THE OKLAHOMA BAR
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Court Issue

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FEATURED PRESENTER:

Jon Jacobmeier
Chief Deputy County Attorney, Pottawattamie County Attorney's Office, Council Bluffs, IA

ABOUT OUR PRESENTER:

Jon Jacobmeier has been the Chief Deputy Pottawattamie County Attorney since 2003. He graduated from Brigham Young University in 1987 and Creighton Law School in 1997. He was an assistant Pottawattamie County Attorney from 1997 to 2000 and then worked for the Richter & Wilber law firm from 2000 to 2003. Currently, Jon's primary responsibilities range from managing the office's twelve assistant county attorneys to prosecuting arsons, kidnappings and murders. Jon has tried over 50 jury trials, including 23 Class "A" (murders and kidnappings) felony trials.

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2020 OK 34

MODIFICATION OF JUDICIAL EDUCATION REQUIREMENTS FOR 2020-2021

SCAD-2020-42. May 18, 2020

ORDER

¶1 Whereas Rule 4 of the Rules for Mandatory Judicial Continuing Legal Education. (Chapter 1, App. 4-B) requires all judges and justices to obtain twelve (12) hours annually of MJCLE;

¶2 Whereas the Governor of Oklahoma declared an Emergency on March 15, 2020, and the Supreme Court and Court of Criminal Appeals entered three joint orders dealing with the COVID-19 Emergency which altered the operation of the district courts through August 1, 2020 and suspended rules and procedures from March 16, 2020 to May 18, 2020;

¶3 Whereas the emergency continues to exist and has resulted in the cancellation of the July 2020 Annual Oklahoma Judicial Conference and the June 2020 Annual Sovereignty Symposium and neither will be rescheduled. Numerous other judicial education seminars and conferences have been cancelled for 2020;

¶4 Whereas good cause exists for modifying the annual requirement and instead temporarily allowing judges two years to meet the requirements;

¶5 Whereas this Order does not affect any statutory requirement for judicial education for those judges with juvenile dockets;

¶6 IT IS THEREFORE ORDERED that effective immediately, the MJCLE requirement for the calendar years 2020 and 2021, is reduced from 12 hours per year to a combined total of 18 hours, and any or all credit may be earned in one or both years. Carry over hours from 2019 will also apply. The Administrative Office of the Court will provide judges and justices with an interim report for 2020 and a final report for 2021.

¶7 DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 18th day of May, 2020.

/s/ Noma D. Gurich
Chief Justice

ALL JUSTICES CONCUR

2020 OK 35

RE SUSPENSION OF 2020 CONTINUING EDUCATION REQUIREMENTS FOR CERTIFIED AND REGISTERED COURTROOM REPORTERS

SCAD-2020-43. May 18, 2020

ORDER

¶1 Due to the impacts of the COVID-19 pandemic, the State Board of Examiners of Certified Courtroom Interpreters has requested the Supreme Court to suspend the continuing education requirements for Registered and Certified Courtroom Interpreters for calendar year 2020. See Rule 19 of the Rules of the State Board of Examiners of Certified Courtroom Interpreters, Title 20, Chapter 23, Appendix 2.

¶2 For good cause shown, and as recommended by the Board, the Supreme Court hereby orders that the continuing education requirements applicable to Oklahoma Registered and Certified Courtroom Interpreters are suspended for the 2020 calendar year. Any approved continuing education hours that are accrued in 2020 may be carried over and counted towards the 2021 interpreter continuing education requirements.

¶3 DONE BY ORDER OF THE SUPREME COURT this 18TH day of May, 2020.

/s/ Noma D. Gurich
Chief Justice

ALL JUSTICES CONCUR

2020 OK 48

RE: Court Fund Expenditures for Civil Transcripts

No. SCAD-2020-50. June 8, 2020

ORDER

¶1 Due to ongoing budgetary constraints in the District Courts, including but not limited to those arising from the economic impacts of the COVID-19 pandemic, all Court Fund expenditures must be carefully reviewed and targeted for the most critical functions. The Supreme Court will continue to follow the long standing practice that budgeted amounts for transcripts shall only be used in indigent criminal, juvenile and matters specifically required by statute. In all other cases, other than an indigent criminal or juvenile matter, regardless of the type of hearing or method of trial (jury, nonjury, or remote), the cost of the transcript shall be borne by the parties.

¶2 No exceptions will be permitted without prior authorization from the Chief Justice for good cause shown. If the Chief Justice authorizes transcript costs to be paid by the Court Fund, the applicable transcript fee shall not exceed the amount authorized in indigent criminal cases, as set forth in this Court's administrative order, SCAD-2020-2, dated January 13, 2020 (or as such order may be amended from time to time).

¶3 This directive shall take effect on the 8th day of June, 2020.

¶4 DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 8th day of JUNE, 2020.

/s/ Noma D. Gurich
Chief Justice

ALL JUSTICES CONCUR

2020 OK 49

State of Oklahoma ex rel. Oklahoma Bar Association, Complainant, v. Haskell Doak Willis, Respondent.

Rule 6.2A. SCBD-6925. June 8, 2020

ORDER OF IMMEDIATE INTERIM SUSPENSION

¶1 On May 1, 2020, the complainant, Oklahoma Bar Association (OBA), filed a verified complaint against the respondent, Haskell Doak Willis, pursuant to Rules 6 and 7 of the Rules Governing Disciplinary Proceedings (RGDP), 5 O.S.2011, ch. 1, app. 1-A. The OBA, with the concurrence of the Professional Responsibility Commission, requests an emergency interim suspension pursuant to Rule 6.2A of the RGDP.

¶2 In support, the OBA presented a plea agreement filed in the U.S. District Court for the Eastern District of Oklahoma, Case No. CR-19-39-RAW, in which Respondent agreed to voluntarily plead guilty to Felon in Possession of a Firearm, in violation of 18 U.S.C. § 922(g). The Respondent and the United States agreed to a sentence of 12 months and one day of imprisonment, although the formal sentencing has not occurred. In addition, Respondent agreed to contact the Oklahoma Bar Association regarding the plea agreement and plea of guilty and to withdraw his status as an active member of the Oklahoma Bar Association.

¶3 According to the Complaint, Respondent failed to contact the OBA within the following month. The OBA contacted Respondent who agreed to provide a comprehensive case list regarding the status of all of his pending cases. Since then, mailings to Respondent have been returned and phone messages and e-mails have received no response. The OBA states that it is unknown how many cases are pending in Oklahoma in which Respondent is currently serving as attorney of record. The OBA further states that Respondent has not updated his roster address, has vacated the premises of his law office, and does not have an IOLTA account pursuant to Rule 1.15 ORPC.

¶4 In the Complaint, the OBA reports that 4 grievances are currently pending in the General Counsel's office of the OBA, each of which were filed by current clients of the Respondent involved in pending litigation and/or criminal matters. In each instance, Respondent has collected fees and been unresponsive to the complainant clients.

¶5 The OBA requests an emergency interim suspension under Rule 6.2A on the grounds the alleged conduct of Respondent poses an immediate threat of substantial and irreparable harm. On May 7, 2020, this Court ordered Respondent to show cause no later than May 21, 2020, why an order of immediate interim suspension should not be entered. Respondent did not respond.

¶6 Upon consideration of the OBA's Rule 6.2 verified Complaint and application for an

order of emergency interim suspension, and the evidence presented, the Court finds that Respondent's has committed conduct in violation of the Oklahoma Rules of Professional Conduct and such conduct poses an immediate threat of substantial and irreparable public harm.

¶7 IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Haskell Doak Willis is immediately suspended from the practice of law, pursuant to Rule 6.2A of the RGDP.

¶8 Inasmuch as Respondent did not file an objection under Rule 6.2A(2)(a) and (b), Haskell Doak Willis is ordered to give written notices by certified mail, within 20 days from the date of this order, to all of his clients having legal business then pending of his inability to represent them and the necessity for promptly retaining new counsel. If Haskell Doak Willis is a member of, or associated with, a law firm or professional corporation, such notice shall be given to all clients of the firm or professional corporation, which have legal business then pending with respect to which the Respondent had substantial responsibility. Haskell Doak Willis shall also file a formal withdrawal as counsel in all cases pending in any tribunal. Haskell Doak Willis must file, within 20 days from the date of this Order, an affidavit with the Commission and with the Clerk of the Supreme Court stating that he has complied with this Order, together with a list of the clients so notified and a list of all other State and Federal courts and administrative agencies before which the lawyer is admitted to practice. Proof of substantial compliance by Haskell Doak Willis with this Order shall be a condition precedent to any petition for reinstatement.

¶9 DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE on June 8, 2020.

/s/ Noma D. Gurich
Chief Justice

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

Edmondson, J., not participating./s/ Noma D. Gurich

2020 OK 50

SIGNATURE LEASING, LLC, an Oklahoma limited liability company, Plaintiff/Appellant, v. BUYER'S GROUP, LLC, an Oklahoma limited liability company; BUYER'S GROUP OPERATING COMPANY, INC., an Oklahoma corporation; and WILLIAMS and WILLIAMS MARKETING SERVICES, INC., an Oklahoma corporation, Defendants/Appellees.

No. 115,100. June 9, 2020

ON CERTIORARI TO THE COURT OF CIVIL APPEALS, DIVISION II

¶0 Plaintiff requested a declaratory judgment regarding a contract containing an arbitration clause which Plaintiff alleged that Defendants had fraudulently induced Plaintiff to sign. Defendants filed motions to dismiss and motions to compel arbitration which the district court granted. The Court of Civil Appeals reversed and remanded to the district court. We previously granted Defendants' petition for certiorari.

COURT OF CIVIL APPEALS OPINION VACATED; JUDGMENT OF DISTRICT COURT AFFIRMED.

Ryan A. Ray, Norman Wohlgemuth Chandler Jeter Barnett & Ray, P.C., Tulsa, OK, for Plaintiff/Appellant, Signature Leasing, LLC.

R. Tom Hillis and R. Kyle Alderson, Titus Hillis Reynolds Love Dickman & McCalmon, Tulsa, OK, for Defendants/Appellees, Buyer's Group, L.L.C. and Buyer's Group Operating Company, Inc.

Fred C. Cornish, Tulsa, OK, for Defendant/Appellee, Williams & Williams Marketing Services, Inc.

OPINION

DARBY, V.C.J.,

¶1 The underlying question before us is whether the district court or the arbitrator determines challenges of fraudulent inducement to the entirety of a contract which contains an arbitration clause under the Oklahoma Uniform Arbitration Act (OUAA), 12 O.S.2011, §§ 1851-1881. We answer that the arbitrator makes that determination and affirm the judgment of the district court compelling the matter to arbitration.

I. STANDARD OF REVIEW

¶2 A determination of the existence of a valid enforceable agreement to arbitrate is a question of law to be reviewed by a *de novo* standard. *Okla. Oncology & Hematology P.C. v. US Oncology,*

Inc., 2007 OK 12, ¶ 19, 160 P.3d 936, 944; *Rogers v. Dell Computer Corp.*, 2005 OK 51, ¶ 18, 138 P.3d 826, 831. An application to compel arbitration may present mixed questions of law and fact regarding the existence of an arbitration agreement. *Bruner v. Timberlane Manor Limited Partnership,* 2006 OK 90, ¶ 8, 155 P.3d 16, 20. Signature Leasing, LLC (Purchaser), did not dispute the evidence, relative to the issue now before the Court, presented by Buyer's Group, LLC, Buyer's Group Operating Company, Inc., (together "Seller"), or Williams & Williams Marketing Services, Inc. (Broker), but rather disputed the conclusion to be drawn from such evidence, making *de novo* review proper. A legal question involving statutory interpretation is also reviewed *de novo*. *Samman v. Multiple Injury Trust Fund,* 2001 OK 71, ¶ 8, 33 P.3d 302, 305; *Arrow Tool & Gauge v. Mead,* 2000 OK 86, ¶ 6, 16 P.3d 1120, 1123. Further, when reviewing a district court's dismissal of an action, we examine the issues *de novo*. *Rogers v. Quiktrip Corp.*, 2010 OK 3, ¶ 4, 230 P.3d 853, 855-56.

II. BACKGROUND

¶3 On June 5, 2012, Broker conducted an auction of the Indian Springs Country Club (Indian Springs) on behalf of Seller. Purchaser was the high bidder on the property. Immediately after the auction, Purchaser's members were presented with the "Purchase and Sale Agreement" (Agreement) which contained a provision that any controversy or claim arising out of or relating to the Agreement would be settled by binding arbitration. Purchaser alleged that its members were coerced by Broker into signing the Agreement immediately, without the opportunity for requested legal review. Purchaser alleged that following the auction, it learned of significant problems with the golf course and extensive title issues regarding the real property. Purchaser alleged it then contacted a local title company who informed Purchaser that there were too many title problems to allow transfer of marketable title to the Indian Springs property.

¶4 On June 8, 2012, Purchaser sent a letter to Broker rescinding the Agreement. On June 12, 2012, Broker, by means of a letter to Purchaser and one of Purchaser's members, formally rejected Purchaser's rescission and claimed that neither the terms of the auction nor the Agreement itself allowed for rescission. Broker further alleged that Purchaser had ample time prior to the auction to review the Agreement, that Purchaser decided to forego due diligence at its own fault and peril, and that Purchaser had no bona fide basis for breaching the Agreement. Petition Ex. C, *Signature Leasing, LLC v. Buyer's Group, LLC,* No. CJ-2013-4183 (Tulsa Cty. Dist. Ct.). Broker also alleged that the member personally had registered for the auction and had agreed to be bound to the terms and conditions of both the auction and the Agreement in his individual capacity.

III. PROCEDURAL HISTORY

¶5 On September 6, 2013, Purchaser filed a petition in Tulsa County District Court against Seller and Broker (together "Defendants"). Purchaser requested a declaratory judgment that Purchaser properly rescinded the contract, the contract is unenforceable, and that Purchaser's members do not bear personal liability regarding the Agreement. Purchaser alleged that Defendants obtained their signature on the Agreement through duress, menace, fraud, or undue influence. Further, Purchaser claimed fraudulent and negligent misrepresentation by the Defendants, and violation of title 76, section 2 of the Oklahoma statutes.[1]

¶6 On February 13, 2014, Seller filed a motion to compel arbitration, pursuant to title 12, sections 1856 and 1858, and a motion to dismiss, pursuant to title 12, section 2012(b)(6) for failure to state a claim.[2] Seller argued that the parties entered into a valid and enforceable contract and Seller has a substantive and mandatory right to arbitrate claims. Broker filed a motion to dismiss pursuant to section 2012(b)(6) on February 18, 2014 and a motion to compel arbitration on February 19, 2014. Broker adopted and incorporated Seller's motion to compel arbitration. Purchaser responded that arbitration cannot be compelled when the underlying contract is the subject of a claim of fraudulent misrepresentation.[3]

¶7 On June 6, 2016, the district court granted Defendants' motions to dismiss and motions to compel arbitration. The district court found:

> 1. Extant Oklahoma law on resolving challenges to arbitration agreements conflicts with the Federal Arbitration Act (hereinafter "FAA").
>
> 2. Federal law adheres to the "separability doctrine" under the FAA. *See Nitro-Lift Technologies, LLC v. Howard,* [568] U.S. [17, 21], 133 S.Ct. 500, 503, 184 L.Ed.2d 328 (2012) ("… and when the parties commit to arbitrate contractual disputes, it is a mainstay of the Act's substantive law that attacks

on the validity of the contract, as distinct from attacks on the validity of the arbitration clause itself, are to be resolved by the arbitrator in the first instance, not by a state or federal court.") (Quotations and citations omitted).

3. Plaintiff's allegations of fraud are to the contract as a whole, not to the arbitration clause itself. The FAA displaces Oklahoma law in this case, and mandates that the validity of the contract must be determined by the arbitrator.

4. The arbitration clause in this contract is valid on its face.

5. The matter is compelled to arbitration as (1) the FAA applies, and (2) the FAA displaces Oklahoma's rejection of the separability doctrine.

Ord. on Defs.' Mots. to Dismiss and Mots. to Compel Arb. 1-2, *Signature Leasing, LLC v. Buyer's Group, LLC,* No. CJ-2013-4183 (Tulsa Cty. Dist. Ct. June 6, 2016).

¶8 On June 20, 2016, Purchaser filed a petition in error. Purchaser argued that Defendants had waived applicability of the FAA because they did not timely raise it, the choice of law provision should control, the transaction did not involve interstate commerce and the district court erred when it determined that the FAA applied regardless of whether the transaction involved interstate commerce, and finally the district court erred when it found that the OUAA conflicts with the FAA. Purchaser noted the lack of explicit language in the district court's order regarding interstate commerce and claimed the court therefore failed to make a finding regarding that issue.

¶9 On appeal, Defendants argued that the choice of law and waiver arguments were settled by COCA in the prior appeal and thus are settled under the law of the case doctrine. Defendants further argued that they had not waived their right to compel arbitration under the FAA, that the Oklahoma choice of law provision is not controlling, and the district court properly determined that the FAA applied, therefore properly compelling arbitration. Finally, Defendants noted the distinct conflict between the FAA and Oklahoma case law as it applies to the arbitration provision in this case.

¶10 On April 9, 2019, the Court of Civil Appeals (COCA) reversed the district court's decision and remanded for an evidentiary hearing on Purchaser's contract revocation claim. COCA found that because the transaction did not involve interstate commerce and the parties agreed to be governed by Oklahoma law, Oklahoma law controls. COCA noted that the parties did not invoke the FAA in the Agreement or in the motions to compel arbitration. Finally, COCA held that the ruling from *Shaffer v. Jeffery*, 1996 OK 47, ¶ 26, 915 P.2d 910, 917, regarding determination of allegations of fraud in the inducement, does not inherently conflict with the FAA. Judge Fischer dissented, noting that due to repeal of the original Oklahoma arbitration act, *Shaffer* may no longer be good law and the OUAA mandates arbitration. Defendants filed a petition for rehearing which COCA denied.

¶11 On June 21, 2019, Defendants timely filed a petition for certiorari. Defendants argue that COCA erred in their analysis and application of United States Supreme Court precedent regarding interstate commerce and that arbitration is mandated under the FAA. Further, Defendants argue that legislative amendments to the OUAA have overturned *Shaffer* and therefore arbitration is also mandated under Oklahoma law.

¶12 On certiorari, Purchaser argues that COCA correctly determined the transaction did not involve interstate commerce. Additionally, Purchaser argues that Defendants recognized *Shaffer* as valid earlier and have waived and forfeited any right to contend otherwise for the first time now. In reply, Defendants argue that the issue of whether *Shaffer* is good law has been properly preserved and raised in the petition for certiorari. We previously granted certiorari.

IV. ANALYSIS

¶13 The underlying question before us is whether the district court or an arbitrator should determine the challenge of fraudulent inducement to the entirety of a contract which contains an arbitration clause. In 1996, we answered this question in *Shaffer*, 1996 OK 47, ¶ 26, 915 P.2d at 917. Due to subsequent legislative enactments, we are called upon to readdress the issue.

¶14 Although neither party directly raised the question of *Shaffer*'s validity earlier, both parties have argued the applicability of the OUAA and both have also applied *Shaffer* at different times throughout the proceedings. Defendants specifically based their initial motions to

compel arbitration on sections 1836 and 1838 of the OUAA. COCA also remanded the case the first time, in part, for consideration of whether *Shaffer* conflicts with federal law – bringing its validity into question for the case at hand. We therefore conclude that the issue of *Shaffer*'s validity in correlation with the OUAA was preserved in this case. Further, we have previously stated that "[i]f supported by law and evidence, the *nisi prius* judgment will be affirmed even if it was based on an incorrect theory and neither party tendered below an appropriate analysis of the applicable law." *Akin v. Mo. Pac. R.R. Co.*, 1998 OK 102, ¶ 35, 977 P.2d 1040, 1054.

¶15 In *Shaffer*, the Court considered title 15, section 802(A) of the original Oklahoma Uniform Arbitration Act, 15 O.S.2001, §§ 801-818 (Original Act), which is extremely similar to federal law.[4] We recognized that the United States Supreme Court applies the separability doctrine for challenges of fraudulent inducement to an arbitration clause arising under the FAA – separating the arbitration clause from the rest of the contract for review of the clause by a court – but that challenges of fraudulent inducement to the entirety of a contract containing an arbitration agreement are reviewed by the arbitrator. *Shaffer*, 1996 OK 47, ¶¶ 15, 18, 915 P.2d at 915, 916. We held, however, that although the Original Act contained almost identical language to the FAA, separability did not apply to the Original Act. *Id.* ¶¶ 24, 26, 915 P.2d at 917-18. We noted that in Oklahoma, if a contract is procured by fraud, unless the party reaffirms it, there is no contract. *Id.* ¶ 21, 915 P.2d at 917 (citing *Hooper v. Com. Lumber Co.*, 1959 OK 87, ¶ 12, 341 P.2d 596, 598. We also noted that a party cannot simultaneously both rescind and affirm a contract. *Shaffer*, 1996 OK 47, ¶ 25, 915 P.2d at 917 (citing *State ex. rel. Burk v. Okla. City*, 1976 OK 109, ¶ 12, 556 P.2d 591, 594. Therefore, we found that under the Original Act, the district court made the determination of fraudulent inducement regardless of whether the challenge is to the entire contract or to the arbitration clause only. *Shaffer*, 1996 OK 47, ¶ 26, 915 P.2d at 917-18.

¶16 In 2005, the Oklahoma legislature repealed the Original Act and replaced it with the new uniform arbitration act found in title 12, sections 1851-1881. 2005 Okla. Sess. Laws, ch. 364, § 7(C). The new act is also known as the Uniform Arbitration Act (OUAA) and governs all agreements to arbitrate after January 1, 2006. 12 O.S.2011, §§ 1851, 1854. Section 1880(A) of the OUAA mandates that "[i]n applying and construing the Uniform Arbitration Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it." 12 O.S.2011, § 1880.

¶17 Section 802(A) of the Original Act is identical to OUAA section 1857(A), and extremely similar to federal law.[5] When the Legislature enacted the OUAA, however, they added section 1857(C), which provides that "[a] n arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable." 12 O.S.2011, § 1857 (C). We have since recognized this change while comparing state and federal law on the issue of separability, but without opportunity to apply it. *See Rogers*, 2005 OK 51 ¶ 13 n.5, 138 P.3d at 830 n.5.[6] We do so now.

¶18 "The goal of any inquiry into the meaning of a legislative enactment is to ascertain and follow legislative intent." *Arrow Tool & Gauge*, 2000 OK 86, ¶ 15, 16 P.3d at 1125. We presume the legislative intent is expressed in the text of the statute and that the legislature "intended that which it expressed" *Id.* Amendment of a plain, unambiguous statute indicates the legislature's intention "to change or alter the law rather than to clarify it." *Video Gaming Techs., Inc. v. Tulsa Cty. Bd. of Tax Roll Corr.*, 2019 OK 84, ¶ 12, 455 P.3d 918, 921. If the earlier version of a statute has been judicially interpreted, a legislative amendment is presumed to change the existing law. *Samman*, 2001 OK 71, ¶ 13, 33 P.3d at 307. Because section 802(A) was the subject of a clear and unambiguous judicial interpretation in *Shaffer*, we hold section 1857(C)'s enactment changed the existing law.[7]

¶19 The language in section 1857, in light of its amendment after prior judicial pronouncement, mandates that determination of fraudulent inducement to the entire contract is a question for the arbitrator. Section 1857(C) makes Oklahoma's law uniform with the majority of other states in application of arbitration laws, thus following the legislative intent set out in section 1880. Section 1857(C) also makes Oklahoma's policy on separability fall in line with the United States Supreme Court's interpretation of title 9, section 2 of the Federal Arbitration Act on the issue of who determines claims of fraud in the inducement to the entirety of a contract that contains an arbitration clause.

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 87 S.Ct. 1801, 18 L. Ed. 2d 1270 (1967); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 126 S.Ct. 1204, 163 L. Ed. 2d 1038 (2006); *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 133 S. Ct. 500, 184 L. Ed. 2d 328 (2012). Because Oklahoma law mandates arbitration here, the Court need not reach the question of interstate commerce.

V. CONCLUSION

¶20 The district court properly granted Defendants' motions to compel arbitration and motions to dismiss. Therefore, the Court of Civil Appeals opinion is vacated. The district court's judgment is affirmed.

COURT OF CIVIL APPEALS OPINION VACATED; JUDGMENT OF DISTRICT COURT AFFIRMED.

Concur: Gurich, C.J., Darby, V.C.J., Kauger, Winchester, Edmondson, Colbert, Combs (by separate writing), Kane, Rowe, JJ.

1. "One who willfully deceives another, with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers." 76 O.S.2011, § 2.

2. Those provisions provide in relevant part: "an application for judicial relief under the Uniform Arbitration Act must be made by application and motion to the court and heard in the manner provided by law or rule of court for making and hearing motions." 12 O.S.2011, § 1856(A).

> A. On application and motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement:
> 1. If the refusing party does not appear or does not oppose the motion, the court shall order the parties to arbitrate; and
> 2. If the refusing party opposes the motion, the court shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate. . . .

12 O.S.2011, § 1858(A).

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . Failure to state a claim upon which relief can be granted.

12 O.S.2011, § 2012(B)(6).

3. On April 8, 2014, the district court denied the motions to dismiss and motions to compel, pending further determination of the fraud issue. Defendants filed petitions in error and the Court of Civil Appeals (COCA) reviewed the case. *Signature Leasing, LLC v. Buyer's Group, LLC*, No. 112,769 (Okla. Civ. App.) (consol. with No. 112,772). On October 20, 2015, COCA reversed the district court and remanded. On remand, COCA specifically ordered the district court:

> to hold an evidentiary hearing in order to determine whether the transaction at issue involved interstate commerce and therefore the FAA. *Rogers v. Dell Computer Corp*., 2005 OK 51, ¶¶ 15-17, 138 P.3d 826[, 830-831].
>
> Should the trial court determine the FAA applies, then it must send this case to arbitration. Under the FAA, "attacks on the validity of the contract, as distinct from attacks on the validity of the arbitration clause itself, are to be resolved 'by the arbitrator in the first instance, not by a federal or state court.[']" *Nitro-Lift Technologies, L.L.C. v. Howard*, ___ U.S. ___, 133 S. Ct. 500, 503, 184 L. Ed. 2d 328 (2012) (quoting *Preston v. Ferrer,* 552 U.S. 346, 349, 128 S. Ct. 978, 169 L. Ed. 2d 917 (2008). If, however, the trial court determines the FAA does not apply, then the trial court must determine whether Oklahoma's law that "allegations of fraud in the inducement of an agreement to arbitrate must be resolved by the court prior to either compelling arbitration or dismissing the case[," *Shaffer v. Jeffery*, 1996 OK 47, ¶ 26, 915 P.2d 910, 917,] conflicts with federal law on this issue. *See Nitro-Lift,* 133 S. Ct. at 504 ("'[W]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.'")(quoting *Marmet Health Care Center, Inc. v. Brown*, ___ U.S. ___, 132 S. Ct. 1201, 1203, 182 L. Ed. 2d 42 (2012)); *see also AT&T Mobility LLC v. Concepcion*, 565 U.S. 333, 131 S. Ct. 1740, 1747, 179 L. Ed. 2d 742). In this event, the trial court must determine whether Oklahoma's law stating that a claim for fraud in the inducement of the contract as a whole must be resolved by the trial court prior to arbitration conflicts with the FAA.

Opinion at 9-10, *Signature Leasing, LLC v. Buyer's Group, LLC*, No. 112,769 (Okla. Civ. App. Oct. 20, 2015). On March 30, 2016, the district court held an evidentiary hearing.

4. Section 802(A) provided in relevant part:

> This act shall apply to a written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties. Such agreements are valid, enforceable and irrevocable, except upon such grounds as exist at law or in equity for the revocation of any contract.

15 O.S.1991, § 802(A). Section 2 of the Federal Arbitration Act provides:

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (2018).

5. "An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract." 12 O.S.2011, § 1857(A).

6. "Under the newly enacted provisions of the OUAA, '[a]n arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.' 2005 Okla. Sess. Laws, ch. 364, § 7(C)." *Rogers,* 2005 OK 51 n.5, 138 P.3d at 830 n.5.

7. When the Legislature adopted the OUAA, they adopted a modified version of the Uniform Arbitration Act of 2000. *Sooner Builders & Invs., Inc. v. Nolan Hatcher Constr. Servs., L.L.C.*, 2007 OK 50, ¶ 22, 164 P.3d 1063, 1070. Section 1857(C) was adopted word for word as recommended by the Uniform Arbitration Act of 2000. While not binding, the comments therein reaffirm our standard rule that amendment of a judicially interpreted statute is presumed to change the law.

> The language in Section 6(c), "whether a contract containing a valid agreement to arbitrate is enforceable," is intended to follow the "separability" doctrine outlined in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co*., 388 U.S. 395 (1967). . . . A majority of States recognize some form of the separability doctrine under their state arbitration laws. . . .
>
> Other States have either limited or declined to follow the Prima Paint doctrine on separability. . . . *Shaffer v. Jeffery*, 915 P.2d 910 (Okla. 1996) (recognizing that majority of States apply the doctrine of separability but declining to follow the doctrine)….

Uniform Arbitration Act, § 6, cmt. 4 (Dec. 13, 2000) (drafted by National Con'f of Comm'nrs on Uniform State Laws) (internal citations omitted). The Oklahoma legislature chose to enact the proposed language following separability, word for word, even in light of *Shaffer* being cited as an example of a state declining to follow separability. This reinforces our rule that legislative amendments of judicially interpreted statutes are intended to amend them.

COMBS, J., with whom, Gurich, C.J. and Kauger, J., join, concurring

¶1 The majority opinion overrules our holding in *Shaffer v. Jeffery*, 1996 OK 47, 915 P.2d 910, based upon the 2005 amendments to Oklahoma's version of the Uniform Arbitration Act (UAA), 12 O.S. 2011, §§1851-1881, and the rationale in *Prima Paint Corp. v. Flood & Conklin*

Mfg. Co., 388 U.S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967).

¶2 In *Shaffer v. Jeffery*, we held that both allegations of fraud in the inducement of an arbitration agreement or fraud in the inducement of a contract which contains an arbitration agreement must be resolved by the district court first. *Shaffer*, 1996 OK 47, ¶26. We noted this deviated from *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, where the United States Supreme Court held:

> [I]f the claim is fraud in the inducement of the arbitration clause itself – an issue which goes to the 'making' of the agreement to arbitrate – the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally.

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-404 (1967).

¶3 The Oklahoma version of the UAA was amended and recodified in 2005, almost 10 years after *Shaffer*; in particular, the majority focuses on 12 O.S. 2011, §1857 of the UAA which provides:

> A. An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract.
>
> **B. If necessary, a court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.**
>
> **C. An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and <u>whether a contract containing a valid agreement to arbitrate is enforceable.</u>**
>
> D. If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue by the court, unless the court otherwise orders. (emphasis added).

The opinion notes that subsection C was added when it was recodified. It interprets this subsection to say that "determination of fraudulent inducement to the **entire contract** is a question for the arbitrator." Op., ¶19 (emphasis added). This is essentially the same thing the United States Supreme Court said in *Prima Paint Corp*. A claim attacking the enforceability of the arbitration provision itself may be challenged in court. However, a claim which attacks the existence of the contract in general, and not particularly against an arbitration agreement itself, would be for an arbitrator to decide.

¶4 The United States Supreme Court opinion, *Nitro-Lift Techs., L.L.C. v. Howar*d, supports the severability theory. 568 U.S. 17, 133 S. Ct. 500, 184 L. Ed. 2d 328 (2012). *Nitro-Lift Techs., L.L.C.* held:

> And when parties commit to arbitrate contractual disputes, it is a mainstay of the Act's substantive law that **attacks on the validity of the contract, <u>as distinct from attacks on the validity of the arbitration clause itself</u>, are to be resolved "by the arbitrator in the first instance, not by a federal or state court**." *Preston v. Ferrer,* 552 U.S. 346, 349, 128 S.Ct. 978, 169 L.Ed.2d 917 (2008); *see also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967). For these purposes, an "**arbitration provision is severable from the remainder of the contract**," *Buckeye, supra*, at 445, 126 S.Ct. 1204, and its validity **is subject to initial court determination; but the validity of the remainder of the contract (<u>if the arbitration provision is valid</u>) is for the arbitrator to decide**. (emphasis added).

Id. at 20-21. This language indicates when an arbitration agreement itself is challenged, the issue may be determined by a state court. If the court should determine the arbitration agreement is valid, the validity of the remainder of the contract is an issue for the arbitrator. However, under the UAA, an attack on the entire contract which contains an arbitration agreement, as opposed to a specific attack to the arbitration agreement itself, is to be resolved by the arbitrator in the first instance.

¶5 In the situation where a person specifically challenges the arbitration agreement, *Prima Paint Corp., Nitro-Lift Techs. L.L.C.*, and todays' majority opinion would allow the court to hear the arbitration challenge first. Should the court find the arbitration agreement invalid, the matter would proceed in the court system. Should

the court find the arbitration agreement valid, the entire proceeding would be deferred to the arbitration system.

2020 OK 52

LYNNE MILLER, ROBERT "BOB" THOMPSON, WILLIAM "BILL" NATIONS, and DICK REYNOLDS, Petitioners/ Protestants/Appellees, v. STEPHEN ELLIS, Respondent/Proponent/Appellant.

No. 118,782. June 15, 2020

MEMORANDUM OPINION

PER CURIAM:

¶1 This appeal arises from the Protest to the Legal Sufficiency and Signature Count of Referendum Petition 1920-1, Ordinance No. O-1920-24, City of Norman, Oklahoma filed by Petitioners/Protestants/Appellees Lynne Miller, Robert "Bob" Thompson, William "Bill" Nations, and Dick Reynolds (collectively, Protestants) on January 10, 2020, in Cleveland County District Court. Respondent/Proponent/Appellant Stephen Ellis (Proponent) appeals the trial court's February 27, 2020, Journal Entry of Judgment finding the gist of Referendum Petition 1920-1 (RP 1920-1) legally insufficient and ordering RP 1920-1 be stricken. The Court retained this appeal and placed it on the Fast Track Docket by order filed on May 27, 2020. The legal sufficiency of the gist of RP 1920-1 is a question of law subject to this Court's *de novo* review. *Patterson v. Sue Estell Trucking Co. Inc.*, 2004 OK 66, ¶5, 95 P.3d 1087. *See In re: Referendum Petitions No. 0405-1, 0405-2, and 0405-3*, 2007 OK CIV APP 19, ¶8, 155 P.3d 841.

¶2 RP 1920-1 seeks a referendum on Ordinance No. O-1920-24, City of Norman, Oklahoma (Ordinance). The Ordinance amends the University North Park tax increment financing district (UNP TIF) in a manner described in detail in the title of the Ordinance and in the text of RP 1920-1.[1] The gist of the petition is found at the top of the signature page and provides: "Referendum on the 2019 UNP Tax Increment Finance District Project Plan amendments."[2]

¶3 Proponent contends a different standard should be applied in determining the sufficiency of the gist of a referendum petition than is applied in determining the sufficiency of the gist of an initiative petition. The Court directly addressed and rejected that argument in *Oklahoma's Children, Our Future, Inc. v. Coburn*, 2018 OK 55, ¶13 n.7, 421 P.3d 867. Proponent further contends that even if a different standard is not applied, the gist of RP 1920-1 is sufficient based on existing precedent.

¶4 The purpose of the gist is to prevent fraud, deceit, or corruption in the initiative process. *In re: Initiative Petition No. 420, State Question No. 804*, 2020 OK 10, ¶4, 458 P.3d 1080; Coburn, 2018 OK 55 at ¶13; *In re: Initiative Petition No. 409, State Question No. 785,* 2016 OK 51, ¶3, 376 P.3d 250. In furtherance of that aim, the gist must put signatories on notice of the changes being made, and the gist must explain the proposal's effect. *In re: Initiative Petition No. 420*, 2020 OK 10 at ¶4; *Coburn*, 2018 OK 55 at ¶13; *In re: Initiative Petition No. 409*, 2016 OK 51 at ¶3. A sufficient gist must provide signatories with sufficient information to make an informed decision about the true nature of the measure. *In re: Initiative Petition No. 420*, 2020 OK 10 at ¶11; *In re: Initiative Petition No. 409,* 2016 OK 51 at ¶7. *See In re: Initiative Petition No. 384, State Question No. 731*, 2007 OK 48, ¶¶11-12, 164 P.3d 125. In satisfying these requirements, the gist need not describe policy arguments for or against the proposal and need not contain every regulatory detail so long as its outline is not incorrect. *In re: Initiative Petition No. 409*, 2016 OK 51 at ¶3; *In re: Initiative Petition No. 384*, 2007 OK 48 at ¶¶8-9; *In re: Initiative Petition No. 363, State Question No. 672*, 1996 OK 122, ¶20, 927 P.2d 558.

¶5 The gist of RP 1920-1 does not provide even an outline. It fails to provide any explanation of what the 2019 UNP Tax Increment Finance District Plan amendments are, the effect they have on existing law, and the effect on the law if the Ordinance they are contained in is rejected by voters at the polls. The gist fails to mention the Ordinance that is the target of RP 1920-1 by name. The gist does not contain even a summary of the considerably more detailed description in RP 1920-1 itself.

¶6 In *Coburn,* this Court found the gist of a referendum petition to be insufficient in part because it failed to describe two of the five taxes that would be affected by a rejection of the legislation in question, HB 1010xx. *See* 2018 OK 55 at ¶23. Similar to this matter, the gist in *Coburn* opened with a simple statement that "[t]he Proposition is to repeal House Bill 1010XX..." The gist proceeded to describe three of the five taxes that would be affected by a repeal of HB 1010XX. This Court concluded the gist was insufficient, noting:

> Potential signatories may be aware that by signing the petition and then rejecting HB 1010xx at the polls, they would be removing some tax increases. But without even a brief mention in the gist of all of the taxes they will be rejecting, they are fundamentally unable to cast an informed vote.

Id. at ¶23.

¶7 In this matter, signatories may be aware that by signing the petition and then rejecting the Ordinance they will be rejecting amendments made to the UNP Tax Increment Finance District Plan. But without even a brief mention in the gist of what those amendments are, signatories are fundamentally unable to cast an informed vote because they have no idea what effect rejection of the Ordinance at the polls will actually have on the UNP Tax Increment Finance District Plan. In none of the cases discussed by the parties has this Court found a gist to be legally sufficient which was this uninformative concerning the actual effect of the measure.

¶8 Upon our *de novo* review, the Court finds the gist of RP 1920-1 is legally insufficient. The judgment of the trial court is affirmed. Any petition for rehearing in this matter must be filed no later than June 17, 2020.

ALL JUSTICES CONCUR

PER CURIAM:

1. *See* Protest to the Legal Sufficiency and Signature Count of Referendum Petition 1920-1, Ordinance No. O-1920-24, City of Norman, Oklahoma and Brief in Support, January 10, 2020, Ex. A, Petition for Referendum, R. 28

2. *See* Protest to the Legal Sufficiency and Signature Count of Referendum Petition 192-1, Ordinance No. O-1920-24, City of Norman, Oklahoma and Brief in Support, January 10, 2020, Ex. A, Petition for Referendum, R. 57.

2020 OK 53

IN RE: Rules of the Supreme Court of the State of Oklahoma on Licensed Legal Internship (5 O.S. ch. 1 app. 6)

SCBD No. 2109. June 15, 2020

ORDER

This matter comes on before this Court upon an Application to Amend Rule 7 of the Rules of the Supreme Court of the State of Oklahoma on Licensed Legal Internship (hereinafter "Rules") filed on June 4, 2020. This Court finds that it has jurisdiction over this matter and Rule 7 is hereby amended to add new Rule 7.9 as set out in Exhibit A attached hereto, effective immediately.

DONE IN CONFERENCE this 15th day of JUNE, 2020.

/s/ Noma D. Gurich
CHIEF JUSTICE

ALL JUSTICES CONCUR

EXHIBIT "A"

RULES OF THE SUPREME COURT ON LICENSED LEGAL INTERNSHIP

RULE 7.9

Representation by the Licensed Legal Intern in administrative hearings is limited in the following manner:

(a) When the supervising attorney represents a party adverse to the state agency, the supervising attorney must be present at all stages of the administrative proceeding.

(b) When the supervising attorney represents the state agency, the Licensed Legal Intern may appear at any stage of the administrative proceeding as authorized by that agency.

2020 OK 54

Re: Suspension of 2020 Continuing Education Requirements for Certified Shorthand Reporters

SCAD-2020-52. June 15, 2020

ORDER

¶1 Due to the impacts of the COVID-19 pandemic, the State Board of Examiners of Certified Shorthand Reporters has requested the Supreme Court to suspend the continuing education requirements for Certified Shorthand Reporters for calendar year 2020. *See* 20 O.S. §1503.1.

¶2 For good cause shown, and as recommended by the Board, the Supreme Court hereby orders that the continuing education requirements applicable to Certified Shorthand Reporters are suspended for the 2020 calendar year. Any approved continuing education hours that are accrued in 2020 may be carried over and counted towards the 2021 CSR continuing education requirements.

¶3 DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 15th day of June, 2020.

/s/ Noma D. Gurich
CHIEF JUSTICE

ALL JUSTICES CONCUR

OBA EDUCATIONAL PROGRAMS DIRECTOR SUSAN DAMRON TO STEP DOWN

With eight years of tenure as the OBA Educational Programs Director under her belt, Susan Damron will be stepping down to pursue other interests as of July 1. Much of her work at the OBA has focused on developing the high-quality educational opportunities that members have come to expect from the Continuing Legal Education Department team. She joined the OBA staff May 31, 2012.

Ms. Damron came to the OBA as a former assistant attorney general with over 30 years of professional experience. Before joining the OBA, her career was primarily devoted to work involving advocacy for victims, including more than six years serving as victim services unit chief for the Oklahoma Office of Attorney General.

Ms. Damron graduated from the OCU School of Law in 1993 and became a member of the bar shortly after.

Her replacement, Janet Johnson, joined the OBA earlier this month.

NOTICE OF HEARING ON THE PETITION FOR REINSTATEMENT OF GLEN L. WORK, SCBD # 6924 TO MEMBERSHIP IN THE OKLAHOMA BAR ASSOCIATION

Notice is hereby given pursuant to Rule 11.3(b), Rules Governing Disciplinary Proceedings, 5 O.S., Ch. 1, App. 1-A, that a hearing will be held to determine if Glen L. Work should be reinstated to active membership in the Oklahoma Bar Association.

Any person desiring to be heard in opposition to or in support of the petition may appear before the Professional Responsibility Tribunal at the Oklahoma Bar Center at 1901 North Lincoln Boulevard, Oklahoma City, Oklahoma, at 9:30 a.m. on **Monday, July 20, 2020**. Any person wishing to appear should contact Gina Hendryx, General Counsel, Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, Oklahoma 73152, telephone (405) 416-7007.

PROFESSIONAL RESPONSIBILITY TRIBUNAL

2020 OK CR 11

BRENT ALLEN HAMILTON, Appellant, vs. THE STATE OF OKLAHOMA, Appellee

No. F-2019-398. June 4, 2020

SUMMARY OPINION

KUEHN, VICE PRESIDING JUDGE:

¶1 Appellant, Brent Allen Hamilton, was convicted by a jury in Canadian County District Court, Case No. CF-2017-489, of Lewd Acts with a Child Under Sixteen. On May 28, 2019, the Honorable Paul Hesse, District Judge, sentenced him to three and one-half years imprisonment, in accordance with the jury's recommendation. Appellant must serve 85% of his sentence before parole consideration. 21 O.S.Supp.2015, § 13.1(18). This appeal followed.

¶2 Appellant raises four propositions of error in support of his appeal:

> PROPOSITION I. THE TRIAL COURT COMMITTED AN ABUSE OF DISCRETION WHEN IT ALLOWED THE STATE TO REPLAY SELECTED PORTIONS OF THE DVD OF A.R.B'S FORENSIC INTERVIEW (STATE'S EXHIBIT 1, COURT'S EXHIBIT 1) DURING CLOSING ARGUMENT.
>
> PROPOSITION II. THE EVIDENCE PRODUCED BY THE STATE AT TRIAL WAS INSUFFICIENT FOR A REASONABLE JURY TO CONVICT.
>
> PROPOSITION III. THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT ALLOWED A JUROR WHO HAD FALLEN ASLEEP DURING TRIAL TO PARTICIPATE IN DELIBERATIONS.
>
> PROPOSITION IV. THE CUMULATIVE EFFECT OF THE ERROR ADDRESSED ABOVE DEPRIVED APPELLANT OF A FAIR TRIAL AND REQUIRES REVERSAL OF THE CONVICTION.

¶3 After thorough consideration of these propositions, the briefs of the parties, and the record on appeal, we affirm. Appellant was charged with inappropriate sexual conduct toward two of his step-daughters on the same evening; he was acquitted on one of the charges, and received close to the minimum sentence on the other. In Proposition I, he claims the prosecutor's replaying of selected portions of one victim's forensic interview in closing argument violated 22 O.S.2011, § 894 and *Reed v. State*, 2016 OK CR 10, 373 P.3d 118. Appellant timely objected to this procedure beforehand. We review the trial court's management of closing argument for an abuse of discretion. *Bosse v. State*, 2017 OK CR 10, ¶ 82, 400 P.3d 834, 863.

¶4 Section 894 outlines the procedure for representing testimony at the jury's request once they begin their deliberations. Unlike testimony, physical exhibits usually go to the deliberation room for the jurors' free access. While a recording of a witness's forensic interview is usually played during trial and often marked as a physical exhibit, forensic interviews are "the equivalent of recorded testimony" and thus should not automatically be provided to the jury for free access in deliberations. *Reed*, 2016 OK CR 10, ¶ 11, 373 P.3d at 122.

¶5 In its case in chief, the State presented a video recording of one victim's forensic interview to corroborate her trial testimony. Although marked as an exhibit, the recording was not provided to the jury during deliberations (and in fact they never asked to review it). In essence, Appellant asks this Court to extend *Reed* and Section 894 beyond the confines of the jury deliberation room and into open court before the case has even been submitted. Counsel have freedom in closing argument to highlight the evidence favorable to them, so long as that evidence was properly admitted at trial. *See Browning v. State*, 2006 OK CR 8, ¶ 36, 134 P.3d 816, 839; *Alverson v. State*, 1999 OK CR 21, ¶¶ 38-40, 983 P.2d 498, 513. We decline to extend *Reed*, and Section 894, to a party's use of properly admitted evidence in closing argument. Trial courts have considerable discretion in the management of courtroom proceedings, including whether and to what extent parties may display audio-visual material in closing argument.[1] Proposition I is denied.

¶6 In Proposition II, Appellant claims the victim's allegations were "inconsistent, unreliable, and uncorroborated," and cannot support his conviction. We disagree. The victim's claims were corroborated by the observations of her older sister, who not only saw Appellant lying

with the victim on her bed at the time the abuse allegedly occurred, but who made contemporaneous notes of what was happening on her phone. When the girls' mother confronted Appellant the next day with their claims, he apologized profusely and claimed he could not remember the incident. Defense counsel thoroughly cross-examined both girls about perceived inconsistencies in their ac-counts. A rational juror could find Appellant guilty, beyond a reasonable doubt, on the totality of the evidence. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Gordon v. State,* 2019 OK CR 24, ¶ 32, 451 P.3d 573, 583. Proposition II is denied.

¶7 In Proposition III, Appellant complains about a juror who may have nodded off during opening statements. The record shows that the matter was promptly brought to the court's attention. Neither party asked to have the juror removed. We therefore review only for plain error, which requires Appellant to show an actual error that is plain or obvious, and which affected his substantial rights, meaning the outcome of the trial. *Thompson v. State*, 2018 OK CR 5, ¶ 7, 419 P.3d 261, 263. There is absolutely no indication of any other problems with this juror for the rest of the trial. The trial court may certainly remove a sitting juror and substitute an alternate when good cause is shown. *Grant v. State*, 2009 OK CR 11, ¶ 33, 205 P.3d 1, 16. Here, the trial court was never asked to take such action, and the record simply does not support any basis for doing so. There was no plain error. Proposition III is denied.

¶8 In Proposition IV, Appellant claims the cumulative effect of the errors identified above warrants relief. Having found no error in the preceding claims, there is no error to accumulate. *Engles v. State*, 2015 OK CR 17, ¶ 13, 366 P.3d 311, 315. Proposition IV is therefore denied.

DECISION

¶9 The Judgment and Sentence of the District Court of Canadian County 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 CANADIAN COUNTY THE HONORABLE PAUL HESSE, DISTRICT JUDGE

ATTORNEYS AT TRIAL

Lee Berlin, Andrea Brown, Kyle Killam, 8516 E. 101st St., Ste. A, Tulsa, OK 74133, Counsel for Defendant

Eric Epplin, Asst. District Attorney, 303 N. Choctaw, El Reno, OK 73036, Counsel for the State

ATTORNEYS ON APPEAL

Andrea Brown, Swab, Stall, Horton & Fu, 2021 S. Lewis Ave., Ste. 520, Tulsa, OK 74104, Counsel for Appellant

Mike Hunter, Attorney General of Oklahoma, Amy Stuart, Asst. Attorney General, 313 N.E. 21st St., Oklahoma City, OK 73105, Counsel for Appellee

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

1. In this case, the trial court wisely asked the prosecutor to copy the particular excerpts used in closing argument, to be preserved as a Court's Exhibit for appellate review. We encourage any court which might permit such presentations to do the same. *See Glossip v. State,* 2007 OK CR 12, ¶¶ 65-75, 157 P.3d 143, 155-56.

2020 OK CR 14

JERRY LEE NEWMAN, Appellant, v. THE STATE OF OKLAHOMA, Appellee

Case No. F-2018-1178. June 4, 2020

OPINION

ROWLAND, JUDGE:

¶1 Appellant Jerry Lee Newman was tried by a jury in the District Court of Tulsa County, Case No. CF-2017-3086, for the crimes of First Degree Felony Murder – Eluding an Officer (Count 1) in violation of 21 O.S.Supp.2012, § 701.7(B); Larceny of Automobile (Count 2) in violation of 21 O.S.2011, § 1720; Obstructing an Officer (Count 3) in violation of 21 O.S.Supp. 2015, § 540; Leaving the Scene of a Fatality Collision (Count 4) in violation of 47 O.S.2011, § 10-102.1; Driving with License Suspended (Count 5) in violation of 47 O.S.Supp.2016, § 6-303(B); and Assault with a Dangerous Weapon (Count 6) in violation of 21 O.S.2011, § 645. Newman was convicted on Counts 1-5 and acquitted on Count 6. The jury assessed punishment at life in prison with the possibility of parole and a $10,000.00 fine on Count 1, twenty-three years imprisonment on Count 2, thirty years imprisonment and a $10,000.00 fine on

Count 4, and one year and a $500.00 fine on each of Counts 3 and 5. The Honorable William D. LaFortune, District Judge, presided over the trial and sentenced Newman in accordance with the jury's recommendation ordering the sentence imposed in Count 2 to run consecutive to Count 1, Count 3 to run concurrent with Count 2, Count 4 to run consecutive to Counts 1, 2, and 3, and Count 5 to run concurrent with Count 4. Newman appeals his Judgment and Sentence raising the following issues:

(1) whether there was sufficient evidence to convict him beyond a reasonable doubt of first degree felony murder-eluding an officer;

(2) whether he was denied a fair trial when the trial court erred by failing to instruct the jury on the lesser related offense of second degree felony murder;

(3) whether the trial court erred in admitting prejudicial photographs into evidence;

(4) whether the use of improper other crimes evidence deprived him of a fair trial;

(5) whether use of the crime of eluding a peace officer as the predicate felony for first degree felony murder violated the intended use of the felony murder statute;

(6) whether prosecutorial misconduct denied him his due process rights to a fair trial;

(7) whether he was denied effective assistance of counsel; and

(8) whether an accumulation of error deprived him of a fair trial.

¶2 We find relief is not required and affirm the Judgment and Sentence of the district court.

FACTS

¶3 At 5:00 a.m. on May 24, 2017, Donald Watkins, a self-employed truck driver, was sitting in his truck at Rush Peterbilt Truck Center in Sapulpa waiting for the business to open. Around 5:30 a.m., a man wearing a red hoodie and carrying a backpack walked beside his truck. After watching this man attempt to get into numerous locked vehicles on the property and into the locked building, Watkins called 911 to report the suspicious behavior.

¶4 Three Sapulpa police units responded to the 911 call, one standing by with Watkins while the other two went to different locations on the property. One of these three officers, Sapulpa Police Captain Steve Thompson, saw a large white Oklahoma Natural Gas utility truck driving toward him through the lot. The truck accelerated and drove through the fence, and Captain Thompson was forced to move his patrol car to avoid being hit.

¶5 The truck sped off the lot with at least two patrol cars giving chase with lights and sirens activated, and others from the Tulsa Police Department and the Oklahoma Highway Patrol joining the pursuit. The utility truck proceeded through Sapulpa and its outskirts for nearly half an hour, running red lights and stop signs at speeds of up to 89 mph. When the truck entered State Highway 75 driving southbound in the northbound lane, the pursuing officers pulled to the shoulder and increased the distance between them and the utility truck while trying to keep the truck in sight. They kept their lights and sirens activated to warn the cars on the highway to yield or slow down while others attempted to catch up with the utility truck by driving parallel to it in the proper southbound lane of the highway.

¶6 Many and perhaps all of the officers lost sight of the utility vehicle when they slowed or exited the northbound lane, but they quickly came upon a collision wherein the utility truck had struck a small white car head on. The driver of the white car was dead at the scene and the ONG truck was rolling slowly toward a fence off the side of the highway. A witness who passed the utility truck on the highway seconds before the collision heard the impact and immediately stopped at about the same time that patrol cars arrived on the scene. Another witness saw a man wearing red over blue running behind the utility truck after the crash. When the officers checked, the man was gone and there was no one inside or around the utility truck leading officers to assume its driver had jumped the fence.

¶7 The police developed information about the identity of the driver of the utility truck, and later that same day Jerry Newman was taken into custody and booked into the Tulsa County Jail. In a recorded telephone call made to his father from the jail, Newman admitted to

being the driver of the stolen utility truck. Furthermore, video taken by a DriveCam in the cab of the ONG truck clearly shows that Newman was driving the vehicle. At trial, Donald Watkins, the truck driver who called 911 from the Sapulpa business, also identified Newman as the person he watched walk around the lot trying to get into vehicles and the building that early morning.

1.

¶8 In his first proposition, Newman claims that the evidence presented at trial was insufficient to support his conviction for first degree felony murder – eluding an officer. This Court reviews challenges to the sufficiency of the evidence in the light most favorable to the State and will not disturb the verdict if any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. *See Logsdon v. State*, 2010 OK CR 7, ¶ 5, 231 P.3d 1156, 1161; *Spuehler v. State,* 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04. In evaluating the evidence presented at trial, we accept the fact-finder's resolution of conflicting evidence as long as it is within the bounds of reason. *See Day v. State,* 2013 OK CR 8, ¶ 13, 303 P.3d 291, 298. *See also Davis v. State*, 2011 OK CR 29, ¶ 83, 268 P.3d 86, 112-13 ("The credibility of witnesses and the weight and consideration to be given to their testimony are within the exclusive province of the trier of facts and the trier of facts may believe the evidence of a single witness on a question and disbelieve several others testifying to the contrary."). "Pieces of evidence must be viewed not in isolation but in conjunction, and we must affirm the conviction so long as, from the inferences reasonably drawn from the record as a whole, the jury might fairly have concluded the defendant was guilty beyond a reasonable doubt." *Davis v. State*, 2004 OK CR 36, ¶ 22, 103 P.3d 70, 78 (quoting *Matthews v. State*, 2002 OK CR 16, ¶ 35, 45 P.3d 907, 919-20). This Court also accepts all reasonable inferences and credibility choices that tend to support the verdict. *Coddington v. State,* 2006 OK CR 34, ¶ 70, 142 P.3d 437, 456.

¶9 Newman's specific claim is that because at the time of the deadly crash officers had backed off their active pursuit, he was no longer in the commission of the crime of eluding an officer and thus not guilty of felony murder. In support of this argument, Newman directs this Court's attention to the testimony of Sapulpa Police Officer David Snelson that when Newman started driving southbound in the northbound lane of a major highway, the pursuit was terminated. However, Officer Snelson clarified, "In other words, we quit actively chasing him in the southbound lane northbound." He added that the officers were still attempting to catch up with Newman by driving parallel to him while driving southbound in the southbound lane.

¶10 Newman takes too myopic a view of his own actions and the consequences thereof. He stole a truck, crashed through a fence, and spent more than half an hour running from up to a dozen police officers. When it became too dangerous to maintain the direct pursuit, officers did their best to back off but still keep him in sight although at times just prior to the crash they lost visual contact with him. The fact that the officers chose not to follow him speeding the wrong way down a highway does not magically end his commission of the crime nor does it absolve him of criminal liability for it. The evidence, when viewed in the light most favorable to the State, proved each element of the crime of first degree felony murder and the predicate crime of eluding an officer, beyond a reasonable doubt.

¶11 Newman also argues in this proposition that the jury instruction defining "in the commission of" was confusing. The instruction, not met with objection below, was given as follows:

> A person is in the commission of eluding an officer when he is performing an act which is an inseparable part of and/or performing an act which is necessary in order to complete the course of conduct constituting and/or fleeing from the immediate scene of eluding an officer.

¶12 While the instruction included all three clauses instead of just one, the record reflects that this was intentional because the trial court believed that the evidence presented at trial supported each of them. The instruction given substantially mirrored the uniform jury instruction OUJI-CR(2d) 4-65 and was not confusing. This proposition is without merit.

2.

¶13 In his second proposition, Newman argues that the trial court erred in failing to instruct the jury, *sua sponte*, on the lesser offense of second degree felony murder with larceny of an automobile as the underlying felony. "It is settled law that trial courts have a duty to instruct the jury on the salient features

of the law raised by the evidence with or without a request." *Hogan v. State,* 2006 OK CR 19, ¶ 39, 139 P.3d 907, 923 (citing A*tterberry v. State*, 1986 OK CR 186, ¶ 8, 731 P.2d 420, 422). *See also Soriano v. State*, 2011 OK CR 9, ¶ 36, 248 P.3d 381, 396. This Court normally reviews a trial court's choice of jury instructions for an abuse of discretion. *See Cipriano v. State*, 2001 OK CR 25, ¶ 14, 32 P.3d 869, 873. However, because the record does not show that trial counsel either requested these instructions or objected to the trial court's failure to give them our review is for plain error only. *See Rutan v. State,* 2009 OK CR 3, ¶ 78, 202 P.3d 839, 855. To be entitled to relief for plain error, an appellant must show: "(1) the existence of an actual error (i.e., deviation from a legal rule); (2) that the error is plain or obvious; and (3) that the error affected his substantial rights, meaning the error affected the outcome of the proceeding." *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923. "This Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice." *Stewart v. State*, 2016 OK CR 9, ¶ 25, 372 P.3d 508, 514.

¶14 It is true that "the trial court must instruct on any lesser included offense warranted by the evidence." *Jones v. State*, 2006 OK CR 17, ¶ 6, 134 P.3d 150, 154, (citing *Shrum v. State,* 1999 OK CR 41, ¶¶ 10-12, 991 P.2d 1032, 1036-37) (lesser included instructions should be given if supported by the evidence). An underlying requirement of *Shrum*, however, is that a lesser offense instruction should not be given unless the evidence would support a conviction for the lesser offense. *See Lewallen v. State,* 2016 OK CR 4, ¶ 11, 370 P.3d 828, 831. A defendant is entitled to a lesser included offense instruction only when *prima facie* evidence of the lesser included offense has been presented at trial. *See Ball v. State,* 2007 OK CR 42, ¶ 32, 173 P.3d 81, 90 (citing *Glossip v. State,* 2001 OK CR 21, ¶¶ 28-29, 29 P.3d 597, 603-04). "*Prima facie* evidence of a lesser included offense is that evidence which would allow a jury rationally to find the accused guilty of the lesser offense and acquit him of the greater." *Davis v. State,* 2018 OK CR 7, ¶ 7, 419 P.3d 271, 277 (quoting *Davis*, 2011 OK CR 29, ¶ 101, 268 P.3d at 116). The facts recounted above clearly indicate there was no *prima facie* evidence that would have allowed the jury rationally to find Newman guilty only of larceny of an automobile and acquit him of eluding a police officer. Thus, there was no error, plain or otherwise, in the trial court's failure to instruct the jury on second degree murder with larceny of an automobile as the underlying felony. Relief is not required.

3.

¶15 Newman argues that the introduction of gruesome pictures deprived him of his right to a fair trial and a reliable sentencing. Because none of the photographs at issue were objected to at trial we review for plain error. *See Williams v. State*, 2008 OK CR 19, ¶ 69, 188 P.3d 208, 223.

¶16 We have noted that gruesome crimes make for gruesome photographs. *Cole v. State,* 2007 OK CR 27, ¶ 29, 164 P.3d 1089, 1096. This alone, however, will not render them inadmissible as long as they "are not so unnecessarily hideous or repulsive that jurors cannot view them impartially." *Bosse v. State*, 2017 OK CR 10, ¶ 48, 400 P.3d 834, 853. The test for admissibility of photographs is not whether they are gruesome but whether they are relevant and their probative value is not substantially outweighed by the danger of unfair prejudice or needless presentation of cumulative evidence. 12 O.S.2011, §§ 2401, 2402, 2403.

¶17 The photographs at issue in the present case were not particularly gruesome. Some showed the victim before he was removed from his vehicle, some depicted the injuries to his body, and some showed x-rays of his broken bones. These were relevant as they depicted the decedent's injuries and they illustrated and corroborated the medical examiner's testimony. The probative value of these photographs, considered both individually and collectively, was not substantially outweighed by their prejudicial effect and thus their admission into evidence was not error, plain or otherwise.

4.

¶18 Newman argues that error occurred when the State introduced evidence of other uncharged crimes at trial, specifically that after Newman was arrested a pat down search revealed that he possessed a fake black plastic gun which he subsequently tried to destroy with his foot. Newman argues on appeal that this was evidence of an uncharged crime and the trial court erred by allowing its introduction into evidence. Because the evidence he now challenges was not met with objection below, review on appeal is for plain error under the test set forth in *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

¶19 "The basic law is well established – when one is put on trial, one is to be convicted – if at all – by evidence which shows one guilty of the offense charged; and proof that one is guilty of other offenses not connected with that for which one is on trial must be excluded." *Lott v. State*, 2004 OK CR 27, ¶ 40, 98 P.3d 318, 334. However, "[i]f a defendant's conduct is part of the *res gestae* of the charged offense, then it is not considered other crimes or bad acts evidence." *Vanderpool v. State,* 2018 OK CR 39, ¶ 24, 434 P.3d 318, 324 (citing *Rogers v. State,* 1995 OK CR 8, ¶¶ 20-21, 890 P.2d 959, 971). Evidence is considered part of the *res gestae*, when: "a) it is so closely connected to the charged offense as to form part of the entire transaction; b) it is necessary to give the jury a complete understanding of the crime; or c) when it is central to the chain of events." *Eizember v. State,* 2007 OK CR 29, ¶ 77, 164 P.3d 208, 230 (internal quotations omitted). The evidence that Newman was carrying a fake gun at the time he cased the Rush Peterbilt Truck Center while obviously looking for something to steal was central to the chain of events and inextricably intertwined with the evidence that formed the basis of the crime of larceny of an automobile. It was connected to the factual circumstances of this crime and provided contextual information to the jury. Furthermore, the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice. 12 O.S.2011, § 2403. There was no error, plain or otherwise, in the admission of this evidence.

5.

¶20 Newman contends the crime of eluding an officer is not a constitutionally acceptable predicate offense for first degree felony murder. He argues that because eluding can be committed in some instances as a misdemeanor, it is not the type of inherently dangerous conduct that should serve as the basis for first degree felony murder (deaths occurring during the commission of an enumerated felony). Newman's failure to raise this issue at trial forfeits appellate review of this claim for all but plain error under the test set forth in *Hogan,* 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

¶21 "The matter of defining crimes and fixing the degrees of punishment is one of legislative power." *Salyers v. State,* 1988 OK CR 88, ¶ 7, 755 P.2d 97, 100. "Arguments concerning the wisdom of the felony murder rule in this state should not be addressed to the Court, since the rule is one of statute." *Brogie v. State,* 1985 OK CR 2, ¶ 31, 695 P.2d 538, 545. Because Newman's argument is "more about public policy than controlling law, it is better directed to our state legislature." *Harris v. State*, 2019 OK CR 22, ¶ 93, 450 P.3d 933, 966.

¶22 This case is controlled by the reasoning in *Brown v. State,* 1987 OK CR 181, ¶ 16, 743 P.2d 133, 138 wherein this Court addressed a similar issue in regard to a jury instruction challenge:

> [A]ppellant urges that the trial court erred in refusing to give requested instructions on first degree manslaughter. Appellant's primary argument is that 21 O.S. 1981 § 444 distinguishes between misdemeanor and felony escapes from lawful custody, and because the escape here was at most a misdemeanor, an instruction on misdemeanor-manslaughter under 21 O.S. 1981 § 711 (1) was required. The appellant was charged alternatively with malice aforethought and felony-murder under 21 O.S.Supp.1982 § 701.7 (A) & (B). Section 701.7(B) does not distinguish between misdemeanor and felony escapes from lawful custody, but expressly provides that "[a] person . . . commits the crime of murder in the first degree when he takes the life of a human being, regardless of malice, in the commission of . . . *escape from lawful custody*. . . ." (emphasis added) The State contends, and we must agree, that the specific felony-murder statute prevails over the general escape from lawful custody statute. *See Jones v. State,* 507 P.2d 1267, 1270 (Okl.Cr. 1973) (specific statute controls over general statute). Initially, we note that the language of "any felony" which was present in 21 O.S. 1971 § 701 (3) was deleted from our current Section 701.7(B) which was enacted in 1976. Under rules of statutory construction, the foregoing change in language indicates a change in legislative intent. *See Irwin v. Irwin*, 433 P.2d 931, 934 (Okla. 1965). Statutes are to be construed so as to effectuate their purposes. *Owens v. State,* 665 P.2d 832, 834 (Okl.Cr. 1983). We believe that the Legislature has expressed a clear and unambiguous intent that Section 701.7 (B) was designed to deter escapes from lawful custody because of the inherent danger to law enforcement officers in such situations. In its wisdom, the Legislature has determined that escapes from lawful

> custody, whether they are denominated misdemeanors or felonies, are fraught with danger to law enforcement officers, as the instant case so tragically demonstrates. The risk of lethal violence is the same, regardless of whether the escape constitutes a felony or a misdemeanor. Therefore, we believe that the clear purpose of Section 701.7(B) would be improperly thwarted by a construction limiting its scope to only felony escapes.

¶23 The Legislature implicitly recognized eluding an officer was an inherently dangerous act that created a foreseeable risk of death when it amended the first degree felony murder statute and added eluding an officer to the list of enumerated crimes in section 701.7(B). This section continues to provide that "[a] person also commits the crime of murder in the first degree, regardless of malice, when that person or any other person takes the life of a human being during, or if the death of a human being results from, the commission or attempted commission of . . . eluding an officer . . . ." The statute does not distinguish between misdemeanor and felony eluding and construing it as advocated by Newman would thwart the intent of the Legislature. Newman has shown no error and his contention that the crime of eluding an officer is not a constitutionally acceptable predicate offense for first degree felony murder is rejected.

6.

¶24 Newman complains that the cumulative effect of prosecutorial misconduct during the prosecutor's cross-examination of him and in closing argument deprived him of his right to a fair trial. Only a few of the comments at issue were met with objection at trial. We review the comments not objected to below for plain error. *See Harney v. State,* 2011 OK CR 10, ¶ 23, 256 P.3d 1002, 1007. This Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Hogan,* 2006 OK CR 19, ¶ 38, 139 P.3d at 923.

¶25 "[W]e evaluate the alleged misconduct within the context of the entire trial, considering not only the propriety of the prosecutor's actions, but also the strength of the evidence against the defendant and the corresponding arguments of defense counsel." *Hanson v. State*, 2009 OK CR 13, ¶ 18, 206 P.3d 1020, 1028. Both sides have wide latitude to discuss the evidence and reasonable inferences therefrom. *See Harmon v. State*, 2011 OK CR 6, ¶ 81, 248 P.3d 918, 943. Relief is only granted where the prosecutor's flagrant misconduct so infected the defendant's trial that it was rendered fundamentally unfair. *Jones v. State,* 2011 OK CR 13, ¶ 3, 253 P.3d 997, 998. It is the rare instance when a prosecutor's misconduct during closing argument will be found so egregiously detrimental to a defendant's right to a fair trial that reversal is required. *See Pryor v. State*, 2011 OK CR 18, ¶ 4, 254 P.3d 721, 722.

¶26 Newman first asserts that misconduct occurred when the prosecutor badgered and disparaged him. He complains that the prosecutor disrespected him by calling him by his first name during cross-examination and badgered him by asking him questions that were argumentative or impossible to answer. The record reflects that before the prosecutor called him by his first name he asked Newman if he could do so and Newman acquiesced. In addition, while the prosecutor's cross-examination of Newman was not particularly gentle, it was not required to be. Newman chose to testify and the prosecutor was allowed wide latitude on cross-examination. "[T]he State is permitted to cross-examine the defendant's witnesses at trial concerning any matter which is responsive to testimony given on direct examination or which is material or relevant thereto and which tends to elucidate, modify, explain, contradict or rebut testimony given in chief by the witness." *Bench v. State,* 2018 OK CR 31, ¶ 141, 431 P.3d 929, 967. The prosecutor's cross-examination of Newman was not improper and there was no error here, plain or otherwise.

¶27 Next, Newman complains that the prosecutor improperly referenced other crimes and bad acts during cross-examination of him and in closing argument. None of the comments at issue were met with objection at trial. Most were not error at all and any which may have bordered upon impropriety certainly did not rise to the level of plain error.

¶28 Finally, Newman argues that in closing argument the prosecutor mischaracterized and misstated the facts and injected personal opinion into the argument. Again, most of these comments were not met with objection at trial. While prosecutors may not misstate the evidence they are allowed to comment upon it and draw logical inferences therefrom. *Bench,* 2018 OK CR 31, ¶ 137, 431 P.3d at 966. Further,

minor misstatements that cannot be found to have affected the trial will not warrant relief. *Id.* Newman cannot show the existence of an error because the remarks, read in context, are largely based on the evidence and inferences from it. *Pullen v. Stat*e, 2016 OK CR 18, ¶ 13, 387 P.3d 922, 927. Furthermore, taken in context, the prosecutor did not improperly state his personal opinion of guilt, but permissibly argued that the evidence supported a finding of guilt. *See Williams*, 2008 OK CR 19, ¶¶ 106-107, 188 P.3d at 228. The argument was not error, plain or otherwise. Relief is not required.

7.

¶29 Newman contends that he was denied constitutionally effective assistance of counsel. This Court reviews claims of ineffective assistance of counsel *de novo,* to determine whether counsel's constitutionally deficient performance, if any, prejudiced the defense so as to deprive the defendant of a fair trial with reliable results. *Strickland v. Washington,* 466 U.S. 668, 687 (1984); *Malone v. State*, 2013 OK CR 1, ¶ 14, 293 P.3d 198, 206. Under this test, Newman must affirmatively prove prejudice resulting from his attorney's actions. *Strickland*, 466 U.S. at 693; *Head v. State,* 2006 OK CR 44, ¶ 23, 146 P.3d 1141, 1148. "To accomplish this, it is not enough to show the failure had some conceivable effect on the outcome of the proceeding." *Id.* Rather, Newman must show that there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. *Id.* "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* This Court need not determine whether counsel's performance was deficient if the claim can be disposed of on the ground of lack of prejudice. *See Malone,* 2013 OK CR 1, ¶ 16, 293 P.3d at 207.

Record Based Claims:

¶30 Newman complains that trial counsel was ineffective for failing to: (1) request instructions on second degree felony murder; (2) object to the jury instruction on the definition of "in the commission of" for first degree felony murder; (3) object to prosecutorial misconduct; (4) object to irrelevant and prejudicial photographs; (5) object to evidence of other crimes; and, (6) argue that the evidence was insufficient to support the eluding element of first degree felony murder. The merits of these claims were addressed and rejected above, in Propositions 1, 2, 3, 4, and 6. Newman cannot show on this record that, but for counsel's actions, the result of his trial would have been different. Because he has failed to establish prejudice from his attorney's actions, Newman's ineffective assistance of counsel claim is denied.

Extra-Record Based Claims:

¶31 Because Newman's remaining three ineffective assistance of counsel claims rely on evidence outside the record, we do not reach the merits of these complaints, but only determine whether additional fact-finding regarding them is necessary. Rule 3.11(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2020). Newman has filed an application for evidentiary hearing pursuant to Rule 3.11(B). There is a strong presumption of regularity in trial proceedings and counsel's conduct and the application must contain sufficient information to show, by clear and convincing evidence, a strong possibility that trial counsel was ineffective for failing to identify or use the evidence at issue. Rule 3.11(B)(3)(b)(i). Where nothing in the supplemental materials alters or amplifies in any compelling way the portrait that emerged from the evidence and testimony at trial, this Court will find the extrajudicial materials fail to establish by clear and convincing evidence a strong possibility that trial counsel was ineffective. *See Sanchez v. State*, 2009 OK CR 31, ¶ 104, 223 P.3d 980, 1013.

¶32 Newman first complains that trial counsel was ineffective for failing to present witnesses whose testimony would support his defense that he was no longer eluding the police at the time of the collision. In support of his argument, he attached to his application two newspaper articles in which officials involved made statements about the pursuit. He also asserts that trial counsel was ineffective for putting on a voluntary intoxication defense that was irrelevant to the most serious of the charges against him. He argues that this defense required him to testify when he otherwise would not have done so and this resulted in him unknowingly waiving his right to a bifurcated trial. In support of this claim, Newman attached affidavits from himself and trial counsel.

¶33 Having reviewed Newman's request for an evidentiary hearing to develop this claim and the materials offered to support his request this Court finds that he has failed to meet his burden, as he has not shown by clear

and convincing evidence a strong possibility that the outcome of his trial would have been different. Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2020). Newman is not entitled to an evidentiary hearing to further develop his ineffective assistance of counsel allegations. His motion and this claim are denied. *See Simpson v. State*, 2010 OK CR 6, ¶ 53, 230 P.3d 888, 905-06.

8.

¶34 Newman claims that even if no individual error in his case merits relief, the cumulative effect of the errors committed requires a new trial or favorable sentence modification. "The cumulative error doctrine applies when several errors occurred at the trial court level, but none alone warrants reversal." *Tafolla v. State*, 2019 OK CR 15, ¶ 45, 446 P.3d 1248, 1263. Although individual errors may be of insufficient gravity to warrant reversal, the combined effect of an accumulation of errors may require a new trial. *Id.* The commission of several trial errors does not deprive the defendant of a fair trial when the errors considered together do not affect the outcome of the proceeding. *Id.* There are no errors, considered individually or cumulatively, that merit additional relief in this case. This claim is denied.

DECISION

¶35 The Judgment and Sentence of the district court is **AFFIRMED**. Appellant's request to supplement the record or in the alternative application for evidentiary hearing on sixth amendment claim is **DENIED**. 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 delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, THE HONORABLE WILLIAM D. LAFORTUNE, DISTRICT JUDGE

APPEARANCES AT TRIAL

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Julie Doss, Kevin Keller, Asst. District Attorneys, Tulsa County Courthouse, 500 S. Denver, Tulsa, OK 74103, Counsel for State

APPEARANCES ON APPEAL

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OPINION BY: ROWLAND, J.
LEWIS, P.J.: Specially Concur
KUEHN, V.P.J.: Concur
LUMPKIN, J.: Concur
HUDSON, J.: Concur

LEWIS, PRESIDING JUDGE, SPECIALLY CONCURRING:

¶1 I join in the Court's conclusion that the Legislature is constitutionally authorized to define the killing of a human being in the commission of eluding or attempting to elude an officer as first degree murder. Appellant's premise that this statute authorizes a murder conviction based on the commission of a mere misdemeanor is based on an absurd and illogical construction of the statute in question.

¶2 Section 540(A)(A) of Title 21 defines the essential crime of eluding as increasing the speed of a vehicle or extinguishing its lights "in an attempt to elude such peace officer," after receiving a visual and audible sign from an officer to bring the vehicle to a stop. Eluding in this manner is a misdemeanor. Section 540(A)(B) provides that when the crime of eluding is committed "in such manner as to endanger any other person," the crime is a felony.

¶3 Section 701.7(B) of Title 21 defines as first degree murder, regardless of malice, the taking of human life "during, or if the death of a human being results from . . . the commission or attempted commission of . . . eluding an officer." Consistent with this language, the Court has long recognized the requirement of a logical, causal relationship between the underlying felony and the resulting death. *Malaske v. State,* 2004 OK CR 18, ¶ 5, 89 P.3d 1116, 1118.

¶4 Just as it was in this case, the taking of a human life during, or as a result of, the commission or attempted commission of the crime of eluding an officer will invariably be a case where the act of eluding endangered another person. The statute punishes the taking of life while committing an inherently dangerous felony as first degree murder, and falls well

within the Legislature's general police power to define and punish offenses.

¶5 In the discussion of Proposition Seven, the opinion conveys the impression that the Court might not reach "the merits" of Sixth Amendment claims raised by the Appellant if those claims rely on "evidence outside the record." The text suggests that our analysis of Appellant's motion to supplement the record in connection with these claims under Rule 3.11(B) simply determines "whether additional fact-finding regarding them is necessary."

¶6 A motion to supplement the record with an evidentiary hearing under Rule 3.11(B) is only proper where the Appellant has raised a corresponding claim of ineffective assistance of counsel in the appellate brief. Rule 3.11(B)(3)(b). This Court reviews the motion and supporting extra-record materials in conjunction with that claim to determine whether those materials show "clear and convincing" evidence of a "strong possibility" that trial counsel was ineffective in the manner alleged by the Appellant. Rule 3.11(B)(3)(b)(i).

¶7 Absent this clear and convincing evidence of a strong possibility of both deficient performance and prejudice, we adjudicate Appellant's corresponding claim of ineffective assistance by *denying* relief, without further supplementing the record. In effect, the Court concludes from its analysis of the corresponding claim and the supporting materials submitted under Rule 3.11(B) that Appellant has not, and probably cannot, establish a Sixth Amendment violation.

¶8 Our resolution of ineffectiveness claims in this way determines more than whether the merits will be reached on direct appeal; it is a final adjudication by the court of last resort. *Simpson v. State*, 2010 OK CR 6, ¶ 53, 230 P. 3d 888, 906 (holding that denial of a request for an evidentiary hearing under Rule 3.11(B) necessarily involves an adverse adjudication of the corresponding ineffective counsel claim under the more rigorous *Strickland* standard); *State v. Blevins*, 1992 OK CR 4, ¶ 2, 825 P. 2d 270, 271.

¶9 I am authorized to state that Vice Presiding Judge Kuehn joins in this separate opinion specially concurring.

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Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS
Thursday, May 28, 2020

F-2019-104 — Bobby Otto Powers, Appellant, was tried by jury for the crime of Sexual Battery in Case No. CF-2018-828 in the District Court of Oklahoma County. The jury returned a verdict of guilty and recommended five years as punishment. The trial court sentenced accordingly. From this judgment and sentence Bobby Otto Powers has perfected his appeal. The Judgement and Sentence is AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., Concur in Results; Kuehn, V.P.J., Concur in Part/Dissent in Part; Hudson, J., Concur; Rowland, J., Concur.

F-2018-1208 — Tracy Dawn Nelson, Appellant, was tried by jury for the crime of First Degree Murder - Child Abuse in Case No. CF-2017-455 in the District Court of Washington County. The jury returned a verdict of guilty and set punishment at life imprisonment with the possibility of parole. The trial court sentenced accordingly. From this judgment and sentence Tracy Dawn Nelson has perfected her appeal. AFFIRMED. Appellant's application for evidentiary hearing on sixth amendment claim is DENIED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs in results; Hudson, J., concurs.

F-2019-278 — Keenan Dwayne Hamilton, Appellant, was tried by jury for the crime of Forcible Sodomy in Case No. CF-2016-796 in the District Court of Cleveland County. The jury returned a verdict of guilty and recommended as punishment twenty five years imprisonment. The trial court sentenced accordingly. The Judgment and Sentence is AFFIRMED. From this judgment and sentence Keenan Dwayne Hamilton has perfected his appeal. Opinion by: Lumpkin, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur in Part/Dissent in Part; Hudson, J., Concur; Rowland, J., Concur.

F-2018-388 — Brian Paul Campbell, Appellant, was tried by jury for the crimes of four counts of Sexual Abuse of a Child Under 12; and one count of Child Neglect, in Case No. CF-2016-4511, in the District Court of Tulsa County. The jury returned a verdict of guilty and recommended as punishment life imprisonment plus a $5,000.00 fine for each count. The Honorable Kelly Greenough, District Judge, sentenced accordingly ordering all five sentences to run consecutively and various cost and fees. From this judgment and sentence Brian Paul Campbell has perfected his appeal. AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concurs in Results; Kuehn, V.P.J., Concurs in Results; Lumpkin, J., Concurs; Rowland, J., Special Concurs.

F-2018-261 — James Hampton Smith, Appellant, was tried by jury in Case No. CF-2016-707, in the District Court of Pottawatomie County, for the crimes of Count 1: Manufacturing Child Pornography; Count 2: Child Sexual Exploitation-Child Under 12; and Count 3: Engaging in Human Trafficking. The jury returned a verdict of guilty and recommended as punishment twenty years imprisonment on Count 1; life imprisonment on Count 2; and fifteen years imprisonment on Count 3. The Honorable John G. Canavan, Jr., District Judge, sentenced accordingly ordering the sentences for all three counts to run consecutively each to the other. From this judgment and sentence James Hampton Smith has perfected his appeal. AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur; Lumpkin, J., Concur in Part/Dissent in Part; Rowland, J., Concur in Part/Dissent in Part.

F-2018-897 — Clifford Eugene Williams, Appellant, was tried by jury in Case No. CF-2014-179, in the District Court of Oklahoma County, for the crimes of Counts 6-7: Manufacturing Child Pornography; Count 12: Taking Clandestine Photographs; Count 13: Rape in the Second Degree by Instrumentation; Counts 14-15: Taking Clandestine Photographs; Count 16: Manufacturing Child Pornography; and Count 17: Publishing or Exhibiting Child Pornography. The jury returned a verdict of guilty and recommended as punishment ten years each on Counts 6 & 7; five years on Count 12; ten years on Count 13; five years each on Counts 14 & 15; ten years on Count 16; and ten years on Count 17. The Honorable Cindy H. Truong, District Judge, sentenced accordingly ordering

the sentences to run consecutively and gave credit for time served. From this judgment and sentence Clifford Eugene Williams has perfected his appeal. AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concurs in Part/Dissents in Part; Kuehn, V.P.J., Concurs in Part/Dissents in Part; Lumpkin, J., Concurs; Rowland, J., Concurs.

Thursday, June 4, 2020

F-2018-1286 — Appellant Jaime Luevano Geimausaddle entered a plea of guilty to Possession of a Controlled Dangerous Substance and Unauthorized Use of a Motor Vehicle in Oklahoma County Case Nos. CF-2016-4564 and CF-2017-0355, respectively. Sentencing was deferred for six years, subject to terms and conditions of probation. The State filed an application to accelerate Geimausaddle's suspended sentences alleging new offenses in Oklahoma County Case Nos. CF-2018-2115 and CF-2018-3396. The Honorable Timothy R. Henderson granted the State's application and sentenced Geimausaddle to ten years imprisonment in Case No. CF-2016-4564 and five years in Case No. CF-2017-0355, and ordered the sentences to be served consecutively. Geimausaddle has perfected his appeal of the acceleration of his deferred sentences. AFFIRMED. Opinion by: Kuehn, V.P.J.; Lewis, P.J., concur; Lumpkin, J., concur; Hudson, J., concur; Rowland, J., concur.

RE-2019-399 — Appellant Damien McGirt entered a blind plea of guilty in Case No. CF-2014-163, in the District Court of Jackson County, on June 12, 2015, to Driving a Motor Vehicle While Under the Influence of Alcohol, Leaving the Scene of an Accident involving Damage, and Eluding/Attempting to Elude a Police Officer. Appellant was convicted and sentenced to ten years imprisonment each for Counts 2 and 3. On October 25, 2018, the State filed a Supplemental Motion to Revoke Suspended Sentence. Following a revocation hearing, the trial court revoked twenty-five years of Appellant's remaining suspended sentence. The revocation is AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., concurs in results; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Rowland, J., concurs.

F-2018-717 — Appellant Antwoin Lee Walker was tried and convicted by jury for the crimes of Attempting to Kill – Counts 1 and 2; First Degree Rape – Count 3; Attempted First Degree Rape – Count 4 and Second Degree Robbery – Count 5, all after Conviction of Two or More Felonies in the District Court of Canadian County, Case No. CF-2017-445. In accordance with the jury's recommendation the trial court sentenced Appellant to life imprisonment for each of Counts 1 and 2, 30 years in Count 3, 25 years in Count 4 and 20 years in Count 5. The terms in all counts were ordered to be served concurrently except for Count 4. From this judgment and sentence Antwoin Lee Walker has perfected his appeal. AFFIRMED. Opinion by: Kuehn, V.P.J.: Lewis, P.J.: concur; Lumpkin, J.: concur; Hudson, J.: concur; Rowland, J.: specially concur.

C-2019-221 — Nhut Hong Nguyen, Petitioner, entered a plea of nolo contendere to two counts of negligent homicide-motor vehicle, in Case No. CM-2017-551 in the District Court of Canadian County. The Honorable Jack D. McCurdy, II, District Judge, found Petitioner guilty and sentenced him to one (1) year in the Canadian County Jail on each count, all suspended except for the first sixteen (16) days to be served on eight (8) consecutive weekends, with the sentences to be served consecutively, with the exception of the time in the county jail which will be served concurrently, and a $500.00 fine on each count. The court also imposed various fees and costs. Further, Petitioner was ordered to pay restitution to the families of the two victims (David Villerand and Kaylee Hamilton) to cover their funeral expenses. Petitioner was ordered to pay $16,368.29 and $13,906.17 to each of the victims' families. Petitioner filed an application to withdraw his plea, which was denied. He now seeks the writ of certiorari. The petition for writ of certiorari is DENIED. The judgment and sentence is AFFIRMED. The order granting restitution is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs; Rowland, J., concurs.

RE-2019-304 — Appellant Jerry Leigh Axtell entered an *Alford* Plea to two charges of Assault with a Dangerous Weapon in Oklahoma County Case No. CF-2014-3003 and was sentenced to ten years imprisonment with all but the first five years suspended. On April 8, 2019, the State filed an application to revoke Axtell's suspended sentences alleging he committed the new crime of Assault and Battery upon a Police or Other Law Officer as alleged in CF-2019-1356. On April 26, 2019, the Honorable Timothy R. Henderson revoked Axtell's suspended sentences in full. Jerry Leigh Axtell has perfected his appeal of the revocation of

his suspended sentences. AFFIRMED. Opinion by: Kuehn, V.P.J.: Lewis, P.J., concur; Lumpkin, J., concur; Hudson, J., concur; Rowland, J., concur.

F-2019-192 — Dewantez Deshawn Lovelace, Appellant, was tried by jury for the crime of Murder in the First Degree (Count 1/A), Unlawful Possession of a Controlled Drug with Intent to Distribute, After Former Conviction of Two or More Felonies (Count 2/B), Robbery with a Firearm, After Former Conviction of Two or More Felonies (Count 3/C), and Reckless Handling of a Firearm (Count 5/D) in Case No. CF-2016-5963 in the District Court of Tulsa County. The jury returned verdicts of guilty and set punishment at life imprisonment on Count 1/A, twenty years imprisonment on Count 2/B, thirty years imprisonment on Count 3/C, and six months on Count 5/D. The trial court sentenced accordingly. From this judgment and sentence Dewantez Deshawn Lovelace 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.

Thursday, June 11, 2020

S-2019-770 — Zachary Ray Harris, Appellee, was charged in Tulsa County District Court, Case No. CF-2019-1874, with Count 1: First-Degree Arson, After Former Conviction of a Felony; and Count 2: Resisting an Officer, a misdemeanor. Appellee was bound over for trial at preliminary hearing. Appellee thereafter filed a *Motion to Quash for Insufficient Evidence*, challenging the evidence presented at the preliminary hearing as to Count 1. A hearing on Appellee's motion was held on October 16, 2019. At the conclusion of the hearing, the Honorable Dawn Moody, District Judge, sustained Appellee's motion as to Count 1. Appellant, the State of Oklahoma, now appeals. The District Court's order sustaining Appellee's motion to quash is REVERSED AND REMANDED with instructions to REINSTATE COUNT 1. Opinion by: Hudson, J.; Lewis, P.J., concurs in results; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Rowland, J., specially concurs.

RE-2019-98 — Appellant Kenneth Lawrence, Jr. entered a plea of guilty on September 4, 2013, in Okmulgee County District Court to Knowingly Concealing Stolen Property in Case No. CF-2011-00499C; and Knowingly Concealing Stolen Property, Possession of a Controlled Dangerous Substance, and Transporting a Loaded Firearm in a Motor Vehicle in Case No. CF-2012-00006. Appellant was convicted and sentenced to the following terms of imprisonment: five years in Case No. CF-2011-00499C; and five years for Count 1, eight years for Count 2, and six months for Count 3 in Case No. CF-2012-00006. The sentences were suspended and ordered to be served concurrently. On August 6, 2018, the State filed a Motion to Revoke Suspended Sentence in both cases. Following a revocation hearing, the trial court revoked Appellant's remaining suspended sentences in full. The revocation is AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs.

COURT OF CIVIL APPEALS
(Division No. 1)
Wednesday, May 27, 2020

118,225 — Alyssa J. Beggs; Terry Beggs; and Alyssa J. Beggs and Terry Beggs on behalf of R.B., a minor, Plaintiffs/Appellants, v. Deeksha L. Reedy, M.D., Defendant/Appellee, and Sayeda Nazir, M.D.; and Wise Eye Associates, Defendants. Appeal from the District Court of Cleveland County, Oklahoma. Honorable Michael Tupper, Judge. Plaintiff/Appellant Alyssa J. Beggs (Ms. Beggs) appeals a grant of summary judgment in favor of Defendant/Appellee Deeksha L. Reddy, M.D. (Dr. Reddy). This matter arises from Ms. Beggs's claims of medical negligence against Dr. Reddy. Dr. Reddy moved for summary judgment on the basis that she was immune from individual suit under the Governmental Tort Claims Act (GTCA). Dr. Reddy asserted that she was an employee of Norman Regional Hospital Au thority (Hospital) – a political subdivision of the State of Oklahoma – at the times relevant to this matter and that she was acting within the scope of her employment. Dr. Reddy also claimed that Ms. Beggs failed to timely submit a notice of tort claim in compliance with the GTCA. The trial court agreed and granted Dr. Reddy's motion for summary judgment. Ms. Beggs appeals. We affirm the trial court's finding that no dispute of material fact existed regarding whether Hospital qualifies as a political subdivision under the GTCA. Further, no dispute remained as to whether Dr. Reddy was an employee of Hospital at the relevant times and acted within the scope of her employment. We therefore affirm the trial court's ruling that Dr. Reddy was immune from individual suit

under the GTCA. AFFIRMED. Opinion by Buettner, J.; Bell, P.J., and Goree, J., concur.

118,235 — Prosperity Bank, Plantiff/Appellee, v. Blue Steel Investments, LLC; Rodney A. Babb; Kimberly Ann Babb; Nemaha Services, LLC; Cornerstone Land Development LLC; Hampton Holdings, LLC; and The Unknown Occupants or Residents, if any, of the Subject property, Defendants/Appellants. Appeal from the District Court of Garfield County, Oklahoma. Honorable Tom L. Newby, Judge. Opinion by Kenneth L. Buettner, Judge: Defendant/Appellant Blue Steel Investments, L.L.C. (Blue Steel) borrowed money from Prosperity Bank (Bank). Blue Steel defaulted and Bank foreclosed. Blue Steel counterclaimed for negligence, fraud, breach of the duty of good faith and fair dealing, and breach of contract. In a series of orders, the trial court ultimately dismissed two of Blue Steel's counterclaims and granted summary judgment in favor of Bank as to Blue Steel's liability and as to Blue Steel's two remaining counterclaims. Blue Steel appeals. We find that the trial court did not err in dismissing Blue Steel's claims for negligence and breach of good faith. Because no dispute of material fact remains as to the issue of Blue Steel's liability, or as to Blue Steel's other counterclaims, Bank is entitled to judgment as a matter of law. Because the trial court provided extensive findings of fact and law in its appealed order, we affirm. Opinion by Buettner, J.; Bell, P.J., and Goree, J., concur.

Thursday, May 28, 2020

118,634 — Robbie Alberda, Successor Trustee of the Margaret Alberda Family Trust, dated February 1st, 2007, Plaintiff/Appellant, v. Ameristate Bank, Defendant/Appellee. Appeal from the District Court of Coal County, Oklahoma. Honorable Paula Inge, Judge. Plaintiff/Appellant Robbie Alberda, Successor Trustee of the Margaret Alberda Family Trust Dated February 1st, 2007 appeals from summary judgment quieting title to the mineral estate at issue in Defendant/Appellee Ameristate Bank. The summary judgment record shows no dispute of material fact or reversible error of law. The judgment on appeal adequately explains the decision and we affirm by summary opinion under Oklahoma Supreme Court Rule 1.202(d). AFFIRMED. Opinion by Buettner, J., Bell, P.J, concurs and Goree, J., dissents.

Friday, May 29, 2020

117,187 — Rick Caruthers, Plaintiff/Appellant, v. City of Tulsa, Defendant/Appellee. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Mary F. Fitzgerald, Judge. Plaintiff/Appellant, Rick Caruthers, appeals from the trial court's judgment confirming an order of the Tulsa Civil Service Commission terminating Plaintiff's employment with Defendant/Appellee, the City of Tulsa. On appeal, Plaintiff asserts City's attorney was improperly permitted to serve in dual roles in violation of the Commission's internal procedures, and the Commission's order contains insufficient findings of fact and conclusions of law. We hold the Commission's order was sufficient to afford judicial review under the facts and circumstances of this case. We also conclude the Commission committed no errors of law and its findings and conclusions are supported by the clear weight of the evidence. Finally, the actions of City's attorney did not violate the Commission's "dual role" prohibition. AFFIRMED. Opinion by Bell, P.J.; Buettner, J., and Goree, J., concur.

Tuesday, June 2, 2020

117,830 — U.S. Bank National Association, as Trustee, Successor in Interest to Bank of America, National Association. As Trustee Successor by Merger to LaSalle National Bank, National Association as Trustee for Salomon Brothers Mortgage Securities VII, Inc., Mortgage Pass-Through Certificates 1997-HUDI, Plaintiff/Appellee, v. Troy Rhinehart, Defendant/Appellant, and Julia D. Rhinehart, Charles W. Rhinehart; John Doe, Occupant; Ford Motor Credit Company, LLC, Gary McKay; Unknown heirs, Successors & Assigns of Charles W. Rhinehart, Deceased; and unknown heirs, Successors & assigns of Julia D. Rhinehart, Deceased, Defendants. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Cindy H. Truong, Trial Judge. Appellant Troy Rhinehart appeals a trial court order granting summary judgment in a mortgage foreclosure case. Upon review of the record, we reverse the order and remand the matter for further proceedings. Opinion by Swinton, V.C.J.; Mtichell, P.J., and Goree, J., (sitting by designation), concur.

Thursday, June 4, 2020

117,912 — Magnum Energy, Inc., Plaintiff/Appellee, V. Board of Adjustment for the City of Norman, Oklahoma, Defendant/Appellant. Appeal from the District Court of Cleveland

County, Oklahoma. Honorable Jeff Virgin, Trial Judge. Magnum Energy, Appellee, sought a variance from a City of Norman ordinance making umbrella liability insurance a condition to issuing a drilling permit within the City limits. The Norman Board of Adjustment, Appellant, denied the request for a variance and Magnum appealed to the Cleveland County District Court. The District Court granted Magnum summary judgment concluding that the City's ordinance conflicted with a state statute regulating oil and gas production and was therefore invalid as applied to Magnum. Because we find no conflict between the ordinance and state statute, the ordinance is enforceable. REVERSED. Opinion by Goree, J.; Bell, P.J., concurs and Buettner, J., dissents.

117,978 — In The Matter of S.R.M., Alleged Deprived Child: Brandy Michelle Miller-Shirle, Appellant, V. State of Oklahoma, Appellee. Appeal from the District Court of Beckham County, Oklahoma. Honorable Michelle Kirby Roper, Trial Judge. Appellant, Brandy Miller (Mother), the natural mother of S.R.M., a deprived minor child, appeals from the trial court's judgment entered upon a jury verdict terminating Mother's parental rights to S.R.M. Appellee, the State of Oklahoma (State), filed a petition to terminate Mother's parental rights under 10A O.S. Supp. 2015 §1-4-904(B)(5), for Mother's failure to correct the following conditions which led to the deprived child adjudication even though Mother was given at least three (3) months to correct the conditions: threat of harm, failure to provide proper care and guardianship, and inadequate and dangerous shelter. State also alleged termination of Mother's parental rights would be in the child's best interests. After a jury trial, the jury determined Mother's parental rights should be terminated due to Mother's failure to correct the conditions of threat of harm and lack of proper parental care and guardianship. The jury also found termination of Mother's parental rights was in the child's best interests. The trial court entered an order terminating Mother's parental rights based on the jury's findings. The court's order found Mother's continued custody is likely to result in serious emotional or physical danger to the child as supported by at least one expert witness. After reviewing the record, we find clear and convincing evidence supports the jury's findings. The trial court's order terminating Mother's parental rights, entered upon the jury's verdict, is AFFIRMED. Opinion by Bell, P.J.; Buettner, J., and Goree, J., concur.

118,368 — Lisa A. Ligeikis, individually and as mother and next friend of E.S.L., a minor, Plaintiff/Appellant, V. Independent School District No. 1 of Tulsa County, Oklahoma, Defendant/Appellee. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Rebecca Nightingale, Trial Judge. Plaintiff/Appellant Lisa A. Ligeikis, individually and as mother and next friend of E.S.L., appeals from summary judgment granted to Defendant/Appellee Independent School District No. 1 of Tulsa County (District). Ligeikis asserted her child suffered psychological harm from being bullied by a classmate due to District's failure to follow its anti-bullying policy. The material facts are undisputed and show District was entitled to judgment as a matter of law. We AFFIRM. Opinion by Buettner, J.; Goree, J., concurs and Bell, P.J., dissents.

Monday, June 8, 2020

117,460 — Robert Todd Stewart, Plaintiff/Appellee, v. Giovanni Gonzalez and Kaylee Smedley, Defendants/Appellants. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Damon H. Cantrell, Judge. Defendants/Appellants made a joint offer to confess judgment pursuant to 12 O.S. §1101 to Plaintiff/Appellee greater than the judgment obtained at trial. Defendants moved for the court to tax Plaintiff their costs, but Defendants' motion was denied and Plaintiff was awarded costs. Defendants appeal arguing the district court misconstrued the statute. "Defendant" as used in §1101 can encompass multiple defendants unless a contrary intention plainly appears. 12 O.S. §25. Neither the language or purpose of §1101 requires a strict reading of "defendant" in the singular form only. The statute authorizes multiple defendants to jointly file an offer to confess judgment to a plaintiff. Reversed and remanded. Opinion by Goree, J.; Buettner, J., concurs and Bell, P.J., dissents.

117,965 — Ben's Auto Sales, Appellant, v. AES Drilling Fluids, LLC, Appellee. Appeal from the District Court of Cleveland County, Oklahoma. Honorable Michael D. Tupper, Trial Judge. Plaintiff/Appellant, Ben's Auto Sales, appeals the trial court's order granting attorney fees to Defendant/Appellee, AES Drilling Fluids, L.L.C. The trial court awarded Defendant attorney fees pursuant to 12 O.S. §936(A) in an action where Defendant prevailed only

on Plaintiff's claim for fraud. Prevailing party attorney fees are not authorized under §936(A) for an action in fraud and therefore the order is reversed. Opinion by Goree, J.; Bell, P.J., and Buettner, J., concur.

(Division No. 2)
Thursday, May 21, 2020

117,783 — Abundance Energy, LLC, Appellant, v. Oklahoma Corporation Commission, Appellee. Appeal from the Oklahoma Corporation Commission. In October 2018, the Interim Director of the Oil and Gas Conservation Division of the Oklahoma Corporation Commission filed a "Complaint for Contempt of Rules & Regulations" asserting that four well sites operated by Abundance Energy, LLC stood in violation of certain statutes and regulations. A hearing before an administrative law judge (ALJ) was subsequently scheduled, but Abundance failed to appear at the hearing. The hearing nevertheless proceeded and the ALJ heard evidence pertaining to the Complaint. In the Interim Order entered in December 2018, the ALJ's recommendations were adopted by the Commission that, among other things, a fine be assessed in the total amount of $8,000 against Abundance. Abundance then filed a motion requesting that the Commission vacate the Interim Order. Abundance asserted, among other things, that the "Commission Attorney did not make a diligent effort to serve" Abundance and that Abundance "was not served as required . . . ." In an order filed in January 2019, the Commission denied Abundance's request, and Abundance appealed from the Commission's January 2019 order. The Commission has taken the position on appeal that if it is concluded that Abundance's appeal is timely, "the matter should be remanded to the Commission with instructions to vacate the Interim Order and conduct a new hearing in the cause on the Complaint." The Supreme Court has concluded that the appeal is timely, but has not addressed the Commission's position that, upon such a conclusion being reached, the Interim Order should be vacated. We reverse the Commission's January 2019 order and remand with instructions that the Interim Order be vacated and a new hearing be scheduled. REVERSED AND REMANDED WITH INSTRUCTIONS. Opinion from Court of Civil Appeals, Division II, by Barnes, P.J.; Rapp, J., and Fischer, J., concur.

116,287 — Scott D. Cochran, Petitioner/Appellee, vs. Aimee C. Cochran, Respondent/Appellant. Appeal from Order of the District Court of Washington County, Hon. Russell C. Vaclaw, Trial Judge. Appellant Aimee Cochran appeals those portions of the Decree of Dissolution of Marriage which enforced a prenuptial agreement she signed with Appellee Scott Cochran and an order of the district court awarding attorney fees to Scott. We find the prenuptial agreement to be enforceable, however it was error for the district court to disregard the formula for calculating alimony contained therein. Consequently, we affirm the Decree except for the award of alimony, which is vacated and remanded to the district court for a determination consistent with this Opinion. The district court's order awarding attorney fees to Scott is also affirmed. AFFIRMED IN PART, VACATED IN PART, AND REMANDED WITH INSTRUCTIONS. Opinion from Court of Civil Appeals, Division II, by Fischer, J.; Rapp, J., concurs and Barnes, P.J., concurs in part and dissents in part.

Thursday, May 28, 2020

117,975 — In the Matter of the Estates of Charles Regional Lonsbury and Lorene Loretta Lonsbury, Deceased, Louis Lonsbury, Personal Representative of the Estate of Charles Regional Lonsbury, Appellant, vs. Cindy Lonsbury, Appellee. Appeal from an Order of the District Court of McClain County, Hon. Charles Grey, Trial Judge. The petitioner, Louis Lonsbury (Louis), Personal Representative of the Estates of Charles Regional Lonsbury and Lorene Loretta Lonsbury, Deceased, appeals the judgment of the probate court in favor of Cindy Lonsbury, Trustee of the Jeffery (Jeffery) and Cindy Lonsbury Trust, dated July 17, 2017. The facts as found by the probate court are not against the clear weight of the evidence. The $119,000.00 payment by Louis to Jeffery was not pursuant to any agreement and did not constitute an advance on Jeffery's share of the Estate left by his parents. The legal characterization of the payment is outside the scope of this probate proceeding because the payment was made from non-probate funds. The conclusions of law entered by the probate court are not contrary to law. The judgment is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Rapp, J.; Barnes, P.J., and Fischer, J., concur.

117,691 (Companion with Case No. 117,690) — The Edmond Public Works Authority, an Oklahoma Public Trust, Plaintiff, and Covell Partners in Development, L.L.C., an Oklahoma Limited Liability Company, Plaintiff/Appel-

lant, vs. Leonard Sullivan, Oklahoma County Assessor, Defendant/Appellee, and The County Board of Equalization, Defendant. Appeal from an Order of the District Court of Oklahoma County, Hon. Don Andrews, Trial Judge. The plaintiff, Covell Partners in Development, L.L.C. (Covell), appeals the trial court's grant of summary judgment to the defendant, Leonard Sullivan, Oklahoma County Assessor (Assessor). This appeal proceeds under the provisions of Okla.Sup.Ct.R. 1.36, 12 O.S. Supp. 2019, Ch. 15, app. 1. This is a companion appeal to *Edmond Public Works Authority (EPWA) v. Leonard Sullivan, Oklahoma County Assessor,* Case No. 117,690. The issue and Record in this appeal are the same as in the companion appeal. The companion appeal was decided by this Court on this date. The Decision in the companion appeal, *Edmond Public Works Authority (EPWA) v. Leonard Sullivan, Oklahoma County Assesso*r, Case No. 117,690, applies here. Okla.Sup.Ct.R. 1.201, 12 O.S. Supp. 2019, Ch. 15, app. 1. Therefore, the judgment of the trial court granting summary judgment to Assessor and denying summary judgment to Covell is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Rapp, J.; Barnes, P.J., and Fischer, J., concur.

Monday, June 8, 2020

118,698 — Glenhurst Home Owners Association, Inc., an Oklahoma not for profit corporation, Plaintiff/Appellee, vs. Bobby Lenard King, an individual, Defendant/Appellant, and Bobby Lenard King Revocable Living Trust, Amie Tuyet Vo King Living Trust, Linh Nga Bui, an individual, 31-W Insulation Company, Inc., a Tennessee for profit corporation, and Dolese Brothers, Company, an Oklahoma for profit corporation, Defendants. Appeal from an Order of the District Court of Oklahoma County, Hon. Cindy H. Truong, Trial Judge. The defendants Bobby Lenard King (King), individually, and the Bobby Lenard King Revocable Living Trust, Bobby Lenard King, Trustee (King Trust) appeal the Order denying their Motion to Reconsider the Judgment granting partial summary judgment and injunctive relief to the plaintiff, Glenhurst Homeowners Association, Inc. (Glenhurst). King and King Trust also appeal the trial court's judgment awarding attorney fees and costs to Glenhurst. None of the additional defendants are the subject to the appealed judgments. The Supreme Court has assigned this case to this Court for decision. This appeal proceeds under the provisions of Okla.Sup.Ct.R. 1.36,12 O.S. Supp. 2019, Ch. 15, app. 1. Glenhurst sued King, individually, and King Trust to compel them to correct conditions on a Lot in the Glenhurst Addition. The condition of the premises was alleged to be in violation of the Glenhurst Addition's Declarations. These Declarations provide that a lot "Owner" is responsible and define what constitutes an "Owner." The trial court agreed that the conditions of the premises violated the Declarations. The trial court entered partial summary judgment against King and King Trust and included mandatory injunctive relief directing them to correct the conditions. The trial court also awarded attorney fees to Glenhurst. Glenhurst did not show that King, individually, is an "Owner" and the partial summary judgment Record shows that he is not an "Owner" as defined in the Declarations. There are questions of fact and law regarding whether King Trust is an "Owner" as defined. The Record shows that its title is for security of a mortgage, which status is an exclusion from being an Owner in the Declarations. In addition, other litigation challenges the title of King Trust, thereby bringing into question whether King Trust has a fee simple title as required by the Declarations. The partial summary judgments are reversed. The award of attorney fees and costs is also reversed. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division II, by Rapp, J.; Barnes, P.J., and Fischer, J., concur.

117,262 — Mandi Michelle McCall, Petitioner/Appellee, vs. Gary Ray McCall, Respondent/Appellant. Appeal from Order of the District Court of Okfuskee County, Hon. Maxey P. Reilly, Trial Judge. Appellant Gary McCall appeals the district court's order granting a protective order in favor of his ex-wife, Mandi McCall. We find that the district court had sufficient evidence to support its determination that a protective order was warranted for harassment. We further find that the portion of the district court's order prohibiting Gary from referencing Mandi or their prior relationship on social media does not violate Gary's right to free speech under either the First Amendment to the United States Constitution or Article II, Section 22 of the Oklahoma Constitution. The portion of the district court's order prohibiting Gary from making any Facebook posts for a period of six months is overbroad and, therefore, vacated. AFFIRMED IN PART, VACATED IN PART. Opinion from Court of Civil Appeals, Division II, by Fischer, J.; Barnes, P.J., and Rapp, J., concur.

(Division No. 3)
Friday, June 5, 2020

117,931 — Jordan L. Hines, Petitioner/Appellee, v. Todd R. Greenwald, Defendant/Appellant. Appeal from the District Court of Cleveland County, Oklahoma. Honorable Scott Brockman, Trial Judge. Defendant/Appellant Todd R. Greenwald (Greenwald) appeals from the trial court's order granting Plaintiff/Appellee Jordan Hines (Hines) a protective order against Greenwald. He argues that the trial court erroneously granted a five year protective order, and that the trial court's findings of domestic abuse were against the clear weight of the evidence and that self-defense is an absolute defense to the issuance of a Victim's Protection Order. For the following reasons, we affirm. Opinion by Swinton, V.C.J.; Mitchell, P.J., and Goree, J., (sitting by designation) concur.

Monday, June 8, 2020

117,787 — American Southwest Mortgage Corporation and U.S. Bank National Association, as Trustee for Morgan Stanley Mortgage Loan Trust 2007-6XS. Plaintiffs/Appellants, v. William H. Rolin and Lora Rolin, Defendants/Appellees, and Central Mortgage Company, Mortgage Electronic Registration Systems, Inc. And Joe Doe and Jane Doe, the unknown occupants or residents, if any of the subject property and FFA Mortgage Corporation, Defendants. Appeal from the District Court of McClain County, Oklahoma. Honorable Charles Gray, Judge. Defendants/Appellants William and Lora Rolin (Defendants) appeal from an order granting summary judgment in favor of Plaintiffs/Appellees U.S. Bank National Association, as Trustee for Morgan Stanley Mortgage Loan Trust 2007-6XS (U.S. Bank) and American Southwest Mortgage Corporation (American Southwest) (collectively Plaintiffs) in a foreclosure action concerning property located in McClain County. Defendants argue that there were questions of material fact concerning the authenticity of the note, allonge, and endorsement; whether Plaintiffs were the actual owners or holders of the note; and whether Defendants were in default. We affirm. Opinion by Swinton, V.C.J.; Mitchell, P.J., and Buettner, J., (sitting by designation) concur.

118,153 — In The Matter of: A.H., Alleged Deprived Child, Tia Hawthorne, Petitioner/Appellant, v. State of Oklahoma, Respondent/Appellee. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Trevor Pemberton, Trial Judge. Petitioner/Appellant Tia Hawthorne (Mother) appeals from the trial court's order terminating her parental rights to her daughter, A.H. Mother's sole proposition of error on appeal is that the trial court did not make a valid finding that A.H. was deprived, which is a statutory prerequisite for terminating parental rights. As noted by Respondent/Appellee the State of Oklahoma (the State), the court tried the matter concurrently with the proceeding to terminate Mother's rights, and the record unquestioningly establishes the trial court made the requisite finding before terminating Mother's rights. Accordingly, we affirm the termination. However, because the order fails to check the box indicating the child has been adjudicated deprived, we remand for correction of the order. AFFIRMED IN PART AND REMANDED WITH INSTRUCTIONS. Opinion by Mitchell P.J.; Swinton, V.C.J., and Goree, J., concur.

118,179 — Lashanna Ford Adeyemo, Petitioner, v. American Airlines, New Hampshire Insurance Company, and The Workers' Compensation Court of Existing Claims, Respondents. Petitioner/Claimant Lashanna Ford Adeyemo (Claimant) appeals from an order of the Workers' Compensation Court of Existing Claims determining that the court does not have jurisdiction based on the statute of limitations. Claimant argues that her motion to reopen the claim was timely filed because it was done within three years of the latest order which awarded benefits pursuant to 85 O.S. § 318 (F). Respondent American Airlines, Inc. (Employer) argues that the request to reopen the claim was barred by the statute of limitations, and therefore, properly denied. The order is SUSTAINED. Opinion by Swinton, V.C.J.; Mitchell, P.J., concurs and Goree, J., dissents.

(Division No. 4)
Thursday, May 21, 2020

117,399 — Houchin Electric Co., Inc., Plaintiff/Appellee, vs. CYLX Corporation, an Oklahoma Corporation aka CYLX Corp.; Pheland Lucas, an Individual; and CYLX Engineering and Construction, Defendants/Appellants. Appeal from an Order of the District Court of Tulsa County, Hon. Daman Cantrell, Trial Judge. CYLX Corporation and Pheland Lucas appeal a *quantum meruit* decision of the district court awarding Houchin Electric Co. $50,601 for electric contracting work. The standard of review for both the denial of the motion for a new trial and the underlying equitable deci-

sions is abuse of discretion. A trial court abuses its discretion when a decision is based on an erroneous conclusion of law or where there is no rational basis in evidence for the ruling. *Childers v. Childers,* 2016 OK 95, ¶ 28, 382 P.3d 1020. We find no error in the district court's decision pursuant to that standard, and affirm the order. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Thornbrugh, P.J.; Wiseman, C.J., and Rapp, J. (sitting by designation), concur.

117,816 — Tremain Antoan Doctor, Petitioner/Appellee, vs. Stephanie Leiko Doctor, Respondent/Appellant. Appeal from an order of the District Court of Comanche County, Hon. Irma Newburn, Trial Judge, denying Stephanie Leiko Doctor's (Mother) petition to vacate a decree of dissolution of marriage. Appellee did not file an answer brief, and we therefore consider the appeal on Mother's appellate filings. We conclude Mother's brief supports her allegations of error that the trial court abused its discretion in refusing to vacate inequitable portions of the decree. We reverse the trial court's decision on Mother's petition to vacate, vacate the portions of the decree at issue here, and remand for further proceedings. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, C.J.; Thornbrugh, P.J., and Hixon, J., concur.

Monday, June 1, 2020

118,091 — Jacqueline Peters, Plaintiff/Appellee, vs. EOG Resources, Inc., a corporation, Defendant/Appellant. Appeal from an Order of the District Court of McClain County, Hon. Leah Edwards, Trial Judge. EOG Resources, Inc. appeals the trial court's grant of summary judgment to Jacqueline Peters (Peters) in an action to cancel an oil and gas lease and to quiet title in and to the mineral rights herein. The lease was to automatically terminate unless EOG timely delivered the bonus payment required. Payment was not delivered in accordance with the lease's terms, which provided no instruction for delivery, no provision that delivery was accomplished when mailed, and no restriction of delivery to the address identified in the lease. As the trial court correctly determined, the court had the equitable power to hold the lease is not terminated or forfeited if the lessee intended to make timely payment, and took such steps, without error or fault on its part, as would accomplish timely payment in due and orderly course but for the intervention of something beyond its control. However, while the trial court's interpretation of the law was correct, we hold that a dispute of fact remains on the issue of whether the equitable rule against forfeiture applied. We further hold that the record on summary judgment is not sufficient to allow the trial court to rule on that issue, and remand for further proceedings consistent with this opinion. We therefore reverse and remand the trial court's May 30, 2019 Order granting Peters' summary judgment and remand for further proceedings. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from the Court of Civil Appeals, Division IV, by Hixon, J.; Wiseman, C.J., and Thornbrugh, P.J., concur.

Wednesday, June 3, 2020

118,329 — Leyce Doolen and Allen Lippoldt, Individually and on behalf of Shepherd Dean Lippoldt, deceased, Plaintiffs/Appellants, vs. Dawn Marie Smith Ronspiez Karlin, R.N./APRN-CNM, John Karlin, Moments of Bliss Midwifery Services, LLC, Brandy Harris, Michelle Brunnabend, D.O., and Bliss Birth Services, Defendants/Appellees. Appeal from an order of the District Court of Oklahoma County, Hon. Cindy H. Truong, Trial Judge, granting Defendant Harris's motion to dismiss and from summary judgments entered in favor of the remaining Defendants. Because the trial court failed to allow Plaintiffs to amend their petition, we reverse the trial court's dismissal of Harris. The trial court's refusal to allow Plaintiffs additional time for discovery before responding to Defendant Brunnabend's summary judgment motion was an abuse of discretion requiring reversal. As to the summary judgment based on the statute of limitations, from examining the record, we cannot determine as a matter of undisputed fact when Plaintiffs discovered or should have discovered the alleged medical negligence because reasonable people could reach different conclusions on this point. The trial court's order granting summary judgment "because the statute of limitations had expired; and, the discovery rule was inapplicable to toll the statute of limitations based on the fact that Plaintiffs were aware of the alleged injury on November 8, 2016, the date of the minor's death" is reversed and the case remanded for further proceedings. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, C.J.; Thornbrugh, P.J., and Hixon, J., concur.

Thursday, June 4, 2020

117,273 — George A. Christian, Jr., Petitioner/Appellant, vs. City of Oklahoma City (OCPD); Catherine Hammarsten (PD), Respondents/Appellees, and Oklahoma County District Attorney's Office; David Prater; Additional Defendants. Appeal from the District Court of Oklahoma County, Hon. Trevor S. Pemberton, Trial Judge. George A. Christian, Jr. (Christian), an inmate in the Oklahoma Department of Corrections (DOC), appeals the trial court's orders denying and dismissing his petition for writ of mandamus. In his petition for writ of mandamus, Christian sought an order directing OCPD to comply with the Open Records Act (ORA), 51 O.S.2011, § 24A.1 et seq., and release certain law enforcement records. We find no abuse of discretion in the trial court's determination that the requested records were not subject to mandatory disclosure pursuant to the ORA. Therefore, the trial court's orders denying and dismissing Christian's petition for writ of mandamus against City and Hammarsten are affirmed. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Hixon, J.; Wiseman, C.J., and Thornbrugh, P.J., concur.

117,913 — In the Matter of I.A.F., a Deprived Child Under 18 Years of Age, Sharlotte Sandstede, Appellant, vs. State of Oklahoma, Appellee. Appeal from an order of the District Court of Tulsa County, Hon. Martha Rupp Carter, Trial Judge, terminating Sharlotte A. Sandstede's (Mother) parental rights to her child. The questions on appeal are whether Mother's due process rights were violated and whether the State of Oklahoma met the clear and convincing evidence standard for terminating Mother's parental rights. After reviewing the record and the law, we conclude Mother failed to show any procedural or due process error and State showed by clear and convincing evidence that Mother's parental rights should be terminated. We affirm. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, C.J.; Thornbrugh, P.J., and Hixon, J., concur.

Friday, June 5, 2020

117,676 — In the Matter of the Custody and/or Guardianship of P.S., Alisha Goodin, Petitioner/Appellant, vs. Amy Spradlin, Respondent/Appellee. Appeal from an order of the District Court of Hughes County, Hon. B. Gordon Allen, Trial Judge, denying Petitioner Alisha Goodin's petition for custody and/or guardianship of PS, a minor child. Like most cases requiring judicial decisions, the parties presented conflicting evidence to the trial court on key points. This does not require us to conclude the trial court's decision constitutes an abuse of discretion. The abuse of discretion standard is by necessity a deferential one. Our examination of the record, particularly the transcripts of the evidence presented to the trial court, leads us to conclude the trial court did not abuse its discretion. The trial court certainly recognized the bond between Petitioner and PS and that she "thrived while in the care of Petitioner," but after considering the evidence, the parties' arguments, and the law, it ultimately determined PS should be with Respondent, Amy Spradlin. This decision is not an abuse of discretion, and we affirm the trial court's order denying Petitioner's petition for custody and/or guardianship. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, C.J.; Thornbrugh, P.J., and Hixon, J., concur.

ORDERS DENYING REHEARING
(Division No. 2)
Thursday, June 4, 2020

117,044 — In Re the Marriage of: Clayton M. Collins, Petitioner/Appellee, vs. Heather D. Collins, Respondent, and Richard Ducote, Esq., Appellant. Appellant Richard Ducote, Esq.'s Petition/Motion for Rehearing or Reconsideration of the Court's January 29, 2020, Order granting Appellee Clayton M. Collins' Motion for Appeal-Related Attorney's Fees is *DENIED*.

Monday, June 8, 2020

116,898 — Terrie Wollard, Plaintiff/Appellee, vs. Brent L. Hajek, individually; Mud Operations, Inc.; and Brent's Tank Trucks, Inc., Defrendants/Appellants, and Brent Hajek and Terrie Hajek s Trustees, and Successor Trustees of the Hajek Revocable Trust Dated June 7, 1994, Defendants. Appellants Brent L. Hajek, Mud Operations, Inc., and Brent's Tank Truck, Inc.'s Petition for Rehearing is *DENIED*.

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