THE OKLAHOMA BAR
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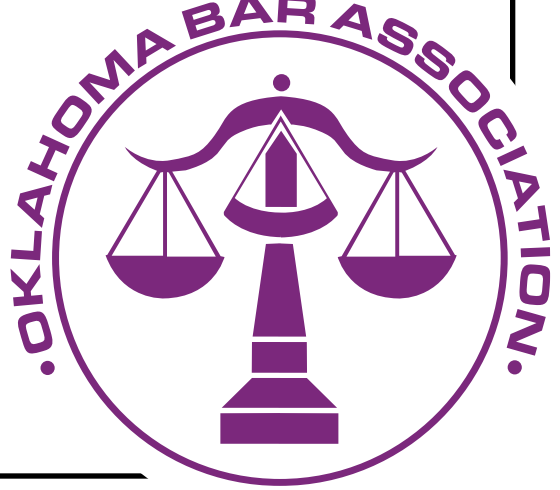
Court Issue



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AN IMPENDING CROSSROAD:

LGBT RIGHTS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

MCLE 1/0

PROGRAM PLANNER:

Alyssa Bryant

Staff Attorney dedicated to Palomar, Oklahoma City's Family Justice Center, Legal Aid Services of Oklahoma, Inc.

This webcast will examine:

- Whether Title VII prohibits discrimination against transgender people based on
  (1) their status as transgender or
  (2) sex stereotyping under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).
- Whether discrimination against an employee because of sexual orientation constitutes prohibited employment discrimination "because of...sex" within the meaning of Title VII.

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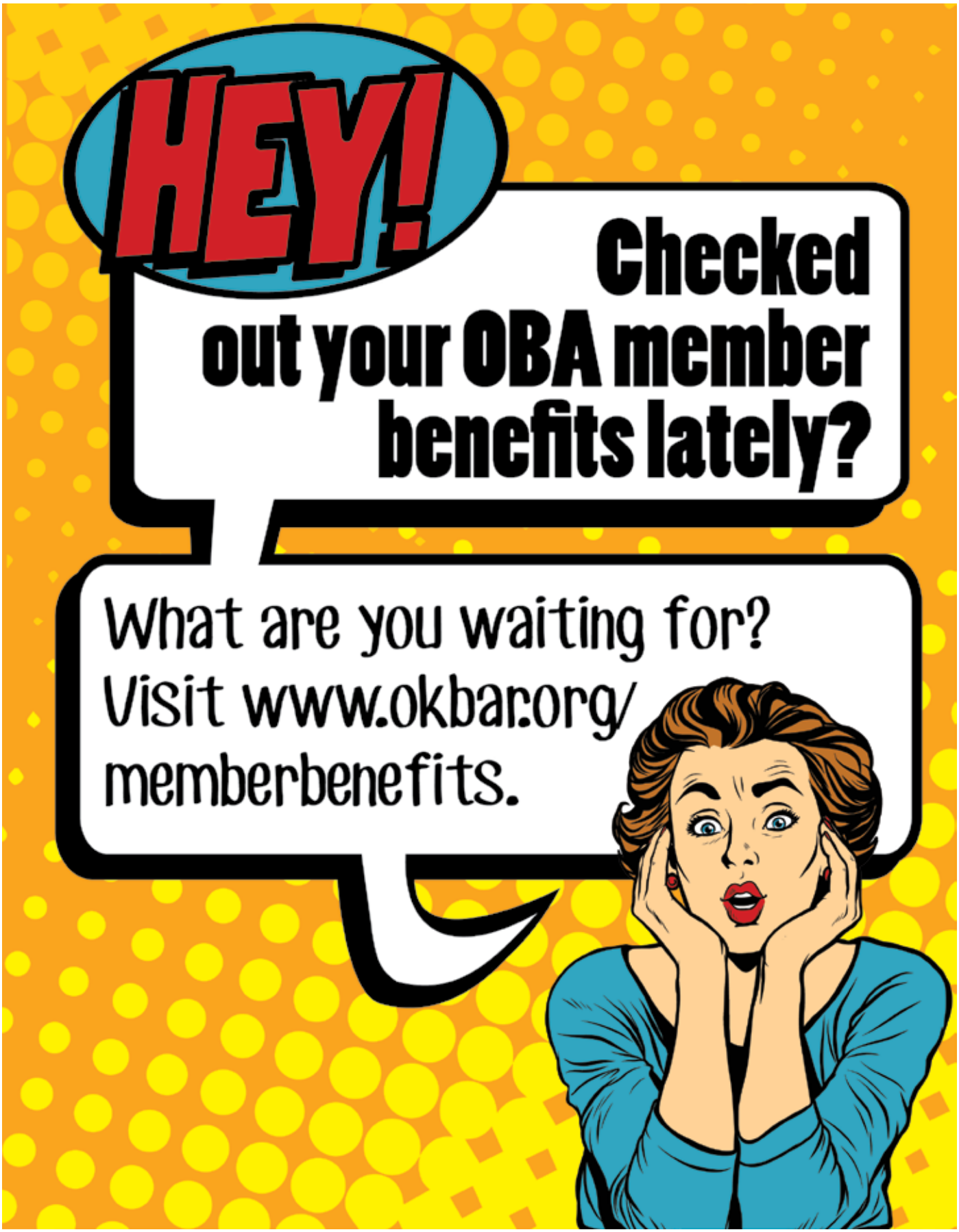
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Opinions of Supreme Court

Manner and Form of Opinions in the Appellate Courts;
See Rule 1.200, Rules — Okla. Sup. Ct. R., 12 O.S. Supp. 1996 (1997 T. 12 Special Supplement)

SCAD No. 2020-37. April 30, 2020

Re: Reinstatement of Certificate of Certified Shorthand Reporters

ORDER

The Oklahoma Board of Examners of Certified Shorthand Reporters recommended to the Supreme Court of Oklahoma that the certificate of each of the Oklahoma Certified Shorthand Reporters named below be reinstated as they have complied with the continuing education requirements for 2019 and annual certificate renewal requirements for 2020 and have paid all applicable fees.

IT IS HEREBY ORDERED pursuant to 20 O.S., Chapter 20, App. 1, Rules 20 and 23, the certificates of the following shorthand reporters are reinstated from the suspension earlier imposed by this Court:

Name	CSR#	Effective Date of Reinstatement
Kortney Houts	1804	April 15, 2020
Dana Burkdoll	1955	April 23, 2020

DONE BY ORDER OF THE SUPREME COURT this 30th day of April, 2020.

/s/ Noma D. Gurich
Chief Justice

2020 OK 22

ORDER REGARDING THE CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY ACT (CARES ACT, PUBLIC LAW NO. 116-136)

SCAD 2020-38. May 1, 2020

1. The Supreme Court continues to issue orders implementing emergency procedures to address the challenges raised by the COVID-19 pandemic. In response to this pandemic, Congress enacted the Coronavirus Aid, Relief, and Economic Security Act (CARES Act, Public Law No. 116-136). The law includes important, immediate protections for tenants and homeowners.
2. In order to address residential evictions, an issue that has health and safety implications, and pursuant to our superintending authority under Article 7, Section 4 of the Oklahoma Constitution, this Court adopts and mandates the implementation of the following temporary pleading requirement.
   A. In support of a Petition for Forcible Entry and Detainer or Affidavit for Possession filed on or after March 27, 2020, the date of passage of the CARES Act, the Plaintiff in any action for eviction shall affirmatively plead that the property that is the subject of the eviction dispute **is or is not a covered dwelling under the CARES Act.**
   B. This requirement shall be met by the filing of the attached VERIFICATION OF COMPLIANCE WITH SECTION 4024 OF THE CARES ACT. The Plaintiff shall supplement all pending cases where the Petition or Affidavit for Possession was not filed with a Verification of Compliance with Section 4024 of the CARES Act. All new filings must comply with this order until further order of this Court.
3. This temporary pleading requirement merely reflects the Act's moratorium prohibiting the lessor of a covered dwelling from filing a legal action to recover possession of the property for nonpayment of rent. See CARES Act Section 4024(b). This requirement shall remain in force and effect until further order of this Court.
4. This order is effective upon the date of filing.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 1st day of May, 2020.

/s/ Noma D. Gurich,
Chief Justice

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

Kane, J., concurs in part and dissents in part;

Rowe, J., dissents (by separate writing).

IN THE DISTRICT COURT OF _____ COUNTY
STATE OF OKLAHOMA

_____,	)	
PLAINTIFF,	)	
	)	CASE NO.: _____
VS.	)	
	)	
_____,	)	
DEFENDANT.	)	

VERIFICATION OF COMPLIANCE
WITH SECTION 4024 OF THE CARES ACT

I, _____, in support of Petition for Forcible Entry & Detainer or Affidavit for possession of the dwelling unit located at:

_____,

submit this Verification of Compliance with Section 4024 of the CARES Act.

1. I am __the Plaintiff or __an authorized agent of the Plaintiff in this action.

2. The facts stated in this Verification are within my personal knowledge and are true and correct.

3. I submit this Verification in support of this action with knowledge of my pleading obligations under 12 O.S. § 2011.

4. This action is being filed due to the non-payment of rent, fees, or other charges.
___Yes ___No

5. The property underlying this action is subject to a mortgage: ___Yes ___No.

6. If yes to paragraph 5, the mortgage is a federally backed mortgage loan or federally backed multifamily mortgage loan as defined in Section 4024(a)(2)(B) of the CARES Act and explained below: ___Yes ___No

> A federally backed mortgage is defined as any loan subject to a lien that was made in whole or in part, or insured, guaranteed, supplemented, or assisted in any way by the Federal Government, or that is purchased or securitized by Freddie Mac or Fannie Mae.

7. The property underlying this action is a "covered property" as defined in Section 4024(a)(2)(A) of the CARES Act and specified below: ___Yes ___No

A "covered property" includes any property that participates in any of the following programs or receives funding from any of the following sources:

- Public Housing (42 U.S.C. § 1437d)
- Section 8 Housing Choice Voucher program (42 U.S.C. § 1437f)
- Section 8 project-based housing (42 U.S.C. § 1437f)
- Section 202 housing for the elderly (12 U.S.C. § 1701q)
- Section 811 housing for people with disabilities (42 U.S.C. § 8013)
- Section 236 multifamily rental housing (12 U.S.C. § 1715z–1)
- Section 221(d)(3) Below Market Interest Rate (BMIR) housing (12 U.S.C. § 1715l(d))
- HOME (42 U.S.C. § 12741 et seq.)
- Housing Opportunities for Persons with AIDS (HOPWA) (42 U.S.C. § 12901, et seq.)
- McKinney-Vento Act homelessness programs (42 U.S.C. § 11360, et seq.)
- Section 515 Rural Rental Housing (42 U.S.C. § 1485)
- Sections 514 and 516 Farm Labor Housing (42 U.S.C. §§ 1484, 1486)
- Section 533 Housing Preservation Grants (42 U.S.C. § 1490m)
- Section 538 multifamily rental housing (42 U.S.C. § 1490p-2)
- Low-Income Housing Tax Credit (LIHTC) (26 U.S.C. § 42)
- Rural housing voucher program under section 542 of the Housing Act of 1949 (42 U.S.C. 1490r).

8. I state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct.

_____ _____

Date Signature

_____

Printed Name

_____

Title/Position

_____

Address

_____

Phone

Rowe, J., dissenting:

¶1 This order and the pleading requirement it imposes are meant to ensure compliance with the temporary moratorium on state eviction proceedings imposed by Section 4024 of the CARES Act.

¶2 Under Oklahoma law, forcible entry and detainer actions are often filed on the small claims docket. 12 O.S. § 1148.14. The verification approved by the Court today places the burden on Plaintiffs (landlords) to verify their compliance with the requisites of the CARES Act. The verification must be signed under penalty of perjury. Many parties appearing on the small claims docket appear pro se; they file their pleadings without the assistance of counsel. A verification mistakenly completed could result in a criminal charge, or, result in an action being dismissed by the court *sua sponte*.

¶3 I am confident that judges can apply the protections afforded in the CARES Act to Defendants in accord with both federal and state law, without the requirement of this verification which may, inadvertently, create a roadblock to Plaintiffs' access to court.

¶4 Accordingly, I respectfully dissent.

SCAD No. 2020-39. May 4, 2020

Re: Publication of SCAD Orders 2020-24, 2020-29, and 2020-36

ORDER

The following three SCAD Orders are hereby ordered to be released for official publication:

1. SCAD No. 2020-24, First Emergency Joint Order Regarding the COVID-19 State of Disaster, with public domain number 2020 OK 25;

2. SCAD No. 2020-29, Second Emergency Joint Order Regarding the COVID-19 State of Disaster, with public domain number 2020 OK 24;

3. SCAD No. 2020-36, Third Emergency Joint Order Regarding the COVID-19 State of Disaster, with public domain number 2020 OK 23;

The three SCAD Orders with the public domain numbers are attached.

DONE BY ORDER OF THE SUPREME COURT this 4th day of May, 2020.

/s/ Noma D. Gurich,
Chief Justice

2020 OK 23

SCAD No. 2020-36. April 29, 2020

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA AND IN THE OKLAHOMA COURT OF CRIMINAL APPEALS

THIRD EMERGENCY JOINT ORDER REGARDING THE COVID-19 STATE OF DISASTER

1. This order modifies the First and Second Joint Emergency Orders (SCAD Nos. 2020-24 & 2020-29) from the Supreme Court and the Court of Criminal Appeals.

2. This order is intended to assist judges and court clerks in all 77 counties with transitioning from shelter in place directives. Local practices should continue to be adopted by courts and county and city officials through orders available to the public.

3. Paragraph 3 of the Second Emergency Joint Order remains in effect and is modified to the extent that all Civil and Criminal jury trials shall be rescheduled on the next available jury docket after July 31, 2020. Any exception shall be approved by the Chief Justice in consultation with the Presiding Judge of the Court of Criminal Appeals.

4. In the event that there is an objection to the continuance of any civil or criminal jury trial, the assigned judge shall make a full record including reference to all Joint Orders Regarding the Covid-19 State of Disaster.

5. Paragraphs 4 and 5 of the Second Emergency Joint Order remain in effect to May 15, 2020. In all cases, the period from **March 16, 2020 to May 15, 2020**, during which all rules and procedures, and deadlines, whether prescribed by statute, rule or order in any civil, juvenile or criminal case were suspended, will be treated as a tolling period. May 16th shall be the first day counted in determining the remaining time to act. The entire time permitted by statute, rule or procedure is not renewed.

6. **Beginning on May 16, 2020, all rules and procedures, and all deadlines whether prescribed by statute, rule or order in any civil, juvenile or criminal case, shall be enforced, including all appellate rules and procedures for the Supreme Court, the Court of**

Criminal Appeals, and the Court of Civil Appeals.

7. For all cases pending before March 16, 2020, the deadlines are extended for only the amount of days remaining to complete the action. For example, if the rule required the filing of an appellate brief within 20 days, and as of March 16, ten (10) days remained to file the brief, then the party has 10 days with May 16, 2020 being the first day.
8. For all cases where the time for completing the action did not commence until a date between March 16 and May 15, 2020, the full amount of time to complete the action will be available. May 16th shall be the first day counted in determining the time to act.
9. In cases involving any deadlines for perfecting an appeal or other appellate proceedings, requests for relief should be directed to the court involved and should be generously granted.
10. Paragraph 6 of the Second Joint Emergency Order is modified to the extent that all civil and criminal non-jury hearings and other matters may be set after May 16, 2020.
11. Judges and other courthouse personnel shall continue to use all available means to ensure the health of all participants in any court proceeding. Judges are encouraged to continue to use remote participation to the extent possible by use of telephone conferencing, video conferencing pursuant to Rule 34 of the Rules for District Courts, Skype, Bluejeans.com and webinar based platforms. Zoom remains blocked on all equipment provided by the AOC/MIS. Judges are encouraged to develop methods to give reasonable notice and access to the participants and the public.
12. Local county officials will continue to guide the extent to which county buildings are closed or have restricted access to the public, All areas of a county facility occupied by judges, judicial staff, court clerks and staff may remain closed to the public with exceptions for all matters and as permitted by local order. Local court orders should specify the terms and conditions required by the public in order to permit entrance, including the requirement that all persons entering the court facilities wear masks and gloves.
13. People who are ill for any reason should be restricted from entering any facility, as set out in paragraph 6 of the First Joint Emergency Order. Social distancing should be practiced. All persons should be reminded to wash their hands. To that end, county facilities are responsible for providing soap and water.
14. To the extent that necessary and emergency in person dockets are being held, not more than 10 persons including the judge and court personnel shall be in a courtroom or other area at one time. This recommendation will remain in effect until public and health officials expand this number to 50 or more.
15. Court clerks and judges may continue to use mail, email, and drop off boxes for acceptance of written materials and correspondence with parties/counsel. All appellate filings shall continue to be made by mail or third party commercial carrier until further notice posted on OSCN.
16. All dispositive orders entered by judges between March 16, 2020 and May 15, 2020 are presumptively valid and enforceable.
17. It is anticipated that additional transitional orders may be entered as deemed necessary.

IT IS SO ORDERED.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 29th DAY OF APRIL, 2020.

/s/ Noma D. Gurich,
Chief Justice

WITNESS OUR HANDS AND THE SEAL OF THIS COURT THIS 29th DAY OF APRIL, 2020.

/s/ David B. Lewis,
Presiding Judge

SCAD No. 2020-29. March 27, 2020

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

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

1. The First Emergency Joint Order entered on March 16, 2020 remains in effect except as it

is modified herein. To the extent that the Joint Emergency Orders conflict with local practices, the First and Second Emergency Joint Orders control.

2. On March 24, 2020, Governor J. Kevin Stitt issued the Fourth Amended Executive Order 2020-07 and ordered that additional steps be taken to protect all Oklahomans from the growing threat of COVID-19. The Second Emergency Joint Order joins the Governor in addressing the ever changing situation in the district courts in all 77 counties as well as the appellate courts in Oklahoma and Tulsa Counties. We admonish all Oklahoma judges, court clerks, court employees and staff and the public to follow the guidelines to protect public health set forth in the Governor's Executive Orders and those issued by the Oklahoma Department of Health and the CDC.
3. All district courts in Oklahoma shall immediately cancel all jury terms through May 15, 2020. 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. If necessary, additional jury terms may be ordered in July and/or August or later in the year.
4. 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 through May 15, 2020. This suspension also applies to appellate rules and procedures for the Supreme Court, the Court of Criminal Appeals, and the Court of Civil Appeals.
5. In any civil case, the statute of limitations shall be extended through May 15, 2020.
6. All courthouses shall be closed to the public with exceptions for emergencies as permitted by local order. To the extent that emergency dockets are being held, no more than 10 persons including the judge and court personnel shall be in a courtroom at one time. Judges and other courthouse personnel shall use all available means to ensure the health of all participants in any court proceeding. If judges continue to hold hearings, all of the mandated COVID-19 precautions issued by the CDC and all State and local governments shall be followed. Judges shall continue to 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.
7. Court clerks and judges should be using email, fax and drop boxes for acceptance of written materials, except for emergencies. All appellate filings shall be made by mail.
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 27th DAY OF MARCH, 2020.

/s/ Noma D. Gurich,
Chief Justice

WITNESS OUR HANDS AND THE SEAL OF THIS COURT THIS 27th DAY OF MARCH, 2020.

/s/ David B. Lewis,
Presiding Judge

2020 OK 25

SCAD No. 2020-24. March 16, 2020

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

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

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 Controlling 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 mem-

bers 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.

2020 OK 20

LEWIS R. METCALF, Petitioner/Appellee, v. BONNIE L. WATSON METCALF, Respondent/Appellant.

Case No. 115,743. April 27, 2020

CORRECTION ORDER

¶1 The opinion in the above styled and numbered cause filed on April 14, 2020, is hereby corrected as follows:

In paragraphs 1, 6 and 17, the word "allude" is changed to "elude."

In footnote 13, the citation "Title 21 O.S. 2011 §§121 et seq." is changed to "Title 24 O.S. 2011 §§112 et seq."

In all other respects, the order shall remain unaffected by this correction order.

DONE BY ORDER OF THE SUPREME COURT THE 27th DAY OF APRIL, 2020.

/s/ Noma D. Gurich,
Chief Justice

2020 OK 21

STATE OF OKLAHOMA, ex rel. OKLAHOMA BAR ASSOCIATION, Complainant, v. JOHN THOMAS GREEN, Respondent.

Rule 6. SCBD No. 6798. April 28, 2020
As Corrected April 30, 2020

BAR DISCIPLINARY PROCEEDINGS

¶0 In this disciplinary proceeding against a lawyer, the complaint alleges two counts of unprofessional conduct deemed to warrant disciplinary sanctions. A trial panel of the Professional Responsibility Tribunal found that the Respondent's actions merit the imposition of professional discipline. It recommended that Respondent be suspended from the practice of law for two years and one day and that he pay the costs of this proceeding. Upon *de novo* review of the evidentiary materials presented to the trial panel,

RESPONDENT IS ORDERED DISCIPLINED BY SUSPENSION OF HIS LICENSE TO PRACTICE LAW FOR A PERIOD OF NINETY DAYS AND DIRECTED TO PAY THE COSTS OF THIS PROCEEDING. COMPLIANCE WITH THIS SUSPENSION AND PAYMENT OF COSTS ASSESSED MUST BE SATISFIED BEFORE

APPLICATION FOR REINSTATEMENT MAY BE CONSIDERED.

Tracy Pierce Nester, Assistant General Counsel, Oklahoma Bar Association, Oklahoma City, Oklahoma, for Complainant

John Thomas Green, Attorney, Ponca City, Oklahoma, for Respondent, pro se

COLBERT, J.

¶1 This disciplinary proceeding against a lawyer poses two questions: (1) Does the record submitted for our examination provide sufficient evidence for a meaningful *de novo* consideration of the complaint and its disposition? and (2) Is suspension for two years plus one day together with payment of costs an appropriate disciplinary sanction for Respondent's breach of acceptable professional behavior? We answer question one in the affirmative and question two in the negative.

¶2 Following a grievance filed by client Jaramie Green (Client - no relation to Respondent) on May 18, 2018, the Oklahoma Bar Association (Complainant or OBA) commenced an investigation of the complaint against John Thomas Green, a licensed lawyer (Respondent). On May 25, 2018, the OBA filed a formal complaint under Rule 6 of the Rules Governing Disciplinary Proceedings (RGDP), 5 O.S. 2011, Ch. 1, App. 1-A.[1] The Complainant charged Respondent with one count for professional misconduct in violation of Rules 1.1,[2] 1.3,[3] 1.4,[4] and 8.4[5] of the Oklahoma Rules of Professional Conduct (ORPC), 5 O.S. 2001, ch. 1, app. 3-A. Complainant charged Respondent with an additional count two for misconduct in violation of Rules 8.1(b)[6] and 8.4, ORPC, and Rule 1.3,[7] RGDP, for failing to cooperate in the disciplinary proceedings. The Complainant urges that Respondent be disciplined by disbarment. Respondent did not answer the Complaint, nor any other pleadings in this case until he eventually filed Respondent's Answer to Complainant's Brief in Chief after the Trial Panel's hearing. He delivered his Answer to the wrong location (Oklahoma Bar Association) on October 9, 2019, and it was later forwarded to this Court.

¶3 A trial panel of the Professional Responsibility Tribunal (PRT) conducted a PRT Hearing on June 13, 2019, without Respondent's presence. Upon conclusion of the hearing, consideration of testimony (Respondent was not present nor were any witnesses on his behalf), and admitted exhibits, the PRT issued its report (PRT Report) on July 11, 2019. Because Respondent failed to answer the Complaint and because of OBA's Motion to Deem the Allegations Admitted had been previously granted, the PRT Report found clear and convincing evidence that Respondent violated Rules 1.1 (Competence), 1.3 (Diligence), and 1.4 (Communication) of the ORPC. The Tribunal also found clear and convincing evidence that Respondent violated Rule 8.4(a) (Misconduct), ORPC, as a result of his violation of Rule 1.3, RGDP. The PRT Report recommended suspension of Respondent's license to practice law for two years and one day in the hope that it would give Respondent time to seek personal support and professional assistance, as well as help from Lawyers Helping Lawyers.

¶4 Following the filing of the PRT Report on July 15, 2019, Complainant filed its Application to Assess Costs in the amount of $1,881.70 on July 15, 2019, and filed its Complainant's Brief In Chief to this Court on August 6, 2019. Respondent failed to file a response to the Brief within the specified time of 15 days following Complainant's Brief in Chief. On September 25, 2019, an extension was granted on this Court's own motion, whereby the Respondent was notified that if he did not file an answer by October 9, 2019, his case would be assigned for disposition without his brief. Respondent finally filed Respondent's Answer to Complainant's Brief In Chief at the OBA on October 9, 2019, and the OBA forwarded that document to this Court on October 28, 2019.

STANDARD OF REVIEW

¶5 The Oklahoma Supreme Court has exclusive original jurisdiction regarding OBA proceedings. In re Integration of State Bar of Okla., 1939 OK 378, ¶ 5, 95 P.2d 113, 114; Matter of Reinstatement of Hutson, 2019 OK 32, ¶22, __ P.3d __. The Court's review is *de novo* and takes into consideration all relevant facts in determining whether discipline is merited and what measures, if any, should be imposed for the misconduct. State ex rel. Okla. Bar Ass'n v. Donnelly, 1992 OK 164, ¶ 11, 848 P.2d 543, 546. The Court implements its constitutionally invested, nondelegable power to regulate and control the practice of law and the legal practitioners. Tweedy v. Okla. Bar Ass'n, 1981 OK 12, ¶ 2, 624 P.2d 1049, 1052. Under a *de novo* examination, the Trial Panel's findings and its recommendations are not binding nor are they persuasive upon this Court. State ex rel. Okla. Bar Ass'n v. Raskin, 1982 OK 39, ¶ 11, 642 P.2d

262, 265. This Court has a duty to be the final arbiter for adjudication and must conduct a full-scale examination of all the relevant facts. State ex rel. Okla. Bar Ass'n v. Johnston, 1993 OK 91, ¶ 13-14, 863 P.2d 1136, 1142 ("In a *de novo* consideration, in which the court exercises its constitutionally invested, nondelegable power to regulate both the practice of law and the legal practitioners, a full-scale exploration of all relevant facts is mandatory. The court's task cannot be discharged unless the PRT panel submits a complete record of proceedings for a *de novo* examination of all material issues."(citations omitted)).

¶6 Before a decision to discipline an offending attorney is made, the misconduct presented must be demonstrated by clear and convincing evidence, as required by Rule 6.12(c), RGDP, 5 O.S. 2001, Ch.1, App. 1-A. To make this determination of evidence and to fully discharge the court of its duty, the trial panel must present a complete record of the proceedings. State ex rel. Okla. Bar Ass'n v. Eakin, 1995 OK 106, ¶ 9, 914 P.2d 644, 648. The Court must determine whether the presented record is sufficient for an independent determination of the relevant facts and to craft an appropriate discipline. State ex rel. Okla. Bar Ass'n v. Perceful, 1990 OK 72, ¶ 5, 796 P.2d 627, 630. The record in this case consists of the pleadings filed with this Court, the transcript of the PRT Hearing and exhibits admitted into the record at the PRT Hearing, the PRT Report of the trial panel filed on July 15, 2019, and the transcript of the deposition of Respondent taken on behalf of the OBA on December 20, 2018. The only so-called record or pleading submitted by Respondent is in the form of Respondent's Answer to Complainant's Brief In Chief, belatedly filed by Respondent in the wrong location (OBA Center), and eventually received by this Court on October 9, 2019. In Respondent's Answer, he set forth only a brief summary of his personal history and problems, asserting that the effect of a divorce, a necessary move, and lack of legal experience together caused him to fall into a depression although he provided no medical evidence of such a diagnosis. He disputed Complainant's arguments but offered no evidence to support those assertions, nor did he make any legal arguments or cite any legal authorities in support of his refutations in order to rebut Complainant's allegations and arguments as set out in Complainant's Brief In Chief. We are left with a record from Respondent devoid of rational legal arguments and filled only with Respondent's excuses. After examination of the complete record submitted on appeal, this Court determines that the record is sufficient for the Court's *de novo* consideration of Respondent's alleged misconduct.

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

¶7 The PRT Report provides an extensive summary of the historic facts in this case gleaned from Respondent's Deposition on December 20, 2018. PRT Report at 2-5. The more salient facts are repeated here as is necessary for this discussion. The PRT Report is replete with Respondent's many failures to respond to requests for information and his lack of cooperation with Complainant's investigator, along with Respondent's failed promises to do better in the future. However, the record shows that these promises to improve and cooperate never materialized.

¶8 The Client relationship began in January of 2018, when Respondent was retained by Client at a gas station in Ponca City, Oklahoma, to provide legal services relating to a post-divorce custody matter pending in Creek County, Oklahoma. Client paid Respondent $150.00 on the spot and eventually paid Respondent a total of $1,140.00, although a fee agreement was never executed or produced. Client faced an upcoming hearing pending in his case on February 6, 2018, before Judge Mark A. Ihrig. The judge had ordered mediation to occur at Client's last court hearing. The mediation was to take place prior to his February 6, 2018, hearing.

¶9 Prior to the mediation hearing, Client notified Respondent that he was unable to complete mediation by this deadline for financial reasons. On the morning of February 6, 2018, Respondent contacted the trial judge's office, speaking with the bailiff, to let the judge know that mediation had not yet occurred and to attempt to seek a continuance. Respondent then incorrectly assumed that a continuance had been granted. Complainant's investigator, Mr. Thames, testified in the trial panel hearing that according a conversation he had with Ms. Eastman, Respondent's opposing attorney in the case, Respondent contacted her regarding a continuance and she was not adverse to a continuance. However, she told Respondent that in that district and with that judge, he does not allow agreed continuances. Ms. Eastman told Respondent that it would have to be approved by the judge in advance and in writing. Mr.

Thames also testified that he spoke with the judge's bailiff who had taken a call from Respondent. The bailiff said he told Respondent that they could not just grant it because it would have to be run by the judge. In addition the trial judge indicated a continuance could not be granted because Respondent had never filed an entry of appearance with the court for Client's case. (Deposition of Respondent at 40, December 20, 2018).

¶10 As a result of these exchanges, Respondent assumed he did not need to go to court for the hearing and told his client that he need not be present either. In any case, the court hearing was held as scheduled, on the afternoon of February 6, 2018, with neither Respondent not his client present. With no representation in court on Client's behalf, the judge granted a default judgment against the Client's interest. Respondent claimed that he later learned that the judge did not allow continuances without express permission.

¶11 Upon learning of the default judgment against himself, Client terminated Respondent as his attorney and requested a refund of the fees paid. In total, Client had paid Respondent $1,140.00. Client then hired a new attorney on March 5, 2019, to whom he paid $1,100.00, and who eventually attained a vacation of the default judgment against Client.

¶12 Client filed a grievance against Respondent with Complainant on May 18, 2018. After Respondent was notified of the complaint and asked to respond, Respondent had to be granted one extension past the deadline plus two additional days to finally respond by letter on July 10, 2018. On August 22, 2018, Respondent met with the General Counsel for the Complainant to discuss the grievance. At that time, Respondent agreed to participate in a diversion program if the Professional Responsibility Commission (PRC) offered it to him. On September 28, 2018, the PRC considered and voted to offer Respondent a referral under Rule 5(c), RGDP. A proposed diversion contract was mailed to Respondent on September 28, 2018, via certified mail (returned undeliverable 11-19-18). This began a series of Respondent's actions and inactions showing lack of cooperation and refusal to participate in the process or carry-out agreed upon solutions.

¶13 Respondent's lack of cooperation continued. After no response from the mailed diversion contract on September 22, 2018, the General Counsel attempted to contact Respondent by telephone and email with no response. A letter was then mailed to Respondent's roster address via certified mail asking for response within 5 days to which Respondent did not respond and it was returned unclaimed on December 12, 2018. On December 2, 2018, Complainant caused a *subpoena duces tecum* to issue for Respondent to appear and bring requested documents on December 20, 2018. This was served via certified mail to his residence and personally at his residence. Respondent did appear on December 20, 2018, but failed to bring any documents requested in the *subpoena*. Respondent then agreed during the deposition to participate in a diversion program if that opportunity was still available and he expressed remorse for his previous lack of communication and cooperation.

¶14 Following the deposition, attempts were again made to contact Respondent by email and telephone to which Respondent failed to respond. On January 11, 2019, the PRC again considered a diversion program, along with a mental health assessment, and evaluation for drug and alcohol dependency. A proposed contract was again mailed to Respondent via certified mail and personally served on him on January 18, 2019, at his residence. This included the diversion contract and appointments scheduled for his assessments at no cost to him. Again, Respondent did not keep the appointments and the letter was returned unclaimed on February 25, 2019.

¶15 On February 22, 2019, the Complainant's General Counsel sent a letter via U.S. mail to Respondent's roster address and to his residence, outlining options available due to his repetitive failures to cooperate. Respondent did not reply. On April 25, 2019, Complainant filed its Complaint with Supreme Court and Respondent was served via certified mail and personal service. Still he did not respond. On May 30, 2019, Complainant filed Motion to Deem Allegations Admitted with the Trial Panel pursuant to Rule 6.4, RGDP. The Motion was sustained by the Trial Panel on June 13, 2019, and there continued to be no response from Respondent.

¶16 When the PRT Hearing was held on June 13, 2019, Respondent did not appear and no witnesses or evidence was presented on his behalf. After sustaining the Complainant's Motion To Deem Allegations Admitted and the trial panel hearing, the Trial Panel Report

(TPR) was issued on July 11, 2019, finding clear and convincing evidence that Respondent violated ORPC Rules 1.1 (Competence), 1.3 (Diligence), and1.4 (Communication). The TPR also found clear and convincing evidence that Respondent violated Rule 8.4(a) (Misconduct), ORPC, because of his violation of Rule 1.3, RGDP. (Discipline for Act Contrary to Prescribed Standards of Conduct).

¶17 The trial panel's recommendation for the rules violations was suspension of Respondent's license to practice law for two years and a day. The Complainant asserts the same rules violations of professional conduct as the PRT, but also charges a violation of Rule 8.1(b), ORPC (Bar Admission and Disciplinary Matters) for Respondent behavior of "knowingly fail[ing] to respond to a lawful demand for information from [a] . . . disciplinary authority." Rule 8.1(b), ORPC. Complainant thus urges this Court to impose the most serious discipline of disbarment plus assessment of costs incurred in the investigation.

DISCUSSION

¶18 Respondent first challenges the sufficiency and completeness of the record that was submitted by Complainant to this Court for a *de novo* review. The Respondent's allegation is without merit. As such, we find that the contents of the submitted record is extensive and complete and sufficient to conduct an independent on-the-record review.[8] Respondent's failure to have further information on the record in his behalf results from Respondent's refusal to participate in the process when offered opportunities, such as failing to answer the Complaint, and failing to attend or defend his position at the PRT Hearing. Respondent failed to participate on his own behalf in almost every way until he finally filed Respondent's Answer To Complainant's Brief In Chief on October 9, 2019. Even in the Respondent's submitted brief, he failed to make any legal arguments or cite a single legal authority in support of his positions. This Court rejects Respondent's allegation that the record does not contain complete and sufficient facts to conduct a *de novo* review.

¶19 Count I of the Complaint filed against Respondent was initiated based on a grievance filed by Respondent's Client, Jaramie Green. The grievance cited many unsuccessful attempts by Client to communicate with Respondent. Then miscommunications between Respondent and the bailiff and opposing counsel led to Respondent's mistaken belief that a continuance had been granted. Compounding that mistake, Respondent then communicated to Client that he need not appear for the hearing because Respondent had gained a continuance. This resulted in Client suffering a default judgment from the trial judge for lack of his appearance in court. Count II of the Complaint focuses on Respondent's many failures to participate in, and cooperate with, Complainant's investigation following the filing of Client's grievance.

¶20 The well-established reason behind the "disciplinary process, including the imposition of a sanction, is designed not to punish the delinquent lawyer, but to safeguard the interests of the public, those of the judiciary and of the legal profession." State ex rel. Okla. Bar Ass'n v. Combs, 2007 OK 65, ¶ 36, 175 P.3d 340, 351 (citations omitted). The measure of discipline imposed upon an offending lawyer should be consistent with the discipline visited upon other practitioners for similar acts of professional misconduct. Id.

¶21 In Count I, as the facts show, Respondent's actions clearly show that he was in violation of professional responsibility rules, specifically those relating to Competence, Diligence and Communication during his representation of Client. ORPC Rules 1.1,1.3, and 1.4. In Respondent's Answer to Complainant's Brief In Chief, he attempted to support his efforts to refute these violations by stating, e.g., he "was prepared to file an entry of appearance", and to explain why he had not done so, said "I was told a continuance would be granted." When trying to defend the fact that he had not gained a continuance for the hearing resulting in a default judgment, "I was prepared to file a motion to vacate in a timely manner" when he learned his client had already hired another lawyer. Respondent was lacking in competence and diligence, unprepared to professionally act for his client, thus violating the charged rules of professional conduct.

¶22 Count II additionally charges that Respondent violated Rule 8.1(b), ORPC, by his knowing failure to respond to Complainant's continued lawful demands for information; asserting that this violation is "quite serious," especially after the numerous opportunities that Respondent was given to cooperate. The second count is founded on Respondent's actions, or lack thereof, in response to Client's grievance

and the ensuing investigation opened by Complainant relating to the grievance.

¶23 Complainant argues for Respondent's disbarment for violations of the professional responsibility rules, citing case authority violations and discipline in previous cases. See, e.g., State ex rel. Oklahoma Bar Ass'n v. Parker, 2015 OK 65, 359 P.3d 184; State ex rel. Oklahoma Bar Ass'n v. Smith, 2016 OK 19, 368 P.3d 810; State ex rel. Oklahoma Bar Ass'n v. Godlove, 2013 OK 38, 318 P.3d 1086. We find each of the cited cases are distinguishable from the instant case.

¶24 Parker, though similar to the instant case, involved respondents who "completely failed to respond to address to their clients' needs and to the inquiries from the Bar during the investigation." Parker, 2015 OK 65, ¶20, 359 P.3d 184, 188. There we held that the appropriate discipline was disbarment (citing State ex rel. Oklahoma Bar Ass'n v. Passmore, 2011 OK 90, 264 P.3d 1238; State ex rel. Oklahoma Bar Ass'n v. McCoy, 1996 OK 27, 912 P.2d 856). Whereas here, Respondent failed to respond to most, but not all, requests as required by the rules. However, he did send a letter to Complainant in response to the Client's initial grievance (albeit delayed), he did appear for a meeting with the general counsel after the grievance was filed, he did show up for a deposition after he was subpoenaed, and he did eventually file a belated Answer to the Complainant's Brief in Chief. However, Respondent did not answer or respond to any entreaties from the investigative efforts of Complainant between August 22, 2018, when he met with General Counsel until his subpoenaed deposition on December 20, 2018. Following the deposition in December of 2018, there was again no participation or cooperation by Respondent until his final act of submitting Respondent's Answer To Complainant's Brief in Chief on October 9, 2019. Though his responses were inadequate, it does not merit disbarment.

¶25 In Godlove, even after multiple sanctions from the court, respondent continued filing frivolous claims and most of the monetary sanctions went unpaid. This too is distinguishable from the case at bar. Godlove, 2013 OK 38, 318 P.3d 1086. The respondent in Godlove violated many of the same rules of professional responsibility as here, but with additional violations of Rules 3.1 and 3.2, ORPC, regarding frivolous lawsuits and failure to expedite the lawsuit, as well as a violation of Rule 8.4(d), ORPC. Rule 8.4(d) which addresses engaging in conduct prejudicial to the administration of justice. In Godlove, the discipline of disbarment was appropriately ordered for respondent.

¶26 In Smith, this Court held that the discipline of disbarment for respondent was merited for multiple violations of the rules of professional conduct involving multiple clients. Smith, 2016 OK 19, 368 P.3d 810. Again, many of the violations were similar to the rules violated by Respondent here, but also included violations of Rule 1.5, ORPC (collecting an unreasonable fee) and Rule 5.2, RGDP, because of multiple instances of failure to respond to the grievance investigation. The respondent in Smith involved the filing of seven separate grievances by different clients, to which respondent completely failed to respond to all. Smith is distinguishable from the case at bar by the fact that Respondent here is found to have violated rules involving only two counts and a single client.

¶27 As the PRT did in its trial panel report, we find this case more akin to State ex rel. OBA v. Giger, (Giger II) 2003 OK 61, 72 P.3d 27. The respondent in Giger II involved facts similar facts to those of Respondent here. In Giger II, respondent claimed that his misconduct resulted from mental and psychological disability but provided no evidence to support this claim. Id. ¶ 40, 72 P.2d at 39. Here Respondent blames his failures on depression with no substantiating evidence and a host of negative personal problems. In both instances, respondents provided no medical evidence of their claims and showed no causal connection. In both cases, the overall damage to the clients was minimal. Giger II explains it this way:

> Emotional or psychological disability may serve to reduce a legal practitioner's ethical culpability, but does not immunize that person from imposition of disciplinary measures that are necessary to protect the public. When a mental disorder is tendered as a mitigation factor for the assessment of a lawyer's culpability, there must be a causal relationship between the medical condition and the professional misconduct. Not only did respondent fail to provide medical substantiation that he suffers from depression, but he also failed to establish a causal link between this perceived mental condition and the misconduct for which additional discipline is sought. *The court can and must protect the public from a lawyer*

who suffers from undefined psychological problems that call into serious question his continued fitness to practice law.

Id. ¶ 39, 72 P.3d at 39 (citations omitted).

The court in Giger II concluded that, although adequate evidence was found to support disbarment, it declined to impose that significant discipline because harm suffered by the client or public were missing or insignificant. Id. As in Giger II, we decline to impose the more serious discipline of disbarment.

MITIGATING FACTORS

¶28 When assessing the discipline to be enforced in an attorney's violation of rules of professional conduct, this Court considers mitigating circumstances in assessing the type and amount of discipline to be assessed. State ex rel. OBA v. Combs, 2007 OK 65, ¶35, 175 P.3d 340, 351; see also, State ex rel. OBA v. Giger, (Giger I) 2001 OK 96, ¶8, 37 P.3d 856, 863-64. Positive factors considered in other cases, e.g., a long history of legal practice without previous discipline, acknowledging misconduct and apologizing for such, and accepting full responsibility for the misconduct are absent here. See Combs ¶ 35, 175 P.3d at 351. Respondent's sole pleading in this case is filled with unfounded excuses to justify his poor representation and behaviors, with no attempt to acknowledge his shortcomings. In State ex rel. OBA v. Brown, 1998 OK 123, ¶19-20, 990 P.2d 840, 845, though respondent presented several mitigating factors, such as acknowledgment of misconduct, cooperation with general counsel in the investigation, and testifying candidly of his mistakes, he was suspended for two years and a day. A previous disciplinary action was also a factor. Respondent here shows a lack of willingness to accept responsibility and remorse for his misconduct.

¶29 Mitigating factors in Respondent's favor here are few in comparison to many other comparable disciplinary actions. However, some of those factors include that Respondent is relatively new and inexperienced to the legal profession since he had only been in practice since 2016. PRT Report at 7. He has no prior grievances or disciplinary actions of record, and he displayed no attempt to purposefully deceive the client in his representation. Also, the client did not suffer appreciable harm although client was forced to attain new counsel at additional cost.

¶30 Complainant recommends disbarment plus assessment of costs incurred in the case. The Trial Panel Report recommends suspension for two years and one day. Though disbarment may be warranted considering Respondent's lack of cooperation and his failure to accept responsibility and acknowledge his misconduct, we are led to dispense a lesser discipline as in Giger II. 2003 OK 61, ¶40, 72 P.3d 27, 39-40. There are many comparison's with this case and Giger II. One being, that Respondent here, as there, blamed his failings on depression, without evidence to support a definitive diagnosis of depression or a causal link from this to his misconduct. We anticipate that, given time to reconcile his personal problems and to seek help for his legal inexperience and lack of practice by working with organizations like Lawyers Helping Lawyers, Respondent will be positioned to gain the help he needs to become a productive member of the bar.

CONCLUSION

¶31 After a thorough review of the record, the Court concludes that clear and convincing evidence shows that Respondent violated ORPC Rules 1.1 (Competence), 1.3 (Diligence), 1.4 (Communication) and 8.4(a) (Misconduct) by his violation of RGDP Rule 1.3 (disciplinary proceedings). We also note that Respondent's failures to respond to lawful requests of information from Complainant's investigator supports the finding of a clear and convincing violation of ORPC Rule 8.1(B) (disciplinary proceedings). These serious violations of the rules of professional conduct require imposition of serious disciplinary action. Upon consideration of these violations, and giving due consideration to the mitigating factors tendered, the severe actions recommended by Complainant and the Trial Panel are not warranted. Therefore, we conclude that Respondent must be disciplined by a suspension of his license for ninety days and be assessed costs incurred in this proceeding.

RESPONDENT IS ORDERED DISCIPLINED (1) BY SUSPENSION OF HIS LICENSE TO PRACTICE LAW FOR A PERIOD OF NINETY DAYS AND (2) BY IMPOSITION OF COSTS OF THIS PROCEEDING IN THE AMOUNT OF $1,881.70. COMPLIANCE WITH THIS SUSPENSION AND PAYMENT OF COSTS ASSESSED MUST BE SATISFIED BEFORE

APPLICATION FOR REINSTATEMENT MAY BE CONSIDERED.

VOTE:

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

Kane, J., not participating

COLBERT, J.

1. The Rules Governing Disciplinary Proceedings are found at 5 O.S. 2001, Ch. 1, App. 1-A. The provisions of the RGDP Rule 6.1 state:

> The proceeding shall be initiated by a formal complaint prepared by the General Counsel, approved by the Commission, signed by the chairman or vice-chairman of the Commission, and filed with the Chief Justice of the Supreme Court.

2. ORPC Rule 1.1 – Competency

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

3. ORPC Rule 1.3 – Diligence

> A lawyer shall act with reasonable diligence and promptness in representing a client.

4. ORPC Rule 1.4 – Communication

> (a) A lawyer shall:
>
> (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
>
> (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
>
> (3) keep the client reasonably informed about the status of the matter;
>
> (4) promptly comply with reasonable requests for information; and
>
> (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional conduct or other law.
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

5. ORPC Rule 8.4 – Misconduct

> It is professional misconduct for a lawyer to:
>
> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
>
> (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
>
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

6. ORPC Rule 8.1(b) - Bar Admission and Disciplinary Matters

> An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:
>
> . . .
>
> (b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or **knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority,** except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

7. RGDP Rule 1.3 - Discipline for Act Contrary to Prescribe Standards of Conduct.

> The commission by any lawyer of any act contrary to prescribed standards of conduct, whether in the course of his professional capacity, or otherwise, which act would reasonably be found to bring discredit upon the legal profession, shall be grounds for disciplinary action, whether or not the act is a felony or misdemeanor, or a crime at all. Conviction in a criminal proceeding is not a condition precedent to the imposition of discipline.

8. The record consists of the pleadings filed with the Supreme Court, the report of the Professional Responsibility Tribunal filed July 15, 2019, the transcript of the Hearing before the Professional Responsibility Tribunal held on June 13, 2019 with OBA Hearing Exhibits 1-24 provided June 13, 2019, Complainant's Application To Assess Costs in the amount of $1,881.70 filed July 17, 2019, and Deposition of John Thomas Green taken on behalf of the OBA on December 20, 2018.

2020 OK 26

THE LEAGUE OF WOMEN VOTERS OF OKLAHOMA, ANGELA ZEA PATRICK, and PEGGY JEANNE WINTON, Petitioners, v. PAUL ZIRIAX, SECRETARY OF THE OKLAHOMA STATE ELECTION BOARD, in his official capacity, Respondent.

No. 118,765. May 4, 2020

ORDER

Original jurisdiction is assumed in this matter to review Petitioner's Application to Assume Original Jurisdiction and Issue Extraordinary Relief. In 2002, the Oklahoma Legislature enacted an alternative method for the making of a declaration, verification, certificate, or affidavit. 2002 Okla.Sess.Laws Ch. 468, § 2. A statement signed, dated, and declared made under the penalty of perjury as set forth in 12 O.S.2011, § 426 carries the force and effect of an affidavit "under any law of Oklahoma or under any rule, order, or requirement made pursuant to the law of Oklahoma" except for a deposition, an oath of office, or an oath required to be taken before a specified official other than a notary public. *Video Gaming Techs., Inc. v. Rogers Cty. Bd. of Tax Roll Corr.*, 2019 OK 83, ¶ 4 n. 1; *In re Reinstatement of Pacenza*, 2009 OK 9, ¶ 25 n. 39, 204 P.3d 58. The affidavit required within the absentee voting statutes (26 O.S.Supp.2019, § 14-101, et seq.) does not fall within this list of exceptions. Therefore, Respondent is directed to recognize affidavits made under the provisions of § 426 in the context of absentee voting. *Chandler U.S.A., Inc. v. Tyree,* 2004 OK 16, ¶ 24, 87 P.3d 598; 26 O.S.2011, § 2-107. Respondent is further ordered to send absentee ballot voters such forms, instructions, and materials as will facilitate the use of § 426. *Id.*; 26 O.S.2011, § 14-127, & § 14-128. Respondent is barred from issuing ballot forms, instructions, and materials suggesting notarization and/or a notarized affidavit form is the only means through which the requisite affidavit for absentee voting may be accomplished. *Cannon v. Lane,* 1993 OK 40, ¶ 12, 867 P.2d 1235; 26 O.S.2011, § 14-127, & § 14-128.

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

/s/ Noma D. GurichCHIEF JUSTICE

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

Winchester, Kane (by separate writing) and Rowe (by separate writing), dissent.

Kane, J., with whom Winchester, J., joins, dissenting

"I conclude that our existing statutes do not provide the relief proposed by the Petitioners, so the issues stand presented to the wrong branch of government. I dissent."

Rowe, J., dissenting:

¶1 I dissent from today's order directing the Secretary of the Oklahoma State Election Board to recognize affidavits made under the provisions of 12 O.S.§ 426 in the context of absentee voting.

¶2 In 2010, Oklahoma voters overwhelmingly approved State Question 746, the Oklahoma Voter I.D. Act, which requires voters to provide a form of identification at the polls in order to vote. 26 O.S. § 7-114.

¶3 This Court upheld the Oklahoma Voter I.D. Act in *Gentges v. Oklahoma State Election Board:*

> While the people have made it clear by constitutional command that they do not want the civil or military power of the state to interfere to prevent the free exercise of the right of suffrage, the people have made it equally clear by a coordinate constitutional command that they want the right of suffrage protected from fraud.

2014 OK 8, ¶21, 319 P.3d 674, 679.

¶4 Considering the history of voter fraud, the specifics of our absentee voter process, and recent legislative history, I agree with the Respondent that it would be absurd to now open the gates and provide for no verification for absentee ballots but still require in-person voters to provide a valid I.D. *See McIntosh v. Watkins,* 2019 OK 6, ¶4, 441 P.3d 1094, 1096 ("Statutory construction that would lead to an absurdity must be avoided and a rational construction should be given to a statute if the language fairly permits.").

¶5 Accordingly, I respectfully dissent.

2020 OK 27

ROBINSON KENNETH ROGERS, Plaintiff/Appellant, v. ESTATE OF JUDITH K. PRATT DECEASED, Defendant/Appellee.

No. 117,671. May 5, 2020

CERTIORARI TO THE COURT OF CIVIL APPEALS, DIVISION I

Tim Mills, Trial Judge

¶0 The decedent, Judith K. Pratt, left her entire estate to her caregivers and friends, neglecting any family. Her son, the plaintiff/appellant, Robinson Kenneth Rogers, which she gave up for adoption at birth, whom she later established a relationship with, objected to the admittance of Pratt's will to probate. He alleged that he was a pretermitted heir, and that the will was procured as the result of undue influence by Pratt's caregivers. The trial court determined that Rogers was not a pretermitted heir and admitted the will to probate. Rogers appealed and the Court of Civil Appeals affirmed. We granted certiorari to determine Roger's status as a pretermitted heir. We hold that the child placed for adoption qualifies as a pretermitted heir and that the evidence was insufficient to show that the omission was intentional.

COURT OF CIVIL APPEALS OPINION VACATED; TRIAL COURT REVERSED AND REMANDED.

Kimberly Adams, Monte Brown, McAlester, Oklahoma, for Plaintiff/Appellant.

Bill Layden, Jim B. Miller, McAlester, Oklahoma, for Defendant/Appellee.

KAUGER, J.:

¶1 We granted certiorari to address whether a child placed for adoption was a pretermitted heir under the terms of the will. We hold that the child placed for adoption qualifies as a pretermitted heir and that the evidence was insufficient to show that the omission was intentional.[1]

FACTS

¶2 On June 5, 1962, the decedent, Judith K. Pratt (birth mother/Pratt) gave birth to a baby boy in Ardmore, Oklahoma. Shortly after birth, Eicie and A.K. Rogers adopted the baby boy on June 7, 1962, naming him Robinson Kenneth Rogers (son/Rogers). The birth mother later married Leland Pratt, but she had no other children.

¶3 Sometime in approximately 1980, the birth mother and her son reconnected, after she found him working in Ardmore, Oklahoma. The two established a relationship and he lived with Pratt and her husband in Texas for 6 or 7 months after his adoptive father died. Rogers also met Pratt's sisters, Carlene and Patricia. After Rogers moved back to Ardmore, he talked to his birth mother a couple of times on the phone, but then lost track of her.

¶4 Pratt's husband died in 2007. Prior to his death, she was very social and family oriented. She often visited and spent holidays with family and friends. After her husband's death, Pratt became depressed and isolated herself from friends and family.

¶5 By the summer of 2017, Pratt was chronically ill with lung cancer. She had let her house deteriorate around her. She had no running water or working septic, and she stayed in an RV next to the dilapidated house. In July of 2017, Pratt contacted a lawyer to do estate planning. She also moved in with Cerita Morley (Morley), so that Morley could help care for her.

¶6 Morley called the lawyer on September 6, 2017, to notify him that Pratt was in bad shape, was going to have a medical procedure, and that she needed her estate planning done by September 13, 2017. On September 13, 2017, Pratt appointed Morley and Morley's daughter, Stacey Parker (Parker), as co-agents for durable power of attorney for healthcare.

¶7 On September 14, 2017, Pratt had a procedure to insert a mediport for lung cancer treatment. During this procedure, the doctor discovered a large protruding mass on her anus. Apparently, she had discovered it two years earlier, but never sought treatment due to embarrassment. On the way home from the procedure, Morley drove Pratt to her lawyer's office where he delivered her a drafted will to her car. Pratt picked up the will from her car after having been under anesthesia and had been taking Xanax as well as oxycodone at the time. The next day, she executed her last will and testament in her bed at Morely's house in front of two witnesses and a notary. Although she did not know the witnesses or notary, they all agreed she was aware of what she was doing, and that she appeared very competent.

¶8 The will provided in pertinent part:

> I, Judith Pratt, a resident of McAlester, Pittsburg County, State of Oklahoma, being of sound mind, being in good health and sensible of the uncertainly of life and the certainty of death, and desiring to make disposition of all my affairs, do hereby declare the following to be my Last Will and Testament, hereby revoking any and all other Wills and Codicils that I previously may have executed.
>
> SECTION 1
>
> I further state and declare that I am a widow; that my husband, Leland Pratt, has predeceased me; that I have no children. I further state that I have numerous other living relatives and that it is my specific intention that they or their heirs receive absolutely nothing from my estate, except as stated hereinafter. Any legatee or devisee hereinafter named in the Will shall not be deemed to have survived me if he or she dies within sixty (60) days of my death. . . .
>
> SECTION VII
>
> All the rest, residue and remainder of my property, of every nature and description, and of every kind and wheresoever situated, whether vested or contingent at the time of my death and whether acquired before or after the execution of this my last Will and Testament including in such rest, residue and remainder, and property over which at the time of my death, I shall have any power of testamentary disposition, I give, devise, and bequeath to the following persons in equal shares, share and share alike, to wit:
>
> Tonnah Johnson, Rocky C. Johnson, Cerita Morley, Frankie Johnson, Rocky W. Johnson, Geoffrey C. Morley, Samatha Morley Parker, Tina Johnson, Stay Parker and Bobby Parker.

The will also made a few specific bequests to a few other people, and directed that Pratt's real property, vehicles, trailer, guns, antiques, items located on the real property, and coins and jewelry be sold with the proceeds applied to Section VII.

¶9 In January of 2018, Pratt moved from Morley's house into Parker's house (Morley's daughter) for continued care. According to Parker, Pratt referred to her as her niece, but in reality, Parker's brother was married to Pratt's

actual niece. Pratt died at Parker's house on June 5, 2018, and her family was not notified of the death. On June 13, 2018, Morley, as personal representative, filed Pratt's will with her Petition for Probate in the District Court of Pittsburg County, Oklahoma.

¶10 On July 25, 2018, Pratt's sister, Carlene Wheller filed an objection to the petition to probate the will and appointment of an executor. She alleged that Morley and her daughter, Parker, were Pratt's primary caregivers and they unduly influenced Pratt to procure the will, leaving them to substantially benefit by it. She also alleged that Pratt lacked the testamentary capacity to execute the will.

¶11 On July 27, 2018, Rogers filed an application for his share of Pratt's estate as a pretermitted child. On September 5, 2018, Rogers also filed an objection to admission of the will, insisting that Pratt was not competent or free from duress, menace, fraud or undue influence when she made her will. The cause proceeded to trial on October 23, 2018. A dozen witnesses participated in the proceedings including: the attorney who drafted the will, the woman who notarized the will, the two witnesses to the will, Rogers, Parker, Pratt's sister Pat, Pat's daughter, three of Pratt's friends, and Pratt's doctor who performed the mediport procedure.

¶12 On November 20, 2018, the trial court entered a minute order admitting the will to probate. It also denied Rogers' application for appointment as personal representative, but reserved the issue of his share as an omitted child for another hearing. The next day, Rogers filed a motion for reconsideration and/or a stay of the proceedings. The trial court held a hearing on the motion for reconsideration on December 19, 2018.

¶13 On December 27, 2018, the trial court held that:

1. The will was not ambiguous;
2. Pratt's statement that she had no children was presumably false; and
3. Pratt's statement combined with a complete disposition of her estate evidenced an intent to exclude Rogers.

Consequently, the court denied Rogers' application for his share as an omitted child. On January 3, 2019, the trial court entered an order incorporating previous rulings into a final ruling admitting the will to probate.

¶14 On January 7, 2019, Rogers appealed. The Court of Civil Appeals affirmed. We granted certiorari on February 10, 2020, to address the issue of how an adoption affects the rights of a child to inherit from a biological parent.

I.

THE CHILD PLACED FOR ADOPTION QUALIFIES AS A PRETERMITTED HEIR.

¶15 The estate admits that an adopted child is entitled to inherit from both biological and adoptive parents, but argues that Rogers was intentionally omitted from the will because Pratt stated that she had no children and she otherwise disposed of her entire estate to specific beneficiaries. Rogers argues that he was a pretermitted heir under the will and that there is no evidence that Pratt intended to intentionally exclude him under the will.

A.

Pursuant to In The Matter of Estate of Flowers, 1993 OK 19, 848 P.2d1146, the Adoption Decree Coupled With The Will's False Statements That The Testatrix Had No Children Renders the Will Ambiguous.

¶16 In In re the Estate of Fred Franklin James v. Raunikar, 2020 OK 7, --- P.3d ---, we recently discussed a child or children as a pretermitted heir(s). We said in paragraphs 17-20:

> ¶17 Disposing of property is an inalienable natural right throughout a person's lifetime.[2] However, the method of disposition of property after death and the right of inheritance are statutory.[3] The Oklahoma Legislature provided for wills and trust as a means of disposing of one's property at death.[4] The Oklahoma pretermitted heir statute, 84 O.S. 2011 §132, provides a statutory method of inheritance for children whom a testator unintentionally fails to provide for or name in a will.[5] It is not a limitation on a testator's power to dispose of his or her property. Rather, it is an assurance that a child is not unintentionally omitted from a will. It provides:
>
> > When any testator omits to provide in his will for any of his children, or for the issue of any deceased child unless it appears that such omission was intentional, such child, or the issue of such child, must have the same share in the estate of the testator, as if he had died intestate, and succeeds thereto as provided in the preceding section.

The pretermitted heir statute does not secure a child with a minimum statutory share of a parent's estate upon the death of a parent.[6] The purpose of the statute is merely to protect an issue's right to take, unless the will gives a clear expression of intentional omission.[7] By the terms of the statute, it must "appear" that the testator intended to leave his child with nothing.[8]

¶18 Cases are legion holding that the prime purpose in construing a will is to arrive at and give effect to the intent of the testator.[9] Since 1928, this Court has consistently interpreted this statute to the effect that an intentional omission to provide for the testator's issue must appear clearly within the four corners of the testamentary document itself.[10] In other words, was there an omission of the will contestant completely, either by name or class? Is there any language in the will manifesting the omission as an intentional act?[11]

¶19 Even the disposition of the entire estate does not alone evince an intent to omit a child or a deceased child's issue. Intent to disinherit must appear upon the face of the will in strong and convincing language.[12] It is also well established that the intent to disinherit must appear within the four corners of the testamentary document, and that extrinsic evidence is inadmissable unless ambiguities appear on the face of the will.[13]

¶20 We have previously noted that there are many ways a person can express the intention to omit to provide for his or her children, including: 1) expressly state that the named child is to receive nothing;[14] 2) provide only a nominal amount for the child who claims to be pretermitted;[15] 3) name a child, but then leave them nothing;[16] 4) declare any child claiming to be pretermitted take nothing;[17] or 5) specifically deny the existence of members of a class to which the claimant belongs coupled with a complete disposition of the estate.[18] (Footnotes included, but renumbered).

¶17 It is this last method which appears to concern this cause. Here, Pratt falsely stated that she did not have any children, noted that she did have other living relatives, but she expressly left her "other living relatives" nothing. Instead, she left her entire estate to specific beneficiaries. In The Matter of Estate of Hester, 1983 OK 93, 671 P.2d 54, the Court was faced with a similar scenario. In Hester, the testator's son alleged that he was a pretermitted heir. It was not disputed that the son was the child of the testator. The will, however, falsely stated that the testator had no children. The testator left his entire estate to his brothers and sisters per capita. The Court determined that the will was not ambiguous, and that no extrinsic evidence was necessary. In a 5-4 decision, the Court held that the specific denial of the existence of members of a class to which the claimant belongs, coupled with a complete disposition of the estate, evinced a definite intent that all members of the named class are intentionally omitted from the provisions of the testator's will.

¶18 However, ten years later, in In The Matter of Estate of Flowers, 1993 OK 19, 848 P.2d 1146, the Court addressed whether an adopted child qualifies as a pretermitted heir under 84 O.S. 1991 §132.[19] In Flowers, the Flowers adopted siblings, a sister and brother. Four years later, the Okfuskee County Court found that adopted daughter to be delinquent and her custody and care were committed to the State. The Court order provided that the Flowers were released from all further liabilities and responsibilities as the daughter's parents. The parental rights to the son were never terminated.

¶19 After Mrs. Flowers, the adoptive mother died, leaving her estate to her sisters, the adopted daughter filed a petition against Flowers' estate as a pretermitted heir. In Flowers, the Court addressed whether: 1) an adopted child's right to inherit was legally severed; and 2) extrinsic evidence was admissible to establish the testator's intent to disinherit the adopted daughter.

¶20 We noted that pursuant to 10 O.S. 1991 §1132,[20] the termination of parental right negates the parent's right to inherit from the child. The statute specifically provides that termination shall not "in any way affect the right of the child to inherit from the parent." We held that pursuant to the plain language of §1132, termination does not affect the right to inherit from the parent. Accordingly the adopted daughter qualified as a pretermitted heir. Title 10 O.S. 2011 §1132, has been renumbered as 10A O.S. Supp. 2019 §1-4-906, but it still provides that termination "shall not in any way affect the child's right to inherit from the parent."[21]

¶21 While Flowers involved an adoptive mother whose parental rights were terminated as to the adoptive child and this cause involves a natural mother who gave up her child for adoption, the rationale of Flowers, coupled with 84 O.S. 2011 §132[22] and 10A O.S. Supp. 2019 §1-4-906[23] controls this cause. The Legislature could have terminated a child's status as a legal heir, but expressly did not do so. Just as a termination order terminates a parents' rights, but does not affect a child's legal status as an heir, neither would an adoption order. While the parental rights of a natural parent to a child given up for adoption are severed, the child's status as a legal heir is not. Accordingly, Rogers qualifies as a pretermitted heir under 84 O.S. 2011 §132.[24]

¶22 Hester, supra, did not involve an adoption, nor did it discuss a child's right to inherit once their parents' (adoptive or natural) rights have been terminated. Consequently, the facts of Hester, supra, and this cause are distinguishable, but Hester and Flowers, supra, also differ markedly regarding extrinsic evidence. In Hester, the Court determined that a will which falsely states that a decedent had no children and which otherwise disposed of the entire estate, was unambiguous on its face so that no extrinsic evidence of intent was allowed.

¶23 In Flowers, supra, the Court held that the existence of the order terminating the testatrix's parental rights is an extraneous fact rendering the will ambiguous. Consequently, parol evidence was admissible to ascertain the adoptive mother's intent. In Flowers, the Court said:

> ¶13 Both parties rely upon this Court's pronouncement in Matter of Estate of Crump, 614 P.2d 1096, 1098 (Okla. 1980). In Crump, we recognized the general rule that under 84 O.S. 1991 § 132 – the pretermitted heir statute – intentional omission to provide for the testator's issue must appear from the four corners of the testator's will. However, the Court also noted an exception to the parol evidence rule. Under this exception, parol evidence is admissible to resolve ambiguous expressions used in the text or **created by the existence of facts extraneous to it.** The only argument made in Crump for the application of the exception to the parol evidence rule was premised on the testator's disposition of his entire estate. Testatorial disposition of an entire estate does not alone evince an intent to omit to provide for a child or a deceased child's issue. Parol evidence was not allowed to show the testator's intent to disinherit his granddaughter in Crump.
>
> ¶14 The instant cause is similar to Crump in that the entire estate was given to Flowers' sisters in the will. The cause differs in that there is an extraneous fact making the will ambiguous - the termination order, duly filed in a court of record and admitted by the trial court. The very existence of this order raises questions concerning Flowers' intent. If Flowers thought the termination order ended any relationship between her and Hooper, the failure to mention Hooper in the will may well have been intentional. If she believed that some familial relationship continued to exist, did Flowers' stated intent to disinherit her adopted son and his "kin" coupled with the false statement that she had only an adopted son create an ambiguity within the will? The intention of the testator is controlling; when the Court construes a will, it must ascertain and give effect to the testator's intent, unless the intent attempts to effect what the law forbids. Here, the termination order makes the admission of extrinsic evidence necessary to determine intent. We find that the existence of the termination order is an extraneous fact rendering the testatrix's will ambiguous. Parol evidence is admissible to ascertain the adoptive mother's intent. (Citations omitted, emphasis in original).

¶24 We went on to hold that adoptive child's legal relationship as a child was severed by the termination order but it did not affect her status as a pretermitted heir. The rationale of Flowers, supra, is more persuasive than that espoused in Hester, supra. Consequently, to the extent Hester, supra, and antecedent decisions upon which it relied are hereby overruled.[25] The existence of the adoption decree, coupled with the will's false statement that Pratt had no children rendered the will ambiguous. Parol evidence is necessary to ascertain her intent.

B.

The Evidence of Intent to Omit the Pretermitted Child is Insufficient.

¶25 The trial court determined that the false statement that Pratt had no children coupled with a complete disposition of her entire estate reflected Pratt's intent to intentionally omit

Rogers from her will. Rogers acknowledges that where there is any substantial evidence supporting the judgment and findings of the trial court, the judgment of the trial court will not be disturbed on appeal.[26] He argues that there is no substantial evidence of intent to omit him, because Pratt lacked testamentary capacity to even execute a will all together. The estate disagrees.

¶26 The witnesses who watched Pratt sign the will, and the notary who notarized it, all testified that Pratt seemed competent. Pratt acknowledged that she was signing her will, and that it was done the way she wanted it done. However, this was not the substantial evidence or even the weight of the evidence, regarding her intent to omit her chid. Pratt's intent, as well as testamentary capacity, were questionable at best.

¶27 Pratt knew that she had had a child and placed him for adoption. The evidence reflects that she sought him out after the adoption and met him, and that he lived with her for several months. Yet, she denied having children in the will. She never told her lawyer that she had a child. He never had the opportunity to explain the effect of omitting a child – regardless of whether he was placed for adoption. Apparently Pratt couldn't remember the names of her sisters either because she neglected to give them to her lawyer as well.

¶28 While Pratt initially contacted the lawyer, and he talked to her a few times before the final will was drafted, Pratt never sat down with the lawyer and went over the drafts or the final draft before she signed it. The was no evidence that the lawyer conveyed to her the final effects of her testamentary acts, nor gave her any instructions on how to execute the will properly. Rather, it was a drive-by will.

¶29 She picked up the will from her car on the way home from surgery after having been under anesthesia and signed it the next day. She had been taking Xanax as well as oxycodone at the time. Neither the witnesses nor the notary was aware of Pratt's medications, her anesthesia, nor her surgery. The urgency of her needing the will before the surgery reflects that she was concerned about possibly recovering from the surgery, given her conditions. Pratt's surgeon described her as weak and noted that anesthesia and medications would affect a person's cognitive abilities – especially a person who is weak and/or debilitated. She was weak enough that she was confined to a bed once she returned from the surgery and signed the will from that bed.

¶30 In addition to her having had surgery the day before executing the will, other evidence illustrates deteriorating cognitive abilities. Pratt let her home rot around her to the extent that it was uninhabitable. It had no water or sewer. She withdrew from her family, friends, and social activities. She had a large mass on her anus, but neglected to inform her doctors. While the evidence was conflicting, there was neither substantial evidence nor even the weight of evidence which supported an intent to omit a child from her will. Consequently, the trial court is reversed and the cause remanded for proceedings consistent with this our determination.

CONCLUSION

¶31 The child given up for adoption qualifies as a pretermitted heir. The false statement that the testator has no children, coupled with the complete disposition of the estate was not dispositive of her intent when documents such as an adoption decree conflicted with such statements. Rather, an ambiguity existed which required parol evidence of intent. The evidence presented was insufficient to show an intent to omit the pretermitted child. Because we determine that the evidence was insufficient to show that the testator intentionally omitted Rogers as a pretermitted heir, we need not address whether the will was procured by undue influence. As the only child of the testator, Rogers takes Pratt's entire estate according to the laws of intestate succession.[27] Consequently, the question of undue influence is moot.

COURT OF CIVIL APPEALS OPINION VACATED; TRIAL COURT REVERSED AND REMANDED.

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

Darby, V.C.J. and Winchester, J., dissent.

KAUGER, J.:

1. We have previously, thoroughly, addressed the procedural posture of the presumption of undue influence in In the Matter of the Estate of Holcomb, 2002 OK 90, 63 P.3d 9, Estate of Gerard v. Gerard, 1995 OK 1144, 911 P.2d 266, and In the Mattter of Estate of Maheras, 1995 OK 40, 897 P.2d 268. Because we determine that the evidence was insufficient to show that the testator intentionally omitted Rogers as a pretermitted heir, we need not address whether the will was procured by undue influence. As the only child of the testator, Rogers takes Pratt's entire estate according to the laws of intestate succession. Con-

sequently, the question of undue influence is moot. Title 84 O.S. 2011 §213 provides in pertinent part:

> 2. The share of the estate not passing to the surviving spouse or if there is no surviving spouse, the estate is to be distributed as follows:
>
> 1. a. in undivided equal shares to the surviving children of the decedent and issue of any deceased child of the decedent by right of representation, or . . .

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

3. Estate of Jackson, see note 2, supra; Snodgrass v. Snodgrass, see note 2, supra.

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

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

6. Estate of Jackson, see note 2, supra; Estate of Hoobler, see note 5, supra.

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

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

9. Estate of Hester, see note 8, supra at ¶9, and citing for e.g., In re Estate of Bovaird, 1982 OK 48, 645 P.2d 500; Miller v. First National Bank & Trust Co., 1981 OK 133, 637 P.2d 75; Bridgeford v. Estate of C.E. Chamberlin, 1977 OK 206, 573 P.2d 694.

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

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

12. Estate of Severns v. Severns, see note 11, supra.

13. Estate of Hester, see note 8, supra; Estate of Severns v. Severns, see note 11, supra.

14. Estate of Hester, see note 8, supra at ¶10.

15. Estate of Hester, see note 8 supra ¶10; Bridgeford v. Estate of C.E. Chamberlin, see note 9, supra.

16. Estate of Hester, see note 8, supra at ¶10; Pease v. Whitlach, 1964 OK 264, ¶7, 397 P.2d 894.

17. Estate of Hester, see note 8 supra at ¶10, Dilks v. Carson, 1946 OK 108, 168 P.2d 1020.

18. Estate of Hester, see note 8 supra at ¶10; Dilks v. Carson, see note 17, supra. We have also held that the intention to disinherit children can appear on the face of a will within which no mention of the children has been made by name or class. Compare, In Re Adams' Estate, 1950 OK 204, 222 P.2d 366 with Estate of Glomset, 1976 OK 30, 547 P.2d 951 and Estate of Severns v. Severns, see note 11, supra.

19. Title 84 O.S. 1991 §132 provided:

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

It has remained unaltered since its enactment in 1910 and remains unaltered in its current version.

20. Title 10 O.S. 1991 §1132 provided:

> The termination of parental rights terminates the parent-child relationship, including the parent's right to the custody of the child and his right to visit the child, his right to control the child's training and education, the necessity for the parent to consent to the adoption of the child and the parent's right to the earnings of the child, and the parent's right to inherit from or through the child. Provided, that nothing herein shall in any way affect the right of the child to inherit from the parent.

21. Title 10A O.S. 2011 §1-4-906 provides:

> A. The termination of parental rights terminates the parent-child relationship, including:
>
> 1.1. The parent's right to the custody of the child;
>
> 2. The parent's right to visit the child;
>
> 3. The parent's right to control the child's training and education;
>
> 4. The parent's right to apply for guardianship of the child;
>
> 5. The necessity for the parent to consent to the adoption of the child;
>
> 6. The parent's right to the earnings of the child; and
>
> 7. The parent's right to inherit from or through the child.
>
> Provided, that nothing herein shall in any way affect the right of the child to inherit from the parent.
>
> B. 1. Except for adoptions as provided in paragraph 3 of this subsection, termination of parental rights shall not terminate the duty of either parent to support his or her minor child.
>
> 2. Any order terminating parental rights shall indicate that the duty of the parent to support his or her minor child will not be terminated unless the child is subsequently adopted as provided by paragraph 3 of this subsection.
>
> 3. Child support orders shall be entered by the court that terminates parental rights and shall remain in effect until the court of termination receives notice from the placing agency that a final decree of adoption has been entered and then issues an order terminating child support and dismissing the case.
>
> C. The Department of Human Services shall not recommend a parent who has had his or her parental rights terminated to seek guardianship of a child in the custody of the Department.

22. Title 84 O.S. 2011 §132, see note 19, supra.

23. Title 10A O.S. 2011 §1-4-906, see note 21, supra.

24. Title 84 O.S. 2011 §132, see note 19, supra.

25. The antecedent decisions which In The Matter of Estate of Hester, 1983 OK 93, 671 P.2d 54, relied upon are O'Neill v. Cox, 1954 OK 270 P.2d 663 and In Re Adams Estate, 1950 OK 201, 222 P.2d 366. The Court in Hester, supra, relied on Adams, supra, even though it also noted that Adams appeared to be plainly inconsistent with more recent pronouncements.

26. In the Matter of Estate of Speers, 2008 OK 16, 179 P.3d 1265.

27. Title 84 O.S. 2011 §213, see note 1, supra.

2020 OK 28

BILLY HAMILTON, Plaintiff/Appellant, v. NORTHFIELD INSURANCE COMPANY, Defendant/Appellee.

No. 117,707. May 5, 2020

CERTIFIED QUESTIONS FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

¶0 The United States Court of Appeals for the Tenth Circuit certified two questions of state law to this Court pursuant to the Revised Uniform Certification of Questions of Law Act, 20 O.S. 2011 §§ 16011611.

CERTIFIED QUESTIONS ANSWERED

Kris Ted Ledford, Ledford Law Firm, Owasso, Oklahoma, for Plaintiff/Appellant Billy Hamilton.

R. Stratton Taylor, Darrell W. Downs, and Jacob R. Daniel, Taylor Foster Mallett Downs Ramsey & Russell, P.C., Claremore, Oklahoma, for Defendant/Appellee Northfield Insurance Company.

J. Drew Houghton, Merlin Law Group, P.A., Oklahoma City, Oklahoma, Simone G. Fulmer, Fulmer Sill, Oklahoma City, Oklahoma, Timothy B. Hummell, Hummell Law Firm, Oklahoma City, Oklahoma, and Rex Travis, Travis Law Office, Oklahoma City, Oklahoma, for Amicus Curiae, Oklahoma Association for Justice.

GURICH, C.J.

¶1 The United States Court of Appeals for the Tenth Circuit certified to this Court two questions of law:

> 1. In determining which is the prevailing party under 36 O.S. § 3629(B), should a court consider settlement offers made by

the insurer outside the sixty- (formerly, ninety-) day window for making such offers pursuant to the statute?

2. In determining which is the prevailing party under 36 O.S. § 3629(B), should a court add to the verdict costs and attorney fees incurred up until the offer of settlement for comparison with a settlement offer that contemplated costs and fees?[1]

¶2 We answer the first question with a "no." The statute at issue in this case – 36 O.S. § 3629(B) – creates an incentive for insurance companies to promptly investigate and resolve claims submitted by their insureds. It allows attorney fees to the prevailing party if a dispute arises over the payment of benefits and litigation eventually results between the insurer and the insured. Answering the first question, we conclude that a court may consider only those timely offers of settlement of the underlying insurance *claim* – and not offers to resolve an ensuing *lawsuit* that results from the insurer's denial of the same – when determining the prevailing party for purposes of awarding attorney fees and costs under section 3629(B).

¶3 Our answer to the first question also resolves the second. Section 3629(B) contemplates only those offers made by the insurer to settle the insured's claim within the prescribed sixty- (formerly, ninety-) day window. Quite plainly, the statute never discusses an offer to settle a lawsuit initiated beyond that period – the whole purpose of the statute is to avoid litigation by creating fee-shifting disincentives if the insured's claim is not speedily resolved. Because the federal court's second question necessarily relates solely to offers made in the course of litigation *after* the lapse of the statute's crucial sixty- (formerly, ninety-) day period, we must answer this question in the negative as well. We caution, however, that this second answer of "no" is strictly limited to the specific context of determining prevailing-party status under section 3629(B) alone. We express no opinion on a trial court's evaluation of the form of settlement offer described in the certifying court's second question when made outside the section 3629(B) setting.

Facts and Procedural History

¶4 The federal court's certification order sets out the underlying facts of this case. When answering a certified question, this Court will not presume facts outside those presented by the certification order itself. *Gov't Emps. Ins. Co. v. Quine*, 2011 OK 88, ¶ 14, 264 P.3d 1245, 1249. That is, "our examination is confined to resolving legal issues." *Id.* We remain free, however, to "consider uncontested facts supported by the record." *Siloam Springs Hotel, LLC v. Century Sur. Co.*, 2017 OK 14, ¶ 2, 392 P.3d 262, 263.

¶5 Billy Hamilton – a small-business owner in Council Hill, Oklahoma – filed a claim in December 2015 with his insurer, Northfield Insurance Company, seeking coverage for his building's leaking roof. Northfield twice denied his claim – once in February 2016, and again in April 2016. Hamilton filed suit against Northfield in November of that year, alleging bad-faith denial of his insurance claim and breach by Northfield of the insurance contract.[2]

¶6 In June 2017, Hamilton's attorney sent Northfield's attorneys an email that included a draft of a proposed pretrial order. In that communication, Hamilton's counsel asked Northfield's lawyers to send him "a serious settlement offer" the following week, noting he had "almost $12k in hard costs invested in this case thus far" and was conveying that information "because that figure impacts how much of any settlement Mr. Hamilton would receive." Counsel for Northfield responded that the insurance company was "willing to offer $45,000 to settle this case," observing that they "believe[d] this [wa]s a fair offer as it [wa]s more than three times the actual damages in this case." Northfield's counsel also stated, "Based upon your out of pocket litigation expenses, this settlement amount will allow you to recover these expenses along with some fees and should reimburse Mr. Hamilton for the entire amount of his repair costs."

¶7 Hamilton rejected the offer and went to trial. A jury awarded him $10,652 – the maximum amount of damages the judge instructed the jury it could award. Hamilton then sought attorney fees and statutory interest under section 3629(B). Northfield responded that Hamilton was not the prevailing party under the statute, given that he had recovered less than its settlement offer to him. The federal district court agreed with Northfield, and Hamilton appealed to the Tenth Circuit Court of Appeals. Initially, a panel of that court affirmed the district court's determination that Hamilton was not the prevailing party for purposes of awarding attorney fees under section 3629(B). But – following a petition for en banc rehearing by Hamilton and additional briefing by amicus

curiae – the Tenth Circuit Court of Appeals granted panel rehearing sua sponte, vacated its opinion as to the issues raised in Hamilton's appeal, and certified the two questions to this Court.

Analysis

First Certified Question

¶8 The federal court's certified questions ask us to define the proper scope and application of a provision of the Oklahoma Insurance Code, 36 O.S. § 3629(B).[3] This is a question of first impression in a matter that offers "no controlling Oklahoma precedent." *Barrios v. Haskell Cty. Pub. Facilities Auth.*, 2018 OK 90, ¶ 6 n.6, 432 P.3d 233, 236 n.6. In pertinent part, the terms of section 3629(B) provide that

> [i]t shall be the duty of the insurer, receiving a proof of loss, to submit a written offer of settlement or rejection of the claim to the insured within sixty (60) days of receipt of proof of loss. Upon judgment rendered to either party, costs and attorney fees shall be allowable to the prevailing party. For purposes of this section, the prevailing party is the insurer in those cases where judgment does not exceed written offer of settlement. In all other judgments the insured shall be the prevailing party.[4]

"The primary goal of statutory interpretation is to ascertain and, if possible, give effect to the intention and purpose of the Oklahoma Legislature as expressed by the statutory language." *Raymond v. Taylor*, 2017 OK 80, ¶ 12, 412 P.3d 1141, 1145. Every provision of every Oklahoma statute "is presumed to have been intended for some useful purpose and every provision should be given effect." *Darnell v. Chrysler Corp.*, 1984 OK 57, ¶ 5, 687 P.2d 132, 134. And "statutes are interpreted to attain that purpose and end, championing the broad public policy purposes underlying them." *Estes v. ConocoPhillips Co.*, 2008 OK 21, ¶ 16, 184 P.3d 518, 525.

¶9 The plain language of section 3629(B) imposes an affirmative duty on an insurer to submit a written offer of settlement or rejection of the claim to the insured within a definite time period: sixty days. "A statute will be given a construction, if possible, which renders every word operative, rather than one which makes some words idle and meaningless." *Estes*, 2008 OK 21, ¶ 16, 184 P.3d at 525. This interpretive principle applies to "every word, phrase, and clause" of the statute. *Matthews v. Rucker,* 1918 OK 29, ¶ 5, 170 P. 492, 493. Moreover, when construing a statute, "relevant provisions must be considered together, where possible, to give force and effect to each." *Ledbetter v. Okla. Alcoholic Beverage Laws Enf't Comm'n,* 1988 OK 117, ¶ 7, 764 P.2d 172, 179. Section 3629(B) speaks of a specific kind of offer – an offer of settlement or rejection of a claim. Its preceding subsection, in turn, contextualizes and clarifies precisely what is meant by a claim: "An insurer shall furnish, upon written request of any insured *claiming to have a loss* under an insurance contract issued by such insurer, forms of proof of loss for completion by such person . . . ." *Id.* § 3629(A) (emphasis added).

¶10 We construe the words in a statute "according to their plain and ordinary meaning." *In re Protest of Hare,* 2017 OK 60, ¶ 10, 398 P.3d 317, 319 – 20. And so in this case we take section 3629(B)'s words in their plain and ordinary sense – just as would the layperson who purchases an insurance policy, suffers a covered loss, and submits proof of that loss to the insurer. The statute tells both parties what to expect when the insured submits the claim. Upon receiving the insured's claim – that is, the proof of loss – the insurer must act within sixty days to settle (or else reject outright – as happened in this case) that claim.

¶11 By its own plain terms, then, section 3629(B)'s claim – toward which the offer of settlement or rejection is directed – must be an insured's request to the insurer to be made whole for a covered loss. This does not equate to, and must not be mistaken for, a claim arising in later litigation. Had the insured's claim been promptly resolved, no litigation would have arisen at all. A section 3629(B) claim directly flows from the insured's written claim of loss, arising under the insurance contract and duly submitted to the insurer for payment of benefits. That is the *only* claim with which this statute is concerned.

¶12 In an earlier examination of section 3629(B), we provided the following gloss on the statute:

> The insurer is the prevailing party only when the judgment is less than any settlement offer that was tendered to the insured, or when the insure[r] rejects the claim and no judgment is awarded. The insured, on the other hand, is the prevailing party when the judgment is more than any settle-

> ment offer that was made, or when the insured receives a judgment when the insurer has rejected the claim.

Shinault v. Mid-Century Ins. Co., 1982 OK 136, ¶ 4, 654 P.2d 618, 619.[5] More recently, we observed (albeit in obiter dictum) that "[section] 3629(B) provides for prevailing party attorney fees where an insurer fails to submit an offer of settlement or rejection *of the claim* within 90 [now, sixty] days after proof of loss and where judgment is entered." *Barnes v. Okla. Farm Bureau Mut. Ins. Co.*, 2004 OK 25, ¶ 8, 94 P.3d 25, 28 (emphasis added). These prior statements were fundamentally sound, and they guide us to our conclusion today.

¶13 An incorrect denial of an insured's claim or an inadequate tender of benefits within the statutory window of section 3629(B), followed by a judgment in the insured's favor after suit is filed, enables the insured to recover attorney fees as the prevailing party in litigation. *See Shinault*, 1982 OK 136, ¶ 4, 654 P.2d at 619. At the same time, an ultimately correct denial of an insured's claim or an adequate tender of benefits – within the statutory window, but improvidently rejected by the insured – may likewise permit the insurer to recover its attorney fees as the prevailing party. *See id.*

¶14 Oklahoma places a premium on incentivizing prompt payment of insurance claims. As we have before explained:

> The statutory duty imposed upon the insurer to accept or reject the claim within ninety [now, sixty] days of the receipt of the proof of loss recognizes that a substantial part of the right purchased by the insured is the right to receive benefits promptly. Unwarranted delay causes the sort of economic hardship which the insured sought to avoid by the purchase of the policy . . . .

Lewis v. Farmers Ins. Co., 1983 OK 100, ¶ 6, 681 P.2d 67, 69; *see also Christian v. Am. Home Assurance Co.*, 1977 OK 141, ¶¶ 20 – 21, 577 P.2d 899, 903 ("Our Insurance Code requires insurance companies to make *immediate* payment of claims. . . . This statutory duty imposed upon insurance companies to pay claims *immediately,* recognizes that a substantial part of the right purchased by an insured is the right to receive the policy benefits promptly.") (emphasis added). As also noted by the Tenth Circuit Court of Appeals, statutes such as Oklahoma's section 3629(B) "seek to prevent insurance benefits from unjustly being consumed by litigation costs and are designed to make the beneficiary whole rather than to punish the insurer." *Smith v. Equitable Life Assurance Soc'y*, 614 F.2d 720, 723 (10th Cir. 1980) (discussing similar Wyoming attorney-fee statute). Statutory provisions like those in section 3629(B) are therefore designed to "allow[] recovery of expenses incurred in pursuing a just and reasonable claim." *Id.* Such statutes "are not penal, but remedial or compensatory, in that actual loss is at issue, traceable directly to the insurer's improper conduct." *Id.*

¶15 These same rationales are reflected in our state's adoption of the Unfair Claims Settlement Practices Act (UCSPA),[6] which mirrors section 3629(B) by requiring insurers to either pay or deny a claim within sixty days of receiving a proof of loss. *See* 36 O.S. Supp. 2018 § 1250.7(A) ("Within sixty (60) days after receipt by a property and casualty insurer of properly executed proofs of loss, the first party claimant shall be advised of the acceptance or denial of the claim by the insurer, or if further investigation is necessary."); *id.* § 1250.7(C) (directing that the "insurer shall complete investigation of a claim within sixty (60) days after notification of proof of loss unless such investigation cannot reasonably be completed within such time" and further providing that "[i]f such investigation cannot be completed, or if a property and casualty insurer needs more time to determine whether a claim should be accepted or denied, it shall so notify the claimant within sixty (60) days after receipt of the proofs of loss, giving reasons why more time is needed."). Indeed, we may presume the Legislature's 2018 amendment to section 3629(B) – narrowing its time limit from ninety to sixty days – was done in furtherance of ensuring uniformity with the UCSPA's sixty-day mandate. Relatedly, in the bad-faith context, we have clarified that the timeframe for judging the reasonableness of an insurer's actions is that initial window in which the insurer makes the decision to pay or deny the claim. *Buzzard v. Farmers Ins. Co.*, 1991 OK 127, ¶ 14, 824 P.2d 1105, 1109 ("[A] claim must be paid promptly unless the insurer has a reasonable belief that the claim is legally or factually insufficient. . . . The knowledge and belief of the insurer during the time period the claim is being reviewed is the focus of a bad-faith claim.").

¶16 We hold that courts may consider only those offers of settlement of the underlying

insurance *claim* – and not offers to resolve an ensuing *lawsuit* that might result from the insurer's denial of the same – made within the (now) sixty-day statutory window when determining the prevailing party for purposes of awarding attorney fees under 36 O.S. § 3629(B). To the extent the Oklahoma Court of Civil Appeals previously arrived at a conflicting interpretation of section 3629(B) in *Shadoan v. Liberty Mutual Fire Insurance Co.*, 1994 OK CIV APP 182, 894 P.2d 1140 – a non-precedential opinion cited by the Tenth Circuit Court of Appeals in its certification order – that opinion fails to align with the principles announced today and is hereby expressly overruled.[7]

Second Certified Question

¶17 It follows that litigation-settlement offers – as opposed to claim-settlement offers – fall beyond section 3629(B)'s initial sixty-day timeframe and, therefore, are simply not within the statute's contemplation. In other words, an offer of litigation "settlement" cannot serve as the catalyst for section 3629(B)'s fee-shifting provision. In the specific context of a section 3629(B) prevailing-party analysis, our answer to the certifying court's second question is "no" – for the very basic reason that the type of offer described does not fall within the definition of a section 3629(B) settlement offer.

¶18 The settlement-offer scenario described in the second question would inevitably invite litigation gamesmanship and eleventh-hour offers. The structure of section 3629(B) affords no room to either. "The reality is that once the benefits have been denied and the plaintiff retains counsel to dispute that denial, additional costs that require relief have been incurred." *Johnson v. Omega Ins. Co.*, 200 So. 3d 1207, 1215 (Fla. 2016).[8] And "all the good faith and settlement offers in the world *after* suit is filed will not immunize a company from the consequences of an unjustified refusal to pay which made the suit necessary" in the first place. *Sloan v. Emp'rs Cas. Ins. Co., Dallas, Tex.*, 521 P.2d 249, 251 (Kan. 1974).

¶19 Were this Court to allow insurers to skirt the sixty-day requirement entirely, offer payment at a later date, and then use that untimely payment to deny attorney fees owed to the policyholder, then the purpose of a statute intended to ensure prompt payment of claims would be thoroughly thwarted. To interpret a statute containing a definite time limit, while giving no credence to the readily discernible rationale underlying that time limit, would epitomize "a vain and useless act." *TRW/Reda Pump v. Brewington*, 1992 OK 31, ¶ 5, 829 P.2d 15, 20. We reject any invitation to graft this illogical interpretation onto section 3629(B). *See AMF Tubescope Co. v. Hatchel*, 1976 OK 14, ¶ 21, 547 P.2d 374, 379 ("[A] statute should be given a sensible construction, bearing in mind the evils intended to be avoided or the remedy afforded."); *see also Christian*, 1977 OK 141, ¶ 22, 577 P.2d at 903 (acknowledging generally the express "intent of our legislature to impose upon insurance companies an obligation to pay a valid claim on a policy promptly"). The sixty-day limit prescribed by section 3629(B) is not a suggestion, and it is not an invitation for an opening offer: it is a legislative directive to insurance companies that ensures the prompt and timely handling of claims.

¶20 If indeed this sixty-day time limit were inconsequential to the eventual determination of prevailing-party status, then section 3629(B) would essentially operate identically to an offer-of-judgment statute, which could be deployed as a fee-shifting mechanism at any time throughout the litigation.[9] But section 3629(B) is functionally distinguishable from the traditional offer-of-judgment statute, the purpose of "which is to encourage judgments without protracted litigation." *Dulan v. Johnston*, 1984 OK 44, ¶ 10, 687 P.2d 1045, 1047. Section 3629(B) is specific to the insurance context, and its sixty-day requirement furthers a definite and different legislative objective – namely, the prompt payment or denial of claims.

¶21 In this case, Northfield attempted to use section 3629(B)'s "written offer of settlement" as a vehicle to include a lump-sum payment for the resolution of Hamilton's lawsuit, while incorporating at least "some [attorney] fees." But the very language of the statute – which explicitly applies to an offer of settlement or rejection "of the claim" – forecloses its use in this manner. Northfield's June 2017 offer of $45,000 to resolve Hamilton's lawsuit is not a statutory settlement offer within the meaning of section 3629(B). Again, section 3629(B) serves to ensure the swift payment of insurance claims, not of lawsuits. The "claim" referenced is the insurance claim alone, and the benefits owed under the insurance contract are the only true "settlement" amounts to which the statute refers.

Conclusion

¶22 36 O.S. § 3629(B) focuses on the payment of indemnity and policy benefits to insureds, so that they may be made whole as quickly as possible. It speeds the timely resolution of an insured's claim. Consistent with a plain reading of the statute and consonant with the statute's purpose of incentivizing the prompt payment of insurance benefits, we hold that – for purposes of determining prevailing-party status under section 3629(B) – a court may consider only those offers made by the insurer to settle the insured's claim within the statute's sixty- (formerly, ninety-) day window. A subsequent litigation-settlement offer – as distinct from a *claim*-settlement offer – falls outside section 3629(B)'s statutory window and is plainly not within the statute's reach.

¶23 In this case, the insured – Hamilton – is the prevailing party entitled to an award of attorney fees under section 3629(B) because he received a judgment in his favor after his insurer, Northfield, twice rejected his claim. The offer that came from Northfield a year and a half later to resolve Hamilton's subsequent lawsuit is not a statutory settlement offer within the meaning of section 3629(B).

¶24 An offer to pay benefits owed under the insurance contract is not a courteous gratuity, but a contractual and legal *necessity*. Any other interpretation of section 3629(B) runs counter to both its intent and plain language. The statute works to facilitate payments from insurers to their policyholders as expeditiously as possible when those amounts are owed under the policy. With our holding today, we honor that purpose.

CERTIFIED QUESTIONS ANSWERED

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

Winchester, Kane and Rowe, JJ., dissent.

GURICH, C.J.

1. We have not substantively reformulated the questions of law certified to us, although it is within our discretion to do so. *See* 20 O.S. 2011 § 1602.1. We have altered the questions only to conform them to this Court's own citation conventions.

2. Hamilton sued Northfield in Oklahoma state court, and Northfield removed the case to the United States District Court for the Eastern District of Oklahoma on diversity grounds.

3. In assessing whether to answer a certified federal question of law, we are guided by twin considerations: "(1) Would the answer be dispositive of an issue in pending litigation in the certifying court?"; and "Is there established and controlling law on the subject matter?" *Barrios v. Haskell Cty. Pub. Facilities Auth.*, 2018 OK 90, ¶ 6 n.6, 432 P.3d 233, 236 n.6.

4. Prior to November 2018, the statute provided for a ninety-day – rather than a sixty-day – window. The statute's text otherwise remains unchanged.

5. The certification order has drawn our attention to an apparent scrivener's error in the officially reported text of our 1982 *Shinault* decision, which (as printed) reads: "The insurer is the prevailing party only when the judgment is less than any settlement offer that was tendered to the insured, or when the *insured* rejects the claim and no judgment is awarded." *Shinault v. Mid-Century Ins. Co.*, 1982 OK 136, ¶ 4, 654 P.2d 618, 619 (emphasis added). Both context and common sense make it clear that the emphasized word in the quoted sentence must correctly refer to the rejection of the claim by the *insurer,* rather than by the "insured."

6. 36 O.S. §§ 1250.1 – 1250.17.

7. That court's conclusion that "[a] plaintiff's status as 'prevailing party' under 36 [O.S.] § 3629(B) must be determined by comparing the plaintiff's ultimate recovery to each settlement offer made by an insurer, even those offers which are made beyond the ninety-day period after it receives the insured's proof of loss" is, of course, no longer tenable after today's decision. *Shadoan v. Liberty Mut. Fire Ins. Co.*, 1994 OK CIV APP 182, ¶ 17, 894 P.2d 1140, 1144.

8. *See also* 36 O.S. § 1250.5(13) (including within the definition of "acts by an insurer . . . constitut[ing] an unfair claim settlement practice" under the UCSPA the practice of "[c]ompelling, without just cause, policyholders to institute suits to recover amounts due under its insurance policies or insurance contracts by offering substantially less than the amounts ultimately recovered in suits brought by them, when the policyholders have made claims for amounts reasonably similar to the amounts ultimately recovered").

9. Generally stated, an offer-of-judgment statute authorizes a defendant to make a settlement offer and then imposes liability (in the form of costs and attorney fees) on the plaintiff who chooses to reject the offer and later recovers a judgment for less than what the defendant had tendered. *See, e.g.*, 12 O.S. 2011 § 940(B) (setting out offer-of-judgment procedure in cases involving negligent or willful injury to property); *id.* § 1101.1 (procedure for actions involving personal injury and wrongful death); *id.* § 1106 (allowing defendant to confess judgment in court for either "part of the amount claimed, or part of the causes involved in the action").

2020 OK 29

NATURAL GAS PIPELINE COMPANY OF AMERICA LLC, Plaintiff/Appellee, v. FOSTER OK RESOURCES LP, Defendant/Appellant.

No. 118,185. May 5, 2020

ON APPEAL FROM THE DISTRICT COURT OF BRYAN COUNTY

The Honorable Mark R. Campbell, Trial Judge

¶0 Natural Gas Pipeline Company of America LLC filed a condemnation action against Foster OK Resources LP seeking permanent and temporary easements to operate and maintain two interstate natural gas pipelines that cross Foster's property. The district court appointed three Commissioners who filed a report as to the just compensation owed to Foster due to the pipeline company's taking. Foster filed exceptions to the report, contending the pipeline company's exercise of eminent domain in seeking the easements was not proper and did not meet the legal standard of necessity. The district court overruled Foster's exceptions, and Foster appealed. The Court retained the appeal.

DISTRICT COURT'S ORDER AFFIRMED.

James R. Waldo, James R. Waldo, P.L.L.C., Oklahoma City, Oklahoma, for Defendant/Appellant Foster OK Resources LP.

David W. Kelly, David W. Kelley, Inc., Durant, Oklahoma, for Defendant/Appellant Foster OK Resources LP.

John D. Dale, Barbara M. Moschovidis, and Ryan A. Pittman, GableGotwals, Tulsa, Oklahoma, for Plaintiff/Appellee Natural Gas Pipeline Company of America LLC.

Heather H. Burrage, The Burrage Law Firm, Durant, Oklahoma, for Plaintiff/Appellee Natural Gas Pipeline Company of America LLC.

Winchester, J.

¶1 Plaintiff/Appellee Natural Gas Pipeline Company of America LLC (NGPL) operates two interstate natural gas pipelines that cross property owned by Defendant/Appellant Foster OK Resources LP (Foster). NGPL brought this condemnation action seeking four separate easements to have consistent access to operate and maintain the pipelines and to clear title issues involving the pipelines. Foster challenged NGPL's exercise of eminent domain and whether NGPL's taking met the legal standard of necessity.

¶2 The issues before the Court are (1) whether the existing easement agreements between NGPL and Foster prevent NGPL from seeking the easements requested in this case, (2) the necessity of the taking by NGPL, and (3) the necessity of surveying Foster's property in determining the amount of just compensation owed to Foster. For the reasons stated herein, we hold that NGPL cannot contract away its right of eminent domain and is not prevented from seeking the easements at issue to operate and maintain the pipelines. NGPL's condemnation of Foster's property was for public use and meets the legal standard of necessity. We further rule the issue of the necessity of a survey in computing just compensation owed to Foster is premature and cannot be determined at this time.

I. FACTS AND PROCEDURE

¶3 Foster owns a 1,330-acre ranch that borders the north shore of the Red River in Bryan County, Oklahoma. NGPL is a Federal Energy Regulatory Commission (FERC) interstate natural gas pipeline company under the Natural Gas Act, 15 U.S.C. § 717a (2020). NGPL operates two interstate natural gas pipelines – AG #1 Pipeline and AG #2 Pipeline – that traverse Foster's property. NGPL operates the pipelines under Certificates of Public Convenience and Necessity issued by FERC.[1] The parties agree that NGPL possesses the right of eminent domain.

¶4 NGPL and its predecessor negotiated two 50-foot easements with Foster for AG #1 Pipeline in 1995 and AG #2 Pipeline in 1989 (Easement Agreements).[2] Foster and NGPL's predecessor also entered into a letter agreement in August 1996 granting NGPL's predecessor the right to install the Palisade System, an aboveground structural support and erosion control system, on an exposed segment of the AG #2 Pipeline near the north shore of the Red River. NGPL's predecessor compensated Foster for this project.

¶5 NGPL brought this condemnation action alleging the combination of constant erosion and necessary maintenance requires NGPL to have consistent and reliable access over Foster's property to properly maintain the pipelines at issue. NGPL further contends the Easement Agreements do not accurately reflect that Foster's property includes a portion of land underneath the Red River or provide notice to third parties of the Palisade System. Specifically, NGPL seeks the following four easements:

1. The "Red River Permanent Easement" spanning the width of the Red River;
2. The "Maintenance Work Temporary Workspace" adjacent and parallel to the existing easement for the AG #2 Pipeline;
3. The "Permanent Access Road Easement" granting NGPL a non-exclusive easement to use Foster's existing road to access the pipelines; and
4. The "Palisade Permanent Easement" involving the structural support system in the Red River.

¶6 The district court appointed three Commissioners to determine the just compensation owed to Foster due to NGPL's taking of the permanent and temporary easements. The Commissioners filed their Report, and Foster filed its Exceptions to the Report. The district court conducted a hearing and overruled Foster's exceptions; Foster appealed. The Court retained the appeal.

II. STANDARD OF REVIEW

¶7 Condemnation proceedings involve both factual determinations and legal rulings. The issue of whether a proposed taking is for a "public use" is a judicial question. *McCrady v. W. Farmers Elec. Coop.*, 1958 OK 43, ¶ 5, 323 P.2d 356, 359. "Whether it is necessary to take particular property for the economic and efficient accomplishment of a lawful public purpose is a question of fact to be determined from the attendant facts and circumstances developed by the evidence." *Pub. Serv. Co. of Okla. v. Willis*, 1997 OK 78, ¶ 18, 941 P.2d 995, 1000. The Court will view a valid declaration of necessity by the appropriate body as conclusive in the absence of a showing of actual fraud, bad faith, or an abuse of discretion by the condemning authority. *Rueb v. Okla. City*, 1967 OK 233, ¶ 12, 435 P.2d 139, 141. The Court will not disturb on appeal the findings of the district court on the issue of the necessity of the taking where there is evidence to support such findings. *City of Tulsa v. Williams*, 1924 OK 136, ¶ 11, 227 P. 876, 878.

III. DISCUSSION

A. The Easement Agreements do not divest NGPL of its right to eminent domain.

¶8 Foster argues the current Easement Agreements between Foster and NGPL prevent NGPL from seeking the easements requested in this case. Foster specifically contends NGPL seeks to utilize eminent domain to circumvent the existing Easement Agreements and to grant NGPL permanent easements that conflict with and abrogate the protections negotiated by the parties in the Easement Agreements. The Court disagrees.

¶9 This Court in *Burke v. Oklahoma City*, 1960 OK 29, 350 P.2d 264, previously rejected a similar argument. The property owners in *Burke* argued that an agreement settling an earlier condemnation proceeding relating to the same property determined the issue of the necessity for taking in a subsequent condemnation proceeding. By such agreement, the defendants contended the condemnor was estopped to maintain the subsequent condemnation proceeding. *Id.* ¶ 15, 350 P.2d at 267. In answering these contentions, the Court stated:

> We conclude and hold that the right of eminent domain is inalienable, cannot be surrendered in whole or in part and cannot be contracted away and res adjudicata and estoppel do not constitute defenses to the causes of action set forth in the petition to condemn as filed by the City herein.

Id. ¶ 20, 350 P.2d at 268.[3]

¶10 We apply *Burke* and hold NGPL cannot surrender, alienate, contract away, or waive its right of eminent domain. The parties are still operating under the Easement Agreements. And the temporary and permanent easements requested by NGPL in this matter are outside the scope of the Easement Agreements. Even if the parties contemplated similar rights in the existing Easement Agreements, the Agreements do not divest NGPL of its right to eminent domain.

B. NGPL's condemnation of Foster's property meets the legal standard of necessity.

¶11 Although NGPL has the right to condemn Foster's property, that determination does not end our analysis. Foster argues that NGPL's taking through the temporary and permanent easements does not meet the legal standard of necessity for public use.

¶12 NGPL claims no right of eminent domain under the Constitution or statutes of Oklahoma but relies solely upon the powers delegated to it under provisions of the Natural Gas Act, 15 U.S.C. § 717f(h) (2020).[4] The Natural Gas Act declares that "the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest." 15 U.S.C. § 717a (2020); *Parkes v. Natural Gas Pipe Line Co.*, 1952 OK 157, ¶ 25, 249 P.2d 462, 466. It is the function of Congress to decide what type of taking is for public use and that the agency authorized to do the taking may do so to the full extent of its statutory authority. *Parkes*, 1952 OK 157, ¶ 26, 249 P.2d at 467. This Court must defer to Congress's decision. *Id.* Under the Natural Gas Act, NGPL has the right of eminent domain to construct, operate, and maintain pipelines for the transportation of natural gas pipelines. 15 U.S.C. § 717f(h). NGPL – operating under certificates of public convenience and necessity issued by FERC – exercised its right of eminent domain to operate and maintain AG #1 Pipeline and AG #2 Pipeline. Congress has decided this power of eminent domain is for public use.[5]

¶13 Under Oklahoma law, the Court will not disturb NGPL's decision as to the necessity for taking in the absence of fraud, bad faith, or an abuse of discretion. *Willis*, 1997 OK 78, ¶ 14, 941 P.2d at 999; *Rueb*, 1967 OK 233, ¶ 12, 435

P.2d at 141. The word "necessity" in connection with condemnation proceedings does not mean an absolute but only a reasonable necessity, such as would combine the greatest benefit to the public with the least inconvenience and expense to the condemning party and property owner. *White v. Pawhuska*, 1928 OK 136, ¶ 9, 265 P. 1059, 1062.

¶14 The parties agree that the Red River Permanent Easement and the Palisade Permanent Easement requested by NGPL are simply to clear title issues. The Easement Agreement for AG #2 Pipeline fails to describe or include the portion of the lands owned by Foster under the Red River.[6] The Easement Agreement also does not include the Palisade System, and the parties' letter agreement executed in 1996 is not recorded in the county land records. We hold such easements are necessary to clear title issues, and NGPL's decision to take such property is not fraudulent, in bad faith, or an abuse of discretion.

¶15 NGPL requested the Maintenance Work Temporary Workspace for work performed to install additional support, recoat, and ensure the integrity of the AG #2 Pipeline.[7] A temporary workspace is no longer needed as NGPL completed the work. However, NGPL should compensate Foster for the use of the workspace. We hold the easement was necessary for the maintenance work performed, and NGPL's decision to take such property was not fraudulent, in bad faith, or an abuse of discretion.

¶16 The main inquiry, in this case, is whether NGPL's taking by the Permanent Access Road Easement meets the legal standard of necessity. In short, Foster contends that another means of access to the pipelines is available to NGPL and therefore, NGPL's taking is not necessary and amounts to fraud, bad faith, or an abuse of discretion. It is well settled in Oklahoma that where a condemnor has selected and designated a route for taking, the courts will not inquire into the matter to demand why some other route was not chosen. *See e.g., Owens v. Okla. Tpk. Auth.,* 1954 OK 345, ¶ 5, 283 P.2d 827, 830; *Williams,* 1924 OK 136, ¶ 12, 227 P. at 879.

¶17 The Court applied this standard in *Graham v. Tulsa*, 1953 OK 204, 261 P.2d 893, wherein the city initiated condemnation proceedings to take privately owned property to extend a public street. The Court held that the taking did not discriminate against the property owner as to indicate that the City acted fraudulently, in bad faith, or abused its discretion even though the city took more property from the property owner than from the hospital. *Id.* ¶ 6, 261 P.2d at 895.

¶18 In reaching its decision, the *Graham* Court cited to an Idaho Supreme Court case, *Grangeville Highway District v. Ailshie*, 290 P. 717 (Idaho 1930), where a plaintiff brought a condemnation action for a right of way for a state highway through the defendants' farm. The defendants denied the necessity for taking, alleging the highway which had been in use for over forty years was as convenient to the public as the proposed highway and its use would inflict less injury upon the defendants. The Idaho Supreme Court applied the same standard used in Oklahoma as to the necessity of taking and reasoned that the defendants cannot prevail merely by showing that there is other land in the immediate neighborhood available and equally useful. *Id.* at 720. Many other states have also held the fact that some other available route might suffice or may even be more desirable was not sufficient to show fraud, bad faith, or an abuse of discretion.[8]

¶19 NGPL has three options to access its pipelines that cross Foster's property: 1) use its right of way as set forth in the Easement Agreements, 2) use the adjacent landowner's private road to access its right of way, or 3) obtain permission from Foster to use its private road to access its right of way. NGPL uses the adjacent landowner's road to access its right of way *only* when it is not transporting equipment to inspect or maintain the pipelines, and NGPL cannot transport machinery on the existing rights of way due to the limited width and terrain. Currently, NGPL has no other means to haul equipment to the pipeline to inspect or maintain the pipelines except by obtaining consent to use Foster's private road.

¶20 Although this case does not involve an initial taking of Foster's property, we nevertheless follow *Graham, Ailshie,* and several other states and hold that NGPL's taking does not amount to fraud, bad faith, or an abuse of discretion merely because another means of access to the pipelines is available to NGPL. *See also Hennen v. State ex rel. Att'y Gen. Short,* 1928 OK 336, ¶ 6, 267 P. 636, 637 (concluding the State could condemn additional property beyond that which the State initially designated as necessary).

¶21 Foster further contends that NGPL's taking is fraudulent, in bad faith, or an abuse of discretion because NGPL's negligence created the need for additional maintenance to the exposed segment of AG #2 Pipeline and the use of Foster's private road. The Department of Agriculture defined the Foster property as highly erodible, and the parties agree that erosion exists over the entire Foster property. When the parties entered into the Easements Agreements more than 24 years ago, NGPL could not have foreseen the extent of the erosion on Foster's property. Further, a portion of the AG #2 Pipeline located at the north bank of the Red River became exposed due to erosion in 1995. Foster voluntarily entered into an agreement with NGPL's predecessor to build the Palisade System to prevent erosion and protect the exposed pipeline. NGPL has accessed that segment of the AG #2 Pipeline for inspection and maintenance by using Foster's private road since NGPL installed the Palisade System. Both Foster and NGPL are aware of the history of erosion on Foster's property, and this Court cannot rule that solely the negligence of NGPL required additional maintenance on the pipeline.

¶22 In determining the necessity of NGPL's taking in this matter, the Court must look at the facts and circumstances developed by the evidence and the conditions at the time of the taking. *Willis*, 1997 OK 78, ¶ 18, 941 P.2d at 1000; *Okla. City v. Cooper,* 1966 OK 10, ¶ 27, 420 P.2d 508, 513. The evidence demonstrates that the right that NGPL is seeking is not included in the Easement Agreements and continuous erosion of the Foster property requires NGPL to have better access over Foster's property to maintain the pipelines. The evidence further shows NGPL must use Foster's private road to haul equipment to the pipeline. NGPL plans to use Foster's private road two to four times a year and will also be responsible for maintaining the road to restore any damage caused by its use of the road. NGPL could have attempted to condemn additional property owned by Foster to construct a road, which would be disruptive and burdensome. Instead, it is more reasonable for NGPL to use Foster's existing road. We hold NGPL's request for a permanent, nonexclusive easement over Foster's road is reasonably necessary, and Foster produced no evidence indicating that NGPL's taking was fraudulent, in bad faith, or an abuse of discretion.

C. The issue of the necessity of surveying Foster's property to compute just compensation owed to Foster is premature and cannot be determined at this time.

¶23 Foster argues the Report of Commissioners is inherently defective because a survey of the Foster property was not done and calls into question the Commissioners' process of determining damages. NGPL contends a survey was not necessary as NGPL's Amended Petition included detailed written descriptions and map images describing the land subject to the condemnation proceedings. NGPL further argues that the district court entrusted to the Commissioners' discretion whether to obtain a survey.

¶24 The issue of the necessity of NGPL's taking is currently before the Court and is not dependent upon whether the Commissioners relied on a survey in computing damages. Instead, the Commissioners were for their evaluation to assume NGPL had the right to condemn Foster's property. Under Oklahoma law, an objection to the report of the commissioners will raise the issue of the necessity of the taking, and only a demand for a jury trial will raise the issue of damages. *State ex rel. Dep't of Transp. v. Perdue*, 2008 OK 103, ¶ 10, 204 P.3d 1279, 1283-84. Foster requested a jury trial on the issue of just compensation. However, the jury trial regarding just compensation has not occurred, and the record is devoid of any evidence that the Commissioners incorrectly calculated damages due to a lack of survey. The issue of whether NGPL adequately compensated Foster is premature. Similarly, based on the record before us, we hold the issue of the necessity of a survey to compute just compensation owed to Foster is premature and cannot be determined at this time.

IV. CONCLUSION

¶25 NGPL did not contract away its right of eminent domain by way of the Easement Agreements between NGPL and Foster. Further, the fact that NGPL has another means of access to its pipelines is insufficient to show that NGPL's taking was fraudulent, in bad faith, or an abuse of discretion. And we rule NGPL's condemnation of Foster's property was for public use and meets the legal standard of necessity. We also hold the issue of the necessity of surveying Foster's property in computing just compensation owed to Foster is premature and cannot be determined at this time. We, therefore, affirm the district court's

ruling denying Foster's Exceptions to Report of Commissioners.

DISTRICT COURT'S ORDER AFFIRMED.

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

NOT PARTICIPATING: Colbert, J.

Winchester, J.

1. FERC issued a blanket certificate to NGPL on September 1, 1982, which states "[t]he construction, acquisition, and operation of facilities and the transportation and sale of natural gas are required by the public convenience and necessity." A blanket certificate allows its holder to engage in certain transactions, such as maintenance work, without seeking additional authorization from FERC. 18 C.F.R. § 157.208(a) (2017). FERC further found the acquisition, conversion, operation, and transportation of natural gas through the AG #1 Pipeline was "in the public interest" and entered an order granting the associated certificate of public convenience and necessity on October 18, 1984. FERC also determined that the acquisition of the AG #2 Pipeline and the construction of minor tie-in facilities was "required by the public convenience and necessity" and issued the associated certificate on August 23, 2004.

2. Each Easement Agreement provides NGPL with a strip of land within which it may construct, operate, and maintain the pipelines and provides that NGPL will maintain erosion control and stabilization where the pipeline crosses the Red River. The Easement Agreements require NGPL to maintain its rights of way and to bury the pipelines at least 36 inches below ground. They also require NGPL to obtain written permission to use Foster's private roads.

3. We follow the majority of jurisdictional consensus, which all agree that the right of eminent domain cannot be contracted away. *See e.g., W. River Bridge Co. v. Dix*, 47 U.S. 507 (1848); *Pub. Serv. Co. of Colo. v. Loveland*, 245 P. 493 (Colo. 1926); *S. Ind. Gas & Elec. Co. v. Boonville*, 20 N.E.2d 648 (Ind. 1939); *Herman v. Bd. of Park Comm'rs*, 206 N.W. 35 (Iowa 1925); *Tenn. Gas Transmission Co. v. Violet Trapping Co.*, 200 So.2d 428, 433 (La. Ct. App. 1967) (holding the condemnor may take additional land of the defendant for the construction of its new pipeline, irrespective of a prior agreement); *Moberly v. Hogan*, 298 S.W. 237 (Mo. 1927); *Mobile & O. R. Co. v. Mayor of Union City*, 194 S.W. 572 (Tenn. 1917); *Muscoda Bridge Co. v. Worden-Allen Co.*, 219 N.W. 428 (Wis. 1928).

4. 15 U.S.C. § 717f(h) states:

> **(h) Right of eminent domain for construction of pipelines, etc.** When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided,* That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

5. The right of eminent domain under 15 U.S.C. § 717f(h) includes rights over roads to access pipeline easements. *Bison Pipeline, LLC v. 102.84 Acres of Land*, 560 F. App'x. 690, 693 (10th Cir. 2013). It also includes the right to obtain easements over land outside of the existing right of way. *See Columbia Gas Transmission, LLC v. 1.01 Acres*, 768 F.3d 300, 302-03, 305, 314 (3rd Cir. 2014) (holding the plain language of FERC's regulations allow certificate holders to replace lines outside of a preexisting right of way).

6. Foster's property extends to the south bank of the Red River. *Choctaw and Chickasaw Nations v. Seay,* 235 F.2d 30, 36 n. 10 (10th Cir. 1956).

7. The Easement Agreements granted temporary workspace access that terminated upon completion of pipeline construction.

8. *See e.g., Mo. Pac. R.R. Co. v. 55 Acres*, 947 F. Supp. 1301, 1312 (E.D. Ark. 1996) (holding the court will not control the exercise of a railway company's discretion in locating its depots although the railway may own other suitable lands); *Arco Pipeline Co. v. 3.60 Acres*, 539 P.2d 64, 71 (Alaska 1975) (noting the heavy burden of proof to persuade the court to substitute its judgment for that of the condemnor); *Catalina Foothills Unified Sch. Dist. No. 16 v. La Paloma Prop. Owners Ass'n, Inc.*, 363 P.3d 127, 132 (Ariz. Ct. App. 2015) (rejecting property owner's argument that the taking was improper because there were other adequate means of entry to the school's campus); *Telford Lands, LLC v. Cain,* 303 P.3d 1237, 1244 (Idaho 2013) (finding reasonable necessity for use of a pipeline although an alternative means of conveying water was available); *Cnty. of Stearns v. Voller,* 584 N.W.2d 800, 804 (Minn. Ct. App. 1998) (concluding court could not consider whether alternate routes existed when determining the issue of necessity); *State ex rel. State Highway Comm'n v. Crossen-Niessen Co.*, 400 P.2d 283, 286 (Mont. 1965) (holding no abuse of discretion in selecting route even if another less expensive route exists).

2020 OK 30

SHELLI FARLEY, individually and as surviving spouse of JASON FARLEY, deceased, Plaintiff/Appellant, v. CITY OF CLAREMORE, OKLAHOMA, Defendant/Appellee.

No. 115,400. May 5, 2020

APPEAL FROM THE DISTRICT COURT OF ROGERS COUNTY

¶0 Surviving spouse of a former fireman for the City of Claremore filed a petition in the District Court of Rogers County against the City of Claremore. Surviving spouse sought damages for wrongful death and an injunction against the City of Claremore. The City of Claremore filed a motion to dismiss seeking dismissal of the action with prejudice. The Honorable Sheila A. Condren, District Judge, granted the motion to dismiss and the surviving spouse appealed. The appeal was retained for disposition by the Oklahoma Supreme Court. We hold: (1) A tort action seeking damages for a surviving spouse, surviving child, and parents of a deceased adult child does not survive in a 12 O.S. § 1053 wrongful death action when: (a) Statutes provide an exclusive worker's compensation remedy for survivors which is substituted for a wrongful death action; and (b) The decedent's employer possesses governmental tort claim sovereign immunity barring a tort action for damages at the time of decedent's death; (2) The brother of the deceased did not possess a section 1053 claim for loss of companionship; and (3) Plaintiff lacked standing to seek injunctive relief.

DISTRICT COURT ORDER DISMISSING ACTION WITH PREJUDICE AFFIRMED

Steven R. Hickman, Frasier, Frasier & Hickman, L.L.P., Tulsa, Oklahoma, for Plaintiff/Appellant.

Andrew W. Lester, Courtney D. Powell, Spencer Fane L.L.P., Edmond, Oklahoma, for Defendant/Appellee.

EDMONDSON, J.

¶1 Plaintiff, a surviving spouse, successfully obtained a death benefits award in the Workers' Compensation Commission. She then brought a District Court action for damages alleging the death of her spouse was caused by negligence and an intentional tort committed by her spouse's employer who is a local government entity. She argued her action was also for the benefit of her surviving child, as well as the surviving parents and brother of the deceased. We conclude: A tort action for damages suffered by a surviving spouse, surviving child, and parents of a deceased adult child does not survive for the purpose of a 12 O.S. § 1053 wrongful death action when: (a) The wrongful death action arises from an injury compensable by an exclusive workers' compensation remedy and the tort action is brought against the employer of the deceased; and (b) The employer possesses governmental tort claim sovereign immunity. The wrongful death injury was adjudicated and compensated by a successful workers' compensation claim after the death of the decedent. This successful adjudication demonstrates the decedent's injury was exclusively before the Commission and not cognizable as a District Court claim at the time of decedent's death. The parents' action for loss of companionship damages was extinguished at the time of decedent's death and did not survive. We hold the local government entity possessed sovereign immunity because the governmental tort claim against the City was for liability for an injury properly compensated by a claim before the Workers' Compensation Commission. The brother of the deceased did not possess a wrongful death § 1053 action for loss of consortium. We also conclude plaintiff lacked standing to seek injunctive relief. We affirm the District Court's dismissal of the petition with prejudice.

I. Trial Court Proceedings and Issues Raised

¶2 Plaintiff, Shelli Farley, is the surviving spouse of Jason Farley, a former fireman for the City of Claremore who died while responding to an emergency request for assistance during a flash flood in Claremore, Oklahoma. Shelli Farley (Farley) brought an action in the District Court of Rogers County against the City of Claremore (the City) both in an individual capacity and as representative of Jason's estate and alleged an entitlement to damages flowing from Jason's death based upon theories of negligence and intentional tort.[1] In addition to seeking wrongful death damages pursuant to Oklahoma's Government Tort Claims Act (OGTCA), she sought an injunction against the City to require the City to comply with an alleged national standard for operation and training of the City's personnel who perform emergency swift water rescues. Her petition expressly states she has been damaged by medical and funeral expenses for Jason.[2]

¶3 The City filed a special entry of appearance with a motion to dismiss. Attached to the motion to dismiss is an order of the Workers' Compensation Commission awarding death benefits to Shelli ten months prior to her commencing her District Court action. The appearance and motion relied on 12 O.S. §2005.2(A) (entry of appearance does not waive § 2012 defenses); 12 O.S. §2012(B)(1)(lack of jurisdiction over the subject matter) and 12 O.S. § 2012(B)(6)(failure to state a claim upon which relief may be granted). The City argued the following in its motion:

> (1) Workers' Compensation remedy was the sole remedy for plaintiff,[3] *and plaintiff had previously and successfully pursued that remedy* and was seeking a double recovery;
>
> (2) Plaintiff's claims are barred by 51 O.S. § 155(14) of the OGTCA,[4] and
>
> (3) Plaintiff's claims are barred by 51 O.S. § 155(6) of the OGTCA;[5]
>
> (4) Plaintiff's claims are barred by 11 O.S. § 29-108;[6]
>
> (5) Plaintiff's claims are barred by 51 O.S. § 155(5) of the OGTCA;[7]
>
> (6) Plaintiff's claims are barred by 51 O.S. § 155(4) of the OGTCA;[8] and
>
> (7) Plaintiff lacks standing to seek injunctive relief, and plaintiff's request is beyond the scope of an injunction because an order requiring municipal adoption of a specific standard for water rescues is an attempt to make the City create a "legislative decision."

The City's motion has an attached exhibit showing a prior workers' compensation award of death benefits to Shelli and Jason Farley's minor child.

¶4 Shelli Farley, as surviving spouse and mother of the deceased's minor child, sought and obtained workers' compensation death benefits for the death of Jason. The amount awarded to Farley was a lump sum ($100,000.00) plus $571.55 per week (backdated and continuing).[9] The amount awarded to the surviving minor child was a lump sum ($25,000.00) to be paid into an interest bearing account with Farley as guardian until the child is 18 years of age, and a weekly benefit of $122.48.[10]

¶5 The Commission's Order states funeral expenses were already paid pursuant to 85A O.S. § 47 at the time of the workers' compensation award.[11] The award is dated ten months prior to filing Farley's District Court petition action also seeking funeral expenses. Costs were awarded against the City in the Order. The City did not contest Farley seeking workers' compensation benefits. The City stipulated to the facts relating to Jason's employment, his wages, his death as compensable by the Commission, the City's insurance coverage, and the identities of Shelli as surviving spouse and their child as a surviving minor child. No one appeared for either the City or insurance carrier at the hearing before the Commission. The Commission heard testimony from Farley prior to entering the award. The order of the Workers' Compensation Commission is dated July 31, 2015, approximately ten months before May 2016 when Farley brought her action in the District Court of Rogers County against the City.

¶6 Farley responded to the City's motion to dismiss with "Plaintiffs' Opposition to Defendant's Motion to Dismiss with Prejudice and Supporting Brief." She did not contest or otherwise challenge the fact she had previously sought and obtained a workers' compensation award for the death of Jason. Farley argued the following in her response:

> (1) Workers' Compensation remedy is not the exclusive remedy because the parents and brother of the deceased, Jason, do not have a remedy with the Workers' Compensation Commission remedy. Further, plaintiff's petition alleges grief and loss suffered by the brother and parents of the deceased spouse.
>
> (2) Plaintiff's claim is not barred by the OGTCA because the City has an obligation to maintain the water drainage system for the City. Section 155(5) of the OGTCA does not bar the claim because the City's actions were ministerial and/or operation as opposed to discretionary.
>
> (3) Plaintiff has standing to seek an injunction because she is a resident of the City and has a personal stake in the outcome of the firefighters being correctly trained for a swift water rescue.

¶7 The City filed a Reply to plaintiff's response which included the following arguments:

> 1. City of Claremore was immune from liability because Farley had pursued and obtained a worker's compensation remedy.
>
> 2. Shelli Farley had obtained a workers' compensation award and the OGTCA confers immunity when the loss is covered by workers' compensation. [citing 51 O.S. § 155(14).
>
> 3. The parents and brother of the deceased, Jason, do not have a wrongful death remedy.
>
> 4. The City is immune pursuant to § 155(4) and § 155(6).
>
> 5. Farley lacks standing to obtain an injunction.

¶8 The trial court granted the motion to dismiss with prejudice. The District Court's order includes the following.

> After reviewing the filings and hearing the arguments of counsel, the Court finds that when all of the facts alleged are taken as true and inference appropriate drawn, there is no set of facts which would entitle plaintiff to the relief she seeks.

The District Court's order did not state which of the several grounds raised by the City were sufficient for dismissing plaintiff's action.

¶9 Farley appealed the trial court's order and this Court retained the appeal. Her petition in error has three assignments of error on appeal.

> 1. She states the District Court granted defendant's motion because the deceased was "a person covered by the Workers' Compensation Act." However, the District Court erred because the Petition alleged death as a result of an "intentional tort" and the trial court failed to address plaintiff's constitutional claims relating to how 85A O.S. § 5 defines an intentional tort.

2. The City is not exempt from liability pursuant to the OGTCA § 155(5) because the City failed to maintain a drainage system it had previously installed.

3. "The District Court [erred] in granting dismissal, per the submissions of the parties."

¶10 Farley's appeal is prosecuted pursuant to Rule 1.36 which provides for the trial court filings to serve as the appellate briefs and the assignments of error on appeal are those listed in an appellant's petition in error.[12] Farley's arguments in her trial court filings which serve as her Rule 1.36 appellate briefs are as follows.

(1) Workers' Compensation remedy is not the exclusive remedy because the parents and brother of the deceased, Jason, do not have a remedy with the Workers' Compensation Commission remedy;

(2) Farley's claim is not barred by the OGTCA because the City has an obligation to maintain the water drainage system for the City, and § 155(5) of the OGTCA does not bar her claim because the City's actions were ministerial as opposed to discretionary; and

(3) Farley has standing to seek an injunction because she is a resident of the City and has a personal stake in the outcome of the firefighters being correctly trained for a swift water rescue.

II. Appellate Review

¶11 The City filed a motion to dismiss which included alleged jurisdictional defenses based upon two arguments: On plaintiff's claim for damages, an argument based on the Governmental Tort Claims Act combined with a final order awarding compensation benefits on allegedly the same cause of action pled in District Court; On plaintiff's claim for injunctive relief, a jurisdictional bar based upon plaintiff's alleged lack of standing. The City's motion to dismiss argued Farley had already received compensation from the Worker's Compensation Commission and the Commission had exclusive jurisdiction over Farley's claims. The City argued judicial notice may be taken of the proceedings before the Workers' Compensation Commission and the public record before the Commission.[13] A copy of the award to Farley and her child was attached to the City's motion to dismiss. The City argued the motion to dismiss should not be converted to summary judgment.

¶12 A motion to dismiss based upon a jurisdictional ground and 12 O.S. § 2012(B)(1) is not converted to a motion for summary judgment by reliance upon facts not appearing on the face of a plaintiff's petition.[14] However, a jurisdictional fact not appearing on the face of the petition and used in support of a 12 O.S. § 2012(B)(6) failure-to-state-a claim defense will convert the motion to one for summary judgment. The City's motion raised both § 2012(B)(1) and § 2012(B)(6). The City's motion relied upon the fact of Farley's successful workers' compensation award to show a governmental tort immunity as well as a collateral estoppel (no double recovery) defense to Farley's action for damages based upon an alleged intentional tort.

¶13 In federal court, judicial notice of fact may occur when the fact is not subject to reasonable dispute and it "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."[15] The Oklahoma statute has similar language.[16] Some federal courts have stated a court may take judicial notice of an indisputably accurate fact[17] on the world wide web (or internet),[18] and public records and government documents available from reliable sources on the internet, such as websites run by governmental agencies may be used for the purpose of judicial notice.[19] Some federal courts have also concluded public agency actions, factfinding, and decisions may be appropriate for judicial notice.[20] A motion to dismiss in federal court based upon Fed.R.Civ.P.12(b)(6) tests the sufficiency of a plaintiff's federal complaint, and the court examines the face of the complaint as well as (1) documents incorporated by reference, (2) documents referenced in the complaint central to plaintiff's claim when the parties do not dispute the documents' authenticity, and (3) matters of which a court may take judicial notice.[21] A Rule 12(b)(6) motion may raise a *res judicata* affirmative defense using facts known by judicial notice without requiring the defense to be raised by answer or converting the motion to summary judgment.[22]

¶14 Concerning the City's estoppel defense based upon a single-recovery rule, sometimes the question whether prior litigation creates a preclusion to additional litigation may be a question of law.[23] A question of law may be decided in the trial court on a motion to dis-

miss as well as a motion for summary judgment. In Wilson v. State Election Bd.,[24] we explained the standard of review with the following:

> A determination of whether the preclusion doctrine applies is solely a question of law if "(1) the facts are undisputed, (2) the preclusion question can be answered solely by reviewing the judgment put forward as the bar, or (3) the preclusion determination can be made solely by inspection of the record of the proceeding(s) culminating in the judgment put forward as the bar." *Feightner v. Bank of Okla.*, 2003 OK 20, ¶ 3, 65 P.3d 624, 627 (citations omitted). Here the application of the preclusion doctrine is a question of law because the determination can be made solely by *de novo* review of the record on appeal and consideration of this Court's opinion in *Wilson I*. *Id.*

Wilson, 2012 OK 2, ¶ 5, 270 P.3d at 157.

Farley did not challenge the fact of a prior workers' compensation recovery for death benefits, and we may review the City's § 2012 (b)(6) estoppel argument and its particular application herein using the appellate standard for reviewing a § 2012 (B)(6) motion as we now explain.

¶15 The City also stated it was challenging the subject matter jurisdiction of the trial court by a § 2012(B)(1) motion, and the City relied on (1) the Oklahoma Governmental Tort Claim Act (OGTCA, 51 O.S.2011 § 151-171), and (2) 11 O.S.2011 § 29-108[25] which provides a statutory immunity for tort liability in certain circumstances.[26] The City's argument rests upon certain implied conclusions of law: (1) Sovereign tort immunity is equated with a § 2012(B)(1) subject matter jurisdiction defense, and (2) Provisions of the OGTCA are a collection of mandatory statutes with strict-compliance requirements for the purpose of subject matter jurisdiction; and (3) A plaintiff's OGTCA cause of action, or claim upon which relief may be granted, contains elements which must be pled to show the presence of subject matter jurisdiction; and (4) An OGTCA defendant may by motion to dismiss invoke extra-pleading facts relating to proper application of the OGTCA without converting the motion to one for summary judgment.

¶16 Generally, sovereign tort immunity includes attributes which are consistent and inconsistent with principles of subject matter jurisdiction.[27] There is no doubt some language in the OGTCA refers to jurisdictional requirements.[28] We have recently observed jurisdictional requirements are often expressed as mandatory or strict-compliance duties, and some mandatory statutory obligations may have attributes authorizing a substantial rather than mandatory compliance.[29] Our Court of Civil Appeals has reviewed a plaintiff's failure to comply with the OGTCA in the context of a § 2012(B)(6) motion.[30] The City asserts governmental tort sovereign immunity as a jurisdictional defense without (1) legal authority discussing attributes of immunity relating to jurisdictional issues, or (2) legal authority or discussion on the nature of facts in support the City's jurisdiction/immunity argument, *e.g.*, jurisdictional facts, quasi jurisdictional facts, and facts necessary to plaintiff's cause of action and whether any of these are jurisdictional.[31]

¶17 We need not analyze sovereign immunity and its relation to subject matter jurisdiction issues raised by the City. An order granting a motion to dismiss raising a jurisdictional issue is reviewed *de novo* and allegations of a petition are deemed as true[32] similar to review of a § 2012(B)(6) motion to dismiss.[33] We note federal courts have allowed facts appropriately subject to judicial notice to be considered for certain purposes when adjudicating a similar Fed. R. Civ. Pro., Rule 12(b)(6) motion without converting the motion to one for summary judgment.[34] We also note the City's motion used the exhibit of the Commission's order for the purpose of showing a final order of the Workers' Compensation Commission, and at the hearing on the motion the City argued that plaintiff "had been compensated under that [Workers' Compensation] act."[35] Farley did not challenge in either the trial court or this Court by assigned error the City's use of the Commission's order.[36] The Commission's order is before us as part of a record on appeal and it was before the trial judge when the City's motion was decided.

¶18 A determination of jurisdiction based upon the legal effect of a document recognized as accurate by all parties presents a question of law.[37] Further, this Court has explained judicial notice should have been taken of a plaintiff's unopposed status as personal representative of a decedent's estate when that status was revealed by a document accompanying a defendant's response brief on summary judgment.[38] The document attached to the City's motion identifies Farley's status relating to a successful

workers' compensation proceeding for death benefits and the award to Farley and her minor child. Farley did not dispute the statements in the document or the procedure used to present it to the District Court. We review the District Court's order *de novo* to determine if an error of law occurred.

¶19 A long-recognized rule is that when a judgment is general in its terms and does not disclose which of several grounds it is based upon, it will not be reversed on appeal if any one of the grounds raised in the trial court is a valid basis for the judgment.[39] Exceptions to this general rule do not apply in the present controversy.[40] This rule that only one legally valid basis is needed for a judgment or judicial decision applies to appellate review of a trial court's order sustaining a motion to dismiss as well as the correctness of a decision on an appellate motion to dismiss filed in the Oklahoma Supreme Court.[41] Consistent with this principle is our explanation that "a legally correct *nisi prius* judgment must be affirmed although it was anchored to a theory different from that on which it comes to be tested on appellate review" when the different theory is adequately supported by the record.[42]

¶20 In an appeal controlled by Okla. Sup. Ct. R. 1.36 the briefs in the appellate court are those which were considered by the trial court when it issued the order reviewed in the 1.36 appeal. City of Claremore's combined motion to dismiss and brief (as well as Reply) in the trial court are this party's appellate briefs and each of its briefed defenses is raised in this appeal.[43] An appellee may raise a legal issue in support of the correctness of the trial court's judgment and the relief actually granted when the issue is supported by the record on appeal.[44] Clearly, an issue is before us on appeal when an appellee argues on appeal the specific issues and associated facts previously submitted to the trial court to consider and those issues and facts are subsequently preserved in the appellate record.[45] We need not review all issues raised by appellee, merely those which are dispositive of Farley's assignments of error in the appeal.

III. Plaintiff's District Court Tort Action For Personal Injury Damages Subsequent To Successful Workers' Compensation Award For The Same Personal Injury

III (A). Single-Injury Rule and Workers' Compensation

¶21 The City's argument combines (1) the fact that Farley successfully obtained a workers' compensation award against the City for death benefits with (2) our 1979 opinion in *Pryse Monument Co. v. District Court*,[46] and (3) our 2003 opinion in *Gladstone v. Bartlesville Independent School Dist. No. 30 (I-30)*.[47] This argument raises both *res judicata (Pryse)* and statutory sovereign immunity issues *(Gladstone).*

¶22 Our 2013 opinion in *Holley v. Ace American Ins. Co.*,[48] explained *Pryse* involved a "prior incarnation" of the workers' compensation statutes, those statutes allowed an injured employee in certain circumstances to elect between pursuing an action in tort in the District Court or a workers' compensation remedy, and a plaintiff's choice of one remedy would bar subsequent use of other remedy.[49]

> Waiver by election will preclude the claimant from vexing the employer with a second suit. Once a remedy is chosen and then pursued to conclusion, the point of no return is reached although there has been no satisfaction, much less vindication, of the right. Three essential elements, all present here, must coincide to make preclusion through waiver by prior election of remedies applicable: (a) two or more remedies must be in existence (b) the available remedies must be inconsistent (c) choice of one remedy and its pursuit to conclusion must be made with knowledge of alternatives that are available....

Holley, 313 P.3d at 923-924, 2013 OK 88 at ¶ 8, quoting *Pryse*, 595 P.2d at 437.

Election of remedies doctrine is based upon the actual existence or availability of two or more remedies.[50] However, the City's argument is not that Farley had two remedies to elect from as discussed in *Pryse*. Instead, Farley was (1) required to use her *sole and only remedy* in workers' compensation law, and (2) when she pursued this remedy and obtained a compensation award then the award had the effect of barring a subsequent District Court action as discussed in *Pryse*. Our opinions and the City's argument recognize the underlying theory in our cases involving successive workers' compensation and District Court proceedings based upon the same injury is analyzing whether an estoppel has been created as opposed to applying the common-law doctrine of election of remedies.[51]

¶23 The particular application of this estoppel argument raised by the City herein is: The single-injury-single-recovery rule which creates an estoppel shows a "single injury" at the time of Jason's Farley's death. This is so because the injury was legally cognizable before the Workers' Compensation Commission at the time of death, and a cognizable claim before the Commission excludes a negligence and intentional tort District Court action. The cognizable claim before the Commission shows that a governmental tort claim sovereign immunity and a workers' compensation exclusive remedy statutes must have applied to Jason Farley's claim at the time of his death. This application is then used to show the District Court negligence and intentional tort claim was extinguished at the time of Jason Farley's death and wrongful death action did not survive. This extinguishment is shown to also extinguish the wrongful death claims/damages of the wrongful death statutory beneficiaries.

¶24 In *Dyke v. Saint Francis Hosp. Inc.*,[52] the Court stated the rule in *Pryse* "in essence erects a *res judicata* bar," and precludes a party using a workers' compensation *remedy* and a District Court *remedy* to recover for the same on-the-job injury.[53] *Res judicata* is identified with *claim preclusion* and ordinarily applied when a claim in a second suit is the same as the claim adjudicated on the merits and to finality in the first proceeding.[54] Although a workers' compensation claim has been historically described with attributes[55] which are different from the elements of negligence and intentional tort claims in a District Court, we have treated a final adjudicated worker's compensation claim awarding benefits as creating a bar to a District Court tort proceeding against an employer for the same injury because the findings necessary to award workers' compensation have a preclusive effect similar to issue preclusion.

¶25 In *Howard v. Duncan*,[56] an injured employee obtained a worker's compensation award and then brought a tort suit in a District Court for the same injury. She alleged her District Court action was proper because the State Industrial Commission lacked jurisdiction to make the award she received. We noted the general rules relating to collateral attacks.[57] We observed the State Industrial Commission held a hearing on the worker's claim, received evidence, and a finding of fact was made sustaining the worker's right to an award. We observed the Commission's jurisdiction was exclusive.[58] We directed the District Court to dismiss plaintiff's action. *Howard v. Duncan*, is consistent with our explanation that a final workers' compensation order awarding benefits is not subject to a collateral attack before the Commission,[59] as well as the rule stating that doctrines of *res judicata* and collateral estoppel apply to a final administrative determination which is adjudicatory in nature.[60]

¶26 The defendant in *Howard* relied upon a workers' compensation statute making plaintiff's remedy exclusive before the Commission, and the City of Claremore relies upon exclusivity language in 85A O.S. § 5.[61] This exclusivity of the workers' compensation remedy means the employee relinquishes a common-law right to bring an action in District Court against his or her employer in exchange for the employer securing statutory compensation for employees with injuries.[62]

¶27 The Workers' Compensation Commission possesses the authority to adjudicate questions of law and fact related to application of workers' compensation law to a particular party before the Commission.[63] *The Commission's application of workers' compensation law to the facts before it includes making specific findings when hearing a claim*.[64] The preclusive force of a workers' compensation award in a subsequent District Court action rests on a f*inding of an accidental injury* by the Worker's Compensation Commission relating to the same injury raised by theories of negligence or an intentional tort in District Court. A finding whether an injury arose out of and in the course of employment as a result of an accident has been construed as a finding and issue of fact when the parties do not agree on facts, and an issue of law when the parties do agree on the facts.[65] On the other hand, when a workers' compensation order determined an injury did not arise out of and in the course of employment and there was no workers' compensation coverage or remedy, this finding did not bar a subsequent District Court action for damages on the same injury.[66] Preclusion doctrines will apply to bar relitigation when a party in a subsequent District Court tort action alleges a former Workers' Compensation Commission's findings on its record were factually incorrect and the Commission lacked jurisdiction.[67]

¶28 The parties agree that on May 23, 2015, Captain Jason Farley, a fireman for the City of Claremore, died while responding to an emergency request for assistance to help people

trapped in a flash flood. The law in effect on that date determines whether the Workers' Compensation Commission possessed jurisdiction to award of benefits,[68] *and this date is also used to determine the law in effect at the time of a decedent's death in a wrongful death action*.[69] A compensable workers' compensation injury must be an "accident" and "unintended."[70] Historically, an "accident" for workers' compensation law was required for liability and generally excluded injury caused by a person's intentional tort.[71] As *Wells v. Oklahoma Roofing & Sheet Metal, L.L.C.*,[72] explains, a remedy for an injury caused by an intentional tort by an employer lies in a District Court, but an "accidental" harm or injury arising from negligence is provided for by the workers' compensation statutes.

¶29 On May 23, 2015, 85A O.S.Supp.2014 § 5, was in effect and stated that the rights granted by the Administrative Worker's Compensation Act were "exclusive of all other rights and remedies of the employee, his legal representative, dependents, next of kin, or anyone else claiming rights to recovery on behalf of the employee against the employer...." On that date 85A O.S.Supp.2014 § 3 was in effect and stated the Administrative Worker's Compensation Act applied to "claims for injuries and death based on accidents."[73] A compensable injury by the Commission included damage or harm to an employee's body as a result of an *accident* arising out of the course and scope of employment.[74]

¶30 The Commission made express findings Farley was an employee of the City, died as a consequence of a compensable work-related incident, the Commission had jurisdiction to award workers' compensation benefits, and both the surviving spouse and surviving minor child were entitled to death benefits pursuant to 85A O.S. § 47. Generally, the accidental nature of an injury compensable by a workers' compensation remedy excludes the possibility that this same injury is simultaneously an "intentional tort"[75] injury caused by an employer. Generally, *res judicata* and collateral estoppel apply to jurisdictional questions,[76] and to a final and express adjudication of an issue properly before an administrative body that is subsequently raised between the same parties or their privies.[77] The preclusive effect of a final adjudication includes a final determination before the Workers' Compensation Commission.[78] This final adjudication includes a determination an injury is compensable because it resulted from an accident. Claim preclusion, collateral estoppel, applies when the claim in the second suit is the same as in the first suit.[79] The Commission determined Farley died from an *accidental injury* covered by Workers' Compensation. An adjudication of the accidental nature of an employee's death precludes a subsequent District Court action collaterally attacking the accidental nature of the injury and alleging it arose from a intentional tort outside the jurisdictional scope of an award by the Workers' Compensation Commission. This award shows that Jason Farley had a workers' compensation claim for an accidental injury at the time of his death, and this claim was subject to the exclusive remedy provided by the workers' compensation statutes.

III (B). Farley's Response to the City's Use of an Estoppel Argument

¶31 Farley maintains she may bring a District Court action for damages alleging an employer's negligence and intentional tort causing the death of an employee although a workers' compensation death benefits award was issued prior to the District Court action.

¶32 Addressing her arguments, we explain: (1) The preclusive effect of a workers' compensation award on a subsequent District Court action is based upon a definition for a cause of action tied to identification of the injury or harm suffered; (2) The wrongful death statutes (12 O.S. §§ 1051, 1053) have authorized damages based upon the decedent's claim not being extinguished at death; (3) The death-benefits remedy in workers' compensation is a substitute for the wrongful death action, and (4) A cognizable workers' compensation death-benefits award of compensation available at the time of a decedent's death bars a subsequent tort action for the same injury against the employee's employer.

¶33 Historically, the scope of a workers' compensation remedy was based on an employee's accidental injury regardless of the employer's degree of negligence, or even without the employer's negligence; but the accidental nature of the injury meant that an intentional injury caused by an employer was not within the scope of workers' compensation remedies.[80] There have been exceptions where an employer could be exposed to *potential* liability in a workers' compensation or a District Court tort proceeding. For example, when an employer acted in more than one capacity, a status or

capacity in addition to employer status.[81] However, this dual-capacity doctrine was abrogated with respect to employers by the recently enacted Administrative Workers' Compensation Act in effect prior to Jason Farley's death.[82] *Further, the formerly effective dual-capacity doctrine did not negate an estoppel, either claim or issue preclusion, when raised as a bar to a double recovery for the same injury.*[83]

¶34 The City of Claremore was found in the workers' compensation proceeding to be the employer of Jason Farley. The District Court petition names the City of Claremore as the sole defendant. The petition alleges negligence and states the City failed to maintain a storm drain at a specific location, previously removed a safety grate over a specific drain pipe, and failed to give Jason Farley and other fireman proper training for swift water rescues. These allegations invoke the status of the City as an employer as well as the City's non-employer role in maintaining safe drainage structures for the benefit of the public. This latter issue raises whether the City has sovereign immunity in this context.

¶35 An employer has a duty to provide a safe workplace for employees.[84] We have explained in the context of the dual-capacity doctrine that when the employer's negligence causing a lack of safety is so inextricably bound to the employer's status and duty as an employer, then the employee's remedy for an injury flowing from employer's negligence is workers' compensation. [85] One reason for this is the general rule that an injury from an employer's negligent failure to provide a safe working environment is addressed by the workers' compensation remedy.[86] Historically, an employee gave up the right to bring a negligence action against his or her employer in exchange for the statutory no-fault worker's compensation remedy.[87] In the present context, the City's argument is that Jason Farley, as an employee, had no survivable negligence or tort claim action which could serve as a basis for a wrongful death action after his death.

¶36 We have applied the concept of "accidental" to an employee's injury consistent with the injury being caused by an employer's negligent conduct, and noted a District Court action based on an employer's negligence was barred by the exclusivity of a workers' compensation remedy.[88] Further, we recently noted a District Court's grant of summary judgment to an employer in a wrongful death action was proper when the employer had been previously ordered to pay death benefits by the Workers' Compensation Court of Existing Claims.[89]

¶37 Farley attempts to escape this estoppel and prohibition on a double recovery by characterizing her two theories of recovery as (a) negligence, and (b) intentional (substantial-certainty) tort authorized by a wrongful death statute, 12 O.S. § 1053. She also alleges a separate cause of action seeking injunctive relief not barred by a previous monetary award against the employer. Farley's argument relating to negligence and intentional tort indicates she has a particular section 1053 wrongful-death-action status that makes the workers' compensation remedy inadequate and allows her to bring a tort action for wrongful-death damages.

¶38 Farley's wrongful-death claims for damages based upon (1) injury to her deceased husband, and (2) injuries to her, Jason's surviving child, and surviving parents are based on the statutes authorizing the survival of a tort action in the form of wrongful-death actions, 12 O.S § 1051 and § 1053. An injury to decedent's person, such as pain and suffering, is based on 12 O.S. § 1051.[90] An injury resulting from the death of the person and inuring to the benefit of the surviving spouse, surviving children, surviving parents, if any, or the decedent's next of kin is pursuant to 12 O.S. § 1053.[91] Both 1051 and 1053 are based upon the same alleged wrongful death with the damages recognized in the two statutes being different, although an estoppel *may* be created if a plaintiff tries to litigate the 1051 and 1053 actions as separate actions.[92]

¶39 As we now explain, the difference between 1051 and 1053 does not help Farley's argument because (1) the parents and brother have no survivable 1053 action, and (2) the workers' compensation death-benefits remedy for a surviving, spouse, children, and dependents is designed as a substitute for a wrongful death action based on 12 O.S. §§ 1051 and 1053.

¶40 Plaintiff argues Jason Farley's parents and brother have no remedy in workers' compensation, and the District Court action for wrongful death was proper as to them as non-named parties represented by Farley in the District Court. They assert they possess a legally cognizable interest in the litigation and the estate of the deceased.

¶41 The 1971 version of 12 O.S. § 1053 contained no language for "loss of consortium,"[93] and damages sought by parents of a deceased were limited to "pecuniary loss" they suffered.[94] Traditionally, the wrongful-death damages were limited to pecuniary benefits specified by statute; and there was no recovery permitted a parent for injury to feelings, mental anguish, loss of society and companionship or destruction of the parent-child relationship.[95] Section 1053 was amended in 1978 to include loss of consortium by the surviving spouse.[96] A 1979 amendment[97] to section 1053 provided for "loss of consortium of the surviving spouse," as well as "loss of companionship and grief of the children and parents of the deceased."[98] Our 1983 opinion in Clark v. Jones,[99] recognized these changes when we explained surviving siblings of the deceased could not bring an action for loss of consortium. We explained any right of survivors to bring an action and the nature of damages allowed are based upon the wrongful death statutes.[100] The statutory language recognizing the surviving spouse's loss of consortium and the loss of companionship suffered by children and parents has remained unchanged and is the same in its current codification at 12 O.S.2011 § 1053. No express language appears in § 1053 providing for loss of companionship or loss of consortium by a sibling. Jason Farley's brother has no section 1053 action for his for loss of companionship or loss of consortium.

¶42 In 1983, *Gaither By and Through Chalfin v. City of Tulsa*,[101] we explained wrongful-death actions were unknown at common law, and any right of action surviving the decedent existed solely because of statutory enactment.[102] *When the Legislature enacted in a wrongful death statute new damages which had not been available for the wrongful death action, then a new "substantive right" was create*d. In our 1977 opinion, *Thomas v. Cumberland*,[103] we explained a parent had been limited by 12 O.S. § 1053 to the pecuniary value of the services provided by a child, then recently enacted 12 O.S.Supp.1975 § 1055[104] had created a new "substantive right" in a wrongful death action for a parent to recover for loss of companionship and love of a minor child and for destruction of the parent-child relationship.[105] We repeated this concept in our 1996 opinion in *Roach v. Jimmy D. Enterprises, Ltd.*,[106] where we explained sections 1053 and 1055 should be read together so that damages based upon the wrongful death of a minor child authorized in section 1055 would include, when appropriate, punitive damages authorized by section 1053.[107] We further explained these rights to specific damages were substantive rights and the law at the time of injury was applicable.[108] Our opinions in *Clark* (1983), *Gaither* (1983), *Thomas* (1977), and *Roach* (1996) demonstrate that when the Legislature amended the wrongful death statutes it created substantive rights possessed by a parent for damages based upon the wrongful death of the parent's child.

¶43 Our 1994 opinion in *Ouellette v. State Farm Mut. Auto. Ins. Co.*,[109] involved a legal action by parents based upon the death of their child. Their child had a surviving spouse and surviving children. We explained the wrongful death statutes provided a remedy for a surviving spouse and surviving children, and *if* neither of these (spouse and surviving children) existed, *then* those who possessed status as statutory next of kin could bring the wrongful death action.

> . . . because wrongful death is not actionable absent a statute, the parents' quest for the damages they seek . . . must accord with the legislative wrongful-death recovery regime . . . A wrongful-death claim may be pressed only by persons authorized to bring it . . . if the decedent leave a surviving spouse and a child or children, *the parents may not take as next of kin,* . . they take as next of kin if the decedent leave neither issue nor a surviving spouse . . . .

Ouellette, 1994 OK 79, 918 P.2d at 1366-1367, material omitted.

In *Ouellette* we explained a wrongful-death claim may be brought by persons authorized by statute, *e.g.*, the personal representative of the decedent and if none has been appointed, then by the widow, or where there is no widow, by the decedent's next of kin, with recovery inuring to the exclusive benefit of the surviving spouse and children, if any, or next of kin. We observed this language addressed the parties eligible to sue in a wrongful death action, and was intended to address an administrative concern, the multiplicity of suits.[110] Farley does not address the effect of *Ouellette* on the status of Jason Farley's parents or brother and the nature of their interest, if any, in the estate of Jason as defined by 84 O.S. § 213 and in the context of a surviving spouse and a surviving child.[111]

¶44 The wrongful death cause of action pursuant to 12 O.S. § 1053 created or authorized a

survivable cause of action with damages recovered by a surviving parent.[112] Section 1053 defines the action as authorized when certain conditions are met, including (1) a wrongful death and (2) if the deceased had a judicially cognizable claim to maintain if living.

> A. When the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, or his or her personal representative if he or she is also deceased, *if the former might have maintained an action, had he or she lived,* against the latter, or his or her representative, for an injury for the same act or omission. The action must be commenced within two (2) years.

12 O.S.2011 § 1053(A) (emphasis added).

Our 1992 opinion in *Riley v. Brown and Root,* Inc.,[113] expressly stated the section 1053 action is derivative in the sense that survivors' rights are based upon the rights of the decedent, and we relied on our opinions in *Haws v. Luethje*,[114] and *Hill v. Graham*,[115] when we stated the following:

> But Section 1053 provides now, as it has always provided, for an action of wrongful death *only if the decedent might have maintained an action if he or she had lived. The rights of the survivors are derivative. Haws,* 503 P.2d at 874. The survivors have no more and no less rights than did the decedent. "... [A]ny right of action thus granted by the statute is predicated solely upon the right of action which was personal to the deceased had he lived." *Hill v. Graham,* 424 P.2d 35, 37-38 (Okla.1967).

Riley, 836 P.2d at 1301 (emphasis in original).

Our 2014 opinion in *Boler v. Security Health Care, L.L.C.*,[116] explained the action authorized by section 1053 was not "*wholly* derivative" in the sense the cause of action must not have been extinguished before the death of the decedent.[117] *The statutory language in § 1053(A) still continues in force and effect and a parent's action for wrongful death damages arising from loss of companionship is derived from a legal right which was possessed by decedent and which was legally cognizable, e.g., not extinguished*.[118] Further, because wrongful-death actions were unknown at common law and any right of action surviving the decedent exists *solely* because of statutory enactment,[119] we must construe section 1053 in harmony with the Workers' Compensation statutes and the sovereign immunity statutes to obtain a result consistent with the plain meaning of all of the statutes and the intent plainly expressed by the Legislature.[120]

¶45 Jason Farley's theoretical negligence and intentional tort theories could not have been maintained in a District Court action by Jason Farley; *i.e.*, the theories could not be a basis for stating a claim upon which relief may be granted. This is so because his common-law tort rights were extinguished by operation of law. They were extinguished by: (1) A statute which operated upon Jason Farley's circumstances to make his tort claim cognizable *solely* as a substituted workers' compensation claim before the Workers' Compensation Commission, and (2) A sovereign immunity statute which barred his District Court action; and (3) A statute which removed the dual-capacity doctrine as an available remedy for him against his employer. Jason Farley had no common-law tort claim when he died and no loss of consortium damages were cognizable at that time.[121] The single-recovery-for-single-injury rule shows that Jason Farley's *potential or theoretical* tort claim for damages at the time of his death was based upon the same injury or cause of action used for a workers' compensation claim. The successful workers' compensation proceeding occurred after his death but in combination with the relevant statutes does show he possessed at the time of his death an *exclusive* worker's compensation remedy against an entity possessing a governmental tort claim sovereign immunity as explained herein.

¶46 Historically, the right to workers' compensation death benefits was statutorily created to be consistent with 12 O.S. § 1053 and 84 O.S. § 213,[122] and the workers' compensation death benefits were treated as an exclusive statutory remedy substituted for the statutory wrongful death action guaranteed by an Oklahoma constitutional provision and approved by a vote of the People in Oklahoma.[123] For example, in *Gaasch, Estate of Gaasch v. St. Paul Fire and Marine Insurance Company*,[124] plaintiff's petition stated a "wrongful death"claim against an insurer, and further characterized the cause of action as both an action on a contract and a "bad faith" tort claim where an insurer failed to provide medical care as ordered by the Oklahoma Workers' Compensation Court. We noted the exclusive available remedy in the workers' compensation statutes for the particular wrongful conduct giving rise to the alleged injury,

and we affirmed the District Court's summary judgment for the insurer.[125] When the workers' compensation statutes provide an exclusive remedy for an alleged wrongful conduct, this is the remedy which must be pursued.

¶47 Farley also argues *Parret v. UNICCO Serv. Co.*,[126] and *Wells v. Oklahoma Roofing & Sheet Metal, L.L.C.*,[127] save her action from dismissal. Farley's argument against dismissal relies upon characterizing the employer's conduct as negligent or intentional and thereby demonstrating a cause of action in District Court which is distinct from a worker's compensation remedy. *Wells* explained (1) the common law divides personal injuries between accidental versus willful or intended, (2) the workers' compensation statutes provide a remedy for accidental injuries but a remedy for willful or intended injuries lies in a District Court, and (3) an intentional injury includes those injuries which an employer possessed knowledge that an injury was substantially certain to result.[128] *Wells* did *not* recognize multiple causes of action for the same wrongful death or injury. We did not approve the concept that an injured employee possessed one cause of action with a workers' compensation remedy, three actions based upon each degree of negligence,[129] and one action based upon an intentional tort. Similarly, *Parret's* explanation of the substantially-certain intentional tort did not authorize a subsequent District Court action against an employer after a claimant's successful workers' compensation proceeding. Characterizing a party's degree of negligence or intentional conduct is generally understood as an assessment on a continuum of culpability or tort liability[130] and not creating different causes of action for the same injury.

¶48 Generally, a cause of action is defined by a "transaction or occurrence" and multiple theories of liability do not turn a single cause of action into multiple causes of action. In summary, no matter how many theories of liability appear to arise from a single harm, they all arise from the same or single transaction or occurrence.[131] *Wells* determined an injured employee could bring an action in District Court against an employer based upon the employer's intentional conduct as shown by the substantial-certainty standard. *Wells* did not authorize double or multiple recovery for the same injury.

¶49 Oklahoma has used for certain purposes the "single or indivisible injury" rule for identifying a cause of action. For example, the rule has been used in the context of multiple tortfeasors.[132] More on point, our 1913 opinion in *Shawnee Gas & Electric Co. v. Motesenbocker*[133] stated with respect to the cause of action for wrongful death provided by statute:

> The statute contemplated only one action. No case has been cited or found in which it was held that the cause of action for wrongful death could be divided or damages for the same death could be sued for in separate actions by the various individuals who had sustained damages thereby. The rule is the other way.

Shawnee Gas, 138 P. at 792.

This language was cited by our Court of Appeals in 1992 explaining why the mother and father of their deceased child could not bring separate wrongful death actions,[134] and again in 1994 in a Court of Civil Appeals' opinion this Court approved for precedential publication.[135] We have also explained that the "same death" could not be used by multiple individuals in separately filed actions by those who had allegedly sustained damages. For example, we explained a wrongful death action is purely statutory, can only be brought by a person expressly authorized by statute, and "there is only one cause of action."[136] Historically, a workers' compensation remedy applied to a *type of injury,* one arising out of and in the course of employment, and in our case with the injury of *death* authorizing statutory damages to a surviving spouse and dependent children. Further, wrongful death statutes *also applied to a particular* t*ype of injury, i.e., death,* and provided damages recoverable by the statutory beneficiaries. Viewing the workers' compensation death-benefits remedy as a "same claim" substitute for the wrongful death cause of action is reasonable and supported by our precedent.

¶50 We have held in certain instances when formal barriers prevent full presentation of remedies or theories of relief in one action, a party is not precluded from bringing another claim in a subsequent action which arose out of the same set of facts as the first action.[137] However, when a successful workers' compensation adjudicated claim is followed by a District Court action seeking damages against an employer for the same injury, our opinions have been closer, although not identical, to the *Restatement of the Law (Second), Judgments*, § 24, and its

prohibition on splitting a claim. One comment to § 24 includes the following language:

> The rule stated in this Section as to splitting a claim is applicable although the first action is brought in a court which has no jurisdiction to give a judgment for more than a designated amount. When the plaintiff brings an action in such a court and recovers judgment for the maximum amount which the court can award, he is precluded from thereafter maintaining an action for the balance of his claim. . . It is assumed here that a court was available to the plaintiff in the same system of courts – say a court of general jurisdiction in the same state – where he could have sued for the entire amount.

Restatement (Second) of Judgments, § 24, cmt. g. (material omitted).

Farley's suit is an assertion she may obtain a full and complete recovery against the City by an action in an Oklahoma District Court for an intentional tort which is not within the remedial jurisdiction of the Workers' Compensation Commission. Farley made a choice to prosecute her claim before the Workers' Compensation Commission as a workers' compensation claim. Again, a basic concept from *Pryse* and its progeny is that a successfully obtained workers' compensation remedy erects a bar or estoppel preventing a District Court tort recovery for the *same injury* against the same employer.[138] Farley's success before the Commission shows Jason Farley possessed a legally cognizable workers' compensation claim as an *exclusive* remedy, and Farley's District Court petition is not saved from dismissal by characterizing her District Court action as alleging negligence or intentional conduct torts which survived Jason Farley's death in a wrongful death action.

¶51 *In summary*: When an alleged wrongful death is used to obtain a death benefits award by the Workers' Compensation Commission against an employer and the surviving spouse and minor child of the deceased receive an award; then this wrongful death may not be a basis for a statutory wrongful death action in a District Court against the same employer for that same injury alleging negligence or intentional conduct by the employer causing the death of the deceased. Further, because the decedent had no cognizable tort claim against his employer at the time of his death, no tort claim survived for the basis of loss of companionship or loss of consortium damages pursuant to 12 O.S. § 1053.

III (C). Sovereign Immunity and Plaintiff's Governmental Tort Claim

¶52 Farley argues her petition should not be dismissed because it alleges an action pursuant to the Oklahoma Governmental Tort Claim Act (OGTCA, 51 O.S.2011 § 151-171) against the City of Claremore. Farley alleged the City failed to perform reasonable maintenance to a drain pipe and drainage safety grate. Farley invoked the City's status as both an employer and the dual-capacity doctrine with the City acting as a governmental entity for her OGTCA claim. She relied on *Teeter v. City of Edmond*,[139] where we distinguished between a city's discretionary acts where no tort liability was attached and ministerial or operational acts which were not exempt from tort liability.[140]

¶53 The City countered it was immune pursuant to the OGTCA. The OGTCA is the exclusive remedy to recover against a governmental entity in tort.[141] Governmental immunity of a subdivision of the State is waived only to the extent and in the manner provided in the OGTCA.[142] Section 155(14) of the OGTCA states: "The state or a political subdivision shall not be liable if a loss or claim results from: . . . (14) Any loss to any person covered by any workers' compensation act or any employer's liability act;...." 51 O.S.Supp.2013 § 155(14).

¶54 In *Smith v. State ex rel. Dept. of Transportation*,[143] we explained a 1988 amendment to the Oklahoma Governmental Tort Claims Act extended the State's immunity to claims covered by a workers' compensation act, and that such immunity did not violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U. S. Constitution.[144] We re-examined section 155(14) in *Gladstone v. Bartlesville Independent School Dist. No. 30 (I-30)*,[145] where a wrongful death claim was brought and challenged the constitutionality of section 155 (14). We noted "the state and political subdivisions are not liable for injuries to tort claimants who stand covered by the workers' compensation regime," and we concluded the immunity did not violate due process or equal protection principles.[146] The surviving spouse had received statutory workers' compensation benefits and this Court affirmed the District Court's summary judgment to the employer of the deceased, although the Court noted our Court of Civil Appeals had previously con-

cluded in a different case that success with an alternative remedy was not required for imposition of the section 155(14) immunity.[147]

¶55 Farley's argument asks us to construe ministerial or operational acts of the City in maintaining the drainage pipe and drainage gate as an exception to cases such as *Gladstone*. In *Moran v. Del City* we explained the "maintenance" duties by a governmental entity used as a basis of tort liability cannot be negated by an incorrect and broad OGTCA exemption from liability not intended to address cases where those duties arise.[148] Farley asks us to construe an OGTCA exemption from sovereign immunity (maintenance of drainage structures by the City) as applying to a tort claim against an employer/governmental entity. Generally, a governmental entity is immune unless the Legislature has expressly waived the immunity.[149] We must construe the OGTCA as part of a consistent whole.[150] Considering the demise of the dual capacity doctrine, it is reasonable to construe § 155(14) consistent with that demise instead of construing it as suggested by Farley. We rejected Farley's argument in *Gladstone*.

¶56 We hold: the City of Claremore has § 155(14) immunity for a statutory wrongful death action in District Court brought by a surviving spouse against the City as the former employer of the deceased when the same wrongful death injury was the basis of an award for death benefits made by the Workers' Compensation Commission to the surviving spouse and surviving minor child.

¶57 *In summary*: (1) The issue whether Farley possessed a workers' compensation remedy has been answered by her success before the Workers' Compensation Commission with its findings of record. (2) This success is based upon a finding the injury was accidental and within the jurisdiction of the Workers' Compensation Commission, as opposed to an intentional-tort injury outside the jurisdiction of the Commission. (3) The dual-capacity doctrine was abrogated with respect to employers by the recently enacted Administrative Workers' Compensation Act. (4) The express immunity in § 155(14) includes any OGTCA claim subject to a workers' compensation remedy. (5) Any negligence or intentional tort claim brought by Farley was barred by OGTCA and the exclusive workers' compensation remedy at the time of Jason Farley's death. (6) The parents and brother of Jason Farley have no 12 O.S. § 1053 wrongful death claim against Jason Farley's former employer, the City of Claremore. The District Court committed no legal error when it dismissed Farley's claims for damages.

IV. Injunctive Relief and Standing

¶58 Farley's petition states her former husband and other firefighters rescued a woman and six small children from water caused by a flash flood. She alleges the fire fighters did not have a "formal training program supporting swift water rescue" at the time of Jason Farley's death in May 2015. She alleges Jason Farley drowned due to inadequate training. She alleges the area where Jason Farley died is known to flood.

¶59 Farley alleged the City's Fire Department "claims to follow NFPA standards." She states she is seeking a temporary and permanent injunction to compel the City "to comply with the training standards set forth in NFPA [National Fire Protection Association] 1670" Standards on Operation and Training for Technical Search and Rescue Incidents. Farley alleges the City did not institute a rescue policy for swift water rescues until June 2015, held its first class for a swift water rescue in July 2015, and then an addendum regarding unseen hazards was issued in October 2015. She alleges that by January 2016 the fire fighters had not received any swift water rescue training "beyond an introductory lecture."

¶60 The City's motion challenged Farley's standing and personal stake in the training of firefighters, and argued an injunction requiring to adopt a training standard was infringing on a legislative decision by the City and improper for an injunction. Farley responded she possessed a personal stake because of her husband's death. She also stated an injunction "would ensure that all citizens of Claremore, including plaintiff herself, can be safely rescued in the event of another flash flood or similar such water event," and her personal residence "is within only a few blocks of a Zone A flood zone." Further, "The only way to ensure that individuals such as plaintiff will be safe during future flooding events, which are sure to occur given the City's drainage system and geographic location, is to require that the City's fire fighters are properly trained in swift water rescue."

¶61 A mandatory injunction is an extraordinary remedial process and seeks relief in the form of commanding the performance of a positive act, such as requiring a public official

to enforce law by a plaintiff's request for an injunction in the nature of mandamus.[151] Farley does not seek an injunction to compel the City to adopt a standard. Farley alleges the City and its officials have failed to enforce a standard it adopted after the death of her husband.

¶62 Federal court standing has been explained with the following: "'The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.'"[152] When a plaintiff seeks an injunction against an official policy, plaintiff must "credibly allege" a realistic threat to the plaintiff from the policy.[153] The alleged injury must be actual or imminent and fairly traceable to the challenged action.[154] The concept of imminence cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for the purpose of standing, *e.g.*, the injury is certainly impending.[155] The High Court has "repeatedly reiterated" that "certainly impending" is necessary to show an "injury in fact" and allegations of "possible future injury" are not sufficient to show standing.[156]

¶63 Some of this federal-court language discussing a party's standing to request an injunction is expressed in similar forms by several opinions of this Court when explaining (1) elements a plaintiff must prove to obtain an injunction, and (2) allegations in a petition necessary to show standing for equitable relief. We have explained in the contexts of requests for both preliminary and permanent injunctions that the injury of the plaintiff must not be nominal, theoretical or speculative.[157] Further, this injury or threat of injury shown by a party must be based upon a "reasonable probability" of its occurrence.

> It is not sufficient ground for injunction that the injurious acts may possibly be committed or that injury may possibly result from the acts sought to be prevented; but there must be at least a reasonable probability that the injury will be done if no injunction is granted, and not a mere fear or apprehension of same.

Sunray Oil Co. v. Cortez Oil Co., 1941 OK 77, 112 P.2d 792, 796, quoting *Simons v. Fahnestock,* 1938 OK 264, 78 P.2d 388 (syllabus by the Court).

The conduct of the officials Farley seeks to enjoin must be acts which upon their performance will cause irreparable injury to legal rights of Farley which are cognizable in equity.[158] In *Independent School Dist. No. 9 of Tulsa Cnty. v.Glass*,[159] we explained allegations of injury necessary to show standing for equitable relief could be challenged by a motion to dismiss which did not test the merits of the elements of proof necessary to obtain injunctive relief.

> Before a litigant possesses standing as a proper party to seek injunctive relief, it must be alleged that: the challenged action has caused him/her injury in fact; the relief sought would remedy the injury; and, the interest sought to be protected is within the zone of interest to be protected or regulated by the statute in question. For purposes of ruling on a motion to dismiss for lack of standing, the trial court and the reviewing court must construe the petition in favor of the complaining party. It is not necessary to decide whether a litigant will ultimately be entitled to any relief in order to hold that the party has standing to seek judicial redress for his/her grievance. The proper inquiry concerning standing is whether the plaintiff has in fact suffered injury to a legally protected interest as contemplated by statutory or constitutional provisions. If he has not, standing does not exist, and the case must be dismissed. If standing exists, the case must proceed on the merits.

Glass, 639 P.2d at 1237 (note omitted).

The nature of a plaintiff's injury is one of the elements for proof necessary to obtain an injunction and also a standing requirement which may be challenged at the pleading stage. When testing the sufficiency of a petition the allegations of injury must state an infringement upon a legal interest possessed by the plaintiff and the threat of infringement must not be speculative or hypothetical. *Glass, supra.*

¶64 When a legal proceeding is brought for injunctive relief because of a public official's failure to comply with law, then *the plaintiff must possess a legal interest or cause of action arising from this failure personal to the plaintiff* and apart from the public generally, unless the legislature has expressly authorized the equitable remedy, such as an injunction to restrain an illegal tax and the plaintiff possesses standing as a taxpayer.[160] We have explained this rule in various ways. For example: (1) The Court has never approved of a general class of non-Hohfeldian[161] private parties who may bring

public actions for the vindication of public rights and the correction of purely public wrongs of whatever nature;[162] (2) The plaintiff must possess a cause of action, a cognizable legal injury, at the time of the suit and this injury must be of such nature it warrants a remedy in equity;[163] and (3) Equity may be used to restrain public officials from threatened acts which are ultra vires and beyond the scope of their authority, or acts which are unlawful, when the acts of the official *would cause irreparable injury or destroy rights of the complainant* cognizable in equity.[164]

¶65 Farley's request for an injunction is based upon an allegation that the City has the proper policy of following NFPA standards, but is imperfectly implementing those standards with insufficient training for firemen required to rescue people from swift flowing flood waters. She alleges she needs an injunction to ensure she, as a citizen, will be rescued in a future flash flood. She does not allege any citizens of the City have suffered an injury because of this inadequate training. She alleges her husband, a fireman, died as a result of inadequate training before the City started training for rescues during flash floods. Farley is not a fireman receiving this allegedly inadequate training.

¶66 Farley's petition alleges flash flooding occurred at a certain location where her husband died. While she alleges her residence is "in a flood plain" she makes no allegations she has been in a flash flood and needed a swift water rescue. Her allegation that an injunction is necessary to protect the citizens of the City does not show an actual or threatened injury which will occur with a reasonable probability, but is in the nature of an alleged "public wrong" to the population in a general sense. We agree with the District Court that Farley failed to show standing to seek an injunction.

V. Conclusion

¶67 Plaintiff, a surviving spouse, successfully obtained a death benefits award in the Workers' Compensation Commission. She then brought a District Court action for damages alleging the death of her spouse was caused by negligence and an intentional tort committed by her spouse's employer who is a local government entity. She argued her action was also for the benefit of her surviving child, as well as the surviving parents and brother of the deceased. We conclude: (1) A tort action seeking damages for a surviving spouse, surviving child, and parents of a deceased adult child does not survive in a 12 O.S. § 1053 wrongful death action when (a) an exclusive worker's compensation remedy for survivors is substituted for a wrongful death action, and (b) the decedent's employer possesses governmental tort claim sovereign immunity barring a tort action for damages at the time of decedent's death; (2) The brother of the deceased did not possess a section 1053 claim for loss of companionship; and (3) Plaintiff lacked standing to seek injunctive relief.

¶68 The wrongful death injury was adjudicated and compensated by a successful workers' compensation claim after the death of the decedent. This successful adjudication demonstrates the decedent's injury was exclusively before the Commission and not cognizable as a District Court claim at the time of decdent's death. The parents' claim for loss of companionship damages was extinguished at the time of decedent's death and did not survive. We affirm the District Court's dismissal of the petition with prejudice.

¶69 CONCUR: GURICH, C.J., DARBY, V.C.J., KAUGER, WINCHESTER, EDMONDSON, KANE, and ROWE, JJ.

¶70 DISSENT: COLBERT, J.

¶71 DISQUALIFIED: COMBS, J.

EDMONDSON, J.

1. *See* Petition, at Count I, "negligence," and Count II "wrongful death", citing 12 O.S. § 1053.

2. Petition, at ¶ 44.

3. *Gaasch, Estate of Gaasch v. St. Paul Fire and Marine Insurance Company*, 2018 OK 12, ¶ 18, 412 P.3d 1151, 1156 ("This single recovery by a plaintiff has been historically recognized by the Legislature in statute, and our Court has explained that an employer and insurance carrier have been protected from a claimant obtaining a 'double recovery' for the same injury.").

4. 51 O.S. § 155 (14): "The state or a political subdivision shall not be liable if a loss or claim results from: . . . 14. Any loss to any person covered by any workers' compensation act or any employer's liability act;"

5. 51 O.S. § 155 (6): "The state or a political subdivision shall not be liable if a loss or claim results from: . . . (6). Civil disobedience, riot, insurrection or rebellion or the failure to provide, or the method of providing, police, law enforcement or fire protection;"

6. 11 O.S.2011 t 29-108:

> "A municipal fire department answering any fire alarms or performing fire prevention services or rescue, resuscitation, first aid, inspection or any other official work outside the corporate limits of its municipality shall be considered an agent of the State of Oklahoma, and acting solely and alone in a governmental capacity. Said municipality shall not be liable in damages for any act of commission, omission, or negligence while answering or returning from any fire or reported fire or doing or performing any fire prevention work or rescue, resuscitation, first aid, inspection or any other official work."

7. 51 O.S. § 155 (5): "The state or a political subdivision shall not be liable if a loss or claim results from: . . .(5). Performance of or the failure

to exercise or perform any act or service which is in the discretion of the state or political subdivision or its employees;"

8. 51 O.S. § 155 (4): "The state or a political subdivision shall not be liable if a loss or claim results from: . . .(4). Adoption or enforcement of or failure to adopt or enforce a law, whether valid or invalid, including, but not limited to, any statute, charter provision, ordinance, resolution, rule, regulation or written policy;"

9. 85A O.S.Supp.2014 § 47 (C)(1) provides in part: ("Beneficiaries-Amounts. If an Injury or occupational illness causes death, weekly income benefits shall be payable as follows: (1) If there is a surviving spouse, a lump-sum payment of One Hundred Thousand Dollars ($100,000.00) and seventy percent (70%) of the lesser of the deceased employee's average weekly wage and the state average weekly wage.....").

10. 85A O.S.Supp.2014 § 47 (C)(2) (provides the formula for compensating a surviving minor child when there is also a surviving spouse).

11. 85A O.S.Supp.2014 § 47 (C)(5) ("The employer shall pay the actual funeral expenses, not exceeding the sum of Ten Thousand Dollars ($10,000.00)").

12. *Osage Nation v. Bd. of Commr's of Osage Cnty.*, 2017 OK 34, ¶ 4, 394 P.3d 1224, 1229.

13. The City relied on two federal court opinions: *VanZandt v. Oklahoma, ex rel. Oklahoma Dept. of Human Services*, 2006 WL 3361553 (W.D. Okla. 2006), (unpublished) and T*al v. Hogan*, 453 F.3d. 1244 (10th Cir.2006).

14. *Young v. Station 27, Inc.*, 2017 OK 68, n. 10, 404 P.3d 829.

15. *Kaspersky Lab, Inc., United States Department of Homeland Security,* 909 F.3d 446, 464 (D.C.Cir. 2018) citing *Hurd v. District of Columbia,* 864 F.3d 671, 686 (D.C. Cir. 2017) and Federal Rules of Evidence, Rule 201(b).

16. 12 O.S. 2011 § 2202:

> A. This section governs only judicial notice of adjudicative facts.
> B. A judicially noticed adjudicative fact shall not be subject to reasonable dispute in that it is either:
> 1. Generally known within the territorial jurisdiction of the trial court; or
> 2. Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
> C. A court may take judicial notice, whether requested or not.
> D. A court shall take judicial notice if requested by a party and supplied with the necessary information.
> E. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

17. *O'Toole v. Northrop Grumman Corp.*, 499 F.3d 1218, 1224 (10th Cir. 2007) ("Federal Rule of Evidence 201(b) states: 'A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.'").

18. *O'Toole v. Northrop Grumman Corp.*, 499 F.3d at 1224-1225.

19. *U.S. v. Iverson*, 818 F.3d 1015, 1022-1023 (10th Cir. 2016) (government records, statements, and reports are continually being placed on the internet to allow easy access to the general public). *See also Bentley v. United of Omaha Life Insurance Company*, 371 F.Supp.3d 723, 727 (C.D.Cal.2019); *Harris v. Cnty. of Orange*, 682 F.3d 1126, 1132 (9th Cir. 2012) (noting that a court may take judicial notice of "undisputed matters of public record"); *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746, n.6 (9th Cir. 2006) (taking judicial notice of pleadings, memoranda, and other court filings).

20. *Fornalik v. Perryman*, 223 F.3d 523, 529 (7th Cir. 2000) (discussing a court taking judicial notice of (1) official Immigration and Naturalization Service actions and Board of Immigration Appeals, (2) agency factfinding, and (3) agency and judicial decisions).

21. *Northstar Fin. Advisors Inc. v. Schwab Investments*, 779 F.3d 1036, 1042 (9th Cir.) *cert. denied,* ___ U.S. ___, 136 S.Ct. 240, 193 L.Ed.2d 133 (2015) (on a motion to dismiss, courts are allowed to consider matters of public record); *Gee v. Pacheco,* 627 F.3d 1178, 1186 (10th Cir. 2010). *See also Coto Settlement v. Eisenberg,* 593 F.3d 1031, 1038 (9th Cir. 2010) (court may consider on a motion to dismiss matters of public record).

22. *Day v. Moscow*, 955 F.2d 807, 811 (2d Cir. 1992) (court may take judicial notice of its records for the purpose of a *res judicata* defense raised by a motion to dismiss without requiring defendant to raise defense by answer); *Tal v. Hogan,* 453 F.3d 1244, 1264 n.24 (10th Cir. 2006) (facts subject to judicial notice may be considered in a Rule 12(b)(6) motion without converting the motion to summary judgment).

23. *Feightner v. Bank of Oklahoma, N.A.*, 2003 OK 20, ¶ 3, 65 P.3d 624, 627 (application of preclusion doctrine may present either a question of law or a mixed question of law and fact depending upon the circumstances).

24. 2012 OK 2, 270 P.3d 155.

25. 11 O.S.2011 § 29-108:

> A municipal fire department answering any fire alarms or performing fire prevention services or rescue, resuscitation, first aid, inspection or any other official work outside the corporate limits of its municipality shall be considered an agent of the State of Oklahoma, and acting solely and alone in a governmental capacity. Said municipality shall not be liable in damages for any act of commission, omission, or negligence while answering or returning from any fire or reported fire or doing or performing any fire prevention work or rescue, resuscitation, first aid, inspection or any other official work.

26. *Shockey v. City of Oklahoma City,* 1981 OK 94, 632 P.2d 406, 408 (discussing (1) the "general rule" prior to adoption of the Oklahoma Tort Claims Act which characterized the operation and maintenance of a municipal fire department as an exercise of a governmental function resulting in immunity from tort liability, and (2) the enactment of 11 O.S. § 29-108 was a codification of the general rule).

27. *State of Oklahoma ex rel. State Insurance Fund v. JOA, Inc.*, 2003 OK 82, n. 5, 78 P.3d 534, 536.

28. *See, e.g., Grisham v. City of Oklahoma City,* 2017 OK 69, ¶ 7, 404 P.3d 843, 846-847 (a notice requirement in the OGTCA is a "mandatory prerequisite jurisdictional requirement to filing a tort claim for damages").

29. *I.T.K. v. Mounds Public Schools,* 2019 OK 59, ¶¶ 19-24, 451 P.3d 125, 135-137.

30. *See, e.g., Lassiter v. City of Moore*, 1990 OK CIV APP 76, 802 P.2d 1292, 1293 (notice and filing provisions of Oklahoma Governmental Tort Claims Act are essential to the establishment to a cause of action and absent compliance therewith sovereign immunity applies and the action would fail to state a claim upon which relief can be granted pursuant to § 2012(B)(6)) (published by order of the Court of Civil Appeals).

31. *See, e.g., Chandler v. Denton*, 1987 OK 109, 747 P.2d 938, 942-943 (jurisdictional facts show the matter involved in the suit constitute a subject matter within the jurisdiction of the court); *Abraham v. Homer,* 1924 OK 393, 226 P. 45, 47-48 (1924) (quasi jurisdictional facts show non-jurisdictional conditions precedent to the right to proceed after the court has acquired jurisdiction, but a quasi jurisdictional fact which shows compliance with a mandatory requirement may become a jurisdictional fact necessary to the third element of jurisdiction, jurisdiction to render the particular judgment).

32. *Young v. Station 27, Inc.*, 2017 OK 68, ¶ 8, 404 P.3d 829, 834.

33. *Cates v. Integris Health, Inc.*, 2018 OK 9, ¶ 7, 412 P.3d 98, 101-102 (*de novo* appellate review of a District court's decision granting a motion to dismiss includes testing the law that governs the claim, and if judicial relief is possible under any set of facts that can be gleaned from the petition, then the motion to dismiss should be denied).

34. *Tal v. Hogan*, 453 F.3d 1244, n. 24, 1264 (10th Cir. 2006).

35. Record on Accelerated Appeal, No. 115,400, Tab 7, Tr. at pg. 3 (hearing on motion to dismiss).

36. S*ee, e.g., McClendon v. Slater*, 1976 OK 112, 554 P.2d 774, 779 (Court noted a party made no objection to the Court taking judicial notice). *Cf. U.S. v. Rodriguez-Berrios*, 573 F.3d 55, 62-63 (1st Cir. 2009) (party could not raise on appeal the trial court erroneously took judicial notice of a document when the party failed to properly object in the trial court, and also explicitly withdrew a particular objection related to the judicial notice).

37. *Sheffer v. Buffalo Run Casino, PTE, Inc.*, 2013 OK 77, 315 P.3d 359.

38. *Roth v. Mercy Health Center, Inc.*, 2011 OK 2, ¶ 14, 246 P.3d 1079, 1085.

39. *Hines v. Bacon*, 1922 OK 176, 207 P. 93 (Syllabus by the Court); *Douglas v. Douglas*, 1936 OK 270, 56 P.2d 362 (same). *See also Askins v. British-American Oil Producing Co.*, 1949 OK 45, 203 P.2d 877, 881 ("But the finding of the trial court was a general finding in favor of defendant, and in such case we have repeatedly held that where a judgment might have been based upon either of two or more grounds, but the specific ground was not pointed out, the judgment will not be disturbed upon appeal if supported on either ground); *Maras v. Smith,* 1966 OK 231, 420 P.2d 483, 484 ("In the absence of special findings by the trial court, pursuant to timely request therefor, indicating the facts found from the evidence and the law of the case applicable thereto, the judgment of the trial court will not be reversed on appeal if it can be sustained on any ground.").

40. *See, e.g., Bredouw v. Jones,* 1966 OK 93, 431 P.2d 413, 420 (explaining the general rule of single-ground legal sufficiency in both "equity cases and law actions" does not apply when an erroneous and prejudicial instruction was considered by the jury).

41. *Hightower v. Glenn*, 1947 OK 57, 179 P.2d 127 ("Where the trial court has sustained a motion to dismiss an action and the record on appeal does not reflect the exact theory advanced and adopted by the court, the dismissal will be sustained if correct under any theory presented in this court.") (Syllabus by the Court); *City of Chandler v. Farley*, 1959 OK 20, 338 P.2d 885 (appellate motion to dismiss an appeal raising several grounds was sustained when one of the grounds had merit); *Niles v. Niles,* 1947 OK 26, 177 P.2d 89 (same).

42. *Myers v. Lashley,* 2002 OK 14, ¶ 7, 44 P.3d 553, 557 ("When supported by the record, a legally correct *nisi prius* judgment must be affirmed although it was anchored to a theory different from that on which it comes to be tested on appellate review."), citing *Akin v. Missouri Pacific R. Co.*, 1998 OK 102, ¶ 35, 977 P.2d 1040, 1054; *Bivins v. State ex rel. Oklahoma Memorial Hosp*., 1996 OK 5, ¶ 22, n. 40, 917 P.2d 456, 465, n. 40; *Matter of Estate of Maheras*, 1995 OK 40, ¶ 7, 897 P.2d 268, 272 n. 6; *Wright v. Grove Sun Newspaper Corp., Inc.*, 1994 OK 37, ¶ 18, 873 P.2d 983, 992.

43. *Osage Nation v. Bd. of Commr's of Osage Cnty*., 2017 OK 34, ¶ 17, 394 P.3d 1224, 1233 ("this appeal is prosecuted pursuant to Rule 1.36 which provides for the trial court filings to serve as the briefs on appeal"); *Shero v. Grand Sav. Bank*, 2007 OK 24, ¶ 4, 161 P.3d 298, 300 (the Supreme Court's determination of a motion for both oral argument and additional briefing is based upon the parties' briefs filed in the District Court and "the law cited therein" when the motion for appellate argument and briefing is filed in an appeal from an District Court order granting a motion to dismiss and governed by Okla. Sup. Ct. R., Rule 1.36).

44. *In re Assessment of Personal Property Taxes Against Missouri Gas Energy, etc*., 2008 OK 94, n. 85, 234 P.3d 938, 960 ("A successful party below who does not bring an appeal, counter-, or cross-appeal may, as appellee, press only those errors which, if rectified, would support the correctness of the trial court's judgment ... Such a party is restricted to the defense of the relief it was granted below.") (citation omitted).

45. *In re M.K.T*., 2016 OK 4, ¶ 88, 368 P.3d 771, 799 (appellee's legal issues in support of a District Court's judgment or decree and which are presented in an appellate answer brief are limited in scope by their application to those facts shown in the certified record on appeal).

46. 1979 OK 71, 595 P.2d 435.

47. 2003 OK 30, 66 P.3d 442.

48. 2013 OK 88, 313 P.3d 917.

49. *Holley,* 2013 OK 88, ¶ 8, 313 P.3d 917, 923-924.

50. *Hines v. Superior Court of Okmulgee County*, 1967 OK 188, 435 P.2d 149, 151 ("Under the doctrine of election of remedies there can be no bar to later litigation of the same subject matter unless two or more remedies for the same claim do in fact co-exist.") citing *Young v. Seely,* 1961 OK 302, 366 P.2d 951.

51. The common-law doctrine of election of remedies became an anachronism for District Court practice when the Oklahoma Pleading Code with its notice-pleading standard became effective in 1984. *Howell v. James*, 1991 OK 47, 818 P.2d 444, 466-448. The new notice-pleading standard did not authorize either double recovery for the same cause of action or inconsistent judgments. *Howell*, 818 P.2d at 447. *See also Great Plains Fed. Sav. And Loan Ass'n v. Dabney*, 1993 OK 4, n. 3, 846 P.2d 1088, 1094 (Opala, J., concurring and joined by Kauger, J.) (explaining same principles and citing *Howell*).

52. 1993 OK 114, 861 P.2d 295.

53. *Dyke*, 861 P.2d at 302.

54. Claim preclusion, or *res judicata* at common law, prevents a party in a second suit between the same parties, or their privies, from relitigating an adjudicated claim as well as issues of fact or law necessary to the previous final judgment on the merits, or relitigating those issues which could have been decided in the previous suit. *State ex rel. Tal v. City of Oklahoma City*, 2002 OK 97, ¶ 20, 61 P.3d 234, 245; *Wilson v. State ex. rel. State Election Bd*., 2012 OK 2, ¶ 9, 270 P.3d 155, 158. Issue preclusion, or collateral estoppel at common law, prevents relitigation of an issue in a second suit on a different claim. *Oklahoma Dept. of Public Safety v. McCrady*, 2007 OK 39, ¶ 7, 176 P.3d 1194, 1199. *See also Miller v. Miller*, 1998 OK 24, ¶¶ 22-23, 956 P.2d 887, 896 (claim preclusion and issue preclusion are distinct doctrines but often used interchangeably and imprecisely).

55. Differences in the descriptions for workers' compensation and common-law tort claims are well-known. For example, a workers' compensation claim includes (1) accidental injury, (2) occurring in the course of, and (3) arising out of, the employment with (4) statutorily-required proof of damages, and (5) statutorily determined compensation. *See*, *e.g.*, *Continental Cas. Co*., 2006 OK 36, ¶ 21, 142 P.3d 147, 152 (discussing accidental injury arising out of and in course of employment); *Texas Oklahoma Exp. v. Sorenson*, 1982 OK 113, 652 P.2d 285, 290 (differences in proof of quantum of compensatory damages for workers' compensation noted); *Hill v. American Medical Response*, 2018 OK 57, 423 P.3d 1119 (AMA Guides to the Evaluation of Permanent Impairment used for specific claims). *Compare, Brigance v. Velvet Dove Restaurant, Inc*., 1986 OK 41, 725 P.2d 300, 306 (noting well-known elements of a negligence cause of action, *i.e.*, duty, breach, causation, and damages).

56. 1933 OK 256, 21 P.2d 489.

57. A collateral attack is an attempt to avoid, defeat, evade or deny the force and effect of a final order or judgment in an incidental proceeding other than by appeal, writ of error, certiorari, or motion for new trial. *Nilsen v. Ports of Call Oil Co*., 1985 OK 104, 711 P.2d 98, 101. A direct attack is one authorized by law. *In re Hess' Estate*, 1962 OK 74, 379 P.2d 851, 853.

58. *Howard v. Duncan*, 21 P.2d at 492.

59. *Consolidated Mtr. Frt. Terminal v. Vineyard*, 1943 OK 358, 143 P.2d 610, 612.

60. *State ex rel. Dept. of Transp. v. Little*, 2004 OK 74, n. 48, 100 P.3d 707, 719.

61. 85A O.S.Supp. 2014 § 5(A) states in part: "The rights and remedies granted to an employee subject to the provisions of the Administrative Workers' Compensation Act shall be exclusive of all other rights and remedies of the employee, his legal representative, dependents, next of kin, or anyone else claiming rights to recovery on behalf of the employee against the employer, or any principal, officer, director, employee, stockholder, partner, or prime contractor of the employer on account of injury, illness, or death."

62. *Maxwell v. Sprint PCS*, 2016 OK 41, ¶ 25, 369 P.3d 1079, 1092.

63. *Robinson v. Fairview Fellowship Home for Senior Citizens, Inc*., 2016 OK 42, ¶¶ 8-9, 371 P.3d 477, 481-482.

64. *Bowling v. Blackwell Zinc Co*., 1959 OK 263, 347 P.2d 1024, 1026-1027.

65. *Stiles v. Oklahoma Tax Commission*, 1987 OK 85, nn. 5-6, 752 P.2d 800, 802 ("Whether an injury does arise out of and in the course of a claimant's employment is an issue of fact to be determined by the Workers' Compensation Court") citing *Thomas v. Keith Hensel Optical Labs,* 1982 OK 120, 653 P.2d 201; *Pearl v. Associated Milk Producers,* 1978 OK 105, 581 P.2d 894. *See Pina v. American Piping Inspection, Inc*., 2018 OK 40, ¶ 15, 419 P.3d 231, 236 (in a workers' compensation original proceeding before the Supreme Court, *a form of direct statutory review*, an order will not be vacated if the record contains substantial evidence in support of the facts upon which the order is based, and when no dispute as to facts is present the parties" have presented an issue of law); *Yzer, Inc. v. Rodr*, 2012 OK 50, ¶ 3, 280 P.3d 323, 325 (in a workers' compensation original proceeding before the Supreme Court, *a form of direct statutory review*, the Court's review of a compensation award will include an independent review of a *conclusion of law* stating an accidental injury arose out of and in the course of employment).

66. *Video Independent Theatres, Inc. v. Woodson,* 1972 OK 163, 505 P.2d 482, (Court explained principle in the context of denying a petition for a writ of prohibition seeking to stop a District Court action for damages alleging personal injury).

We need not explain in this proceeding the types of findings by the State Industrial Court/Commission which could be sufficient, or not, to bar or stay a subsequent or pending District Court action, or when the pursuit of remedy in a particular forum could be used to either bar or stay a proceeding in a different forum.

67. *Tibbetts v. Sight 'n Sound Appliance Centers, Inc*., 2003 OK 72, ¶ 18, 77 P.3d 1042, 1061 ("The preclusion doctrine is applicable whether the contested issues in the case in which it is invoked were rightly or wrongly decided.").

68. *Mullendore v. Mercy Hospital Ardmore,* 2019 OK 11, ¶ 11, 438 P.3d 358, 363 ("The law in effect at the time of the injury controls both the award of benefits and the appellate standard of review.").

69. *See Roach v. Jimmy D. Enterprises, Ltd*., 1996 OK 26, 912 P.2d 852, 854-855, quoting *Thomas v. Cumberland Operating Co*., 1977 OK 164, 569 P.2d 974, 976-977 at note 108, *infra,* and accompanying text.

70. 85A O.S.Supp.2014 § 2 (9)(a) defines a "Compensable injury" as damage or harm to the physical structure of the body, or damage or harm to prosthetic appliances, including eyeglasses, contact lenses, or hearing aids, of which the major cause is either an accident, cumulative trauma or occupational disease arising out of the course and scope of employment. Section 2(9)(a)(1) defines an accident as unintended, unanticipated, unforeseen, unplanned, and unexpected.

71. *See*, *e.g.*, *Roberts v. Barclay*, 1962 OK 38, 369 P.2d 808, 809 (worker's compensation applied only to disability or death resulting from accidental injuries, and conclusory allegations employer acted "wilfully and knowingly" without facts giving rise to such inference were insufficient to show plaintiff's fall from a scaffold was anything other than an accidental injury arising out of and in the course of employment with an exclusive worker's compensation remedy).

72. 2019 OK 45, 457 P.3d 1020.

73. 85A O.S.Supp.2014 § 3 states in part: "A. Every employer and every employee, unless otherwise specifically provided in this act, shall be subject and bound to the provisions of the Administrative

Workers' Compensation Act . . . B. This act shall apply only to claims for injuries and death based on accidents which occur on or after the effective date of this act."

74. 85A O.S.Supp.2014 § 2(9)(a) stated in part: "'Compensable injury' means damage or harm to the physical structure of the body … solely as the result of ether an accident, cumulative trauma or occupational disease arising out of the course and scope of employment...."

75. 85A O.S.Supp.2014 § 5(B)(2) (the exclusive liability pursuant to the workers' compensation statutes does not apply if the injury is the result of an intentional tort caused by the employer).

76. *Read v. Read*, 2001 OK 87, ¶ 16, 57 P.3d 561, 567-568.

77. *State ex rel. Dept. of Transportation v. Little*, 2004 OK 74, nn. 47-48, 100 P.3d 707, 718-719.

78. *H. L. Hutton & Co. v. District Court of Kay County*, 1965 OK 9, 398 P.2d 530, 534 ("This court has consistently held that a finding of fact by the State Industrial Court determining its jurisdiction, unappealed and final, is *res judicata* as to such fact, and the same question cannot be again adjudicated between the parties in any further proceeding before the State Industrial Court or in any subsequent action or proceeding in any other court.").

79. *Miller v. Miller,* 1998 OK 24, ¶ 24, 956 P.2d 887, 897.

80. *Roberts v. Barclay,* 1962 OK 38, 369 P.2d 808, 809, 811 (Workmen's Compensation Law by its terms applies only to disability or death resulting from accidental injuries; and while it may be conceded that an employee who has been wilfully injured by his or her employer has a common law action for damages, an employer's demurrer to an employee's petition in District Court should be sustained and judgment entered for employer when the petition contains only allegations of simple negligence); *Adams v. Iten Biscuit Co.*, 1917 OK 47, 162 P. 938, 945 (1915 Workmen's Compensation Law provided an employee for a injury whether occurring from the negligence of the employer or not arising out of and in the course of employment, but did not include willful or intentional injuries inflicted by the employer).

81. *Weber v. Armco, Inc.,* 1983 OK 53, 663 P.2d 1221, 1225 (The dual-capacity doctrine applied to former workers' compensation statutes stated an employer who was generally immune from tort liability might become liable to its employee as a third-party tortfeasor; if the employer possessed, in addition to its capacity as an employer, a second capacity that conferred upon the employer legal obligations independent of those imposed upon the employer as an employer.).

82. *Odom v. Penske Truck Leasing Co.*, 2018 OK 23, ¶ 14, 415 P.3d 521, 527 ("The plain language of 85A O.S.Supp.2013 § 5 unambiguously abrogates the dual-capacity doctrine with regard to employers as defined by the AWCA."); *Braitsch v. City of Tulsa,* 2018 OK 100, n. 5, 436 P.3d 14, 21 (the Administrative Workers' Compensation Act, AWCA, repealed and replaced the provisions of the Workers' Compensation Code effective February 1, 2014); *Lind v. Barnes Tag Agency, Inc.*, 2018 OK 35, n. 5, 418 P.3d 698, 706 (Wyrick, J., concurring) (dual-capacity doctrine was superseded by statute, 85 A O.S.Supp.2013 § 5(A), as recognized in *Odom*).

83. As explained herein our opinions have historically held a workers' compensation order awarding a benefit for an injury acts to preclude or bar a subsequent District Court tort action for the same injury. We have applied this concept to a plaintiff invoking a dual capacity doctrine justification for pursuing a District Court action. *Price v. Howard*, 2010 OK 26, n. 5, 236 P.3d 82, ("The dual persona doctrine does not sanction multiple recovery through two remedies for the same harm."), citing *Dyke v. Saint Francis Hosp., Inc.*, 1993 OK 114, 861 P.2d 295, 302.

84. *Weber v. Armco, Inc.*, 1983 OK 53, 663 P.2d at 1226.

85. *Weber v. Armco, Inc.*, 1983 OK 53, 663 P.2d at 1226.

86. *Crowder v. Continental Materials Co.*, 1979 OK 12, 590 P.2d 201 (the employee's remedy was pursuant to workers' compensation when various acts of negligence including a failure to provide safe place in which to work and creation of a hidden danger were alleged).

87. *Roberts v. Barclay, supra,* at notes 71 and 80, and *Adams v. Iten Biscuit Co., supra*, at note 80.

88. *Davis v. CMS Continental Natural Gas, Inc.*, 2001 OK 33, ¶¶ 6-8, 23 P.3d 288,

89. *Lind v. Barnes Tag Agency, Inc.*, 2018 OK 35, ¶ 10, 418 P.3d 698, 701 ("The trial court's grant of summary judgment in favor of BTA, as Decedent's employer, was proper pursuant to the exclusive remedy provisions of 85 O.S. Supp. 2006 § 12").

90. 12 O.S.2011 § 1051:

> In addition to the causes of action which survive at common law, causes of action for mesne profits, or for an injury to the person, or to real or personal estate, or for any deceit or fraud, shall also survive; and the action may be brought, notwithstanding the death of the person entitled or liable to the same.

91. 12 O.S.2011 § 1053:

> A. When the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, or his or her personal representative if he or she is also deceased, if the former might have maintained an action, had he or she lived, against the latter, or his or her representative, for an injury for the same act or omission. The action must be commenced within two (2) years.
>
> B. The damages recoverable in actions for wrongful death as provided in this section shall include the following: Medical and burial expenses, which shall be distributed to the person or governmental agency as defined in Section 5051.1 of Title 63 of the Oklahoma Statutes who paid these expenses, or to the decedent's estate if paid by the estate.
>
> The loss of consortium and the grief of the surviving spouse, which shall be distributed to the surviving spouse.
>
> The mental pain and anguish suffered by the decedent, which shall be distributed to the surviving spouse and children, if any, or next of kin in the same proportion as personal property of the decedent.
>
> The pecuniary loss to the survivors based upon properly admissible evidence with regard thereto including, but not limited to, the age, occupation, earning capacity, health habits, and probable duration of the decedent's life, which must inure to the exclusive benefit of the surviving spouse and children, if any, or next of kin, and shall be distributed to them according to their pecuniary loss.
>
> The grief and loss of companionship of the children and parents of the decedent, which shall be distributed to them according to their grief and loss of companionship.
>
> C. In proper cases, as provided by Section 9.1 of Title 23 of the Oklahoma Statutes, punitive or exemplary damages may also be recovered against the person proximately causing the wrongful death or the person's representative if such person is deceased. Such damages, if recovered, shall be distributed to the surviving spouse and children, if any, or next of kin in the same proportion as personal property of the decedent.
>
> D. Where the recovery is to be distributed according to a person's pecuniary loss or loss of companionship, the judge shall determine the proper division.
>
> E. The above-mentioned distributions shall be made after the payment of legal expenses and costs of the action.
>
> F. 1. The provisions of this section shall also be available for the death of an unborn child as defined in Section 1-730 of Title 63 of the Oklahoma Statutes.
>
> 2. The provisions of this subsection shall not apply to:
>
> a. acts which cause the death of an unborn child if those acts were committed during a legal abortion to which the pregnant woman consented, or
>
> b. acts which are committed pursuant to the usual and customary standards of medical practice during diagnostic testing or therapeutic treatment.
>
> 3. Under no circumstances shall the mother of the unborn child be found liable for causing the death of the unborn child unless the mother has committed a crime that caused the death of the unborn child.

92. *Deep Rock Oil Corp. v. Sheridan*, 173 F.2d 186 (10th Cir. 1949) (a 1051 action was brought by surviving spouse as administratrix of the estate alleging pain, agony, and mental suffering by deceased prior to his death, and the trial court adjudicated evidence was insufficient to show employer caused the injury; and when the second action was brought pursuant to 1053 for the benefit of spouse and children the appellate court concluded summary judgment for employer was proper due to the estoppel effect of first proceeding).

93. 12 O.S.1971 § 1053:

> When the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, or his personal representative if he is also deceased, if the former might have maintained an action had he lived, against the latter, or his representative, for an injury for the same act or omission. The action must be commenced within two years. The damages must inure to the exclusive benefit of the surviving spouse and children, if any, or next of kin; to be distributed in the same manner as personal property of the deceased.

94. *Rogers v. Worthan*, 1970 OK 22, 465 P.2d 431, 438 ("It is well settled that an action for damages for wrongful death is purely statutory, and that, in such an action, the damages are limited to the pecuniary benefits lost, through the death, by those specified in the statute… In an action by a parent for the wrongful death of a child, the loss is determined by the sums of money and the acts and services of a pecuniary value which the child probably would have contributed to the parent during the lifetime of the latter except for the wrongful death.").

95. *Gaither By and Through Chalfin v. City of Tulsa,* 1983 OK 61, 664 P.2d 1026, 1030. *Compare Shawnee Gas & Elec. Co. v. Motesenbocker,* 1913 OK 481, 138 P. 790, 793 (parent could recover damages for loss of services due to injury to the child); *Adams Hotel Co. v. Cobb*, 1899 IT 78, 53 S.W. 478 (same).

96. 1978 Okla. Sess. Laws Ch. 106, § 1 (eff. Oct. 1, 1978).

97. 1979 Okla. Sess. Laws, Ch. 235, § 1 (eff. Oct. 1, 1979).

98. 12 O.S.Supp. 1979 § 1053 (B) states in part:

> (B) The damages recoverable in actions for wrongful death as provided in this section shall include the following: . . . The loss of consortium and the grief of the surviving spouse, which shall be distributed to the surviving spouse. . . The grief and loss of companionship of the children and parents of the decedent, which shall be distributed to them according to their grief and loss of companionship.

99. 1983 OK 10, 658 P.2d 1147.

100. *Clark v. Jones*, 658 P.2d at 1149. S*ee also Superior Supply Co. Inc. v. Torres,* 1995 OK CIV APP 18, 900 P.2d 1005, 1008 (released for publication by order of the Court of Civil Appeals) (observing the Legislature amended § 1053 in 1979 by adding loss of consortium and grief of a surviving spouse and loss of companionship and grief of the children and parents of the decedent as recoverable damages).

101. 1983 OK 61, 664 P.2d 1026.

102. *Gaither,* 664 P.2d at 1030.

103. 1977 OK 164, 569 P.2d 974.

104. 12 O.S.2011 § 1055:

> In all actions hereinafter brought to recover damages for the death of an unmarried, unemancipated minor child, the damages recoverable shall include medical and burial expense, loss of anticipated services and support, loss of companionship and love of the child, destruction of parent-child relationship and loss of monies expended by parents or guardian in support, maintenance and education of such minor child, in such amount as, under all circumstances of the case, may be just.

105. *Thomas,* 569 P.2d at 977 (section 1055 was not procedural and created new substantive rights). *See also Majors v. Good,* 1992 OK 76, 832 P.2d 420 (statutory increases or restrictions on the amount of recoverable damages are changes in substantive rights that must be applied prospectively only).

106. 1996 OK 26, 912 P.2d 852.

107. *Roach*, 912 P.2d at 855-856 (explaining punitive damages were not recoverable in cases involving wrongful death of a child prior to the Legislature amending the wrongful death statutes, and the wrongful death statutes should be read together as a consistent whole).

108. *Roach*, 912 P.2d at 854-855, quoting *Thomas v. Cumberland Operating Co*., 569 P.2d at 976-977.

109. 1994 OK 79, 918 P.2d 1363.

110. *Weeks v. Cessna Aircraft Co*., 1994 OK CIV APP 171, 895 P.2d 731, 734 (approved for publication by the Supreme Court)

111. *See Ouellette v. State Farm Mut. Auto. Ins. Co*., 1994 OK 79, 918 P.2d 1363, 1366-1367, and *Murg v. Barnsdall Nursing Home*, 2005 OK 74, n. 4, 123 P.3d 11, 16, at note 122 *infra*.

112. *Gaasch, Estate of Gaasch v. St. Paul Fire and Marine Insurance Company*, 2018 OK 12, n. 11, 412 P.3d 1151 ("Oklahoma's Wrongful Death Act created a new cause of action for pecuniary losses suffered by the deceased's spouse and next of kin by reason of decedent's death."). *See also Clark v. Jones, supra,* and *Ouellette v. State Farm Mut. Auto. Ins. Co., supra*.

113. 1992 OK 114, 836 P.2d 1298.

114. 1972 OK 146, 503 P.2d 871.

115. 1967 OK 10, 424 P.2d 35.

116. 2014 OK 80, 336 P.3d 468.

117. *Boler,* 2014 OK 80, ¶ 11, 336 P.3d at 472 ("The claim is derivative only in the sense that it must not have been extinguished before death.").

118. Due to our holding we need not further analyze the scope of derivative or independent attributes for either a wrongful death action and damages or loss of consortium damages in various actions. *Compare, Laws v. Fisher,* 1973 OK 69, 513 P.2d 876, 878 (loss to husband of spousal services was based on derivative damages arising from an injury to his wife, and derivative claim was barred by wife's previous unsuccessful suit); *and* Carroll J. Miller, Annotation, *Injured Party's Release of Tortfeasor as Barring Spouse's Action for Loss of Consortium*, 29 A.L.R.4th 1200, 1201 (1984) ("more prevalent view seems to be that the loss of consortium suit is not barred as it is a separate and independent cause of action which is the property of the spouse and cannot be controlled by the injured person"); *Beaver v. Grand Prix Karting Ass'n, Inc.*, 246 F.3d 905, 911 (7th Cir. 2001) (quoting *Miller).*

119. *Gaither By and Through Chalfin v. City of Tulsa*, 1983 OK 61, 664 P.2d 1026, 1030.

120. *In re Initiative Petition No. 397, State Question No. 767*, 2014 OK 23, ¶ 9, 326 P.3d 496, 501 (The primary goal in reviewing a statute is to ascertain legislative intent, if possible, from a reading of the statutory language in its plain and ordinary meaning.); *Oklahoma City Zoological Trust v. State ex rel. Public Employees Relations Bd*., 2007 OK 21, ¶ 6, 158 P.3d 461, 464 (statutes are afforded a reasonable and sensible construction in a manner consistent with other statutes); *St. Paul Fire & Marine Ins. Co. v. Getty Oil Co.*, 1989 OK 139, 782 P.2d 915, 918 (when construing statutes we give effect to the express intention of the legislature).

121. *Rios v. Nicor Drilling,* 1983 OK 74, 665 P.2d 1183, 1186 (any common-law tort claim which decedent might have had against decedent's employer was precluded by the exclusive remedy provided by the Workers' Compensation Act, and the right of action for loss of consortium by decedent's wife was also barred). *Accord, Harrington v. Certified Systems, Inc*., 2001 OK CIV APP 53, ¶ 36, 45 P.3d 430, 436 (released for publication by order of the Court of Civil Appeals) (injured employee's exclusive remedy for the injury in question was under the Workers' Compensation Act and defendants possessed immunity from any other liability, including a claim for loss of consortium by the injured employee's wife).

122. *See*, *e.g.*, *Ouellette v. State Farm Mut. Auto. Ins. Co.,* 1994 OK 79, 918 P.2d 1363, 1366-1367 (the term "next of kin" in § 1053 includes those entitled to share in the distribution of the personal property of the deceased, and a particular party's next-of-kin status must be determined by 84 O.S. § 213); *Murg v. Barnsdall Nursing Home*, 2005 OK 74, n. 4, 123 P.3d 11, 16 (next of kin in wrongful death statutes refers to those entitled to distribution of decedent's estate); *Wallace v. State Indus. Ct.*, 1965 OK 134, 406 P.2d 488, 490 (explaining *Capitol Steel Iron Co. v. Fuller*, 1952 OK 209, 245 P.2d 1134, and Okla. Const. Art 23, § 7, and stating any provision in the Workmen's Compensation Act which modifies the provisions of 12 O.S. 1053 and 1054, except to provide an amount of compensation under the Act for death resulting from injuries suffered in employment, is void); *Stark v. Watson*, 1961 OK 17, 359 P.2d 191, 193 (to participate in the compensation award the party must not only be an heir at law of decedent as defined by the descent and distribution statutes, but also a dependent as defined by the Workmen's Compensation Act).

123. *Roberts v. Merrill*, 1963 OK 250, 386 P.2d 780, 783 (workers' compensation exclusive remedy for an employee's death is "a substituted remedy" for the wrongful death statute); *Tatum v. Tatum*, 1982 OK 62, n. 15, 736 P.2d 506, 510 (legislative power to fashion a substituted workers' compensation remedy for wrongful death is derived from the 1950 amendment to Okla. Const. Art. 23 § 7).

124. 2018 OK 12, 412 P.3d 1151.

125. 2018 OK 12, at ¶¶ 28-31, 412 P.3d at 1158-1160.

126. 2005 OK 54, 127 P.3d 572.

127. 2019 OK 45, 457 P.3d 1020.

128. *Wells,* 2019 OK 45, at ¶¶ 8, 17, 19, 23-24.

129. There are three statutory degrees of negligence in Oklahoma, slight, ordinary, and gross. *See* 25 O.S.2011 § 5 ("There are three degrees of negligence, namely, slight, ordinary and gross. The latter includes the former."); 25 O.S.2011 § 6 ("Slight negligence consists in the want of great care and diligence; ordinary negligence in the want of ordinary care and diligence; and gross negligence in the want of slight care and diligence.").

130. *Walston v. Boeing Co.*, 181 Wash.2d 391, ¶ 26, 334 P.3d 519, 525 (2014) ("The gradations of tortious conduct can best be understood as a continuum.") citing *Woodson v. Rowland*, 329 N.C. 330, 341-42, 407 S.E.2d 222 (1991) (discussing the *Restatement (Second) of Torts* § 8A & cmt. b (1965) and W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on the Law of Torts* § 8, at 35 (5th ed.1984).

131. *Andrew v. Depani-Sparkes*, 2017 OK 42, n. 19, 396 P.3d 210, discussing *Retherford v. Halliburton Co*., 1977 OK 178, 572 P.2d 966, 968-969; *Rodgers v. Higgins*, 1993 OK 45, 871 P.2d 398, 402-403.

132. *Brigance v. Velvet Dove Restaurant,* 1988 OK 68, 756 P.2d 1232, 1233-1234. *See also Hoyt v. Paul R. Miller, M.D., Inc*., 1996 OK 80, 921 P.2d 350, 355-356 (discussing the single injury rule for defining a single cause of action and how this common-law definition is applied in the context of a statute controlling contribution among tortfeasors and 12 O.S. § 832).

133. 1913 OK 481, 138 P. 790.

134. *Weavel v. U.S. Fidelity & Guar. Co*., 1992 OK CIV APP 177, 852 P.2d 783 (approved for publication by order of the Court of Civil Appeals).

135. *Weeks v. Cessna Aircraft Co.*, 1994 OK CIV APP 171, 895 P.2d 731 (approved for publication by Supreme Court) explained in *Roth v. Mercy Health Center, Inc*., 2011 OK 2, ¶¶ 15-20, 246 P.3d 1079.

136. *Abel v. Tisdale*, 1980 OK 61, 619 P.2d 608, 609-610.

137. *Carris v. John R. Thomas & Assocs., P.C.*, 1995 OK 33, 896 P.2d 522, 530, citing *Wilson v. Kane,* 1993 OK 65, 852 P.2d 717, 720, and *Restatement (Second) of Judgments* § 26 (1982) (exceptions to the General Rule Concerning Splitting [Claims] include at § 26(c):"The plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on

the subject matter jurisdiction of the courts or restrictions on their authority to entertain multiple theories or demands for multiple remedies or forms of relief in a single action, and the plaintiff desires in the second action to rely on that theory or to seek that remedy or form of relief....").

138. *Dyke v. Saint Francis Hosp., Inc.*, 1993 OK 114, 861 P.2d 295, 302 ("Under the teachings of *Pryse Monument Co. v. District Court* an employee who has two remedies for the same injury and has prosecuted one of them to conclusion (securing an award or judgment), is barred from resort to the other remedy. This rule, which in essence erects a *res judicata* bar, is applicable to compensation claimants who may also press a tort remedy.").

139. 2004 OK 5, 85 P.3d 817.

140. *Teeter,* 2004 OK 5, ¶¶ 11-14, 85 P.3d 817, 821-822 (after city made the discretionary act to create a crosswalk and painted lines for this purpose it was required to maintain the crosswalk pavement markings, but the city was not liable for the discretionary act or for its failure to install additional warning signs or devices).

141. *Gowens v. Barstow,* 2015 OK 85, ¶ 12, 364 P.3d 644, 649-650.

142. *Moran v. City of Del City,* 2003 OK 57, ¶ 6, 77 P.3d 588, 590.

143. 1994 OK 61, 875 P.2d 1147.

144. 1994 OK 61, 875 P.2d at 1148-1149.

145. 2003 OK 30, 66 P.3d 442.

146. 2003 OK 30, ¶ 13, 66 P.3d at 449.

147. *Gladstone*, 2003 OK 30, n. 9, 66 P.3d at 445, explaining *Maltsberger v. Board of County Comm'rs*, 1999 OK CIV APP 79, 987 P.2d 437 (affirming summary judgment for county in OGTCA action when postal employee suffered an injury from a collapsed bridge, and had pursued a remedy under Federal Employees Compensation Act but had failed to recover due to insufficient medical evidence).

148. *Moran v. Del City,* 2003 OK 57, 77 P.3d 588 (an "inspection power or function" exemption cannot include becoming aware of circumstances in a general sense without also bringing many types of negligence actions permitted by the OGTCA within the class of exempted claims causing a result contrary to the OGTCA).

149. *Barrios v. Haskell County Public Facilities Authority,* 2018 OK 90, ¶ 8, 432 P.3d 233, 237.

150. *Pellegrino v. State ex rel. Cameron Univ. etc.*, 2003 OK 2, ¶ 16, 63 P.3d 535, 540.

151. *Osage Nation v. Bd. of Commr's of Osage Cnty.*, 2017 OK 34, nn. 55-56, 394 P.3d 1224, 1240 citing *Peck v. State ex rel. Department of Highways,* 1960 OK 89, 350 P.2d 948, 950; *Saxon v. Macy,* 1990 OK 60, 795 P.2d 101; *Garner v. City of Tulsa,* 1982 OK 104, 651 P.2d 1325.

152. *Renewable Fuels Ass'n v. U. S. Environmental Protection Agency*, 948 F.3d 1206, 1231 (10th Cir. 2020) quoting *Spokeo, Inc. v. Robins,* 578 U.S. ___, 136 S. Ct. 1540, 1547, 194 L.Ed.2d 635 (2016).

153. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 184-185, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000), explaining *Los Angeles v. Lyons,* 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983)

154. *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 409, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013).

155. *Clapper,* 568 U.S. at 409.

156. *Clapper,* 568 U.S. at 409.

157. *Dowell v. Pletcher,* 2013 OK 50, ¶ 7, 304 P.3d 457, 460; *Sharp v. 251st Street Landfill, Inc.*, 1996 OK 109, 925 P.2d 546, 549.

158. *Stephens v. Borgman,* 1949 OK 166, 210 P.2d 176, 178.

159. 1982 OK 2, 639 P.2d 1233.

160. *Tulsa Industrial Authority v. City of Tulsa*, 2011 OK 57, ¶ 25, 270 P.3d 113, 125- 126 (discussing equitable remedy provided by 12 O.S.§ 1397). *Stevens v. Fox*, 2016 OK 106, ¶ 15, 383 P.3d 269, 275, citing *Thomas v. Henry,* 2011 OK 53, ¶ 6, 260 P.3d 1251 (In order to have taxpayer standing we have held "a taxpayer possesses standing to seek equitable relief when alleging that violation of a statute will result in illegal expenditure of public funds.").

161. A non-Hohfeldian plaintiff sues to secure judicial relief that would benefit the plaintiff as a member of the community as a whole. *Tulsa Industrial Authority v. City of Tulsa*, 2011 OK 57, n. 47, 270 P.3d 113, 126. A Hohfeldian plaintiff seeks a judicial determination that the plaintiff possesses "a right, a privilege, an immunity or a power" vis-a-vis the opposite party in litigation. *Id.*

162. *State ex rel. Okla. Bar Ass'n v. Mothershed*, 2011 OK 84, ¶ 82, 264 P.3d 1197, 1228.

163. *Powell Briscoe, Inc. v. Peters,* 1954 OK 107, 269 P.2d 787, 791, quoting *Sunray Oil Co. v. Cortez Oil Co.*, 1941 OK 77, 112 P.2d 792 ("An injunction will not issue to protect a right not in esse and which may never arise, or to restrain an act which does not give rise to a cause of action").

164. *Stephens v. Borgman*, 1949 OK 166, 210 P.2d 176, 178 (quoting a legal encyclopedia).

Bar News

OBA Member Reinstatements

The following members of the Oklahoma Bar Association suspended by Supreme Court Order have complied with the requirements for reinstatement, and notice is hereby given of such reinstatements:

Jason Lee Eliot, OBA No. 17613
9705 E. 33rd Street
Jones, OK 73049

Maria Kristina Roberts, OBA No. 18134
28390 E. 55th St. S.
Broken Arrow, OK 74014-1700

OBA Member Resignations

The following members have resigned as members of the association and notice is hereby given of such resignations:

Arlen Darrell Allison,
OBA No. 243
46 N. Turtle Rock Ct.
The Woodlands, TX 77381

Thomas D. Boettcher,
OBA No. 916
P.O. Box 1708
Norman, OK 73070-1708

Travis Morgan Dodd,
OBA No. 16827
34221 SE Ash Street
Snoqualmie, WA 98065

Rachel Ann Gessouroun,
OBA No. 32717
2901 N. Classen Blvd., Ste. 112
Oklahoma City, OK 73106-5438

Adriana Lauren Hartley,
OBA No. 32418
550 Palmer St., Ste. 102
Delta, CO 81416

Andrew Tyler Hudgens,
OBA No. 32634
1810 Brooken Hill Dr.
Fort Smith, AR 72908

Larry S. Kaplan,
OBA No. 4872
323 Woodcrest Dr.
Richardson, TX 75080-1947

Rebecca Rose Kasman,
OBA No. 31128
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Muskogee, OK 74401

Janet Susan Whitworth,
OBA No. 9581
4600 Timberidge Cir.
Norman, OK 73072

Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS
Thursday, April 16, 2020

F-2019-93 — Nehemiah Martin Hellems, Appellant, was tried by jury in Case No. CF-2018-145, in the District Court of Bryan County, with three Counts of Assault and Battery with a Dangerous Weapon, After Six Prior Felony Convictions, (Counts 1, 4 & 5); one count of Domestic Assault and Battery Resulting in Great Bodily Harm, After Six Prior Felony Convictions, (Count 2); and one count of Domestic Assault and Battery by Strangulation, After Six Prior Felony Convictions, (Count 3). The jury recommended a sentence of life imprisonment for each count. The Honorable Mark R. Campbell, District Judge, sentenced Hellems in accordance with the jury's verdicts. Judge Campbell further ordered that the sentences for all five counts run consecutively. From this judgment and sentence Nehemiah Martin Hellems has perfected his appeal. AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concur in Results; Kuehn, V.P.J., Concur in Results; Lumpkin, J., Concur; Rowland, J., Concur.

F-2019-185 — Delvin Keith Jackson, Appellant, was tried by jury for the crime of Possession of Controlled Substance (Cocaine Base) (Count 1), Felon in Possession of a Firearm, After Former Conviction of a Felony (Count 3), and Possession of Drug Paraphernalia (Count 6) in Case No. CF-2018-1378 in the District Court of Oklahoma County. The jury returned verdicts of guilty and set punishment at one year imprisonment on each of Counts 1 and 6, and eight years imprisonment on Count 3. The trial court sentenced accordingly and ordered the sentences to run consecutively with each other, awarded credit for time served, and further ordered nine months of post-imprisonment supervision. From this judgment and sentence Delvin Keith Jackson has perfected his appeal. AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs.

C-2019-806 — Petitioner Alexzander Matthew Haerich entered a plea of no contest in the District Court of McClain County to First Degree Rape (Count 1), First Degree Burglary (Count 2), and Misdemeanor Domestic Abuse (Count 3) in Case No. CF-2018-114. The Honorable Leland W. Shilling, Special Judge, accepted his plea and sentenced him in accordance with the plea agreement to twenty years imprisonment with the final ten years suspended on Count 1, ten years imprisonment on Count 2, and one year in the county jail on Count 3. Judge Shilling imposed a $50.00 fine on each of the three counts, ordered the sentences to run concurrently and awarded credit for time served. Haerich timely filed a pro se motion to withdraw his no contest plea that was denied following a hearing. Haerich appeals the denial of that motion. Petition for a Writ of Certiorari is DENIED. The district court's denial of Petitioner's motion to withdraw plea is AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs.

F-2018-997 — Tyler Jay Young, Appellant, was tried by jury for the crime of murder in the first degree - child abuse in Case No. CF-2015-1396 in the District Court of Cleveland County. The jury returned a verdict of guilty and in second stage found he committed the offense after three previous felony convictions and set punishment at life imprisonment without the possibility of parole. The trial court sentenced accordingly. From this judgment and sentence Tyler Jay Young 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.

Thursday, April 23, 2020

F-2019-160 — Appellant Mario Reyes was tried by jury and found guilty of Injuring a Public Building (Count I) (21 O.S.2011, § 349) and Prisoner Placing Bodily Fluid on Government Employee (Count II) (21 O.S.2011, § 650.9), both counts After Former Conviction of Two or More Felonies, in the District Court of Blaine County, Case No. CF-2013-48. The jury recommended as punishment imprisonment for fifteen (15) years in Count I and thirty (30) years in Count II. The trial court sentenced

accordingly, ordering the sentences to be served consecutively. It is from this judgment and sentence that Appellant appeals. Appellant's sentences were within applicable statutory range for a habitual offender with five (5) prior felony convictions. *See* 21 O.S.2011, §§ 51.1, 349, and 650.9. "This Court will not modify a sentence within the statutory range unless, considering all the facts and circumstances, it shocks the conscience." *Kelley v. State*, 2019 OK CR 25, ¶ 18, 451 P.3d 566, 572; *Pullen v. State*, 2016 OK CR 18, ¶ 16, 387 P.3d 922, 928. **DECISION:** The **JUDGMENT** and **SENTENCE** is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2020), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision. AN APPEAL FROM THE DISTRICT COURT OF BLAINE COUNTY, THE HONORABLE PAUL K. WOODWARD, DISTRICT JUDGE. Opinion by: Lumpkin, J.; Lewis, P.J.: Concur; Kuehn, V.P.J.: Concur; Hudson, J.: Concur; Rowland, J.: Concur.

M-2019-0322 — Appellant, Alberto Daniel Hernandez, was convicted following a non-jury trial in the District Court of Texas County, Case No. CM-2018-197, of Reckless Driving. The Honorable A. Clark Jett, Associate District Judge, sentenced Appellant to ten days in the Texas County Detention Center, with credit for time served. Appellant appeals from the Judgment and Sentence imposed. Judgment and Sentence AFFIRMED. Opinion by: Kuehn, V.P.J.: Lewis, P.J.: Concur; Lumpkin, J.: Concur; Hudson, J.: Concur; Rowland, J.: Concur.

F-2018-1290 — Appellant, Robert Vincent Wonsch, was tried by jury and convicted of: Counts 1, 3, 4, 9 and 12, Sexual Battery, in violation of 21 O.S.Supp.2015, § 1123(B); Count 2, Attempted Procuring of Lewd Exhibition of a Person, in violation of 21 O.S.2011, § 1021; Count 10, Kidnapping, in violation of 21 O.S.2011, § 741; Count 11, Forcible Sodomy, in violation of 21 O.S.2011, § 888; Count 13, Pattern of Criminal Offenses, in violation of 21 O.S.2011, §425; and Counts 14 and 15, Engaging in Lewdness, in violation of 21 O.S.Supp.2013, § 1029.[1] The jury recommended punishment as follows: Count 1, seven years imprisonment; Count 2, two years imprisonment; Counts 3 and 4, five years imprisonment; Count 9, five years imprisonment; Count 10, fifteen years imprisonment; Count 11, eighteen years imprisonment; Count 12, nine years imprisonment; Count 13, two years imprisonment and payment of a $5,000.00 fine; Counts 14 and 15, one year in jail and payment of a $10,000.00 fine. The trial court sentenced Appellant accordingly, but modified the fines in Counts 13 and 14 to $1,000.00 and ordered all the sentences to run consecutively to one another. Appellant was acquitted of Counts 5-8 and Count 16. **DECISION:** The **JUDGMENT** and **SENTENCE** is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2020), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision. AN APPEAL FROM THE DISTRICT COURT OF CLEVELAND COUNTY, THE HONORABLE STEVEN KESSENGER, DISTRICT JUDGE. Opinion by: Lumpkin, J.; Lewis, P.J.: Concur; Kuehn, V.P.J.: Concur in Results; Hudson, J.: Concur; Rowland, J.: Concur.

1. Appellant will have to serve 85% of his sentence on Count 11 before becoming eligible for parole consideration. 21 O.S.Supp.2015, § 13.1. Appellant was acquitted of Counts 5-8 and Count 16.

F-2018-1214 — Appellant Daniel Jay Carroll was tried and convicted by jury for the crime of Attempted First Degree Robbery, After Former Conviction of Two or More Felonies, in the District Court of Comanche County, Case No. CF-2017-856. In accordance with the jury's recommendation the trial court sentenced Appellant to 25 years imprisonment. From this judgment and sentence Daniel Jay Carroll has perfected his appeal. AFFIRMED. Opinion by: Kuehn, V.P.J.: Lewis, P.J.: Concur; Lumpkin, J.: Concur in Result; Hudson, J.: Concur in Result; Rowland, J.: Concur in Result.

F-2019-190 — Appellant James Michael Phillips was tried and convicted by jury for the crime of Robbery with a Firearm in Tulsa County District Court, Case No. CF-2015-4655. In accordance with the jury's recommendation the trial court sentenced Appellant to 23 years imprisonment and fined him $8,000. From this judgment and sentence James Michael Phillips has perfected his appeal. AFFIRMED. Opinion by: Kuehn, V.P.J.: Lewis, P.J.: Concur; Lumpkin, J.: Concur in Results; Hudson, J.: Concur in Results; Rowland, J.: Concur.

F-2019-118 — Appellant Andrew Leland Anderson was tried and convicted by jury for the crime of Count I – Assault With a Dangerous Weapon, and Count II – Larceny of Merchandise From Retailer (Misdemeanor), each after one prior felony conviction, in the District Court of Bryan County, Case No. CF-2018-16. In accordance with the jury's recommendation,

the trial court sentenced Appellant to 10 years imprisonment in Count I and fined him $20 in Count II. From this judgment and sentence Andrew Leland Anderson has perfected his appeal. AFFIRMED. Opinion by: Kuehn, V.P.J.: Lewis, P.J.: Concur; Lumpkin, J.: Concur; Hudson, J.: Concur; Rowland, J.: Concur.

F-2018-1065 — Christopher Hunt, Appellant, was tried in a non-jury trial for the crimes of Count 1, domestic abuse resulting in great bodily harm; Count 2, assault with a dangerous weapon; and Count 3, carrying a weapon, in Case No. CF-2017-2 in the District Court of Lincoln County. The Honorable Cynthia Ferrell Ashwood found Appellant guilty after former conviction of two or more felonies and sentenced him to concurrent terms of twenty years imprisonment on each of Counts 1 and 2 and thirty days in jail on Count 3. From this judgment and sentence Christopher Hunt has perfected his appeal. The Judgment and Sentence is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs in results; Hudson, J., specially concurs; Rowland, J., concurs.

Thursday, April 30, 2020

F-2019-348 — Billy Dee Williams, Appellant, was tried by jury for the crime of First Degree Murder (Count 1) and Transporting Loaded Firearm in Motor Vehicle (Count 3) in Case No. CF-2017-5484 in the District Court of Tulsa County. The jury returned verdicts of guilty and recommended as punishment life imprisonment without the possibility of parole and a $10,000.00 fine on Count 1 and six months in county jail and a $500.00 fine on Count 3. The trial court sentenced accordingly. From this judgment and sentence Billy Dee Williams has perfected his appeal. AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs in results; Hudson, J., concurs; Rowland, J., concurs.

F-2019-277 — Appellant Chris Leslie Solida was tried by jury for the crimes of Counts I and II – Assault and Battery Upon a Corrections Personnel, in Woodward County District Court Case No. CF-2016-215. In accordance with the jury's recommendation the trial court sentenced Appellant to two years imprisonment and fined him $500.00 in Count I and to three years and a $500.00 fine in Count II. The sentences were ordered to run consecutively. From this judgment and sentence Chris Leslie Solida has perfected his appeal. AFFIRMED. Opinion by: Kuehn, V.P.J.: Lewis, P.J.: concur; Lumpkin, J.: concur in results; Hudson, J.: concur; Rowland, J.: concur.

F-2019-97 — Brian Jay Shenefield, Appellant, was tried by jury for the crime of Child Abuse by Injury, After Two Previous Felony Convictions in Case No. CF-2016-6206 in the District Court of Tulsa County. The jury returned a verdict of guilty and set punishment at thirty-five years imprisonment. The trial court sentenced accordingly. From this judgment and sentence Brian Jay Shenefield has perfected his appeal. AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs in results; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs.

COURT OF CIVIL APPEALS
(Division No. 1)
Tuesday, April 14, 2020

118,142 — Derek Kretchmar, Petitioner/Appellee, v. Michelle Kretchmar, Respondent/Appellant. Appeal from the District Court of Grant County, Oklahoma. Honorable Jack Hammontree, Judge. In this proceeding to modify child support, Respondent/Appellant, Michelle Kretchmar (Mother), appeals from the district court's order modifying the child support obligation of Petitioner/Appellee, Derek Kretchmar (Father). Mother asserts the district court erred when it denied her oral request to testify at the hearing telephonically; when it refused to relate-back Father's new child support obligation to the date the motion to modify was filed; when it alternated the parties' annual tax deduction for the child; and when it computed the child support amount. After reviewing the sparse record designated by Mother, we cannot find Mother's allegations of error are reasonably supported nor can we find Mother's allegations of error are supported by the record. Accordingly, we hold the district court did not abuse its discretion when it made its evidentiary rulings and when it entered the order of modification. The district court's order is affirmed. Opinion by Bell, P.J.; Buettner, J., and Goree, J., concur.

Tuesday, April 21, 2020

117,856 — Katya L. Mitchell, Petitioner/Appellee, v. Marty L. Mitchell, Respondent/Appellant. Appeal from the District Court of Mayes County, Oklahoma. Honorable Shawn S. Taylor, Judge. Respondent/Appellant Marty L. Mitchell (Husband) appeals the denial of his motion to modify visitation. Petitioner/Appellee Katya L. Mitchell (Wife) has not filed an

answer brief and accordingly, this case proceeds on Husband's brief only. Husband argues the trial court abused its discretion in not following the child's stated preference, but no evidence of the child's preference is in the record. The record on appeal is not supportive of Husband's sole claim of error and we therefore affirm. Opinion by Buettner, J.; Bell, P.J., and Goree, J., concur.

118,318 — In Re The Marriage of Steven Ritchey, Plaintiff/Appellee, v. Marci Ritchey, now Gordon, Defendant/Appellant. Appeal from the District Court of Okmulgee County, Oklahoma. Honorable Cynthia D. Pickering, Judge. In this action for the dissolution of marriage, Respondent/Appellant, Marci L. Ritchey, now Gordon (Wife), appeals from the trial court's order denying her petition to vacate the decree of dissolution of marriage and dismissing the case. Wife alleges the decree of dissolution of marriage should be vacated under 12 O.S. 2011 §1031(3)(4) and (5), because Petitioner/Appellee, Steven E. Ritchey (Husband), obtained the decree through fraud, mistake, and Wife's incompetency. After a hearing, the trial court entered a comprehensive amended order with findings of fact and conclusions of law, denied Wife's petition and dismissed the case. We AFFIRM the district court's amended order under Supreme Court Rule 1.202(d) and (e), Oklahoma Supreme Court Rules, 12 O.S. 2011 Ch. 15, App. Opinion by Bell, P.J.; Buettner, J., and Goree, J., concur.

Tuesday, April 28, 2020

117,314 — Oklahoma Department of Human Services, Petitioner/Appellant, v. Oklahoma Merit Protection Commission, Respondent, and Hana Momic, Respondent/Appellee. Appeal from the District Court of Oklahoma County, Oklahoma. The Department of Human Services discharged Appellee from her position. Appellee appealed to the Oklahoma Merit Protection Commission. Commission reinstated Appellee to her employment, but with a demotion. It also awarded her attorney fees in the amount of $20,272.50. DHS appealed the attorney fee ruling to the district court. The district court affirmed the Commission Decision, finding it to be free from prejudicial error. We find the Commission Decision's Addendum Order awarding attorney fees to Appellee in the amount of $20,272.50 is free from prejudicial error, and the district court's order is AFFIRMED. Opinion by Goree, J.; Bell, P.J., and Buettner, J., concur.

117,551 — Howard Glaze, Plaintiff/Appellant, v. Jerry Truster, Defendant/Appellee. Appeal from the District Court of Tulsa County, Oklahoma. Plaintiff/Appellant, Howard Glaze, appeals *pro se*, the trial court's grant of summary judgment in favor of his former attorney, Jerry Truster, Defendant/Appellee. Defendant's motion for summary judgment cites legal authority and sets forth a statement of undisputed material facts tending to show he fully performed the contracted services and any loss suffered by Plaintiff was the result of an intervening, supervening cause. The asserted undisputed facts are supported by evidentiary material. For his response, Plaintiff set forth only denials unsupported by evidentiary material. We affirm the grant of summary judgment pursuant to Rule 13 of the Rules for District Courts. The judgment is AFFIRMED. Opinion by Goree, J.; Bell, P.J., and Buettner, J., concur.

(Division No. 2)
Thursday, April 16, 2020

118,120 — In the Matter of: S.F. and K.F., Alleged Deprived Children. Rebecca Font, Appellant, v. The State of Oklahoma, Appellee. Appeal from the District Court of Oklahoma County, Hon. Trevor Pemberton, Trial Judge. In this termination of parental rights proceeding, Rebecca Font (Mother) appeals from an order of the trial court terminating her parental rights to S.F. and K.F., both of whom are enrolled members of the Choctaw Nation, upon a jury verdict finding she failed to correct the conditions that led to the children's deprived adjudication. Mother asserts various procedural and evidentiary errors as a basis for reversal of the termination of parental rights order. Five of Mother's arguments have as their premise that the absence of certain findings in the adjudication order and the final order require reversal of the court's order terminating her parental rights. Other asserted errors concern jury selection, the juror forms, and the credibility of the Choctaw Nation's expert witness. Mother also asserts State failed to prove by clear and convincing evidence that she failed to meet the conditions that led to adjudication. Further, Mother contends the final order is deficient because a relevant box was not checked on the preprinted form stating evidence was presented by a qualified expert witness concerning the continued custody of the children by Mother. While we agree the absence of that finding is in error, the court made the requisite findings that the Indian

Child Welfare Act applies in this case and that by evidence beyond a reasonable doubt the continued custody of the children by Mother would likely result in serious physical or emotional harm to the children. Additionally, the trial court in fact heard testimony from a qualified expert witness as well as other child welfare workers. The final order, however, must be corrected to reflect that evidence. With the exception of the needed correction to the termination order, we conclude the procedural and evidentiary errors asserted by Mother are either harmless error or are errors without merit or support in the record. We also conclude State met the burdens of proof required by the Oklahoma Children's Code, the Oklahoma Indian Child Welfare Act, and the federal Indian Child Welfare Act regarding termination of Mother's parental rights and that the termination of those rights is in the best interests of the children. Accordingly, we affirm the order terminating Mother's parental rights, but remand the cause to the trial court to modify the order to reflect that the testimony of a qualified expert witness was presented at trial as required by 24 U.S.C. § 1912(f). AFFIRMED AND REMANDED WITH DIRECTIONS. Opinion from Court of Civil Appeals, Division II, by Barnes, P.J.; Rapp, J., and Fischer, J., concur.

Tuesday, April 21, 2020

117,427 — Donald Wells, individually as a shareholder of Eastland, Inc., and derivatively on behalf of Nominal Defendant Eastland, Inc., and James Michael Wells, individually as a shareholder of Eastland, Inc., and derivatively on behalf of Nominal Defendant Eastland, Inc., Plaintiffs/Appellants, vs. Steven Wells, individually; Daniel S. Wells, individually; Nancy Wells, individually; Anna Wells Hixon, individually; and Matthew Kent Wells, individually, Defendants/Appellees, and Eastland, Inc., Nominal Defendant/Appellee. Appeal from an Order of the District Court of Tulsa County, Hon. Rebecca Brett Nightingale, Trial Judge. Plaintiffs appeal an Order granting partial summary judgment to Defendants. Plaintiffs further appeal a post-judgment Order awarding attorney fees to Defendants. The attorney fees appeal has been consolidated with the summary judgment appeal by Order of the Oklahoma Supreme Court. Plaintiffs and Defendants are stockholders in Eastland, Inc. Plaintiffs sued claiming that Steven Wells engaged in wrongful acts as a shareholder and corporate officer. Plaintiffs further claim that the other defendants have breached their fiduciary duties by failing to take action against Steven Wells. Next, Plaintiffs allege that Steven Wells acted oppressively as a controlling shareholder and against them as minority shareholders. The trial court granted a partial summary judgment which became a final judgment after Plaintiffs dismissed remaining claims. In a following hearing, the trial court awarded attorney fees to Defendants. Defendants raised the Tainted Shares Rule as a ground for summary judgment as to the first claim. This rule provides that a purchaser of stock from a seller who participated or acquiesced in the alleged wrongdoing cannot bring a lawsuit. Plaintiffs acquired their stock from a Trust established by their father. Under the Record, there is a question of fact regarding the threshold element of acquisition of stock from the alleged wrongdoer. This question of fact precludes summary judgment on this claim. Defendants established that Plaintiffs had no evidence of any damages resulting from the claim of oppressive conduct. Summary judgment was proper as to this claim. Plaintiffs sought two amendments, which were denied. The first was to substitute a party because of the death of plaintiff Michael Wells. On remand, Plaintiffs may reassert this request and the trial court shall permit this amendment. The second requested amendment was to allege fraud. The circumstances existing when the trial court ruled show that the case had been pending for approximately two years, discovery was complete, and a trial date had been set. In addition, the motion to amend lacks any specificity regarding the alleged fraud and, likewise, any allegation to refute Defendants' claim of prejudice. When the ruling was made to deny this amendment, the trial court had a substantial reason for its decision. Plaintiffs have not demonstrated an abuse of discretion. In light of the reversal of the summary judgment, it is necessary to vacate the judgment granting Defendants their request for attorney fees. In doing so, this Court expresses no opinion regarding whether Plaintiffs or Defendants might be entitled to attorney fees and the vacating of the judgment for attorney fees is without prejudice to either party. AFFIRMED IN PART, REVERSED IN PART, VACATED 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.

Tuesday, April 28, 2020

117,027 — Susan Harriman and Frank Holdsclaw, as next of kin of Mary Holdsclaw, deceased, Plaintiffs/Appaellees, vs. Rajesh Narula, M.D., Defendant/Appellant, and Quality Health Care, LLC, dba Care Living Center, Defendant. Appeal from Order of the District Court of Oklahoma County, Hon. Aletia Haynes Timmons, Trial Judge. Defendant Naresh Narula, M.D., appeals the district court's order denying his motion to vacate a default judgment entered against him on May 22, 2012, and a judgment for damages entered against him on July 11, 2012. Narula also appeals the order overruling his motion to reconsider that ruling. Narula has repeatedly argued in the trial court and in his appellate briefing that default judgments are not favored. However, "a party petitioning for a vacation of judgment must prove more than just a general disfavor of default judgments." *Williams v. Meeker N. Dawson Nursing, LLC*, 2019 OK 80, ¶ 12, 455 P.3d 908. There was conflicting evidence at the hearing on Narula's motion to vacate. The trial judge, faced with the conflict between the Narula affidavits and the testimony of the two attorney witnesses, resolved the issues against Narula. The trial court did not abuse its discretion in denying Narula's motion to vacate the default judgment. The district court's order denying Narula's motion to vacate the default judgment and the court's denial of Narula's motion to reconsider that ruling are affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division II by Fischer, J.; Barnes, P.J., and Rapp, J., concur.

Thursday, April 30, 2020

117,243 — Ruby Aguirre, Plaintiff/Appellant, vs. M&N Dealerships, LLC, an Oklahoma Limited Liability Company dba Edmond Hyundai, Defendant/Appellee. Appeal from an Order of the District Court of Oklahoma County, Hon. Thomas Prince, Trial Judge, directing Appellant's case to arbitration. The argument presented to the district court was that Appellant signed what initially appears to be part of an arbitration agreement that was in the Purchase Agreement. The signed Purchase Agreement states that disputes shall "be resolved by neutral binding arbitration." The Purchase Agreement also states, however, that "the terms of this arbitration agreement are fully set forth in the 'Arbitration Agreement' executed by the purchaser on or about the same date as this purchase and are fully incorporated as if fully set forth herein." No referenced "Arbitration Agreement" stating any terms was executed. Therefore, a contract was agreed to in this case, but it could not be consummated because financing could not be obtained. Oklahoma administrative law specifically addresses this situation as it applies to automobile sales, and voids the agreement on the request of the consumer, setting the parties back to the original status quo as near as possible. No contractual relationship remains. We find that, under these specific circumstances, the arbitration clause does not survive the failure of the underlying contract of which it was a part. As such, the order compelling arbitration is reversed, and the matter is remanded for further proceedings. REVERSED AND REMANDED. Opinion from the Court of Civil Appeals, Division II, by Thornbrugh, J.; Reif, S.J. (sitting by designation), concurs, and Fischer, P.J., concurs in part and dissents in part.

(Division No. 3)
Thursday, April 23, 2020

117,094 — 4 Star General Contracting, Inc., Plaintiff/Appellee, v. Jason Gunnwoong Moon, Anna Moon a/k/a Anna Van Alstine, Robert Bower, and Tier 1 Contracting, LLC, Defendants/Appellants. Appeal from the District Court of Cleveland County, Oklahoma. Honorable Jeffrey Virgin, Judge. During the course of this lawsuit – a commercial business dispute between the parties – defendants moved to disqualify plaintiff's attorney because it was likely he would be called as a witness on defendants' counterclaims and because he had previously represented one of the defendants in a paternity action. The trial court denied the motion to disqualify, finding that plaintiff's attorney was not a material witness "at this time" and that the business dispute and the paternity action were not so related as to require disqualification under the applicable rules of professional conduct. Although we find the plaintiff's attorney likely violated one or more rules of professional conduct, and his lack of decorum (already sanctioned by the trial court below) is evident from the record, disqualification is not an appropriate remedy at this time. Accordingly, we affirm. Opinion by Mitchell, P.J.; Swinton, V.C.J., and Buettner, J., (sitting by designation) concur.

117,715 — Fonzie Rey Hickman f/k/a Alfonzo Rey Paredes, Sky 26 Enterprises Inc. a/k/a Allurez .Com a/k/a Allurez Diamonds & Fine Jewelry, Appeal from the District Court of

Cleveland County, Oklahoma. Honorable Lori Walkley, Judge. Plaintiff/Appellant Fonzie Rey Hickman f/k/a Alfonzo Rey Paredes (Hickman) appeals from the trial court's order sustaining the motion to compel arbitration filed by Defendant/Appellee Sky 26 Enterprises Inc. a/k/a Allurez a/k/a Allurez.com a/k/a Allurez Diamonds & Fine Jewelry (Allurez). We find the trial court erred by failing to conduct an evidentiary hearing to decide whether Hickman manifested assent to Allurez's terms and conditions, and the arbitration provision contained therein, when he purchased a diamond ring from Allurez's website. Accordingly, we REVERSE AND REMAND for further proceedings. Opinion by Mitchell, P.J.; Swinton, V.C.J., and Buettner, J., (sitting by designation) concur.

117,893 — Patrick Chesley, Plaintiff/Appellant, v. Lynne Chesley and Amy Meyer, Defendants/Appellees. Appeal from the District Court of Cleveland County, Oklahoma. Honorable Lori Walkley, Trial Judge. Plaintiff/Appellant Patrick Chesley (Husband) appeals from an order granting the motion to dismiss of Defendants/Appellees Lynne Chesley (Wife) and Amy Meyer (Meyer) (collectively Defendants) in an action to enforce a decree of divorce between Husband and Wife, a breach of oral contract claim concerning the property at issue, and an intentional breach of contract claim against Meyer as Wife's representative. The court found that the divorce court retained jurisdiction over the matter; that the statute of limitations had run on the breach of oral contract claim; and that Meyer was Wife's agent and therefore was not a proper defendant. We agree with the trial court and affirm. Opinion by Swinton, V.C. J.; Mitchell, P.J., and Buettner, J., (sitting by designation) concur.

118,085 — Dr. Robert McIntyre, M.D., Plaintiff/Appellant, v. State of Oklahoma, ex rel. Oklahoma Department of Mental Health and Substance Abuse Services. Defendant/Appellee. Appeal from the District Court of Oklahoma County, Oklahoma. On March 9, 2020, this court issued an order seeking an explanation as to why this appeal should not be dismissed for lack of an appealable order, as it appeared from the appellate filings that defendant's counterclaim remains pending below. Each party responded, and the appellant agrees that defendant's counterclaim, which he calls "part and parcel of the Plaintiff's allegations of breach of contract," is pending and remains to be litigated in the trial court. As such, the order appealed is not a judgment or final order. 12 O.S. 2011 §681; *In re Guardianship of Berry,* 2014 OK 56, ¶34, 335 P.3d 779, 789-90. Additionally, the order was not certified as final pursuant to 12 O.S. 2011 §994(A), nor does the appellant make any claim in its response to the show cause order that the order appealed is one of the special cases of interlocutory orders that are immediately appealable under 12 O.S. 2011 §952 and §993. DISMISSED. Opinion by Mitchell, P.J.; Swinton, V.C.J., and Buettner, J., (sitting by designation) concur.

118,099 — Xerox Corporation, Plaintiff/Appellee, v. John R. Hawkins, Defendant/Appellant. Appeal from the District Court of Washington County, Oklahoma. Honorable Russell C. Vaclaw, Judge. Defendant/Appellant John Hawkins (Hawkins) appeals from an order granting summary judgment in favor of Plaintiff/Appellee Xerox Corporation (Xerox) related to overpayment of short-term disability payments. Hawkins argues that the trial court erred in finding that the evidence before the court was sufficient to grant summary judgment; that the trial court did not follow the law regarding summary judgment; and that the trial court was improperly influenced by the failure of Hawkins to file a response to the motion for summary judgment. We AFFIRM. Opinion by Swinton, V.C. J.; Mitchell, P.J., and Buettner, J., (sitting by designation) concur.

(Division No. 4)
Tuesday, April 14, 2020

118,435 — Jesse Wayne Duffield and Candy Warden, Plaintiffs/Appellants, vs. Ruby Lois Duffield, Carroll Lee Haggard, Tammy Cornell, Travis Cornell, Misty Lancaster, Sherry Steffens, Joe Lane and Kurt Lane, Defendants/Appellees. Appeal from an order of the District Court of Delaware County, Hon. Barry Denney, Trial Judge, granting Defendants' motion to dismiss for Plaintiffs' lack of standing to bring suit. Plaintiffs argue this dismissal of their constructive trust action for lack of standing is erroneous as a matter of law and that they have established standing by alleging a depletion of their inheritance by Defendants' actions which caused them injury. The question before us is whether Plaintiffs' potential inheritance from the estate of a living person is a legally protected interest to establish standing. We hold that it is not. Because Ruby Duffield is living, Plaintiffs, as potential heirs at law, have no vested legal interest in her assets or property. Even though Jesse Wayne Duffield claims he

may have had "a substantial inheritance that should have been worth hundreds of thousands of dollars," the right to that inheritance, if any, has not vested. Because Plaintiffs cannot demonstrate injury to a legally protected right, Plaintiffs lack standing, as the trial court held, and may not maintain this suit against Defendants. The trial court correctly dismissed Plaintiffs' case for lack of standing, and pursuant to our *de novo* review, we affirm. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, C.J.; Thornbrugh, P.J., and Fischer, J. (sitting by designation), concur.

Tuesday, April 21, 2020

117,152 — Dr. Elias Quintana, d/b/a Fort Gibson Investments, LLC, d/b/a Cherokee Apartments, Plaintiff/Appellee, vs. Tiffany McNeal, Defendant/ Appellant. Appeal from an Order of the District Court of Muskogee County, Hon. Weldon Stout, Trial Judge. Tiffany McNeal appeals a denial of judgment upon her counterclaim for damages following trial of a small claims action. McNeal asserts that the district court erred by denying her claim for damages under 41 O.S.2011, § 121(C), based on failure to supply essential services like heat or gas; under 41 O.S.2011, § 124(A), for unlawful entry or harassment; and under 41 O.S.2011, § 123, for wrongful removal or exclusion of premises. The district court determined McNeal violated the Landlord and Tenant Act by refusing to pay rent, without complying with the notice provisions of section 121(A). The court also references that McNeal wanted payment for repair, without complying with the Act. While the order could be clearer, its reference appears to pertain to the fact that McNeal ceased paying rent, but seeks recovery of sums paid in rent based on diminution in value of the dwelling. The district court acknowledged Landlord's obligations to supply essential services, and remedies available under section 121 (C)(3) and (3), reflecting these provisions were considered, and no damages awarded. This Court will not disturb the trial court's findings in a small claims action if there is any competent evidence tending to support them. We conclude there was competent evidence, and affirm the trial court's order. AFFIRMED.

116,228 — Acadiana Maintenance Service, Plaintiff/Appellee, vs. Kris Agrawal, Defendant/Appellant, and Amy Agrawal and Energy Production Services, LLC, Defendants. Appeal from an Order of the District Court of Beaver County, Hon. Ryan D. Reddick, Trial Judge, denying Kris Agrawal's (Agrawal) motion to reconsider the court's denial of his petition to vacate a 2015 default judgment that Agrawal claims was entered against him in a small claims action filed in 2014. The matter reaches this Court following Agrawal's emergence from an involuntary bankruptcy proceeding that was initiated in April 2016. The orders from which Agrawal has appealed were rendered void because they, as well as Agrawal's own pleadings, were filed in violation of the automatic stay of Agrawal's bankruptcy proceedings. As such, we find the record does not contain a valid order reviewable by this Court as a matter of law. The lack of an appealable order in the trial court deprives this Court of jurisdiction, and the appeal must be dismissed. APPEAL DISMISSED. Opinion from the Court of Civil Appeals, Division IV, by Thornbrugh, P.J.; Wiseman, C.J., and Rapp, J. (sitting by designation), concur.

117,632 — Emily Reed, formerly Wiesman, Petitioner/Appellant, vs. Robert Wiesman, Respondent/Appellee. Appeal from an Order of the District Court of Tulsa County, Hon. Cliff Smith, Trial Judge, granting summary judgment in favor of Robert Wiesman (Father). The trial court found that Emily Reed, formerly Wiesman's (Mother) lack of good faith in filing an "Application for Expedited Temporary Approval for Relocation" of the parties' child (Child) excused the court from taking further evidence regarding Child's best interests. Although we decline to reverse the decision that Mother's application for temporary relocation was not made in good faith, we vacate the court's order granting summary judgment and remand with instructions. We reject Father's contention that, once a court determines an application for temporary relocation pursuant to 43 O.S.2011 § 112.3(H)(2) is not made in good faith, such finding is dispositive of the relocation quest because nothing remains to be litigated. Title 43 O.S.2011 § 112.3 plainly and unambiguously places the burden on the relocating parent to show that the proposed relocation is made in good faith. If successful, then the burden shifts and the parent objecting to relocation must show that the proposed relocation is not in the child's best interest. If the parent seeking relocation is unsuccessful in demonstrating good faith, then the burden of demonstrating that relocation is in the child's best interest remains with that parent. We therefore vacate the judgment and remand with instructions to conduct a hearing on the merits of Mother's motion to relocate

made pursuant to 43 O.S.2011 § 112.3, to include Mother's burden to show the proposed relocation is made in good faith. VACATED AND REMANDED WITH INSTRUCTIONS. Opinion from the Court of Civil Appeals, Division IV, by Thornbrugh, P.J.; Reif, S.J. (sitting by designation), and Wiseman, C.J., concur.

Thursday, April 23, 2020

117,292 — Kevin Easley, individually and as representative of a class of persons similarly situated, Plaintiff/Appellee, vs. City of Norman, an Oklahoma Municipal Corporation, Defendant/Appellant. Appeal from an Order of the District Court of Cleveland County, Hon. C. Steven Kessinger, Trial Judge, granting Kevin Easley's (Easley) motion for class certification. Easley filed a petition as a putative class alleging City charged a $3.00 surcharge or convenience fee when a customer paid a utility bill, municipal fine, license, or permit with a credit or debit card by telephone or online in violation of the Oklahoma Uniform Consumer Credit Code (U3C), 14A O.S.2011, § 1-101 et seq. Easley asserted City's actions were a breach of contract and sought a declaratory judgment and injunction. The district court granted class certification. On appeal, City asserts Easley failed to establish commonality. We conclude there are common issues of fact and law. The order granting Easley's motion for class certification is therefore 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.

118,319 — In the Matter of: D.F.A.; J.R.A.; J.L.A.; and D.J.A., Alleged Deprived Children, Philena Adamson, Appellant, vs. State of Oklahoma, Appellee. Appeal from an Order of the District Court of Bryan County, Hon. Trace Sherrill, Trial Judge, terminating Philena Adamson's (Mother) parental rights to her four children (Children). We conclude State has shown by clear and convincing evidence that Mother's parental rights should be terminated pursuant to 10A O.S.2011 §§ 1-4-904(B)(5) and 1-4-904(B)(7). We see no abuse of discretion by the trial court in accepting Mother's waiver of her right to a jury trial, and find that any error in its manner of recording that waiver was harmless. We reject Mother's contention that 10A O.S.2011 § 1-4-902 is a statute of repose that would deprive the court of subject matter jurisdiction if the State fails to file a petition to terminate parental rights as directed by § 1-4-902(A). Finally, we strike from the judgment the trial court's finding that Mother's parental rights are terminated pursuant to § 1-4-904(B)(16) concerning Children's length of time in foster care. Although the court was entitled to take that factor into consideration when determining Children's best interests, the statutory section at issue was enacted after the date of State's petition to adjudicate Children as deprived, and therefore is inapplicable here. This error by the trial court, though fundamental in nature, was harmless because other grounds support termination of Mother's parental rights. Accordingly, we affirm the trial court's order terminating Mother's parental rights as modified. AFFIRMED AS MODIFIED. Opinion from the Court of Civil Appeals, Division IV, by Thornbrugh, P.J.; Wiseman, C.J., and Hixon, J., concur.

ORDERS DENYING REHEARING
(Division No. 1)
Thursday, April 23, 2020

117,919 — Billy J. Schmidt, Petitioner, vs. The Multiple Injury Trust Fund and The Workers' Compensation Commission, Respondents. Petitioner's Petition for Rehearing, filed January 30, 2020, is *DENIED*.

(Division No. 4)
Thursday, April 23, 2020

116,006 — In Re the Marriage of: Kasey L. Wiles (now Bailes), Petitioner/Appellant, vs. Leslie H. Wiles, Jr., Respondent/Appellee. Appellant's Petition for Rehearing is *DENIED*.

Monday, April 27, 2020

118,297 — Melissa Duncan, as Personal Representative of the Estate of Danny Leo Stills, deceased, Plaintiff/Appellant, vs. Scott G. Lilly, M.D., as Individual, Cardiology Clinic of Muskogee, Inc., an Oklahoma Corporation, Defendant/Appellees. Appellant's Petition for Rehearing is hereby *DENIED*.

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