's] retirement pay.

The trial court further found that the order "shall be deemed to be a 'Qualified Domestic Relations Order' pursuant to the Uniformed Former Spouses' Act, P.L. 97-252, 10 U.S.C. §1408." Because Husband had retired before the divorce, Wife was entitled to begin receiving monthly distributions immediately. The order also states that the monthly amount would be increased "each time [Husband] receive[d] any adjustment to his retired pay" and that the "share shall be 50% of the increase in [Husband's] payments." The order further says that if "[Wife] does not receive the amount she is entitled to receive under the Order, [Husband] shall pay directly to [Wife] the amount [she] is entitled to receive if [Husband] receives [her] portion."

¶3 The United States Department of Veterans Affairs determined Husband was 100% disabled and awarded him disability pay effective June 1, 2001, more than five years after the divorce. Because a service member at that time had to waive retirement in order to receive disability, Wife stopped receiving her share of Husband's retirement from the military's Defense Finance and Accounting Service (DFAS) and Husband received only disability payments from the VA.

¶4 However, Congress passed legislation effective January 1, 2004, allowing particular classes of eligible retirees to receive both retired and disability pay which is known as Concurrent Retirement and Disability Pay (CRDP), 10 U.S.C.A. § 1414. Thereafter, Husband began receiving his military retirement and VA dis-

ability payments. However, when the military retirement payments resumed, Wife did not receive her portion of those benefits pursuant to the divorce decree. In a letter dated September 6, 2013, DFAS notified Husband that it received an application from Wife for payment from his retirement pay. In a letter dated October 25, 2016, DFAS notified Husband that an audit of his CRDP account shows it was “in an overpaid status in the amount of \$91,538.00 for the time period of January 1, 2004 through August 31, 2013.” The letter further advised that the “overpayment was caused by an underpayment to [his] former spouse due to time periods that Former Spouse deductions were not made from [his] monthly retired pay” and the amount was calculated to include “all CRSC<sup>1</sup> and CRDP retroactive payments that may have been due to [his] account.”

¶5 On July 10, 2018, Husband filed a motion for military pension division order stating that “[n]o military pension division order was entered at the time of the Divorce Decree.” Wife responded stating the trial court entered a military pension division order which was referred to and attached to the 1996 divorce decree. She filed a motion to dismiss Husband’s motion as moot with a copy of the military pension division order attached to her motion, arguing DFAS “has been provided with this order, has approved it, and is currently paying [Wife] her share of [Husband’s] disposable retirement pay.” Husband filed a reply contending his disability pay is “not subject to property division” and asked the trial court to “render the disability benefits in question not subject to the divorce decree granted in 1996, and as such deny [Wife’s] entitlement to them, during the time that [Husband] was not receiving retirement pay.” He further asked the trial court to enter “a new military pension division order that complies with current law.”

¶6 Wife then filed a brief arguing the trial court should deny Husband’s request for a new military order explaining:

Congress passed the Uniformed Services Former Spouse Protection Act (USFSPA), 10 U.S.C. §1408 et seq., allowing state courts to divide the retirement. Thereafter, the U.S. Supreme Court decided *Mansell v. Mansell*, 490 U.S. 581 (1989). The issue in the *Mansell* case was whether, after a state court ruling granting a former spouse a share of military retirement benefits, a [service member] could waive those benefits to

receive disability payments. At that time, to receive disability, a [service member] had to waive any disposable retired pay in the same amount as the disability. The *Mansell* court ruled that 10 U.S.C. §1408(c) (1) preempts states from dividing the value of the waived military retirement pay because it is not “disposable retired pay” as defined by the statute.

After the *Mansell* ruling, state courts began to insert language in divorce decrees that required the [service member] who waived retirement pay, to reimburse directly the affected former spouse, and other similar orders designed to restore the benefit.

In 2003, Congress began taking steps to modify the VA waiver requirement. In that year, legislation was passed taking effect January 1, 2004, to allow concurrent receipt of both forms of payment – retired pay and disability payments – for certain classes of eligible retirees. This is known as the Concurrent Retirement and Disability Pay (CRDP) and is found at 10 U.S.C. §1414. The law provided for a ten-year phased elimination of the disability offset and the veteran’s retirement pay increased gradually until the phase in period which ended in 2014. This is likely what prompted the letter from DFAS to the Defendant that she was once again eligible for retirement pay.

Wife further states that “it appears that DFAS is telling [Husband] that he has been receiving during the phase-in retirement benefits that include the portion awarded to [Wife].” Wife argues the issue is therefore “whether [Husband] is required to return to [Wife] retirement benefits he has received during the phase in period under CRDP that rightfully belong to her.” Wife contends the trial court cannot reverse the divorce consent decree awarding her half of Husband’s retirement benefits because the order is *res judicata*. The trial court, according to Wife, can only enforce its previously entered order and “has no jurisdiction to order DFAS to create a different result.”

¶7 At a hearing where the parties presented arguments on the issues, the trial court concluded that “[a] military order has been entered in the case” and “[t]his Court has no jurisdiction to change the order.” The trial court denied Husband’s motion for a new military pension division order.

¶8 Husband appeals.

## STANDARD OF REVIEW

¶9 Husband urges that “[t]his case necessitates [a] decision as to whether the trial court had jurisdiction or authority to issue a new QDRO, or enter an order clarifying the 1996 QDRO.” So we must determine whether the trial court properly denied Husband’s “motion for military pension division order” because it had “no jurisdiction to change the order” already in existence. “[A] question concerning the jurisdictional power of the trial court to act as it did” triggers a *de novo* standard of review. *Jackson v. Jackson*, 2002 OK 25, ¶ 2, 45 P.3d 418. “Questions of law are also reviewed *de novo*, which involves a plenary, independent and non-deferential examination of a trial court’s legal rulings.” *Id.*

## ANALYSIS

¶10 The issue before us is whether the trial court properly denied Husband’s “motion for military pension division order” because it had “no jurisdiction to change the order” already in existence. Husband argues the trial court had jurisdiction to subsequently clarify the order dividing military retirement benefits – i.e., he “seeks an order clarifying the previous QDRO to exclude from the definition of ‘disposable retirement pay’ the waived retirement pay related to disability benefits.”

¶11 Husband seeks clarification of the following provision in paragraph 5 of the 1996 military pension division order:

1. Notwithstanding the provisions of 10 U.S.C. §1408(a)(4), for purposes of this Order the terms “military retired pay” and “retired pay” mean the full monthly retirement benefit [Husband] is or would be entitled to receive, before any statutory, regulatory, or elective deductions are applied. It includes retired pay paid or payable due to longevity of active duty and/or reserve service and all payments paid under the provisions of Title 10, Chapter 61, United States Code. It also includes all amounts of retired pay [Husband] in any manner actually or constructively waives or forfeits for any reason or purpose.

Husband asserts “the plain language of the QDRO appears to include waived military pay related to [his] disability pay” and “defines ‘retirement pay’ to include ‘the full monthly benefit [he] is or would be entitled to receive before any statutory, regulatory, or elective

deductions are applied’ and ‘also includes all amounts of retired pay [Husband] in any manner actually or constructively waives or forfeits for any reason or purpose.’” Husband further contends that “DFAS interpreted the QDRO to include the waived retirement pay in return for disability pay as retirement pay divisible and payable to [Wife] under the QDRO.”

¶12 Even though Husband qualified for disability benefits after the agreed order dividing military pension was entered, Wife *does not dispute* she would not be entitled to any disability benefits pursuant to federal law. In fact, Wife states in her appellate brief: “Nothing in the Military Order grants to [Wife] any disability benefit, and after [*Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023, 104 L. Ed. 2d 675 (1989)], she would not be entitled to any disability benefit.” Instead, Wife argues the relevant provision of the military pension order states that in the event Husband wrongfully receives Wife’s portion of the disposable military retired pay, she must be repaid. These provisions in paragraph 5 state:

h. [Wife’s] right to receive her portion of retired pay should begin immediately due to the fact that [Husband] has retired from the military service and is receiving retirement pay. [Wife] shall be entitled to 50% of the retired pay as and when [Husband] receives it. [Wife] shall receive by direct payment from the military finance center an amount of [Husband’s] disposable military retired pay equal to 50% of the retired pay.

i. This monthly amount shall be increased each time [Husband] receives any adjustment to his retired pay. The increase in [Wife’s] share shall be 50% of the increase in [Husband’s] payments. *In the event [Wife] does not receive the amount she is entitled to receive under the Order, [Husband] shall pay directly to [Wife] the amount [she] is entitled to receive if [he] receives [her] portion.*

(Emphasis added.)

¶13 According to Wife, that is exactly what occurred in this case. She explains she is not trying to recover any of Husband’s disability benefits he received as a result of waiving his retirement benefits. Federal law unambiguously prohibits Wife’s recovery of such benefits. *Mansell v. Mansell*, 490 U.S. 581, 581, 109 S. Ct. 2023, 2024, 104 L. Ed. 2d 675 (1989)(The Uniformed Services Former Spouses’ Protec-

tion Act, 10 U.S.C. § 1408, “does not grant state courts the power to treat as property divisible upon divorce military retirement pay waived by the retiree in order to receive veterans’ disability benefits.”). To the contrary, Wife is arguing that according to the October 25, 2016, DFAS letter, Husband received her share of his disposable military retirement pay and it must now be repaid pursuant to the military pension order. The letter explains, “An audit of your Concurrent Retirement and Disability Pay (CRDP) has identified that your account is in an overpaid status in the amount of \$91,538.00 for the time period of January 1, 2004 through August 31, 2013.”

¶14 In 2004, Congress introduced the CRDP and the CRSC which allow qualified military retirees to receive both a certain amount of their retirement and disability pay with no reduction. *See generally* 10 U.S.C.A. §§ 1413a, 1414. The DFAS website provides the most lucid explanation of these programs that were “created by Congress to allow eligible military retirees to receive monthly entitlements in addition to retired pay.” *See* <https://www.dfas.mil/retiredmilitary/disability/payment.html> (last visited February 11, 2020). It further states that the CRDP “allows military retirees to receive both military retired pay and Veterans Affairs (VA) compensation. This was prohibited until the CRDP program began on January 1, 2004.” <https://www.dfas.mil/retiredmilitary/disability/crdp.html> (last visited February 11, 2020). The “CRDP is a ‘phase in’ of benefits that gradually restores a retiree’s VA disability offset. This means that an eligible retiree’s retired pay will gradually increase each year until the phase in is complete effective January 2014.” *Id.* Further, the CRDP is “subject to division with a former spouse.” <https://www.dfas.mil/retiredmilitary/disability/comparison.html> (last visited February 11, 2020).

¶15 Wife argues that “[w]hile still receiving his VA disability pay, [Husband’s] retirement pay increased gradually until the phase in period ended in 2014” and that “[d]uring the phase in period, DFAS failed to pay [Wife] her share of the retirement benefit under the Military Order, and instead paid it all to [Husband], thus the overpayment.”

¶16 Wife argues she is entitled to her portion of Husband’s retirement benefits as provided

in the October 25, 2016, letter from DFAS during the time period of January 1, 2004 through August 31, 2013 – i.e., the time in which Husband qualified and participated in the CRDP. There is nothing ambiguous about the provisions in the order dividing the military retirement pay. Husband’s argument pertaining to waiver of retirement pay in order to receive disability pay is inapposite. Wife is seeking her share of the military retirement benefits which, phased in over 10 years from 2004 to 2013, were incorrectly paid solely to Husband, as DFAS explains in its letter. The military pension division order plainly awards Wife 50% of *retired* pay and if she does not receive the amount she is entitled to, she shall be repaid.

¶17 We have “consistently held that a final property division judgment is not subject to modification at a later date.” *Jackson v. Jackson*, 2002 OK 25, ¶ 13, 45 P.3d 418.<sup>2</sup> The record shows unambiguously that Husband received military retirement benefits to which Wife was entitled for the phase-in period between 2004 and 2013 as provided by the CRDP. Disability payments play no part in the benefits to which Wife is entitled.

¶18 We conclude, as did the trial court, that the language in the order dividing the military retirement is clear and the trial court had no authority to change, amend, or modify this military pension division order.

## CONCLUSION

¶19 Our analysis leads us to one conclusion – that the trial court correctly determined it had no jurisdiction to change the agreed order dividing Husband’s military retirement benefits, and we affirm.

## ¶20 AFFIRMED.

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

JANE P. WISEMAN, CHIEF JUDGE:

1. This is a program known as “Combat-Related Special Compensation” enacted to compensate combat veterans. Nothing in the record indicates Husband is eligible for or receives CRSC.

2. However, “a trial court has the authority to issue a subsequent QDRO if an initial one contains some ambiguity concerning the proper division of a retirement benefit under an earlier entered divorce decree, as long as the later QDRO does not alter what was awarded initially by the decree, but conforms to it.” *Jackson v. Jackson*, 2002 OK 25, ¶ 15, 45 P.3d 418. Wife maintains such a military order is not a QDRO. It is unnecessary for us to make this determination and we decline to do so.

# Disposition of Cases Other Than by Published Opinion

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## COURT OF CRIMINAL APPEALS

Thursday, March 5, 2020

**RE-2018-1257** — Jeremy Franklin Archer, Appellant, appeals from the revocation in full of his concurrent five year suspended sentences in Case Nos. CF-2015-94 and CF-2015-116 in the District Court of Johnston County, by the Honorable Wallace Coppedge, District Judge. **AFFIRMED.** Opinion: Lumpkin, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur; Hudson, J., Concur; Rowland, J., Concur.

**RE-2018-1233** — On February 26, 2013, Appellant Brian Frederick Joice entered a guilty plea to one count of Obtaining Cash or Merchandise by Bogus Check/False Pretenses in Muskogee County Case No. CF-2012-30. Joice was sentenced to twenty (20) years, all suspended, subject to terms and conditions of probation. On February 21, 2018, the State filed an Application to Revoke Suspended Sentence, alleging Joice violated the terms of his probation by committing the crimes alleged in Muskogee County District Court Case Nos. CF-2018-143 and CF-2018-260. The District Court of Muskogee County, the Honorable Norman D. Thygesen, revoked Joice's suspended sentence in full. Joice appeals. The revocation of Joice's suspended sentence is **VACATED AND REMANDED TO THE DISTRICT COURT WITH INSTRUCTIONS TO DISMISS THE REVOCATION APPLICATION WITH PREJUDICE.** Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs in results; Hudson, J., concurs; Rowland, J., concurs.

**F-2019-105** — Appellant Jorge Romero-Sanchez was tried by jury and found guilty of Child Sexual Abuse in the District Court of Muskogee County, Case No. CF-2016-609. The jury recommended as punishment twenty (20) years imprisonment and the trial court sentenced accordingly. 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; Hudson, J., Concur; Rowland, J., Concur.

Thursday, March 12, 2020

**C-2019-469** — Petitioner Davante Dee Mil-sap, while represented by counsel, entered guilty pleas to charges in seven separate Oklahoma County cases pursuant to a plea agreement with the State as follows: CF-2017-1372: Count 1, robbery by two or more persons, Counts 6 and 7, assault and battery with a dangerous weapon, Count 8, assault while masked, Counts 9 and 10, pointing a firearm at another, and Count 12, possession of a firearm after juvenile adjudication CF-2017-2271: Count 1, unauthorized use of a motor vehicle, Count 2, possession of a firearm after juvenile adjudication, Count 3, concealing stolen property, Count 4, attempting to elude a police officer, and Count 5, obstructing an officer, CF-2017-7599: Count 1, accessory to a felony (use of a vehicle to facilitate the discharge of a firearm), and Count 3, possession of a firearm after juvenile adjudication, CF-2018-483: Count 1, assault and battery likely to cause death, CF-2018-3085: Counts 1-3, assault and battery on a detention officer, CF-2018-3394: Count 1, assault and battery on a detention officer, CM-2018-3731: Count 1, assault and battery. The pleas were accepted by the Honorable Ray C. Elliott, District Judge, on May 3, 2019, and pursuant to Petitioner's plea agreement with the State, Judge Elliott sentenced Petitioner as follows on June 13, 2019, with all sentences running concurrently to one another: CF-2017-1372: Count 1, 35 years with the first 15 to do and the remaining 20 suspended; and Counts 6, 7, 9, 10 and 12, 10 years imprisonment. CF-2017-2271: Counts 1-3, five years imprisonment; Counts 4 and 5, one year imprisonment. CF-2017-7599: Count 1, 15 years imprisonment; and Count 3, ten years imprisonment. CF-2018-483: Count 1, 15 years imprisonment. CF-2018-3085: Counts 1-3, 5 years imprisonment. CF-2018-3394: Count 1, 5 years imprisonment. CM-2018-3731: Count 1, ninety days imprisonment. On May 13, 2019, Petitioner filed a *pro se* letter/motion seeking to withdraw his guilty pleas. Conflict counsel was appointed, and on June 13, 2019, a hearing was held on Petitioner's motion before the Honorable Ray C. Elliott, District Judge. Petitioner's motion was denied and he now appeals that

denial to this Court. The Petition for a Writ of Certiorari is DENIED. The Judgment and Sentence of the District Court is hereby 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-2018-1003** — Brandon John Smith, Appellant, was tried by jury for Counts 1 through 3, rape in the first degree, and Counts 4 through 11, lewd or indecent acts to a child under sixteen (16) in Case No. CF-2017-818 in the District Court of Cleveland County. The jury returned a verdict of guilty and set punishment at fifteen years imprisonment in each of Counts 1 and 2, eighteen years imprisonment in Count 3, twelve years imprisonment in Count 4, five years imprisonment in each of Counts 5 through 7, nine years imprisonment in Count 8, five years imprisonment in Count 9, six years imprisonment in Count 10, and ten years imprisonment in Count 11. The trial court sentenced accordingly and ordered Counts 1, 2 and 3 to be served consecutively, and Counts 4 through 11 to be served concurrently with each other but consecutively to Counts 1, 2 and 3. From this judgment and sentence Brandon John Smith 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-2018-1121** — Appellant Kelly Lea Fairchild was tried by jury for the crime of First Degree Murder by Permitting Child Abuse in Kiowa County District Court Case No. CF-2018-12. In accordance with the jury's recommendation the trial court sentenced Appellant to life imprisonment. From this judgment and sentence Kelly Lea Fairchild has perfected her appeal. AFFIRMED. Opinion by: Kuehn, V.P.J.; Lewis, P.J.: concur; Lumpkin, J.: concur in results; Hudson, J.: concur; Rowland, J.: concur.

**F-2019-365** — Appellant Emilliano Pulido Lopez was tried by jury for the crime of First Degree Burglary after former conviction of two or more felonies in Oklahoma County District Court Case No. CF-2017-5438. In accordance with the jury's recommendation the trial court sentenced Appellant to 20 years imprisonment. From this judgment and sentence Emilliano Pulido Lopez has perfected his appeal. AFFIRMED. Opinion by: Kuehn, V.P.J.; Lewis, P.J.: concur; Lumpkin, J.: concur; Hudson, J.: concur; Rowland, J.: concur.

**RE-2018-1249** — James Allen Rice, Appellant, appeals from the revocation of five years of his fifteen year suspended sentence in Case No. CF-2012-137 in the District Court of Cherokee County, by the Honorable Sandy Crosslin, Special Judge. AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs.

**C-2019-156** — Michael Craig, Petitioner, entered a blind plea to Attempted Robbery with a Firearm in the District Court of Oklahoma County, Case No. CF-2016-9279. The trial court sentenced him to 15 years imprisonment, all but the first five years suspended, and a \$100 fine. Petitioner's timely motion to withdraw his plea of guilty was denied after a hearing. Petitioner has perfected his certiorari appeal. Petition for Certiorari DENIED; Motion to Withdraw as Counsel GRANTED. Opinion by: Kuehn, V.P.J.; Lewis, P.J., concur; Lumpkin, J., concur; Hudson, J., concur; Rowland, J., concur.

**F-2018-947** — Appellant Stephanie Ann Garcia was tried by jury and convicted of Counts I, III and IV – Lewd Molestation and Count II – Sodomy, Victim Under 16 Years, in Jackson County District Court Case No. CF-2017-63. In accordance with the jury's recommendation the trial court sentenced Appellant to 20 years and a \$1,000.00 fine on each count. The trial court also ordered the sentences to run consecutively and imposed nine months of post-imprisonment supervision. From this judgment and sentence Stephanie Ann Garcia has perfected her appeal. AFFIRMED. Opinion by: Kuehn, V.P.J.; Lewis, P.J.: concur; Lumpkin, J.: concur; Hudson, J.: concur; Rowland, J.: concur.

#### Thursday, March 19, 2020

**F-2019-60** — Appellant Keenan Wayne Andrews entered negotiated pleas of guilty on April 26, 2017, in Okfuskee County district court Case Nos. CF-2017-26 and CF-2017-29. In Case No. CF-2017-26, Appellant pled guilty to Possession of a Controlled Dangerous Substance, Driving with License Suspended, Failure to Maintain Insurance and Transporting an Open Container of Alcohol. In Case No. CF-2017-29, Appellant pled guilty to Possession of a Controlled Dangerous Substance, Bringing Contraband into a Jail and Resisting an Officer. On December 5, 2018, the State filed amended applications to terminate Appellant from the drug court program. Following a hearing on January 16 and 22, 2019, the Honorable Lawrence W. Parish, District Judge, terminated

Appellant's participation in drug court and sentenced him in conformance with the plea agreement. Andrews appeals his termination from drug court. The orders are **AFFIRMED**. Opinion by: Lumpkin, J.; Lewis, P.J.; Concur; Kuehn, V.P.J.; Concur; Hudson, J.; Concur; Rowland, J.; Concur.

**C-2019-655** — Petitioner George Evert Patterson, II appeals the denial of his motion to withdraw plea in the District Court of Pontotoc County, Case Nos. CF-2019-19 and CF-2018-231. In Case No. CF-2018-231, Patterson entered a negotiated plea of no contest to Second Degree Burglary. The Honorable Gregory D. Pollard, District Judge, accepted Patterson's plea and, pursuant to the plea agreement, allowed him to enter the Pontotoc County Drug Court Program. The State sought Patterson's termination from drug court because Patterson violated the terms of his drug court contract by committing new offenses. In Case No. CF-2019-19, Patterson entered a blind plea of no contest to eight counts of Procuring/Possessing Child Pornography. The Honorable C. Steven Kessinger, District Judge, held a joint drug court termination and sentencing hearing. Judge Kessinger terminated Patterson from drug court and sentenced him to five years imprisonment in Case No. CF-2018-231 and to twenty years imprisonment on each of Counts 1 through 8 in Case No. CF-2019-19. Patterson filed a timely motion seeking to withdraw his pleas in both cases. The district court held a hearing and denied the motion. Petition for a Writ of Certiorari is **DENIED**. The district court's denial of Petitioner's motion to withdraw plea is **AFFIRMED**. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs in results; Lumpkin, J., concurs; Hudson, J., concurs.

## **COURT OF CIVIL APPEALS**

### **(Division No. 1)**

**Friday, March 6, 2020**

**117,733** — Remington Auto Sales, LLC, Plaintiff/Appellant, v. Tommy Overtuff d/b/a Goldstar Auto Sales and Hudson Insurance Company, Defendant/Appellee. Hudson Insurance Company, Third-Party Plaintiff, v. Claudia Overtuff, Third-Party Defendant. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Richard Odgen, Trial Judge. Remington Auto Sales, LLC, Plaintiff/Appellant, appeals summary judgment granted in favor of Defendant Hudson Insurance Company, Appellee. Defendant Hudson

is the surety on the used motor vehicle dealer bond for Defendant Tommy Overtuff d/b/a Goldstar Auto Sales. Hudson filed its motion for summary judgment arguing that it was not liable on the bond for Goldstar's conduct and that the bond does not provide coverage for Remington because the transactions were excluded by the terms of the bond. The issue on appeal is whether Hudson is entitled to summary judgment. Hudson is entitled to summary judgment only if Remington is precluded by law from any recovery based on the surety's bond. Because there are factual issues precluding summary judgment, we **REVERSE**. Opinion by Goree, J.; Bell, P.J., and Buettner, J., concur.

**117,793** — In the Matter of the Estate of Alma Pearl Resler, Deceased. Susan Resler-Smith and Kristie Mullings, Applicants/Appellants, v. Kathy Blakley and Roy Resler, Personal Representatives of the Estate of Alma Pearl Resler, Deceased, Personal Representatives/Appellees. Appeal from the District Court of Custer County, Oklahoma. Honorable Jill C. Weedon, Judge. In this probate proceeding, Applicants/Appellants, Susan Resler-Smith, and Kristie Mullings (Grandchildren), the children of a deceased child of Alma Pearl Resler, decedent, appeal from the trial court's order determining Grandchildren were intentionally omitted from decedent's Last Will and Testament and that Grandchildren do not qualify as pretermitted heirs of decedent under 84 O.S. 2011 §132. We hold the Will's language devising and bequeathing the residue of decedent's estate to her "living children/surviving children" was insufficient under Oklahoma law to evince decedent's intent to omit Grandchildren from taking under decedent's Will. The Will failed to identify Grandchildren by name or class; therefore, under extant law, Grandchildren are pretermitted heirs entitled to receive a portion of decedent's estate under §132. The trial court's order determining Grandchildren do not qualify as pretermitted heirs of decedent is reversed and this matter is remanded to the trial court to enter an order determining Grandchildren are heirs of decedent's estate. **REVERSED AND REMANDED**. Opinion by Bell, P.J.; Buettner, J., and Goree, J., concur.

**Friday, March 13, 2020**

**117,648** — STR Investments LLC, an Oklahoma Limited Liability Company, Plaintiff/Appellant, v. Fortitude, Inc., and David J. Hadaway, Defendant/Appellee. Appeal from the District Court of Oklahoma County, Oklaho-



ma. Honorable Patricia Parrish, Judge. In this action to recover unpaid rent under a commercial lease, Plaintiff/Appellant, STR Investments, LLC, an Oklahoma limited liability company (Landlord), appeals from the trial court's judgment dismissing with prejudice Landlord's action against Defendants/Appellees, Fortitude Inc., and David J. Hadaway. The trial court determined this action was barred under the principles of *res judicata* because Landlord previously obtained a judgment against Appellees for unpaid rent in a forcible entry and detainer action. After reviewing the record, we AFFIRM. Opinion by Bell, P.J.; Buettner, J., and Goree, J., concur.

**117,680** — Sharon Morris and Ricky Morris, Husband and Wife, Texas Resident, Plaintiffs/Appellants, v. Western Express, Inc., a Tennessee Corporation; Terry R. Gerald, II, D.O., an Oklahoma Resident; Durant H.M.A., L.L.C. d/b/a Alliance Health Durant, an Oklahoma Limited Liability Company; Mental Health Service of Southern Oklahoma, Inc. d/b/a Mental Health Service of Service of Southern Oklahoma, an Oklahoma Not for Profit Corporation; Defendants/Appellees. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Don Andrews, Trial Judge. Plaintiffs sued hospital and doctor for negligent release of a patient who upon release hijacked a truck, chased Plaintiffs in their truck down the highway, and jack-knifed the stolen truck, causing Plaintiffs to emergently stop, injuring them. The trial court granted the hospital's and the doctor's motions for summary judgment. We affirm. Opinion by Goree, J., Bell, P.J., and Buettner, J., concur.

**118,168** — First United Bank and Trust Co., a State Banking Corporation, Plaintiff/Appellee, v. Charlie K. Doolen, Defendant/Appellant. Appeal from the District Court of Atoka County, Oklahoma. Honorable Paula Inge, Judge. Defendant/Appellant Charlie Doolen appeals from summary judgment granted to Plaintiff/Appellee First United Bank and Trust Co. in its action to recover on a promissory note and for replevin of personal property securing the note. The record shows no dispute of material fact and we AFFIRM. Opinion by Buettner, J.; Bell, P.J., and Goree, J., concur.

**(Division No. 2)**

**Wednesday, March 4, 2020**

**118,475** — Crystal Reed, Plaintiff/Appellant, v. State of Oklahoma, ex rel. Department of Human Services, Defendant/Appellee. Ap-

peal from the District Court of Tulsa County, Hon. Douglas E. Drummond, Trial Judge. This is an appeal from the district court's dismissal of an original action seeking relief from a DHS decision to place Reed on the Restricted Registry due to allegations of child abuse. Rather than appealing the DHS administrative appellate decision to the district court, Reed filed an original action in the district court seeking relief from the DHS decision. Reed's correct course of action is to appeal the final agency action to the district court for review on the agency record. The right of appeal to district court follows from part of a DHS regulation and is not self-evident from Title 10 O.S.2011, § 408. This Court concludes the trial court did not err in dismissing Reed's amended petition, as filed. However, the trial court's dismissal is modified to permit Reed a reasonable time, to be set by the trial court, to appeal the final DHS action placing her on the Restricted Registry. This appeal shall proceed pursuant to the instructions set forth in this Court's Opinion. The Order dismissing Reed's amended petition is affirmed, in part, and modified as set out above. AFFIRMED IN PART, MODIFIED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division II, by Rapp, J., Barnes, P.J., AND Fischer, J., concur.

**Wednesday, March 18, 2020**

**117,574** — In the Matter of the Guardianship of R.B.: Lyndsi Hellard, Respondent/Appellant, v. David Boman and Sandra Boman, Petitioners/Appellees. Appeal from the District Court of Tulsa County, Hon. Terry H. Bitting, Trial Judge. Lyndsi Hellard (Mother) is the natural mother of the minor child R.B. in this guardianship proceeding. David Boman and Sandra Boman (collectively, the Guardians) are the minor child's paternal grandparents. Mother appeals from the trial court's award of attorney fees against her as a sanction and for certain travel costs incurred by the Guardians. We conclude the district court applied its inherent equitable authority to award attorney fees as a sanction narrowly, rather than broadly, and employed the required amount of caution and restraint, and conclude overriding considerations warranted the imposition of sanctions in this case. Further, pursuant to statute and its equitable authority, we conclude the district court did not abuse its discretion in awarding travel expenses to the Guardians to reimburse them for costs associated with their duty to locate and retrieve R.B. We further conclude

the evidence supports the reasonableness of the attorney's fee award to the Guardians; thus, the district court did not abuse its discretion in awarding Guardians' counsel \$10,000 in attorney fees as a sanction for Mother's bad faith and vexatious conduct. Accordingly, we affirm. **AFFIRMED.** Opinion from Court of Civil Appeals, Division II, by Barnes, P.J.; Rapp, J., and Fischer, J., concur.

**Thursday, March 5, 2020**

**117,855** — In the Matter of V.S. and O.S., Alleged Deprived Children, Julia Stevens, Appellant, v. State of Oklahoma, Appellee. Appeal from the District Court of Pottawatomie County, Hon. Dawson Engle, Trial Judge. Mother's parental rights were terminated by a judgment entered on a jury verdict. Mother's appeal does not contain legal authority and in part was not preserved in her motion for new trial. Mother has not demonstrated any error. This Court has reviewed the matter for fundamental error and finds none. The judgment denying the motion for new trial and the judgment terminating Mother's parental rights as to O.S. and V.S. are affirmed. **AFFIRMED.** Opinion from Court of Civil Appeals, Division II, by Rapp, J.; Barnes, P.J., and Fischer, J., concur.

**Thursday, March 12, 2020**

**116,885** — Insured Aircraft Title Service, Inc., Plaintiff, v. Aero Taxis Metropolitanos S.A. de C.V., Defendant/Appellant, and Bernstein Services, Inc.; International Aviation Services (VIP) Corp.; and Xtrordinair Aviation, Inc., Defendants/Appellees. Appeal from an Order of the District Court of Oklahoma County, Hon. Thomas E. Prince, Trial Judge. This is the second appeal in this litigation. The issue is whether the district court followed the Mandate issued by the Supreme Court after the first appeal. The district court granted judgment in favor of Bernstein Services, Inc., the aircraft seller in this transaction, for \$1,000,000 and awarded Aero Taxis Metropolitanos S.A. de C.V. (ATM) only \$1,100,000 of the \$2,100,000 it had deposited into escrow as part of the sale transaction. The district court's February 23, 2018 Judgment in favor of Bernstein and against ATM is consistent with the Opinion and Mandate entered in the previous appeal in this case. The judgment is free from procedural error and is affirmed. **AFFIRMED.** Opinion from Court of Civil Appeals, Division II, by Fischer, J.; Barnes, P.J., and Thornbrugh, J. (sitting by designation), concur.

**(Division No. 3)**  
**Friday, March 6, 2020**

**116,762** — K. West, Petitioner/Appellant, vs. A. West, Respondent/Appellee. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Deborah C. Shallcross, Special Referee. Petitioner/Appellant K. West (Husband) appeals from the revised decision in his divorce proceeding against Respondent/Appellee A. West (Wife). Husband argues Wife lied about her income during the temporary order hearing, which resulted in an inaccurate and inequitable temporary order; Husband claims the court failed to address this issue. Husband also contends the court erred by vacating his voluntary dismissal and continuing the case. Wife counter-appeals, arguing the court erred by denying her application for attorney fees. Both parties also challenge numerous property rulings. **WE AFFIRM IN PART AND REMAND WITH INSTRUCTIONS.** Opinion by Mitchell, P.J. Swinton, V.C.J., concurs, and Bell, J. (sitting by designation), concurs in part and dissents in part.

**117,751** — (Consol. w/117,859) Tom Koscelny, individually, Suzanne Elaine Yelton, individually, and as Trustee of the Jo Ann Koscelny Revocable Trust dated November 16, 1999 as Amended February 28, 2012, Plaintiffs/Appellees, vs. D&K Oil and Gas Investments, LP, an Oklahoma limited partnership, Defendant, and Amcon Resources, Inc., an Oklahoma corporation, and Mitchell Minerals, LLC, an Oklahoma limited liability company, Defendants/Appellants. Appeal from the District Court of Grady County, Oklahoma. Honorable Kory Kirkland, Judge. The dispute below arises from the Plaintiffs/Appellees' sale of minerals to the defendant, D&K Oil and Gas Investments, LP (D&K), who sold those same minerals to Defendant/Appellant Amcon Resources, Inc. (Amcon), who in turn sold a portion of the minerals to Mitchell Minerals, LLC (Mitchell). Plaintiffs prevailed on summary judgment on the basis that the deed from Plaintiffs to D&K was a forgery, and that Amcon and Mitchell's claim of ownership as bona fide purchasers for value was therefore precluded as a matter of law. However, the trial court's ruling that the deed from D&K to the Plaintiffs was in fact a forgery rests upon a premature adjudication of facts that are both material and in dispute. Accordingly, we **REVERSE AND REMAND** for trial. Opinion by Mitchell, P.J.; Swinton, V.C.J., and Bell, J. (sitting by designation), concur.

**Friday, March 13, 2020**

**117,214** — In the Matter of the Estate of Louis Claremore Walker, Deceased: Beverly Walker, Plaintiff/Appellant, vs. Jeff Jones, as Personal Representative of the Estate of Louis Claremore Walker, U.S. Dept. of Interior, on behalf of the Superintendent of the Osage Agency, Bureau of Indian Affairs, Defendants/Appellees. Appeal from the District Court of Osage County, Oklahoma. Honorable David Gambill, Trial Judge. Beverly Walker (Appellant) seeks review of a trial court order, entered after a hearing on counter-motions to dismiss. The motion to dismiss the appeal was deferred to the decisional stage. We find no reversible error of law, and the trial court's detailed findings of fact and conclusions of law adequately explain the decision filed August 23, 2018, which copy and exhibits are attached. The judgment is AFFIRMED under Okla. Sup. Ct. R. 1.202(d). Opinion by Swinton, V.C.J.; Mitchell, P.J., and Bell, J. (sitting by designation), concur.

**118,026** — Michael P. Sechrist, Petitioner, vs. XIT Concrete, Texas Mutual Insurance Co., and The Workers' Compensation Commission, Respondents. Proceeding to Review an Order of The Workers' Compensation Commission. Petitioner Michael Sechrist appeals an order by the Workers' Compensation Commission that affirms an order of an administrative law judge denying jurisdiction of Petitioner's claim under the Administrative Workers' Compensation Act. We sustain the order pursuant to Okla. Sup. Ct. R. 1.202(d). Opinion by Swinton, V.C.J.; Mitchell, P.J., and Bell, J. (sitting by designation), concur.

**(Division No. 4)**

**Wednesday, March 4, 2020**

**118,094** — In the Matter of K.Y., Alleged Deprived Child: Koleasha Pruitt, Appellant, vs. State of Oklahoma, Appellee. Appeal from an Order of the District Court of Oklahoma County, Hon. Susan K. Johnson, Trial Judge, terminating the parental rights of Appellant, Koleasha Pruitt (Mother), to K.Y. (Child) following a bench trial. Mother briefs three propositions of error on appeal: (1) State violated her right to due process of law by taking her testimony by phone rather than paying for her transportation to appear in person; (2) State failed to demonstrate it engaged in "active efforts" as required by 25 U.S.C. § 1912(d) to provide services to prevent the breakup of the Indian family; and (3) State's evidence was insufficient to terminate Mother's parental rights under 10A

O.S. § 1-4-904(B)(12) on grounds of incarceration. We conclude, upon review of the record, that the trial court's judgment terminating Mother's parental rights is supported by the evidence and is in accord with law. Accordingly, the judgment is affirmed. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Thornbrugh, P.J.; Reif, S.J. (sitting by designation), and Wiseman, C.J., concur.

**Wednesday, March 11, 2020**

**118,125** — Waynetta Barrett, Plaintiff/Appellant, vs. Oklahoma CVS Pharmacy, LLC, d/b/a CVS Caremark #8312, and/or CVS Pharmacy #8312, an Oklahoma limited liability corporation; CVS Health Corporation, a foreign corporation; CVS Pharmacy Inc., an Oklahoma corporation; Sharon Oklahoma Realty, LLC, an Oklahoma limited liability corporation; Diamond Contractors, Inc., a foreign corporation; Riley Concrete LLC, an Oklahoma limited liability corporation; and Everything Concrete LLC, an Oklahoma limited liability corporation, Defendants/Appellees. Appeal from an order of the District Court of Canadian County, Hon. Paul Hesse, Trial Judge, granting summary judgments in favor of Everything Concrete, LLC, Oklahoma CVS Pharmacy, LLC, Sharon Oklahoma Realty, LLC, and Diamond Contractors, Inc. (collectively, Defendants), in this premises liability negligence action. Plaintiff fell in the parking area of the store. The question on appeal is whether the trial court properly found that Defendants were entitled to judgment as a matter of law. After review of the record de novo, we conclude the factual issues presented are subject to resolution by a jury, not by summary judgment as a matter of law on undisputed facts. Accordingly, we reverse the summary judgments and remand for further proceedings. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. 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. 4)**

**Friday, March 6, 2020**

**117,634** — Kelvion, Inc., f/k/a GEA Heat Exchangers, Inc., Own Risk No. 17805, Petitioner, v. Marcus McDonald and the Workers' Compensation Commission, Respondents. Petitioners' Petition for Rehearing is hereby DENIED.

# CLASSIFIED ADS

## SERVICES

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

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**OFFICE SPACE FOR LEASE** Located @ C. Craig Cole & Assoc, 2nd Floor, 317 NW 12th, OKC. Several offices. Just 1 mile North of Downtown & Ok Co Courthouse. Includes Kitchen, Reception Area, Conference Room, Internet, Fax, Copier, Janitorial and Free Parking. Furnished or not. For more details telephone 405-232-8700

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

**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

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](mailto:justin@polstontax.com).

DEADLINE EXTENDED! THE OKLAHOMA BAR ASSOCIATION 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. For more information and directions on how to apply, please see display ad on page 330 of this bar journal.

SENIOR POLICY SPECIALIST The Oklahoma Health Care Authority (OHCA) is the State Medicaid Agency of the State of Oklahoma. OHCA is searching for a Senior Policy Specialist to be responsible for developing and coordinating the Medicaid State Plan and 1115 demonstration waiver, to protect Federal Financial Participation (FFP), as mandated by federal regulations for the Medicaid program, which is implemented and maintained by the Oklahoma Health Care Authority (OHCA). The selected individual will prepare reports, present findings, conduct and analyze extensive research and make recommendations. QUALIFICATIONS: Knowledge of policy issues related to state/federal regulations; experience in the use of PC and Internet systems and software applications including but not limited to; Excel, Word, and Adobe. Skill in basic statistical and research techniques, analyzing complex situations, and making responsible decisions. Requires a Bachelor's Degree in Business, Public Administration, Public Health or a closely related field AND 2 years of experience in policy development, policy analysis, program management/development, or technical, statistical research in support of programs and policies OR Bachelor's Degree in Business, Public Administration, Public Health or a closely related field AND an equivalent combination of education and experience totaling 6 years. Policy development, program or project development experience preferred. Experience with state and federal government program management desired. Apply online at: <https://www.okhca.org/>.

EXPERIENCED TULSA TITLE ATTORNEY WANTED. Job description: reading abstracts, issuing title opinions and title commitments, reviewing surveys, reviewing closing documents, issuing title insurance policies and preparing curative documents for various counties in the State of Oklahoma. Salary commensurate with experience. Please send resumes to "Box GG," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

## POSITIONS AVAILABLE

COFFEY, SINGER & 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](mailto:amy@csmlawgroup.com).

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BLANEY TWEEDY TIPTON & HIERSCHE, AN OKLAHOMA CITY FIRM, SEEKS AN ATTORNEY with 2-4 years relevant experience to work in its transactional practice area. Candidates must have a strong academic background, good research and writing skills, and the ability to work in a fast-paced practice with frequent deadlines. The ideal candidate would have experience in real estate, M&A, private equity or commercial lending transactions and general corporate transactional work. Salary commensurate with experience. Applications will be kept confidential. Send resume to Attn: Madison Noel, 204 N. Robinson Ave., Suite 1250, Oklahoma City, OK 73102 or email to [madison@btlawokc.com](mailto:madison@btlawokc.com).

ASSOCIATE GENERAL COUNSEL (2020-2267) TINKER FEDERAL CREDIT UNION has an immediate need for an Associate General Counsel ("AGC") in OKC. This position will provide legal assistance and advice to all levels of staff by identifying and analyzing legal issues related to the credit union. Additionally, the AGC will be responsible for and have the knowledge and expertise to review and draft documents, forms, opinions, and agreements, present legal recommendations, identify risks and liability, and negotiate agreements ensuring Tinker Federal Credit Union ("TFCU") complies with applicable federal and state laws, rules, regulations, and statutes. This position will also support the General Counsel in addressing legal issues, negotiating agreements and providing sound legal advice to the executive office, the Board, Senior Management and other departments. Qualified candidates will have a Juris Doctorate degree from an ABA accredited law school with up to date continuing legal education requirements fulfilled and three to five years' legal experience in consumer, commercial, and/or financial law (preferably in a large credit union or bank) preferred. Must be a Member of the Oklahoma Bar Association, in good standing. Apply online: [www.tinkerfcu.org/careers](http://www.tinkerfcu.org/careers). Credit verification will be evaluated prior to interview. Education, employment, and professional certifications will be verified for final candidates. Selected candidate is subject to substance/alcohol testing and background screening. We promote a substance-free workplace: "Equal Opportunity Employer, M/F/Disability/Vet"

## POSITIONS AVAILABLE

**SPECIAL MUNICIPAL JUDGE (PART-TIME).** The City of Oklahoma City will accept applications from March 10, 2020 through April 10, 2020. Requirements include residency in Oklahoma City and a minimum of four years' experience as a licensed practicing attorney in the State of Oklahoma. For more information and to apply go to [www.okc.gov](http://www.okc.gov).

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FRIDAY,  
MAY 8, 2020  
9 A.M. - 2:50 P.M.

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

MCLE 6/0

PROGRAM PLANNER/  
MODERATOR:

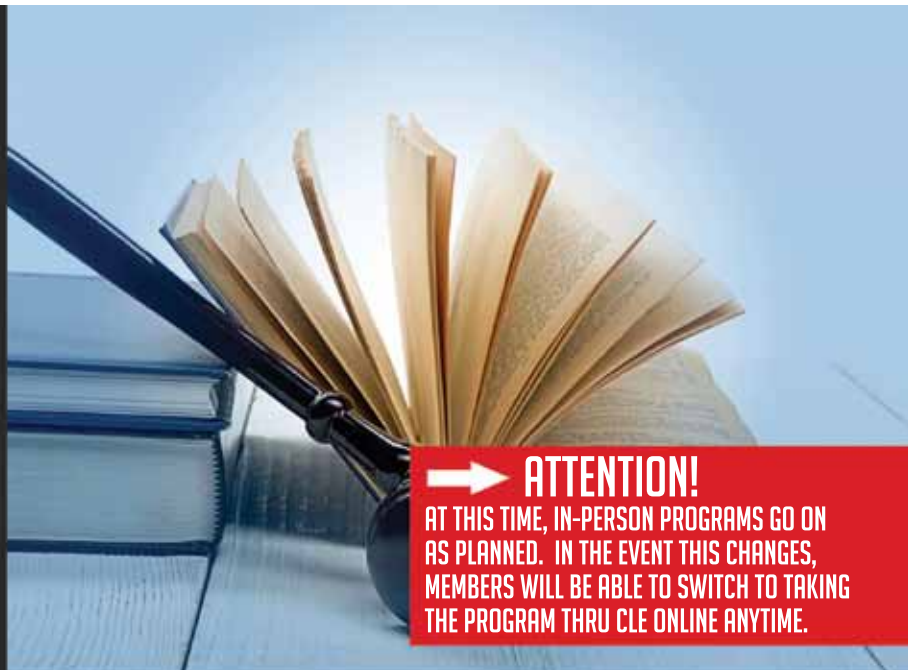
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# A GUIDE TO 42 U.S.C. § 1983 LITIGATION: UPDATES AND HOT TOPICS

## TOPICS INCLUDE:

### **Recent Developments in Section 1983 Litigation**

*David W. Lee, Riggs, Abney, Neal, Turpen, Orbison and Lewis, OKC*

### **Settlements and Litigation Tactics in a Section 1983 Case**

*Melvin C. Hall, Riggs, Abney, Neal, Turpen, Orbison and Lewis, OKC*

### **Pleadings and Defenses in a Section 1983 Case**

*Toby Crouse, State of Kansas Solicitor General*

### **Jail and Prison Litigation Under Section 1983**

*Guy Fortney, Brewster, and De Angelis PLLC, OKC*

### **Due Process and Liberty Interests in Section 1983**

*Robert A. Nance, Riggs, Abney, Neal, Turpen, Orbison and Lewis, OKC*

### **Arrest and Search and Seizure Issues in 42 U.S.C. 1983 Cases**

*Randall Wood, Pierce, Couch, Hendrickson, Baysinger and Green, LLP, OKC*

**TUITION:** Early-bird registration by May 1, 2020 is \$150.00. After May 1st, registration 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](mailto:ReneeM@okbar.org) to register.

FRIDAY,  
MAY 1, 2020  
9 A.M. - 3 P.M.

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MCLE 6/1

This course qualifies for required DV training per 43 O.S. 120.7 for guardians ad litem, parenting coordinators, custody evaluators or any other person appointed by the court in a custody or visitation proceeding involving children.

## PROGRAM PLANNER:

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Oklahoma City

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# UNDERSTANDING DOMESTIC VIOLENCE

## TO ENSURE THE BEST INTEREST OF CHILDREN

During this workshop, participants will hear from a licensed therapist, a child welfare specialist and an attorney. Each professional will discuss their role and the steps they take (individually and together) to help children and non-offending parents find a safe place as they work toward a healthy future.

### LEARNING OBJECTIVES INCLUDE:

- Define domestic violence, coercive control and trauma
- Review current facts and statistics of domestic violence
- Classify the effects of domestic violence on children
- Explain Intergenerational Violence
- Review and discuss safety planning
- Discuss expert testimony
- Identify assessment tools recognized in court proceedings
- Review legislation and court actions protecting children and victims
- Outline best practices for juvenile and family court proceedings

**TUITION:** Early-bird registration by April 24, 2020 is \$150.00. After April 24th registration is \$175.00 and walk-ins are \$200.00. Registration includes continental breakfast and lunch. Members licensed 2 years or less may register for \$75 for the in-person program (late fees apply). All programs may be audited (no materials or CLE credit) for \$50 by emailing [ReneeM@okbar.org](mailto:ReneeM@okbar.org) to register.