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Journal
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Court Issue


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THE OKLAHOMA BAR
Journal

Volume 91 – No. 14 – July 17, 2020

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ADA LOIS SIPUEL FISHER

DIVERSITY AWARDS

Nominations due July 31

Send to diversityawards@okbar.org

The Ada Lois Sipuel Fisher Diversity Awards categories are members of the judiciary, licensed attorneys and entities that have championed the cause of diversity. All nominations must be received by July 31.

For more details, visit www.okbar.org/diversityawards.

OKLAHOMA BAR ASSOCIATION

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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, non-jury, 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 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

2020 OK 56

INDEPENDENT SCHOOL DISTRICT # 52 OF OKLAHOMA COUNTY (Midwest City-Del City); INDEPENDENT SCHOOL DISTRICT #57 OF GARFIELD COUNTY (Enid); INDEPENDENT SCHOOL DISTRICT #71 OF KAY COUNTY (Ponca City); and INDEPENDENT SCHOOL DISTRICT #89 OF OKLAHOMA COUNTY (Oklahoma City), Plaintiffs/Appellants, v. JOY HOFMEISTER, Superintendent of Oklahoma State Department of Education; OKLAHOMA TAX COMMISSION; and KEN MILLER, Oklahoma State Treasurer, Defendants/Appellees, and TULSA PUBLIC SCHOOL DISTRICT, I-1 OF TULSA COUNTY; SAND SPRINGS PUBLIC SCHOOL DISTRICT, I-2 OF TULSA COUNTY; BROKEN ARROW PUBLIC SCHOOL DISTRICT, I-3 OF TULSA COUNTY; BIXBY PUBLIC SCHOOL SYSTEM, I-4 OF TULSA COUNTY; JENKS PUBLIC SCHOOL DISTRICT, I-5 OF TULSA COUNTY; UNION PUBLIC SCHOOL DISTRICT, I-9 OF TULSA COUNTY and OWASSO PUBLIC SCHOOL DISTRICT, I-11 OF TULSA COUNTY and OKLAHOMA PUBLIC CHARTER SCHOOL ASSOCIATION, Intervenor Defendants/Appellees, and WESTERN HEIGHTS INDEPENDENT SCHOOL DISTRICT NO. 1-41 OF OKLAHOMA COUNTY, Plaintiff, v. THE STATE OF OKLAHOMA ex rel., OKLAHOMA STATE DEPARTMENT OF EDUCATION; OKLAHOMA STATE BOARD OF EDUCATION; JOY HOFMEISTER, State Superintendent of Public Instruction for The State of Oklahoma; OKLAHOMA TAX COMMISSION; and KEN MILLER, Oklahoma State Treasurer, Defendants/Appellees.

No. 117,081. July 1, 2020

CORRECTION ORDER

The Court's Opinion filed herein on June 23, 2020, shall be corrected in the following two instances.

1. The Oklahoma Supreme Court Cause Number appearing on the second page of the style or caption of the opinion stating "117,801" shall be corrected to state the correct number "117,081" in agreement with 117,081 stated on the first page of the opinion.
2. The last sentence in paragraph number 95 which states: "The funds lapse on June 30, 2016." shall be corrected to state: "The FY-16 funds may not be encumbered after June 30, 2016, and they legislatively lapse on Nov. 15, 2016."

The opinion of the Court shall otherwise remain as filed June 23, 2020.

DONE BY ORDER OF THE SUPREME COURT THIS 1st DAY OF JULY, 2020.

/s/ Noma D. Gurich
CHIEF JUSTICE

Notice of Judicial Vacancy

The Judicial Nominating Commission seeks applicants to fill the following judicial office:

Associate District Judge – Twenty-First Judicial District
Cleveland County, Oklahoma

This vacancy is created by the retirement of the Honorable Stephen W. Bonner on July 1, 2020.

To be appointed an Associate District Judge, an individual must be a registered voter of the applicable judicial district at the time (s)he takes the oath of office and assumes the duties of office. Additionally, prior to appointment, the appointee must have had a minimum of two years experience as a licensed practicing attorney, or as a judge of a court of record, or combination thereof, within the State of Oklahoma.

Application forms can be obtained on line at www.oscn.net, click on Programs, then Judicial Nominating Commission or by contacting Tammy Reaves at (405) 556-9300. Applications must be submitted to the Chairman of the Commission at the address below no later than **5:00 p.m., Friday, July 24, 2020. If applications are mailed, they must be postmarked by midnight, July 24, 2020.**

Jim Webb, Chairman
Oklahoma Judicial Nominating Commission
2100 North Lincoln Boulevard, Suite 3
Oklahoma City, OK 73105

Want to Get Involved With the YLD?

Run for the OBA/YLD Board of Directors

By Brandi Nowakowski

Each year the Young Lawyers Division holds elections for its officer and director positions. Per the bylaws, the YLD is composed of a chairperson, chairperson-elect, immediate past-chairperson, 20 voting directors and the ex-officio members. The directors and ex-officio members consist of one representative from each Supreme Court Judicial District and Oklahoma and Tulsa counties each having two additional representatives; seven at-large representatives, five of whom are to be elected at large from the division without regard to geographic residence and two of whom are to be elected from counties other than Oklahoma and Tulsa counties; and four ex-officio, nonvoting members. The YLD board's full composition can be found at www.okbar.org/members/YLD/Bylaws.

NOMINATING PROCEDURE

Article 5 of the division bylaws requires that any eligible member wishing to run for office must submit a nominating petition to the Nominating Committee. The petition must be signed by at least 10 members of the OBA/YLD. The original petition must be submitted by the deadline set by the Nominating Committee chairperson. A separate petition must be filed for each opening, except a petition for a directorship shall be valid for one-year and two-year terms and at-large positions. A person must be eligible for division membership for the entire term for which elected.

2021 YLD Board Vacancies

OFFICERS

Officer positions serve a one-year term.

Chairperson-Elect: any member of the division having previously served for at least one year on the OBA/YLD Board of Directors. The chairperson-elect automatically becomes the chairperson of the division for 2022.

Treasurer: any member of the OBA/YLD Board of Directors may be elected by the membership of the division to serve in this office.

Secretary: any member of the OBA/YLD Board of Directors may be elected by the membership of the division to serve in this office.

BOARD OF DIRECTORS

Board of Director positions serve a two-year term.

District 1: Craig, Grant, Kay, Nowata, Osage, Ottawa, Pawnee, Rogers and Washington counties

District 3: Oklahoma County (two seats)

District 5: Carter, Cleveland, Garvin, Grady, Jefferson, Love, McClain, Murray and Stephens counties

District 6: Tulsa County (two seats)

District 7: Adair, Cherokee, Creek, Delaware, Mayes, Muskogee, Okmulgee and Wagoner counties

District 9: Caddo, Canadian, Comanche, Cotton, Greer, Harmon, Jackson, Kiowa and Tillman counties

At-Large: all counties (two seats)

At-Large Rural: any county other than Tulsa or Oklahoma counties

ELIGIBILITY

All OBA members in good standing who were admitted to the practice of law 10 years ago or less are members of the OBA/YLD. Membership is automatic – if you were first admitted to the practice of law in 2008 or later, you are a member of the OBA/YLD!

ELECTION PROCEDURE

Article 5 of the division bylaws governs the election procedure. In October, a list of all eligible candidates and ballots will be published in the *Oklahoma Bar Journal*. Deadlines for voting will be published with the ballots. All members of the division may vote for officers and at-large directorships. Only those members with OBA roster addresses within a subject judicial district may vote for that district's director. The members of the Nominating Committee shall only vote in the event of a tie. Please see OBA/YLD Bylaws for additional information.

DEADLINE

Nominating petitions, accompanied by a photograph and bio (in electronic form) for publication in the OBJ, must be received by Brandi Nowakowski, Nominating Committee Chairperson, at brandi@stuartclover.com and dana@stuartclover.com no later than 5 p.m. Thursday, Aug. 13, 2020.

Results of the election will be announced at the November YLD meeting at the OBA Annual Meeting.

TIPS FROM THE NOMINATING COMMITTEE CHAIRPERSON

- A sample nominating petition can be found at www.okbar.org/YLD/elections. This will help give you an idea of format and information required by OBA/YLD Bylaws (one is also available from the Nominating Committee).
- Signatures on the nominating petitions do not have to be from young lawyers in your own district (the restriction on districts only applies to voting).
- Take your petition to local county bar meetings or to the courthouse and introduce yourself to other young lawyers while asking them to sign – it's a good way to start networking.
- You can have more than one petition for the same position and add the total number of original signatures – if you live in a rural area, you may want to fax or email petitions to colleagues and have them return the petitions with original signatures by U.S. mail.
- Don't wait until the last minute – I will only accept faxes or emails of the petitions if the original petitions are postmarked by the deadline.
- Membership eligibility extends to Dec. 31 of any year which you are eligible.
- Membership eligibility starts from the date of your first admission to the practice of law, even if outside of the state of Oklahoma.
- All candidates' photographs and brief biographical data are required to be published in the OBJ. All biographical data must be submitted by email or on a disk, no exceptions. Petitions submitted without a photograph and/or brief bio are subject to being disqualified at the discretion of the Nominating Committee.

ABOUT THE AUTHOR

Brandi Nowakowski practices in Shawnee. She serves as the YLD immediate past chair and as the YLD Nominating Committee chairperson. She may be contacted at brandi@stuartclover.com.

2021 OBA Board of Governors Vacancies

Nominating Petition Deadline: 5 p.m. Friday, Sept. 4, 2020.

OFFICERS

President-Elect
Current: Michael C. Mordy
Ardmore
(One-year term: 2021)
Mr. Mordy automatically becomes OBA president Jan. 1, 2021
Nominee: **Vacant**

Vice President
Current: Brandi N. Nowakowski
Shawnee
(One-year term: 2021)
Nominee: **Vacant**

BOARD OF GOVERNORS

Supreme Court Judicial District One
Current: Brian T. Hermanson
Newkirk
Craig, Grant, Kay, Nowata, Osage, Ottawa, Pawnee, Rogers, Washington counties
(Three-year term: 2021-2023)
Nominee: **Vacant**

Supreme Court Judicial District Six
Current: D. Kenyon Williams Jr.
Tulsa
Tulsa county
(Three-year term: 2021-2023)
Nominee: **Vacant**

Supreme Court Judicial District Seven
Current: Matthew C. Beese
Muskogee
Adair, Cherokee, Creek, Delaware, Mayes, Muskogee, Okmulgee, Wagoner counties
(Three-year term: 2021-2023)
Nominee: **Vacant**

Member At Large
Current: Brian K. Morton
Oklahoma City

Statewide
(Three-year term: 2021-2023)
Nominee: **Vacant**

SUMMARY OF NOMINATIONS RULES

Not less than 60 days prior to the annual meeting, 25 or more voting members of the OBA within the Supreme Court Judicial District from which the member of the Board of Governors is to be elected that year, shall file with the executive director, a signed petition (which may be in parts) nominating a candidate for the office of member of the Board of Governors for and from such judicial district, or one or more county bar associations within the judicial district may file a nominating resolution nominating such a candidate.

Not less than 60 days prior to the annual meeting, 50 or more voting members of the OBA from any or all judicial districts shall file with the executive director a signed petition nominating a candidate to the office of member at large on the Board of Governors, or three or more county bars may file appropriate resolutions nominating a candidate for this office.

Not less than 60 days before the opening of the annual meeting, 50 or more voting members of the association may file with the executive director a signed petition nominating a candidate for the office of president-elect or vice president, or three or more county bar associations may file appropriate resolutions nominating a candidate for the office.

If no one has filed for one of the vacancies, nominations to any of the above offices shall be received from the House of Delegates on a petition signed by not less than 30 delegates certified to and in attendance at the session at which the election is held.

See Article II and Article III of OBA Bylaws for complete information regarding offices, positions, nominations and election procedure.

Elections for contested positions will be held at the House of Delegates meeting Nov. 6, during the Nov. 4-6 OBA Annual Meeting. Terms of the present OBA officers and governors will terminate Dec. 31, 2020.

Nomination and resolution forms can be found at www.okbar.org/governance/bog/vacancies.

Opinions of Court of Civil Appeals

2020 OK CIV APP 24

CAMERON SMITH, individually and as Personal Representative of the Estate of Gregory Michael Smith, deceased, Plaintiff/Appellant, vs. JULIE LOPP, individually and in her capacities as Trustee of the Sharon A. Smith Living Trust and Personal Representative of the Estate of Gary Don Smith, deceased; THE SHARON A. SMITH LIVING TRUST; SHARON A. SMITH; JONATHAN SMITH; and SONJA SMITH, Defendants/Appellees.

Case No. 117,365. August 30, 2019

APPEAL FROM THE DISTRICT COURT OF CLEVELAND COUNTY, OKLAHOMA

HONORABLE THAD BALKMAN, TRIAL JUDGE

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS

Robert P. Powell, C. Scott Jones PIERCE COUCH HENDRICKSON BAYSINGER & GREEN, L.L.P., Oklahoma City, Oklahoma, for Plaintiff/Appellant

Sara E. Potts, DOERNER, SAUNDERS, DANIEL & ANDERSON, L.L.P., Oklahoma City, Oklahoma, and

David J. Looby, Sara E. Daly, CONNER & WINTERS, LLP, Oklahoma City, Oklahoma, for Defendants/Appellees

DEBORAH B. BARNES, PRESIDING JUDGE:

¶1 Plaintiff Cameron Smith, individually and as Personal Representative of the Estate of Gregory Michael Smith, appeals from an order of the trial court filed in August 2018 granting Defendants' motion to dismiss Plaintiff's petition. The August 2018 order states that "Plaintiff's Petition . . . is hereby DISMISSED for lack of subject matter jurisdiction, pursuant to 12 O.S. 2011, § 2012(b)(1), and for failure to state a claim, pursuant to 12 O.S. 2011, § 2012(b)(6)." Plaintiff also appeals from the trial court's order filed in February 2019 awarding attorney fees to Defendants. Based on our review, we affirm in part, reverse in part, and remand for further proceedings.

BACKGROUND

¶2 Plaintiff is the grandson of Gary Don Smith (GDS) and Sharon A. Smith (SAS). Plaintiff asserts in his petition that GDS died intestate in March 2015, and that GDS was survived by his adult children: Defendant Julie Lopp; Defendant Jonathan Smith; and Gregory Michael Smith (GMS), who is Plaintiff's father and who subsequently died intestate in December 2016. Plaintiff asserts he is the only heir of GMS.

¶3 Plaintiff also asserts GDS was survived by his wife, SAS, but that she is "suffering from Alzheimer's disease and dementia and . . . unable to care for herself." He asserts that, "[s]hortly following the death of GDS, [Defendant Julie Lopp] engaged an attorney to initiate probate proceedings for [the Estate of GDS] and prepare documents purporting to create the Trust, Durable Power of Attorney ('POA') and Last Will and Testament for SAS, with all giving Lopp exclusive control over the Trust and the affairs of SAS and the Estate of GDS." He asserts that "[o]n April 15, 2015, even though SAS was suffering from Alzheimer's and dementia and unable to make decisions on her own behalf, Lopp had SAS execute the Will, POA and documents purporting to create the Trust."

¶4 As set forth in Plaintiff's petition, the above-mentioned probate proceeding for the Estate of GDS was initiated in Cleveland County, Case No. PB-2015-134, and a probate proceeding was also initiated for the Estate of Plaintiff's father, GMS, in Cleveland County, Case No. PB-2017-33. On April 27, 2018, Plaintiff filed documents in both probate proceedings, including a "General Inventory and Appraisement" in Case No. PB-2017-33 in which he, as personal representative of the Estate of GMS, asserted:

> The Estate [of GMS] has an interest in real property from the Estate of [GDS], No. PB-2015-134 . . . . However, there are conflicting inventory and appraisements filed in [the probate of the Estate of GDS] . . . [which] is still pending. An updated inventory will be submitted once the interests from that estate have been determined and distributed.[1]

Also on April 27, 2018, Plaintiff filed a "Motion for Accounting" in the probate proceeding for the Estate of GDS, requesting that the district court order Ms. Lopp (i.e., the personal representative of the Estate of GDS) "to provide an accounting for all activity and the status of all real and personal property of [GDS] and activities undertaken on behalf of the [GDS] Estate."

¶5 In the present action, Plaintiff alleges Ms. Lopp, as Trustee of the Trust of SAS, "entered into an agreement on behalf of the Trust to sell [a certain residence in Oklahoma City (the Residence)] to her brother Jonathan Smith and his wife Sonja Smith for $150,000.00," a price which Plaintiff asserts is at least $41,000 below market value. Plaintiff also asserts that a $30,406.32 benefit in the form of "'Gift Equity' and closing costs . . . resulted in a windfall and preference in favor of Jonathan and Sonja Smith of at least $71,406.52."

¶6 Plaintiff also takes issue with a certain estate sale arranged by Ms. Lopp as Trustee. Plaintiff asserts Ms. Lopp entered into an agreement with an "estate liquidation company to carry out an estate sale on May 6 and 7, 2017, to liquidate the contents of the Residence, with all proceeds to go to the Trust." Plaintiff asserts he "became concerned that items listed in advertisements on the internet were potential assets of the GDS Estate, the GMS Estate and/or Smith Construction, a partnership that provided high quality carpentry services that [GMS] and [GDS] operated." He asserts that despite objecting to the estate sale and requesting that it be delayed, the sale was nevertheless held.

¶7 Plaintiff also asserts in his petition that he has unsuccessfully

> made numerous requests for further documentation from Lopp about potential assets of the GDS Estate in which the GMS Estate may have an interest, including details regarding former assets and effects of GDS that are now claimed to be part of the Trust and the Trust document itself. Plaintiff has requested that Lopp provide a full accounting of the assets and activity involving the GDS Estate and Trust so that Plaintiff can determine assets or potential assets in which he and the Estate of GMS may have an interest.

¶8 Plaintiff has set forth six claims in his petition:

1) He requests a declaratory judgment finding that SAS "did not have the capacity . . . to understand or approve the Trust, POA and Will," and "set[ting] aside the Trust, POA and Will on the grounds of incapacity . . . ."

2) He asserts Ms. Lopp breached "her fiduciary duty to Plaintiff and other persons with an interest in assets of the GDS Estate and the Trust" by undertaking actions "including but not limited to: a) failing to have a guardian appointed for SAS, b) the unlawful sale of the Residence at a loss, c) engaging and participating with a beneficiary of the Trust in mortgage fraud in violation of federal and state consumer finance laws in connection with the sale of the Residence, d) failing to provide an accounting for the disposition of assets and activities undertaken on behalf of the GDS Estate and the Trust, and f) continuing to represent the Estate of GDS and the Trust even though there is an impermissible conflict of interest between the two."

3) He asserts Ms. Lopp's "actions on behalf of SAS and the GDS Estate are in breach of her duties as trustee for the Trust[.]"

4) He asserts the sale of the Residence is void and should be rescinded because SAS lacked capacity to create the Trust and execute the POA and Ms. Lopp lacked authority to sell the Residence.

5) He requests that "[Ms.] Lopp be removed as Trustee and that a guardian and/or successor Trustee be appointed by the Court for SAS and/or the Trust."

6) He asserts that he is entitled to an accounting concerning the Trust, the Trust assets and activities of Ms. Lopp as Trustee, including the disposition of assets and funds.

¶9 After filing a "Qualified Special Entry of Appearance and Reservation of Time and Defenses," Defendants filed a joint motion to dismiss Plaintiff's petition. Defendants point out in their motion to dismiss that Plaintiff alleges in his petition that he is a "contingent beneficiary of the [SAS] Living Trust." Defendants assert, among other things, that Plaintiff, as a mere contingent beneficiary of the Trust, is not a necessary party "under the Oklahoma Trust Act, 60 O.S. 2011, § 175.1, et seq., and dis-

missal is . . . appropriate pursuant to 12 O.S. 2011, § 2012(b)(1)" because the court lacks subject matter jurisdiction over Plaintiff's claims, claims which essentially constitute an attack by one with an unvested interest in a trust against the actions of its trustee.

¶10 In Plaintiff's response, he asserts "Defendants have waived their right to file a motion to dismiss" by filing the above-mentioned special appearance and reservation of time and defenses. Plaintiff further asserts, among other things, that "contingent beneficiaries clearly have standing to pursue an action for breach of trust under Oklahoma law[.]"

¶11 At the hearing on Defendants' motion to dismiss, counsel for Defendants asserted that under the Oklahoma Trust Act, "only those individuals who have vested interests, which means they exist not in the future but now, may challenge the trust administration or bring breaches of trust actions on behalf of themselves for the breach of fiduciary duty by a trustee. . . . It isn't until [SAS] dies and . . . it is also not until all the contingent beneficiaries survive [SAS], that their interests become fully vested and they may bring actions on behalf of their own protected interests[.]" Counsel for Defendants stated that the Trust "is still revocable because [SAS] is still alive."

¶12 Counsel for Defendants also stated that the Residence is not part of the Estate of GDS – i.e., it is "non-probate" – because the Residence "was actually held in joint tenancy with right of survivorship between [GDS] and [SAS]. When [GDS] died, it automatically reverted, by operation of law, no probate action required, to [SAS's] full ownership and . . . possession." Counsel for Defendants also asserted that

> the other assets in the [GDS] estate were also non-probate. And those were, I believe, either two or three payable on death bank accounts. The other assets . . . that are probate, we've provided accountings of those ….
>
> We've got no objection, from my understanding of the correspondence between counsel, about what assets are probate assets of [GDS] that would be inherited per stirpes by [Plaintiff] as . . . an heir to [GMS]. The only assets that were transferred into the trust were the non-probate assets. Everything else is still outside and still pending the finalization of the probate matter for [GDS]. But the [Residence], the bank accounts, which then funded the trust res . . . . [Those assets or the proceeds from the sale of those assets are] completely paying for all of [SAS's] care in the residential facility and for her medical needs . . . .
>
> So as far as the issue regarding the assets, … we have no problem with the probate assets being adjudicated in probate. It's the non-probate assets that are at issue.

¶13 Counsel for Plaintiff stated that he "moved for an accounting of the estate" in the probate proceedings for the Estate of GDS, but asserted,

> our problem is, is that Ms. Lopp because she was the personal administrator for the estate of [GDS], and also the trustee for [SAS], . . . she had control over all of the assets and so she got to pick and choose. And she can say, These were the assets, . . . this was the property. And so she's disclosed some, but we don't know if that's all and we have no way to verify that without getting an accounting of the trust, which we are actually entitled to as a contingent beneficiary. We are entitled to find out the information so we understand the nature of what our interest may be and how we can protect it.

¶14 The trial court stated at the hearing that Plaintiff as a "contingent beneficiary doesn't have [the] rights that [he is] seeking to assert through [his] petition." As set forth above, the trial court granted Defendants' motion to dismiss in its order filed in August 2018 on the basis of a "lack of subject matter jurisdiction, pursuant to 12 O.S. 2011, § 2012(b)(1)," and also "for failure to state a claim, pursuant to 12 O.S. 2011, § 2012(b)(6)."

¶15 Defendant then filed a motion for attorney fees which the trial court also granted. The trial court, in its order filed in February 2019, awarded attorney fees to Defendants in the amount of $13,681.50, and costs in the amount of $232.67.

¶16 From the August 2018 order, as well as from the February 2019 order, Plaintiff appeals.

STANDARD OF REVIEW

¶17 The following standard of review is applicable to this appeal:

> A motion to dismiss is generally viewed with disfavor, and the standard of review

> before this Court is *de novo*. When evaluating a motion to dismiss, this Court examines only the controlling law, taking as true all of the factual allegations together with all reasonable inferences that can be drawn from them. The party moving for dismissal bears the burden . . . to show the legal insufficiency of the petition.

Ladra v. New Dominion, LLC, 2015 OK 53, ¶ 8, 353 P.3d 529 (citations omitted).[2] "If relief is possible under any set of facts which can be established and are consistent with the allegations, a motion to dismiss should be denied." *Miller v. Miller,* 1998 OK 24, ¶ 15, 956 P.2d 887 (footnote omitted). At the pleading stage,

> [a] plaintiff is required neither to identify a specific theory of recovery nor to set out the correct remedy or relief to which he may be entitled. If relief is possible under any set of facts which can be established and is consistent with the allegations, a motion to dismiss should be denied.

Darrow v. Integris Health, Inc., 2008 OK 1, ¶ 7, 176 P.3d 1204 (footnotes omitted). A question of statutory interpretation is also presented on appeal, and questions of statutory interpretation are reviewed *de novo* as well. *See Welch v. Crow,* 2009 OK 20, ¶ 10, 206 P.3d 599 (Questions of statutory construction "are questions of law that we review *de novo* and over which we exercise plenary, independent, and non-deferential authority." (footnote omitted)).

¶18 Regarding the award of attorney fees,

> Because Oklahoma follows the American Rule, a prevailing party is not entitled to an attorney fee award unless authorized by contract, statute or some particular circumstance of the case. *City Nat'l Bank & Trust Co. v. Owens*, 1977 OK 86, 565 P.2d 4. This rule is "firmly established." *Barnes v. Okla. Farm Bur. Mut. Ins. Co.,* 2000 OK 55, ¶ 46, 11 P.3d 162. Whether a party is entitled to an attorney fee is a question of law, reviewed *de novo. Boston Ave. Mgmt., Inc. v. Associated Res., Inc.*, 2007 OK 5, ¶ 10, 152 P.3d 880.

In re Guardianship of Richardson, 2016 OK CIV APP 58, ¶ 4, 423 P.3d 660.

ANALYSIS

I. Motion to Dismiss

A. To the extent Plaintiff is attempting to state a claim on behalf, or as a beneficiary, of the Estate of GDS, the trial court properly dismissed that portion of the petition.

¶19 Plaintiff acknowledges in his petition that probate proceedings have been initiated and are ongoing for the estates of both GDS and GMS. Plaintiff also acknowledges, and the docket sheets of those proceedings confirm, that Plaintiff has filed various documents in those proceedings, including a document in the probate proceeding for the Estate of GDS requesting that the district court order Ms. Lopp, the personal representative of the Estate of GDS, to "provide an accounting for all activity and the status of all real and personal property of [GDS.]"

¶20 Nevertheless, in the present, non-probate proceeding, Plaintiff has set forth allegations that could be interpreted as an attempt to state a claim on behalf of, or as a beneficiary of, the Estate of GDS.[3] However, courts, when sitting in probate, have, by statute, "probate jurisdiction" to, among other things, "compel personal representatives . . . to render accounts," "compel the attendance of witnesses and the production of title deeds, papers, and other property of an estate," and "order and regulate all distribution of property or estates of" the deceased person in question; courts sitting in probate also have authority "[t]o make such orders as may be necessary to the exercise of the powers conferred upon it[.]" 58 O.S. 2011 § 1(A). As explained by the Oklahoma Supreme Court, it is the court sitting in probate that "has the power to determine what property is part of the decedent's estate." *In re Estate of Estes,* 1999 OK 59, ¶ 21, 983 P.2d 438 (citation omitted). *See also Williams v. Mulvihill,* 1993 OK 5, ¶ 8, 846 P.2d 1097 ("Although probate *now* begins in district court, *interdocket remedial boundaries survive*." (emphasis in original)); *In re Fullerton's Estate,* 1962 OK 168, ¶ 0, 375 P.2d 933 (Syllabus by the Court) ("In the absence of statutory restrictions probate courts have such ancillary and incidental powers as are reasonably necessary to an effective exercise of the powers expressly conferred.").[4]

¶21 Portions of Plaintiff's petition could be interpreted as an attempt to undertake an exploratory review and accounting of property which might or might not belong to the Estate of GDS.[5] This portion of Plaintiff's action falls squarely within probate's domain, and is already being addressed in the separate probate proceeding.[6]

¶22 Moreover, even if matters pertaining to the property of an estate but that fall outside the traditional parameters of probate had been alleged by Plaintiff, amendments to 58 O.S. § 1 have "expanded . . . probate's remedial range." *Jernigan v. Jernigan*, 2006 OK 22, ¶ 15, 138 P.3d 539. Title 58 O.S. 2011 § 1(C) provides as follows:

> The district court which has jurisdiction and venue of the administration of any estate is granted unlimited concurrent jurisdiction and venue to hear and determine:
>
> 1. In whom the title to any property is vested, whether the property is real, personal, tangible, intangible, or any combination thereof;
>
> 2. Rights with respect to such property as to all persons and entities;
>
> 3. Whether or not such property is subject to the jurisdiction of the court in the decedent's estate; and
>
> 4. Issues relating to trusts or issues involving a guardian or ward that may arise.

¶23 "[T]he district court sitting in probate has authority to make all such orders as may be necessary to exercise the powers conferred upon it, 58 O.S. 2011 § 1(A)(10)," and, following the 1997 amendments to 58 O.S. § 1, the district court sitting in probate has "further authority to determine rights as to estate property as to all persons and entities. 58 O.S. 2011 § 1(C)." *In re Estate of Vose*, 2017 OK 3, ¶ 15, 390 P.3d 238. *See also Booth v. McKnight*, 2003 OK 49, ¶ 24, 70 P.3d 855 ("A district court sitting in probate has ***unlimited jurisdiction*** to determine in whom an estate's property is to be vested and any rights held by other persons in those assets. Upon a probate's commencement, the district court acquires ***exclusive cognizance over the estate which remains superior to that of every other tribunal***." (citing, inter alia, 58 O.S. § 1(C)) (emphasis in original)).

¶24 Finally, the Oklahoma Supreme Court has explained that a specific procedure should be followed in order for a beneficiary of an estate in probate, who is not a personal representative of that estate, to pursue an action on behalf of that estate. "[T]he probate division may grant leave to a beneficiary to prosecute an action on behalf of the estate" "when there are special circumstances that take the case out of the general rule" which otherwise prohibits such an action. *In re Estate of Bleeker*, 2007 OK 68, ¶ 14, 168 P.3d 774 (emphasis omitted). "[I]n circumscribed circumstances" – such as where "fraud, collusion or refusal to act" "makes it necessary for beneficiaries to bring their own suit for the protection of an interest in the estate that would otherwise be lost" – "persons other than the estate's court-appointed fiduciary" may be granted "leave to pursue litigation for recovery of estate assets." *Id.* ¶¶ 13-14. However, the beneficiary "should present to the court [sitting in probate] a formal application, acting in [one's] capacity as an estate beneficiary, for leave to prosecute on behalf of the estate a claim for the recovery of missing estate assets." *Id.* ¶ 17 (emphasis omitted). The Supreme Court further explained: "If, after an adversary proceeding, leave is granted, [the beneficiary] must then file a petition *qua* court-authorized beneficiary plaintiff stating for the estate the claim upon which her action is founded." *Id.* Here, however, there is no indication that Plaintiff has filed such an application in the probate proceeding for the Estate of GDS, nor has Plaintiff filed the present action as a court-authorized beneficiary plaintiff for the Estate of GDS.

¶25 For all these reasons, to the extent Plaintiff is attempting to state a claim on behalf of, or as a beneficiary of, the Estate of GDS, the trial court properly dismissed that portion of the petition.

B. The trial court erred in dismissing that portion of Plaintiff's petition bringing an action under the Oklahoma Trust Act as a beneficiary of the Trust of SAS.

¶26 Plaintiff challenges various actions undertaken by Ms. Lopp as Trustee of the Trust of SAS. He also seeks to remove Ms. Lopp as Trustee. Plaintiff describes the Trust in his petition as "the [SAS] Living Trust," and he states he is a "contingent beneficiary" of the Trust. As Plaintiff alleges, at all times relevant to this appeal SAS is still living.

¶27 The fundamental issue presented in this regard is whether Plaintiff, as a contingent beneficiary, lacks standing[7] to pursue these challenges. "When standing of a party is brought into issue, the focus is on the party seeking to get the complaint before the court, and not on the issues the party wishes to have adjudicated." *State ex rel. Bd. of Regents for Okla. Agr. & Mech. Colleges v. McCloskey Bros.*, 2009 OK 90, ¶ 18, 227 P.3d 133 (footnote omitted).[8]

> Standing is the right to commence litigation, to take the initial step that frames legal issues for ultimate adjudication by a court or jury. The doctrine of standing identifies those disputes that are appropriately resolved through the judicial process. Standing requires proof of:
>
> > (1) *a legally protected interest* which must have been injured in fact – i.e., suffered *an injury which is actual, concrete and not conjectural in nature,* (2) a causal nexus between the injury and the complained-of conduct, and (3) *a likelihood, as opposed to mere speculation, that the injury is capable of being redressed by a favorable court decision.*

Murray Cnty. v. Homesales, Inc., 2014 OK 52, ¶ 17, 330 P.3d 519 (emphasis added) (internal quotation marks omitted) (citations omitted).

¶28 As a contingent beneficiary, it is difficult to immediately discern whether Plaintiff can assert "an injury which is actual, concrete and not conjectural in nature," or "a likelihood, as opposed to mere speculation, that the injury is capable of being redressed by a favorable court decision." For example, during the life of a trustor, the trust, if revocable, may be revoked by the trustor, and even an "irrevocable" trust may be revoked under certain circumstances.[9] Thus, it would appear that Plaintiff's interest is merely speculative or conjectural for purposes of a standing inquiry. Indeed, by definition, "rights [that] are contingent . . . only . . . come into existence on an event or condition which may not happen[.]" *Randolph v. Bd. of Regents of Okla. Colleges,* 1982 OK 75, ¶ 7, 648 P.2d 825. Thus, Defendants asserted at the hearing:

> In this case, the only person who may bring such action would be the grandmother, [SAS], because she is the only person that [Ms. Lopp], as trustee, owes fiduciary duties to during [SAS's] lifetime. It isn't until [SAS] dies and . . . it is also not until all the contingent beneficiaries survive [SAS], that their interests become fully vested and they may bring actions on behalf of their own protected interests that are now fully vested and essentially have matured . . . .

¶29 Nevertheless, the issue presented is governed by specific statutory language. For purposes of standing, a plaintiff may have "in fact suffered injury to a legally protected interest as contemplated by statutory . . . provisions." *Murray Cnty.*, ¶ 17 (citation omitted). *See also Toxic Waste Impact Grp., Inc. v. Leavitt,* 1994 OK 148, ¶ 11, 890 P.2d 906 ("The Legislature clearly has the authority to grant standing to someone by statute[.]" (citation omitted)). Moreover, the Oklahoma Supreme Court has explained:

> When ruling on a pretrial motion to dismiss for lack of standing, the trial court, and subsequently the reviewing court, "must construe the petition in favor of the complaining party." If the plaintiff alleges facts which are sufficient to establish standing, then the case proceeds to the next stage. A party's standing may be examined at any stage of the proceedings, and the party seeking relief has a greater burden at later stages in the case than in defending a pretrial motion to dismiss.

Okla. Educ. Ass'n v. State ex rel. Okla. Legislature, 2007 OK 30, ¶ 10, 158 P.3d 1058 (footnotes omitted).

¶30 The parties agree that the portion of Plaintiff's petition under consideration here is essentially an attempt to proceed under the Oklahoma Trust Act, 60 O.S. 2011 §§ 175.1-175.57.[10] Section 175.23(A) provides as follows:

> The district court shall have original jurisdiction to construe the provisions of any trust instrument; to determine the law applicable thereto; the powers, duties, and liability of trustee; the existence or nonexistence of facts affecting the administration of the trust estate; to require accounting by trustees; to surcharge trustee; and in its discretion to supervise the administration of trusts; and all actions hereunder are declared to be proceedings in rem.

Section 175.23(C) specifies who may bring such an action:

> *Actions hereunder may be brought by a* trustee, beneficiary, or any person affected by the administration of the trust estate. If the action is predicated upon any act or obligation of any beneficiary, the beneficiary shall be a necessary party to the proceedings. The only necessary parties to such actions shall be those persons designated as beneficiaries by name or class in the instrument creating the trust and who have a vested interest in the trust which is the subject of the action, those persons currently serving as trustees of the trust, and any persons who may be actually receiving distributions from the trust estate at the time the action is filed. Contingent beneficiaries

> designated by name or class shall not be necessary parties.

(Emphasis added.)[11]

¶31 Because the first sentence of § 175.23(C) allows such actions to be brought by a "beneficiary," we must first explore whether the Legislature, in employing this term, intended to include contingent beneficiaries. *See Welch v. Crow,* 2009 OK 20, ¶ 10, 206 P.3d 599 ("The primary goal of statutory construction is to ascertain and follow the intent of the Legislature." (footnote omitted)). "Beneficiary," after all, is defined under the Oklahoma Trust Act as "any person entitled to receive from a trust *any benefit of whatsoever kind or character*." 60 O.S. Supp. 2012 § 175.3(K) (emphasis added). As explained in the Restatement (Third) of Trusts, a beneficiary is defined under the Uniform Trust Code, for example, as a person who has "a present *or future beneficial interest in a trust, vested or contingent*," and, under the Uniform Probate Code, a "'trust beneficiary' includes one 'who has any present or future interest, vested or contingent[.]'" Restatement (Third) of Trusts § 94 comment b (2012) (emphasis added).

¶32 Section 175.3 does specify that the definitions set forth therein apply "unless the context or subject matter otherwise requires"; however, in the same subsection of § 175.23 that is our focal point, the Legislature apparently deemed it nonredundant and useful,[12] when addressing the issue of necessary parties "[i]f the action is predicated upon any act or obligation of any beneficiary," to specify that "[t]he only necessary parties to such actions shall be," among others, "those persons designated as beneficiaries by name or class in the instrument creating the trust *and who have a vested interest in the trust which is the subject of the action*[.]" (Emphasis added.) It would appear from the use of the term beneficiary in this sentence of § 175.23(C) that it is the Legislature's understanding that a person can be a beneficiary and yet not have a vested interest; otherwise, there would be no need for the Legislature to have stipulated that only those beneficiaries who have a vested interest shall be necessary parties. Thus, at least in the narrow context of § 175.23(C), the term beneficiary is not employed in a manner that excludes contingent beneficiaries.[13]

¶33 Moreover, a review of the entire Oklahoma Trust Act reveals that the Legislature has consistently employed the term beneficiary in a manner that does not exclude contingent beneficiaries. *See King v. King,* 2005 OK 4, ¶ 22, 107 P.3d 570 (Legislative "[i]ntent is ascertained from the whole act in light of its general purpose and objective considering relevant provisions together to give full force and effect to each." (footnote omitted)). For example, in § 175.41, the Legislature specifies that even irrevocable trusts

> may be revoked by the trustor upon the written consent of all living persons having vested or contingent interest therein. The term "contingent interest," as used in this section, shall include an interest which a beneficiary may take by purchase, and exclude any interest which a beneficiary may take by descent.

Here, the Legislature again utilizes the term beneficiary in a manner that appears to encompass those with contingent interests.[14]

¶34 In response to a somewhat different, but related, question, the Oklahoma Supreme Court in *Welch v. Crow,* adopted "[t]he Restatement view" expressed in the Restatement (Third) of Trusts § 25 that the existence of a contingent beneficiary satisfies the requirement that a trust "have a separation of the legal estate from the beneficial enjoyment, and that no trust can exist where the same person possesses both." 2009 OK 20, ¶ 16 (footnote omitted). That is, the Court explained that "[a] trust is not illusory simply because it has the same person as the sole trustee and only vested present beneficiary *if it provides for at least a contingent beneficiary*." *Id.* ¶ 17 (emphasis added). Thus, while the Court agreed that "a beneficiary other than the trustor" was needed in order for the trust to be valid, *id.* ¶ 14, the Court concluded the trust in question was valid because, in effect, the contingent beneficiary named in the trust was a beneficiary as broadly defined under § 175.3(K). See *id.* ¶ 17 ("The Restatement view is persuasive and consistent with the definition of a trust beneficiary found at . . . § 175.3(K)." (footnote omitted)). The reasoning in *Welch* lends support to our interpretation of the language in § 175.23(C) that is the focus of this appeal.

¶35 In the present case, although Plaintiff does not elaborate in his petition regarding his alleged interest, he does allege that he is a contingent beneficiary. Because, under the Oklahoma Trust Act, "[a]ctions . . . may be brought by a . . . beneficiary," we conclude the trial court erred in dismissing that portion of Plain-

tiff's petition asserting challenges under the Oklahoma Trust Act in his capacity as a contingent beneficiary.

¶36 Given the arguments of the parties and, in particular, Defendants' assertion that Ms. Lopp owes a duty only to SAS, we emphasize that the Oklahoma Trust Act provides as follows:

> Except as otherwise provided by the terms of a trust, while the trust is revocable and the settlor has capacity to revoke, the rights of the beneficiaries are held by, and the duties of the trustee are owed exclusively to the settlor; the rights to be held by and owed to the beneficiaries arise only upon the settlor's death or incapacity. The trustee may follow a written direction of the settlor, even if contrary to the terms of the trust. The holder of a presently exercisable power of withdrawal or a testamentary general power of appointment has the rights of a settlor of a revocable trust under this section to the extent of the property subject to the power.

60 O.S. 2011 § 175.57(E)(3). We disagree with Defendants that, given the allegations contained in the petition,[15] questions concerning "the duties of the trustee," and whether those duties "are owed exclusively to the settlor," not to mention various other issues which may be raised under the Oklahoma Trust Act, can be readily resolved by the court in favor of Defendants (or any party) as a matter of law at this stage of the proceedings. It is worth recapitulating:

> "Motions to dismiss are generally viewed with disfavor." *Rogers v. Quiktrip Corp.*, 2010 OK 3, ¶ 4, 230 P.3d 853, 856. "The purpose of a motion to dismiss is to test the law that governs the claim in litigation rather than to examine the underlying facts of that claim." *Id.* When reviewing a motion to dismiss, "the Court must take as true all of the challenged pleading's allegations together with all reasonable inferences that may be drawn from them." *Id.*

In re Declaration of Tr. Creating the Avery Family Tr., 2017 OK CIV APP 44, ¶ 5, 402 P.3d 696.

¶37 Plaintiff has adequately pled facts in support of the conclusion that he is a person who may bring an action under the Oklahoma Trust Act; therefore, dismissal of this portion of the petition was improper.

C. <u>The trial court properly dismissed that portion of Plaintiff's petition contesting, outside the Oklahoma Trust Act, the "creation and execution" of specified documents</u>.

¶38 Plaintiff asserts "SAS lacked the capacity . . . to understand and consent to the creation and execution of the Trust, POA, and Will," and therefore "requests the Court to set aside the Trust, POA and Will on the grounds of incapacity[.]" In particular, Plaintiff asserts in his petition that on April 15, 2015, "[Ms.] Lopp had SAS execute the Will, POA and documents purporting to create the Trust." Similarly, in the "Statement of Relevant Facts" in the motion to dismiss, Defendants state: "On April 15, 2015, [SAS] executed estate planning documents created for her by the law firm of Postic & Bates, P.C., thereby establishing the [SAS] Living Trust . . . and naming her daughter, [Ms. Lopp,] as Trustee for the Living Trust," and "[w]hile at the Postic and Bates law office that same day, [SAS] also executed her Last Will and Testament, Durable Power of Attorney, and an Advance Directive Health Care and Nomination of Guardians . . . ."

¶39 While we concluded, above, that Plaintiff has standing for purposes of bringing an action under the Oklahoma Trust Act, we conclude that Plaintiff is otherwise unable, outside the Oklahoma Trust Act and during the life of SAS, to contest "the creation and execution of the Trust, POA, and Will." Pursuant to Plaintiff's allegations, at all times relevant to this appeal SAS is still living, and, in Oklahoma, "a living person has no estate subject to probate and . . . there can be no vested right of inheritance in the estate of a living person." *Randall v. Travelers Cas. & Sur. Co.*, 2006 OK 65, ¶ 2, 145 P.3d 1048 (footnotes omitted).

¶40 Accordingly, we conclude the trial court properly dismissed that portion of Plaintiff's petition contesting the formation of these documents, with the important proviso that, as concluded above, the trial court erred in dismissing that portion of Plaintiff's petition asserting claims under the Oklahoma Trust Act.

II. Attorney Fees and Costs

¶41 Defendants sought, and the trial court awarded, attorney fees pursuant to a provision of the Oklahoma Trust Act.[16] Having concluded above that Plaintiff has adequately pled facts in support of the conclusion that he is a person who may bring an action under the Oklahoma Trust Act and that dismissal of this portion of

the petition was improper, we must reverse the trial court's order awarding attorney fees to Defendants.

CONCLUSION

¶42 We conclude the trial court erred in dismissing that portion of Plaintiff's petition bringing an action under the Oklahoma Trust Act. However, we conclude that to the extent Plaintiff is attempting to state a claim on behalf of, or as a beneficiary of, the Estate of GDS in this action, the trial court properly dismissed that portion of his petition because of, among other things, the ongoing probate proceedings. The trial court also properly dismissed that portion of Plaintiff's petition contesting, outside the Oklahoma Trust Act, the formation of certain documents. Because we conclude the trial court erred in dismissing that portion of Plaintiff's petition bringing an action under the Oklahoma Trust Act, we reverse the trial court's order awarding attorney fees to Defendants pursuant to a provision of the Oklahoma Trust Act. We remand for further proceedings consistent with this Opinion.

¶43 **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS.**

WISEMAN, V.C.J., and RAPP, J., concur.

DEBORAH B. BARNES, PRESIDING JUDGE:

1. Although this document is not contained in the appellate record, this Court has the "present-day capacity to conduct an exploratory review [online] of district court records" "in order to enhance [our] ability to inquire into and protect [our] jurisdiction." Okla. Sup. Ct. R. 1.1(d), 12 O.S. Supp. 2013, ch. 15, app. 1.

2. Plaintiff asserts in his Amended Petition in Error that the trial court "erred in granting [Defendants'] motion to dismiss by relying upon documents attached to [Defendants'] motion without converting [Defendants'] motion to a motion for summary judgment." The only document attached to the motion to dismiss is the Trust of SAS, and the version of the Trust provided is merely an excerpted version, with some pages entirely missing, and other pages partially redacted. Defendants noted in their motion to dismiss that

> [a]lthough [we] attach herein certain excerpts portions (sic) of the Living Trust, this Motion should not be viewed as one made under the summary judgment standard, under either § 2012(b)(1) or (b)(6). *See Doe v. First Presbyterian Church U.S.A. of Tulsa,* 2017 OK 106, ¶ 14 ("A party is generally allowed to submit evidence outside the pleadings when making a challenge to the court's subject matter jurisdiction under 12 O.S. 2011, § 2012(b)(1)."); *Tucker v. Cochran Firm-Criminal Def. Birmingham L.L.C.,* 2014 OK 112, ¶ 30, 341 P.3d 673, 684-85 ("When a defendant files a § 2012(B)(6) motion with an incorporated exhibit which is relied on by plaintiff in the petition, or is integral to plaintiff's petition, the motion is *not* converted into one for summary judgment.") (emphasis in original).

Moreover, because the standard of review on appeal is *de novo*, this Court need not further concern itself with whether the trial court appropriately or inappropriately relied upon certain evidentiary sources in deciding the motion to dismiss. *See also In re Estate of Estes,* 1999 OK 59, ¶ 28, 983 P.2d 438 ("The judgment of the district court is not subject to reversal if the result is correct but based on faulty reasoning.").

Plaintiff also argues the trial court erred in finding that Defendants did not waive the filing of a motion to dismiss for failure to state a claim by filing a reservation of time. However, in the "Qualified Special Entry of Appearance and Reservation of Time and Defenses," Defendants stated they

> hereby reserve an additional twenty (20) days from the answer date . . . in which to answer or otherwise respond to Plaintiff's Petition, pursuant to 12 O.S. 2011, § 2012(A). Defendants further hereby *reserve their objections* to Plaintiff's Petition based upon 12 O.S. 2011, § 2012(B), *and expressly qualify* this Entry of Appearance as such, as allowed under the rule established in *Young v. Walton,* 1991 OK 20, 807 P.2d 248, *Campbell v. American International Group, Inc.*, 1999 OK CIV APP 37, ¶ 9, 976 P.2d 1102, and *First Texas Sav. Assoc. v. Bernsen*, 1996 OK CIV APP 24, 924 P.2d 1293.

(Emphasis added.) Indeed, in *Young* the Oklahoma Supreme Court stated that the terms of § 2012(A)

> do provide that the filing of "an appearance" within the twenty-day period after service of process *extends* the time to respond *and operates as a waiver* of certain challenges. This statute, though, applies only to a defendant's *general* or perhaps to an unspecified appearance, not to one that is explicitly qualified.

1991 OK 20, ¶ 4 (footnote omitted) (emphasis in original). Because Defendants' appearance was explicitly qualified, we are not persuaded by Plaintiff's argument.

3. For example, Plaintiff asserts in his petition that Ms. Lopp has "fail[ed] to provide an accounting for the disposition of assets and activities undertaken on behalf of the GDS Estate," and, moreover, at the hearing on the motion to dismiss, counsel for Plaintiff appears to have acknowledged that Plaintiff is, at least in part, attempting via this action to determine what property is part of the Estate of GDS. Plaintiff also asserts in his petition that in this action he is seeking, in part, to "determine assets or potential assets in which he and the Estate of GMS may have an interest." For purposes of this section of our analysis, we interpret these assertions as attempts to state a claim on behalf, or as a beneficiary, of the Estate of GDS. "The meaning and effect of an instrument . . . depends on its contents and substance rather than on form or title given it by the author." *In re Estate of Estes,* 1999 OK 59, ¶ 24, 983 P.2d 438 (citation omitted). "The legal effect of any court-filed paper – be it a motion, a pleading or some other instrument – is to be measured by its content[.]" *State v. Torres*, 2004 OK 12, ¶ 3 n.5, 87 P.3d 572 (citations omitted). Plaintiff also attempts in his petition to assert claims as a contingent beneficiary of the Trust of SAS, and to challenge the execution of the Trust, POA and Will. We will address these matters separately further below.

4. Moreover, as the Oklahoma Supreme Court has noted, "[t]he probate statutes provide that in a final accounting, the personal representative must, under oath, inform the probate court" regarding numerous matters pertaining to the estate in question, including that "the estate is ready for closing," and "after the entering of an order allowing final accounting, determining heirship and authorizing distribution of the estate, the probate court's review of the estate continues until the representative is discharged." *In re Estate of Hughes*, 2004 OK 20, ¶ 15 n.5, 90 P.3d 1000 (citations omitted). More broadly:

> An administrator is responsible for the faithful administration of the estate's property and has a duty to preserve the estate. The estate administrator has a general duty to take charge of all the effects and personal assets belonging to the decedent and to preserve the same from damage, waste, and injury. An administrator of an estate occupies a fiduciary relationship toward all parties having an interest in the estate. Further, although probate is governed by statutory procedure, substantive law in aid of probate's legal mission of capturing and distributing a deceased person's estate continues to be governed by common-law developments.

In re Estate of Vose, 2017 OK 3, ¶ 31, 390 P.3d 238 (citations omitted) (footnotes omitted).

5. We note that the Oklahoma Supreme Court "has a long history of rejecting the unnecessary waste of judicial resources." *Miami Bus. Servs., LLC v. Davis,* 2013 OK 20, ¶ 16 & n.19, 299 P.3d 477.

6. Because these same issues *are already before the probate court,* the Oklahoma Supreme Court's admonishment that "[a]ll judges of the district court have a constitutionally invested power to transfer cases to another division" – i.e., to the proper division – "of the district court on any tenable legal or equitable ground shown at any point in litigation," *Jernigan v. Jernigan,* 2006 OK 22, ¶ 18, 138 P.3d 539, does not require a transfer in the present case.

7. Although it may be the case, as Plaintiff suggests, that "in the Oklahoma legal system standing is not a component of any of the three indispensable jurisdictional elements" as it is in federal courts, *Toxic Waste Impact Grp., Inc. v. Leavitt*, 1994 OK 148, ¶ 1 n.4, 890 P.2d 906 (Opala, J., concurring), lack of standing is, nevertheless, an appropriate basis for dismissal, *see, e.g., Okla. Educ. Ass'n v. State ex rel. Okla. Legislature,* 2007 OK 30, ¶¶ 6-7, 10, 158 P.3d 1058.

8. *See also In re Estate of Doan*, 1986 OK 15, ¶ 7, 727 P.2d 574 ("Standing determines whether the person is the proper party to request adjudication of a certain issue and does not decide the issue itself. The key element is whether the party whose standing is challenged has sufficient interest or stake in the outcome." (footnote omitted)); *Democratic Party of Okla. v. Estep*, 1982 OK 106, ¶ 7, 652 P.2d 271 ("Standing focuses on the party seeking to get his complaint before the court and not on the issues tendered for determination. In standing problems, the inquiry posed is whether the party invoking the court's jurisdiction has a legally cognizable interest in the outcome of the tendered controversy." (footnote omitted)).

9. Title 60 O.S. 2011 § 175.41 provides, in part, that "[e]very trust shall be revocable by the trustor, unless expressly made irrevocable by the terms of the instrument creating the same. Provided, that any trust may be revoked by the trustor upon the written consent of all living persons having vested or contingent interest therein."

10. The Oklahoma Trust Act is "Oklahoma's version of the Uniform Trust Act which was adopted by the Oklahoma Legislature on May 31, 1941[.]" *State ex rel. Cartwright v. Ogden*, 1982 OK 82, ¶ 22, 657 P.2d 142.

11. In addition, § 175.39 provides:

> Trustees having violated or attempted to violate any express trust, or becoming incompetent or insolvent, or of whose solvency or that of their sureties there is reasonable doubt, or for other cause, in the discretion of the court having jurisdiction, may, *on petition of any person interested*, after hearing, be removed by such court and denied compensation in whole or in part; and any beneficiary, cotrustee, or successor may treat the violation as a breach of trust; and all vacancies in express trusteeships may be filled by such court.

(Emphasis added.)

12. "[T]he Legislature will not be presumed to have done a vain and useless act in the promulgation of a statute[.]" *Wylie v. Chesser*, 2007 OK 81, ¶ 19, 173 P.3d 64 (citation omitted). *See also Bituminous Cas. Corp. v. Cowen Const., Inc.*, 2002 OK 34, ¶ 13, 55 P.3d 1030 ("the former would be rendered redundant and the negotiation for and inclusion of the special endorsement would become a vain and useless act" (footnote omitted)).

13. A necessary party is defined as "[a] party who, being closely connected to a lawsuit, should be included in the case if feasible, but whose absence will not require dismissal of the proceedings." Black's Law Dictionary (11th ed. 2019). Section 175.23(C) provides, as quoted above, that "[c]ontingent beneficiaries designated by name or class shall not be necessary parties" – i.e., at least in the specific actions (those "predicated upon any act or obligation of any beneficiary") addressed in that portion of § 175.23(C) – but we disagree with Defendants that this resolves the issue of whether contingent beneficiaries are "beneficiaries" who may bring an action under the Oklahoma Trust Act.

14. Although some of the uses of the term beneficiary in other provisions of the Oklahoma Trust Act appear to be neutral with regard to whether the term includes contingent beneficiaries, we find no instances in which the term beneficiary, by itself, is employed in a manner that clearly excludes contingent beneficiaries.

15. A selection of those allegations state, for example, that SAS is "residing and being cared for at a memory care facility," is suffering from "Alzheimer's and dementia," is "unable to appreciate that her husband . . . passed away," is "unable to care for herself," and is "not competent to make decisions on her own behalf[.]"

16. Defendants sought attorney fees under § 175.57(D), which states that, "[i]n a judicial proceeding involving a trust, the court may in its discretion, as justice and equity may require, award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust which is the subject of the controversy."

2020 OK CIV APP 25

TRACY-HERALD CORP., d/b/a SUNWOOD APARTMENTS, Plaintiff/Appellee, vs. SABRINA D. JONES, Defendant/Appellant.

Case No. 117,591. February 11, 2020

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

HONORABLE DEBORRAH LUDI-LEITCH, JUDGE

AFFIRMED

Richard A. Hoffman, Tulsa, Oklahoma, for Plaintiff/Appellee,

Eric D. Hallett, LEGAL AID SERVICES OF OKLAHOMA, INC., Tulsa, Oklahoma, for Defendant/Appellant.

Bay Mitchell, Presiding Judge:

¶1 In this forcible entry and detainer action Defendant/Appellant, Sabrina Jones, appeals from a journal entry of judgment evicting her from the apartment she rented from the Defendant/Appellee, Tracy-Herald Corp., d/b/a Sunwood Apartments (Sunwood), and the trial court's denial of Jones's request to vacate the judgment. Jones argues that Sunwood's inclusion of late fees in the amount listed as "rent" in the notice-to-pay-or-quit given under 41 O.S. 2011 §131(B) was so defective as to deprive the trial court of subject matter jurisdiction. Because the presuit notice was sufficient under §131(B) despite the inclusion of the late fees, we affirm.

FACTUAL BACKGROUND

¶2 Jones rented an apartment from Sunwood for $650 per month. The lease included a provision that if the rent was paid late, a fee of $62 per month would be assessed. It is undisputed that Jones failed to pay her rent in both August and September of 2018. On September 12th, Sunwood issued a "Notice to Pay Rent" that demanded Jones vacate the premises within five days of receipt. In relevant part, the notice states as follows:

> Notice to you and all others in possession of the below described premises, that you are hereby notified to vacate, quit and deliver the premises you hold as our tenant, namely: [legal description].
>
> You are to deliver said premises within FIVE (5) days (excluding date of service, Saturday, Sunday and legal holidays) of receipt of this notice, pursuant to the applicable law of Oklahoma.
>
> This notice is provided due to non-payment of rent. The present rent arrearage is in the amount of $1,424.00 according to the account below:
>
> August and September, 2018 rent and late fee

> You may reinstate your tenancy by making full payment within FIVE (5) days (excluding date of service, Saturday, Sunday and legal holidays) on or before the 20th day of September, 2018, as provided under the terms of your lease agreement or by applicable state law. In the event you fail to bring your rent payments current or vacate the premises, we shall immediately take legal action to evict you and to recover rents and damages for the unlawful detention of the premises, together with any future rent that may be due us for breach of your lease agreement.

¶3 The $1,424 listed as "present rent arrearage" was the sum of two months unpaid rent ($1,300) and two months of late fees ($124). It is undisputed that Jones neither paid this amount nor vacated the premises within five days. Sunwood then instituted this forcible entry and detainer action against Jones, seeking a money judgment for the unpaid rent and fees, costs of suit, and possession of the premises.

¶4 A bench trial was held and the trial court found in favor of Sunwood. No court reporter was present and no narrative statement of the proceeding was entered into the record. After trial, at which Jones and her attorney appeared, the court entered judgment in favor of Sunwood for $1,164, costs of suit, and possession of the apartment. The $260 reduction in the judgment from the amount sought was due to a partial payment Jones had made prior to trial.

¶5 Within ten days of the filing of the judgment, Jones filed a motion seeking to vacate the judgment under the theory, among other arguments not presented on appeal, that the trial court was without jurisdiction from the outset because the presuit notice included a demand for payment of late fees, which Jones claims is impermissible under §131(B). A hearing was held on the motion, a transcript of which does appear in the record. The trial court rejected Jones's arguments, including her jurisdictional argument, and entered an order denying the motion to vacate. However, during the course of the proceedings, the trial judge became aware that she had inadvertently included the late fees in the first judgment. Because she never intended to include these fees in her original judgment, she entered a new judgment for $1,040, being $124 less than the initial $1,164 judgment. Jones appeals from both judgments and the order denying her motion to vacate the first judgment.

STANDARD OF REVIEW

¶6 We review the question of whether the trial court had subject matter jurisdiction *de novo. Reeds v. Walker,* 2006 OK 43, ¶10, 157 P.3d 100, 107 ("When there are no contested jurisdictional facts, the question of subject matter jurisdiction is purely one of law which we review *de novo*." (footnotes omitted)). Additionally, statutory construction presents a question of law that we review *de novo. Humphries v. Lewis*, 2003 OK 12, ¶3, 67 P.3d 333, 335. The trial court's failure to vacate the first judgment upon Jones's motion is reviewed for an abuse of discretion. *Ferguson Enterprises v. Webb Enterprises,* 2000 OK 78, ¶5, 13 P.3d 480, 482.

ANALYSIS

¶7 Jones argues that the trial court never had subject matter jurisdiction over the FED action because the presuit notice required under 41 O.S. 2011 §131(B) was defective. The provision in question states:

> A landlord may terminate a rental agreement for failure to pay rent when due, if the tenant fails to pay the rent within five (5) days after written notice of landlord's demand for payment. . . .
>
> Demand for past due rent is deemed a demand for possession of the premises and no further notice to quit possession need be given by the landlord to the tenant for any purpose.

Jones argues that because Sunwood's demand for payment of rent also demanded payment for late fees – which Jones claims cannot be "rent" under the statute[1] – the notice fails as a matter of law, and the trial court was therefore without jurisdiction to proceed with the action to evict.

¶8 Jones relies on several cases[2] for the proposition that "service of a pre-termination notice is jurisdictional." Brief-in-Chief, pg. 7-8. This proposition is correct as far as it goes; however, the cases cited concern whether there was proper service or *proof of service* of the notice.[3] Here, however, the fact of proper service of the presuit notice is admitted, the only question being whether the notice was so deficient under the statute as to amount to no notice at all.

¶9 In this case, Sunwood's notice is fully compliant with 41 O.S. 2011 §131(B) and certainly meets the substantial compliance standard used in evaluating presuit notice requirements.[4] The

presuit notice required under that statute allows a landlord to terminate a lease if the tenant fails to pay rent that is due within five days of the landlord's demand for payment. 41 O.S. 2011 §131(B). The only requirements of the notice are that it be in writing and that it make a demand for payment of rent. *Id.* Here there is no dispute that the notice was given, in writing, and that it demanded payment of rent from Jones. The only complaint is that the notice demanded payment for more than just rent. However, the statute does not forbid a landlord from seeking more than rent in its notice; it simply requires a written demand for payment of rent.

¶10 Jones's position requires reading more into the statute than is present in the text. Under Jones's interpretation, any demand for payment in the §131(B) notice, other than a demand for the exact amount of rent owed at the time of the notice, would invalidate the notice for all purposes. Not only must the landlord include *only* rent, he would be required to be *exactly correct* in his demand for payment or leave the court without jurisdiction to award possession. This reading would add a requirement in the statutory text that is not present, which we will not do. *See, e.g., King v. Hancock*, 1946 OK 278, ¶5, 173 P.2d 944, 946 (refusing to read a requirement that a tenant's name actually appear in the notice to quit where no such requirement was reflected in the statute). In *King*, the Court cautioned: "Unless a definite statutory form [for the notice to quit] is prescribed no special form is indispensable, and any demand is sufficient if the person to whom it is given understands, if of common understanding, what is demanded, and by whom." *Id.* at ¶7, 946.

¶11 The statute does not require that the landlord include any dollar figure in their demand at all, but just a written demand for payment of rent. We hold that the presuit notice in this case was sufficient under §131(B) even though it included a demand for payment of $112 in late fees.

¶12 Finally, we note that Jones complains that because the court below both denied her motion to vacate the first judgment, but then entered a second judgment, "it appears there are now two judgments against the Defendant in this case." Brief-in-Chief, pg. 3. Although we agree that it could appear as though there are two viable judgments remaining against Jones, we wish to clarify that it is only the *second judgment* entered that survived the proceedings below. Although the trial court denied Jones's motion to vacate the first judgment for the reasons Jones requested, the court's entry of an entirely new judgment supplanted the first judgment. "In Oklahoma, there is but one judgment for each cause of action." *Hubbard v. Kaiser-Francis Oil Co.*, 2011 OK 50, ¶16, 256 P.3d 69, 73. Here, there was only one cause of action and there can be only one judgment remaining against Jones. The judgment filed below on October 8, 2018 was entirely superseded by the judgment filed on November, 19, 2018.

¶13 For the reasons set for above, both the November 19, 2018 judgment and the order denying Sunwood's motion to vacate the prior judgment are AFFIRMED.

¶14 Jones's motion for oral argument is DENIED.

SWINTON, V.C.J., and BELL, J. (sitting by designation), concur.

Bay Mitchell, Presiding Judge:

1. For purposes of this opinion, Jones's contention that the late fees cannot be considered rent under the statute is presumed correct; however, it is not clear that such is the case. Under the relevant statute, "rent" is defined as "*all payments*, except deposits and damages, to be made to the landlord under the rental agreement." 41 O.S. 2011 §102(11) (emphasis added). Jones argues that under *Sun Ridge Inv'rs, Ltd. v. Parker,* 1998 OK 22, 956 P.2d 876, late fees must be damages and that late fees cannot therefore be considered "rent." However, *Sun Ridge* does not stand for the proposition that *all* late fees are by definition damages. Rather, *Sun Ridge* focused on whether a $5.00 per day late charge on a $465.00 per month lease was an impermissible penalty or permissible *liquidated* damages under the relevant statutes. *Id.* at ¶6. Indeed, the Court in *Sun Ridge* acknowledged that the landlord also charged a $20.00 per month late fee, but that fee was voluntarily paid by the tenant and not challenged as an impermissible penalty, and therefore not at issue in the case. *Id.* at ¶2. The use of the phrase "damages" in §131(B) might refer to other types of damages than the late-fees-as-liquidated-damages at issue in *Sun Ridge,* such as physical damage to the property. However, because we find that the notice at issue is sufficient even presuming that late fees cannot be considered rent under §131(B), we need not decide this issue.

2. *See Sparks v. Calloway,* 1938 OK 395, 82 P.2d 830; *Bonewitz v. Home Owners Loan Corp.*, 1942 OK 431, 132 P.2d 644; and *Moran v. Hooper,* 1958 OK 28, 321 P.2d 963.

3. *Sparks* holds that the fact of the presuit notice to quit need not be plead, but it is sufficient if it is proved at trial. *Sparks* at ¶4, 831. In *Bonewitz,* evidentiary issues with the fact of service, not the content of the notice, required reversal. *Bonewitz* at ¶5, 645. Likewise, in *Moran* the proof at trial was insufficient to establish that the required presuit notice was given at all. *Moran* at ¶4, 964.

4. Under a presuit notice requirement such as that required under 41 O.S. 2011 §131(B), substantial compliance with the statute is all that is required. *Hobbs v. McGhee,* 1924 OK 717, ¶9, 229 P. 240, 242 ("A substantial notice to quit and leave the premises, and not technical accuracy, is what the statute requires." (quoting *Oklahoma City v. Hill*, 1896 OK 82, 46 P. 568)). *See also, Sparks v. Calloway,* 1938 OK 395, ¶4, 82 P.2d 830, 831 ("Substantial compliance with the terms of the statute is sufficient.... The technical requirements as to pleading are not required in an action in forcible entry and detainer, and where the complaint substantially meets the requirements of the statute, it is sufficient.")

2020 OK CIV APP 26

DAVID SHAWN FRITZ, Plaintiff/Appellant, vs. STATE OF OKLAHOMA ex rel.

DEPARTMENT OF PUBLIC SAFETY, Defendant/Appellee.

Case No. 117,641. September 12, 2019

APPEAL FROM THE DISTRICT COURT OF LOVE COUNTY, OKLAHOMA

HONORABLE WALLACE COPPEDGE, TRIAL JUDGE

AFFIRMED

David S. Fritz, Leon, Oklahoma, *Pro se*

Mark E. Bright, ASSISTANT GENERAL COUNSEL, STATE OF OKLAHOMA, ex rel. DEPARTMENT OF PUBLIC SAFETY, Oklahoma City, Oklahoma, For Defendant/Appellee

JANE P. WISEMAN, VICE-CHIEF JUDGE:

¶1 Appellant David Fritz appeals the trial court's denial of his request to renew his driver's license. After review of the record and applicable law, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 On July 5, 2010, while driving with a Louisiana driver's license, Fritz received a speeding ticket in Missouri. He failed to appear in Missouri traffic court on August 5, 2010. On November 2, 2010, Fritz received an Oklahoma driver's license. Five days later on November 7, the State of Louisiana suspended Fritz's license for failing to appear in Missouri. Although Fritz's Oklahoma license expired on November 30, 2014, he did not seek a renewal until recently. After being denied renewal of his license, Fritz met with Oklahoma Department of Public Safety employee Jackie Sites who is a Driving Compliance Hearing Officer in Ardmore. According to Sites' testimony at the hearing, DPS could not renew Fritz's license while his Louisiana license was suspended.

¶3 By petition to the trial court on October 1, 2018, Fritz appealed DPS's refusal to renew his driver's license. At the conclusion of the hearing held on December 4, 2018, the trial court "dismissed" his petition.

STANDARD OF REVIEW

¶4 Fritz questions whether he was provided due process in DPS's handling of his quest for renewal. "Whether an individual's procedural due process rights have been violated is a question of constitutional fact which is reviewed *de novo." Pierce v. State ex rel. Dep't of Pub. Safety,* 2014 OK 37, ¶ 7, 327 P.3d 530.

¶5 Where the facts are not in dispute and the trial court's decision turns on the application of law, we conduct an independent *de novo* review. *See Manning v. State ex rel. Dep't of Pub. Safety*, 2003 OK CIV APP 57, ¶ 5, 71 P.3d 527. In a *de novo* review, we give no deference to the trial court's reasoning or result. *See Justus v. State ex rel. Dep't of Pub. Safety*, 2002 OK 46, ¶ 3, 61 P.3d 888.

ANALYSIS

¶6 Although Fritz lists five propositions of error, those propositions can best be categorized as two distinct claims: (1) he was not afforded due process by DPS, and (2) DPS's denial of his driver's license is not supported by the law. We first examine the procedural challenge.

I. DPS Procedure

¶7 The established procedure for this appeal is set out in the following provisions of Title 47 O.S.2011 § 6-211:

> A. *Any person denied driving privileges, or whose driving privilege has been canceled, denied, suspended or revoked by the Department*, except where such cancellation, denial, suspension or revocation is mandatory, under the provisions of Section 6-205 of this title, or disqualified by the Department, under the provisions of Section 6-205.2 or 761 of this title, *shall have the right of appeal to the district court as hereinafter provided.* Proceedings before the district court shall be exempt from the provisions of the Oklahoma Pleading and Discovery codes, except that the appeal shall be by petition, without responsive pleadings. The district court is hereby vested with original jurisdiction to hear the petition.
>
> B. *A person whose driving privilege is denied, canceled, revoked or suspended due to inability to meet standards prescribed by law, or due to an out-of-state conviction or violation,* or due to an excessive point accumulation on the traffic record, or for an unlawful license issued, *may appeal in the county in which the person resides*.
>
> . . . .
>
> E. The petition shall be filed within thirty (30) days after the order has been served

upon the person, except a petition relating to an implied consent revocation shall be filed within thirty (30) days after the Department gives notice to the person that the revocation is sustained as provided in Section 754 of this title. It shall be the duty of the district court to enter an order setting the matter for hearing not less than fifteen (15) days and not more than thirty (30) days from the date the petition is filed. A certified copy of petition and order for hearing shall be served forthwith by the clerk of the court upon the Commissioner of Public Safety by certified mail at the Department of Public Safety, Oklahoma City, Oklahoma.

. . . .

I. The court shall take testimony and examine the facts and circumstances, including all of the records on file in the office of the Department of Public Safety relative to the offense committed and the driving record of the person, *and determine from the facts, circumstances, and records whether or not the petitioner is entitled to driving privileges or shall be subject to the order of denial, cancellation, suspension or revocation issued by the Department.* The court may also determine whether or not, from the person's previous driving record, the order was for a longer period of time than such facts and circumstances warranted. In case the court finds that the order was not justified, the court may sustain the appeal, vacate the order of the Department and direct that driving privileges be restored to the petitioner, if otherwise eligible. The court may, in case it determines the order was justified, but that the period of the suspension or revocation was excessive, enter an order modifying the same as provided by law.

. . . .

M. An appeal may be taken by the person or by the Department from the order or judgment of the district court to the Supreme Court of the State of Oklahoma as otherwise provided by law.

(Emphasis added.) As provided in subsection A, Fritz has been denied driving privileges by DPS's refusal to grant him a license after his Oklahoma driver's license expired.

¶8 According to the record, Fritz met with DPS Hearing Officer Jackie Sites on more than one occasion to resolve his problem, but he was unsatisfied with the outcome of these meetings. Fritz then filed his petition in the trial court on October 1, 2018, and a motion for hearing on October 30, 2018. The trial court issued an order setting a hearing for December 4, 2018.

¶9 "The District Court's review of a driver's license denial is conducted *de novo." Trusty v. State ex rel. Dep't of Pub. Safety,* 2016 OK 94, n. 17, 381 P.3d 726. At that December 4th hearing, the trial court heard testimony from Sites, asked questions of the witness and the parties, examined the facts and circumstances, and considered the parties' arguments and legal authorities to determine whether to grant Fritz's appeal. Although the trial court characterized its decision as a "dismissal," it is clearly not a dismissal, but an adjudication on the merits, and we will consider the nature of the decision by what it actually is, rather than the nomenclature given it by the trial court. "The meaning and effect of an instrument filed in court depends on its contents and substance rather than on the form or title given it by the author." *Horizons, Inc. v. Keo Leasing Co.,* 1984 OK 24, ¶ 4, 681 P.2d 757. When the trial court upheld DPS's decision to deny the license renewal, Fritz properly appealed that denial pursuant to subsection M of § 6-211.

¶10 The appropriate procedure for someone whose license renewal request was denied has been followed in this case. The Oklahoma Administrative Code provisions that Fritz cites do not apply to his situation, and the procedure set out there is inapplicable. Fritz's situation does not fall under any of the four categories to receive a hearing before DPS and he therefore is not entitled to such a hearing. Okla. Admin. Code § 595:1-3-3 (2004).[1] Even if Fritz's case had fallen into one of these four categories, DPS's refusal to renew his Oklahoma license would not have been subject to further DPS review. Okla. Admin. Code § 595:1-3-4(e)(2017)("A person is not entitled to a hearing when the action taken by the Department of Public Safety is made mandatory by law."). As discussed below, DPS could not issue Fritz an Oklahoma license while his license in another state was suspended. DPS's response to Fritz's license renewal application is mandated by state law, and no hearing to present evidence or explain the circumstances of his Louisiana license suspension would or could change the outcome as long as his Louisiana license re-

mained suspended. This is equally true of the Missouri citation which may only be resolved by Missouri authorities. After his meetings with Sites, Fritz's only recourse in Oklahoma was to the trial court to test the validity of DPS's denial. He properly pursued this course by following 47 O.S.2011 § 6-211 when he filed this case.

¶11 Once in trial court, Fritz attended a hearing where he was able to present evidence, provide testimony, and counter DPS's arguments. We see no violations of Fritz's right to due process and reject his propositions of error on these points.

II. State law prohibits DPS from issuing a license to a person suspended by another state

¶12 Fritz also challenges the trial court's decision to deny his appeal. The pertinent part of 47 O.S.2011 § 6-103 reads:

> A. Except as otherwise provided by law, the Department of Public Safety shall not issue a driver license to:
>
> . . .
>
> 3. Any person whose driving privilege has been suspended, revoked, canceled or denied in this state or any other state or country until the driving privilege has been reinstated by the state or country withdrawing the privilege . . . .

Fritz does not dispute the authenticity or validity of the DPS records offered and admitted at the December hearing which show the Missouri citation and failure to appear and the subsequent Louisiana license suspension. Fritz stated at the December 4th hearing, "I acknowledge that I don't have a license because I refused to pay a traffic ticket out of Missouri which in turn flagged my license through Louisiana after I had transferred my license to the State of Oklahoma." Tr., p. 4, lines 10-13. Section 6-103 prohibits DPS from issuing a driver's license to someone in Fritz's position. Louisiana suspended Fritz's driving privileges in 2010 based on his failure to appear for a speeding citation in Missouri. DPS may not override or circumvent this statutory restriction and grant Fritz a driver's license.

¶13 As DPS advised him,[2] he must resolve his Louisiana license suspension before DPS may consider his application to renew his Oklahoma driver's license. Nor is there any mechanism for Fritz to challenge in Oklahoma the merits of the speeding ticket he received in Missouri. Based on Oklahoma's clear statutory mandate in § 6-103, no Oklahoma license may be issued or renewed until the underlying out-of-state suspension is lifted and his driving privileges restored in that state. Accordingly, the trial court properly denied Fritz's appeal.

CONCLUSION

¶14 The trial court correctly determined that DPS did not err in refusing to grant or renew Fritz's driver's license.

¶15 **AFFIRMED**.

BARNES, P.J., and RAPP, J., concur.

JANE P. WISEMAN, VICE-CHIEF JUDGE:

1. Oklahoma Administrative Code § 595:1-3-3(b)(2004)provides:

A person has the right to request a hearing before the Department of Public Safety whenever he or she has been aggrieved or adversely affected by an act or refusal to act, or by the issuance of an order or decision by the Department which is subject to review under any applicable statute. Hearings before the Department fall into four categories:

(1) **Hearings under Title 47**. Hearings which are specifically provided for and follow those procedures set forth under Title 47 of the Oklahoma Statutes:

(A) **Implied consent hearings.** Implied consent hearings, involving driving privilege revocation for refusal to take or failure of a breath or blood test for alcohol concentration, are specifically provided for and follow the procedures of the Oklahoma statutes. [47 O.S. §751 *et seq.*].

(B) **Impounded vehicle hearings.** Impounded vehicle hearings follow the procedures specifically provided for under 47 O.S. §903A.

(C) **Parking violations on certain state property.** Hearings involving parking violations on certain state property, as set forth under 47 O.S. §11-1009, are conducted according to state law.

(2) **Hearings under the Administrative Procedures Act – Wrecker or towing service hearings.** Wrecker or towing service hearings resulting in wrecker license cancellation, revocation, or refusal to issue or renew the license, follow the procedures set forth under the Administrative Procedures Act [75 O.S. Art. II] except for those hearings related to vehicles impounded by public agencies which are specifically provided for and conducted according to 47 O.S. §903A.

(3) **Hearings under Department rules.** Hearings provided for by specific rules set forth by divisions within the Department:

(A) **Oklahoma Motor Carrier Safety and Hazardous Materials Transportation Act.** Hearings involving penalties for violation of the Oklahoma Motor Carrier Safety and Hazardous Materials Transportation Act [47 O.S. §230.1 *et seq.*] are conducted as set forth in 595:35-1-9. [47 O.S. §230.9(F)]

(B) **Oversize and overweight vehicles.** Hearings involving the denial or suspension of a permit for oversize and overweight vehicles are conducted as set forth in 595:30-5-3.

(4) **Hearings set forth in this Chapter.** Hearings conducted according to the rules of this Chapter:

(A) **Points violations.** Hearings on points violations resulting in suspension of driving privileges [47 O.S. §6-206].

(B) **Medical aspects.** Hearings on medical aspects relating to a driver's affliction with physical or mental ailments which may cause loss or partial loss of control of or incapability of properly controlling a vehicle [47 O.S. §6-119 *et seq.*].

(C) **Financial responsibility hearings.** Financial responsibility hearings involving the suspension of driving privileges for an owner or driver of a motor vehicle involved in a collision resulting in personal injury, death, or property damage of over three hundred dollars ($300.00) where there is no security (liability insurance) [47 O.S. §7-101].

(D) **Other hearings.** Other hearings conducted within the discretion of the Commissioner of Public Safety [47 O.S. §2-115].

2. Counsel for DPS stated at the December hearing: "I think I've had two conversations with Mr. Fritz and I've told him that he needs to go to Missouri and get this straightened out and get that hold lifted in Louisiana. That's the only remedy that he has. He wants to circumvent that and have the State issue him a license anyway. We can't do that."

2020 OK CIV APP 27

BRITTANY SMITH, Petitioner, vs. WHATABURGER RESTAURANT, LLC, SAFETY NATIONAL CASUALTY CORPORATION and THE WORKERS' COMPENSATION COMMISSION, Respondents.

Case No. 117,832. November 22, 2019

PROCEEDING TO REVIEW AN ORDER OF THE WORKERS' COMPENSATION COMMISSION

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS

Michael R. Green, LAW OFFICE OF MICHAEL R. GREEN, PLLC, Tulsa, Oklahoma, and

Bob Burke, Oklahoma City, Oklahoma, for Petitioner

Catherine C. Taylor, Anthony A. Blair, Reagan Madison Fort, PERRINE, REDEMANN, BERRY, TAYLOR & FRETTE, P.L.L.C., Tulsa, Oklahoma, for Respondents

P. THOMAS THORNBRUGH, JUDGE:

¶1 Petitioner, Brittany Smith (Claimant), seeks review of a Workers' Compensation Commission order affirming an administrative law judge's (ALJ's) finding that Claimant's claim for injury to her cervical and thoracic spine, and spinal cord, is barred by the statute of limitations. For the following reasons, we reverse the Commission's decision and remand for further proceedings.

BACKGROUND

¶2 Claimant filed a CC-Form 3 on April 13, 2017, for an injury that occurred on March 9, 2017, to her low back and right hip when she slipped and fell on an ice water accumulation on the floor at her job at Whataburger (Employer). After the store manager called for an ambulance, she was taken to a local emergency room complaining of pain in her back and rib area. X-rays showed no abnormalities, but she was prescribed pain relief medication and released. She missed work for five days, after which she returned and worked in the same job for another two months, until she quit and went to work in a similar position at another restaurant.

¶3 From the outset of the case, Employer denied liability for the injury "pending discovery." It refused to pay temporary total disability (TTD), refused to pay Claimant's medical expenses, and refused to designate a treating physician. Claimant timely requested a trial date. Both parties obtained medical reports from their respective experts – Claimant in May 2017 and Employer in August 2017. Although the experts' reports – later admitted at trial – made different recommendations for further evaluation and treatment, each physician found that the sole cause of Claimant's lower back and right hip pain was the March 9, 2017, accident.[1] Nonetheless, Employer continued to deny liability and in October 2017 requested the appointment of an independent medical examiner (IME) "to address causation."

¶4 The ALJ appointed Dr. Benjamin White as IME. Dr. White examined Claimant in January 2018, and ordered MRIs of Claimant's cervical, thoracic, and lumbar spine based on the symptoms she reported to him of pain extending up her spine into the thoracic region, cutaneous sensitivity, and numbness in the area of her thoracic spine and in left arm.[2] The IME's report, dated February 21, 2018, states that Claimant's MRIs had revealed that she has a large "spinal cord syrinx extending from her cervical into her thoracic spine," with an associated "Chiari malformation," and that this condition was consistent with the symptoms she had reported to him.[3] The IME also opined "within a reasonable degree of medical certainty that [Claimant's] symptomatic syrinx is causally related to her fall at work." He recommended that Claimant undergo a "Chiari decompression," a surgical procedure with an estimated recovery time of 4 to 6 months. As for Claimant's lower back, however, the IME report stated "[h]er lumbar spine MRI is normal," and her "low back imaging is unremarkable," and recommended no further treatment for her lumbar spine.

¶5 During his deposition in June 2018, the IME further explained that, although he found no "structural abnormality" in need of treatment in Claimant's lumbar, cervical, or thoracic spine, he felt her continued complaints of worsening pain in her low back stemmed from the "anatomic problem [that] is in her spinal cord," which was in need of treatment. During cross examination, on being further pressed to explain what mechanism of injury could be

causing Claimant's continued lower back pain, he stated:

> A. [by the IME] Again, I think that the low back is a bit of a red herring. I think she likely hurt her low back, you know, not in a way that needs surgery or any type of medical treatment, but again, I am far less concerned about her mechanical pain in her low back and even in her neck and thoracic spine, than in the neurologic symptoms she developed in the intervening weeks and months.
>
> * * *
>
> A. Remember, all the signals that go through the low back, those nerves, they get irritated by ruptured discs, bulging discs, all that dreaded stuff that we see in patients who injure themselves, those signals also have to go up the spinal cord.
>
> When the spinal cord starts being stretched, the signals can get mixed up, and so you can get numbness, you can get pain, you can get paresthesias or tingling, odd sensations, and spinal cord syrinxes can cause very odd sensations and can be in all extremities.
>
> In untreated and progressive cases, you can even see paralysis.
>
> Q. Was she having symptoms – Did she complain of symptoms to you other than in her low back?
>
> A. Yes, she did. She complained of symptoms in her arms – weakness in her arms and legs. She complained of kind of upper thoracic pain. She complained of areas in her trunk of cutaneous sensitivity or funny feelings when you touched areas of her trunk.
>
> So she complained of pretty much at least sensory symptoms in all four extremities and in her trunk.
>
> Q. What nervous system would that be related to?
>
> A. The spinal cord. The tracks, the tracks of fibers that carry information up back to the brain. . . .
>
> . . . . .
>
> The spinal cord has got 15 or 20 different tracks, with fibers that carry different information up and down, and all of them can be affected. That's why you can get really bizarre symptoms from syrinx and a Chiari.

White deposition at pp. 33-35.

¶6 Employer paid the expenses of the IME and diagnostic testing as required by 85A O.S. Supp. 2014 § 112(G). However, it continued to deny liability and refused to approve any other medical expenses or treatment.

¶7 On June 18, 2018, within a week of the IME deposition but more than a year after her March 2017 date of injury, Claimant filed an amended CC-Form 3, adding, as injured body parts, her cervical and thoracic spine and her spinal cord. Employer denied the claim and raised the affirmative defense of the statute of limitations at 85A O.S. Supp. 2014 § 69(A), which bars a claim unless filed within one year from the date of injury.

¶8 Claimant argued the one-year period had been tolled by § 69(B)(1) of the 2014 statutes, which extends the limitations period for a claim for "additional compensation" in a case in which "any compensation, including disability or medical, has been paid on account of injury." Title 85A O.S. Supp. 2014 § 69(B)(1) bars a claim for additional compensation unless it is filed within one year of the last payment of compensation or two years of the injury date, "whichever is greater."

¶9 An ALJ heard the matter on July 26, 2018. Claimant testified and medical evidence was admitted, including the IME's report and deposition. The ALJ issued an order on August 7, 2018, finding a work-related injury to Claimant's low back, but holding that the one-year limitations period barred the claim of injury to her cervical and thoracic back and spinal cord. The ALJ recognized that the IME found Claimant's fall at work had caused her Chiari malformation to become symptomatic and obstruct the flow of spinal fluid. However, the ALJ rejected Claimant's contention that Employer's payment for services and testing provided by the IME constituted payment of "compensation" under § 69(B)(1), meaning that § 69(A) applied and barred the amended claim. The ALJ further denied Claimant's request for further medical treatment to her lower back, based on the IME's opinion as to her lumbar spine. Injury to Claimant's right hip was reserved for determination at a later date.

¶10 Claimant appealed to the Commission *en banc*, which affirmed the ALJ. Claimant now seeks review here.

STANDARD OF REVIEW

¶11 Because Claimant's date of injury was in March 2017, the Administrative Workers' Compensation Act (AWCA) governs the law applicable to this matter, including our standard of review. *Brown v. Claims Mgmt. Res., Inc.*, 2017 OK 13, ¶ 9, 391 P.3d 111. Under the AWCA, appellate review is governed by 85A O.S. Supp. 2014 § 78(C),[4] under which this Court may modify, reverse, remand for rehearing, or set aside a WCC order only if it was:

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

¶12 Although limitations issues "involve mixed questions of fact and law and are reviewed as questions of law in this Court," *Ellington v. Horwitz Enter.*, 2003 OK 37, ¶ 4, 68 P.3d 983, the Supreme Court has recognized that, because a limitations defense "is treated as a true affirmative defense, rather than as a jurisdictional question," it is not "independently reviewed by this Court." *Lamson & Sessions v. Doyle*, 2002 OK 89, ¶ 9, 61 P.3d 215. Accordingly, under the administrative review standard of the AWCA, if the determination of a limitations defense depends on a fact issue, then the Commission's determination will be upheld if it is supported by substantial evidence and is not otherwise contrary to law. *See Lamson & Sessions, id.; see also Mullendore v. Mercy Hosp. Ardmore,* 2019 OK 11, ¶ 13, 438 P.3d 358; and *Brown*, 2017 OK 13 at ¶¶ 10-11. To the extent our review requires the resolution of a pure issue of law – such as statutory construction – however, we review the issue *de novo. Arrow Tool & Gauge v. Mead*, 2000 OK 86, ¶ 6, 16 P.3d 1120.

ANALYSIS

¶13 The applicable version of the AWCA limitations statute, 85A O.S. Supp. 2014 § 69, states in relevant part:

> A. Time for Filing.
>
> 1. A claim for benefits under this act, other than an occupational disease, shall be barred unless it is filed with the Commission within one (1) year from the date of the injury. If during the one-year period following the filing of the claim the employee receives no weekly benefit compensation and receives no medical treatment resulting from the alleged injury, the claim shall be barred thereafter. . . .
>
> B. Time for Filing Additional Compensation.
>
> 1. In cases in which any *compensation,* including disability or medical, has been paid on account of injury, a claim for additional compensation shall be barred unless filed with the Commission within one (1) year from the date of the last payment of disability compensation or two (2) years from the date of the injury, whichever is greater. . . . (Emphasis added).

¶14 The definition of "compensation" under the AWCA "*includes the medical services and supplies provided for in Section 50* of this title . . . ." 85A O.S. Supp. 2014 § 2(10) (emphasis added). Section 50, in turn, provides:

> A. The employer shall promptly provide an injured employee with *medical . . . services,* along any with medicine, crutches, ambulatory devices, artificial limbs, eyeglasses, contact lenses, hearing aids, and other apparatus as may be reasonably necessary in connection with the injury received by the employee. The employer shall have the right to choose the treating physician. (Emphasis added).

¶15 Section 69 was addressed by the Court in *Green Country Physical Therapy v. Sylvester,* 2018 OK CIV APP 64, ¶ 26, 429 P.3d 354 (approved for publication by order of the Oklahoma Supreme Court). There, the Court affirmed the Commission's construction of the phrase "last payment of disability compensation" in § 69(B)(1) as including an employer's payment for medical services received by a claimant. The facts of *Sylvester* involved an employer who

initially paid a claimant temporary total disability and for medical treatment – even though the claimant had not filed a formal claim – but then refused to pay for medical needs that arose more than two years after the injury occurred. At that point, which was within one year of the date the employer last paid for medical care, the claimant filed his initial CC-Form 3, and the employer sought dismissal. The Commission held the claim was timely under § 69(B)(1).

¶16 On appeal, the Court agreed, finding the claimant had one year from the date the employer last paid for medical services to file his claim. In comparing AWCA § 69 to predecessor workers' compensation statutes, the Court specifically noted that "section 69(B) broadens the scope of 'reopening any cause' to the instance 'in which *any* compensation, including disability or medical, has been paid on account of injury.'" 2018 OK CIV APP 64at ¶ 20 (emphasis in original).

¶17 Here, Claimant argues the requirement that compensation was paid on account of her injury was met by Employer's request for, and the IME's provision of, an examination and diagnostic testing. She asserts that *Sylvester* applies here as well and renders her amended claim for benefits timely under § 69(B)(1).

¶18 Employer asserts *Sylvester* and § 69(B)(1) do not apply here for the primary reason that, unlike *Sylvester,* Employer has never paid any compensation – whether disability or medical – to Claimant at all. According to Employer, Claimant cannot request "additional compensation" more than one year after her injury, because Employer has never paid "compensation" of any kind in the first instance. Employer argues the Commission correctly interpreted "compensation" as not including an IME's evaluation and testing, and that § 69(B)(1) therefore cannot apply.

¶19 The ALJ's construction of the above statutes (adopted by the Commission *en banc*) reasoned that an IME evaluation does not "fall within the parameters" of 85A O.S. Supp. 2014 § 50(A), because "[n]othing in this section supports the contention that an independent evaluation is the same as providing treatment." By this reasoning, Claimant could not show that "compensation, including disability or medical, ha[d] been paid on account of injury" as required by § 69(B)(1); and § 69(A) therefore applied to bar her amended claim as a matter of law.

¶20 A significant flaw in the Commission's reasoning, however, is presented by its use of the terms "medical services" and "medical treatment" interchangeably in construing the meaning of "compensation paid" in § 69(B)(1). The AWCA clearly uses the term "medical services" in its definition of "compensation" at § 2(10), and just as clearly differentiates medical "treatment" from other "services" provided by medical professionals, including IMEs, elsewhere in the Act. For example, § 45(A)(2) (unchanged from 2017), permits an ALJ to appoint an IME to "determine if further medical treatment is reasonable and necessary" and simultaneously prohibits an IME from "provid[ing] treatment to the injured worker, unless agreed upon by the parties." Another example is § 112(F)(within the statutory provision governing IMEs generally), which requires an employer to designate a "treating physician" if an IME "determines that *more medical treatment* is necessary." (Emphasis added). In addition, § 50(D) refers to recommendations by a claimant's "treating doctor" or "an independent medical examiner."

¶21 It also is noteworthy that § 50(E) requires an employee to attend medical examinations ordered by the court or requested by an employer, but does not suggest that mandatory examinations are not "medical services." Moreover, § 50 does not exclude the services of an IME from its coverage. Although, as noted above, IMEs are the subject of a separate statute, at AWCA § 112, that section also authorizes the Commission to set rules concerning appointment, oversight, and payment of IMEs. The Commission has done so with rules set forth in a chapter of Title 810 of the Oklahoma Administrative Code entitled, "*Medical Services*." *See* OAC §§ 810:15-9-1 through 810-15-9-6.

¶22 Reading these AWCA provisions as a whole strongly suggests that, even though an IME may not provide medical "treatment" *per se,* an IME's services are no less "medical services" than those of any other services provided by a medical professional. As such, an IME evaluation and testing services clearly come within the definition of "compensation" under the AWCA, and thus within the parameters of § 69(B)(1) requiring that "compensation" has been paid due to an injury before that statutory section applies.

¶23 For this reason, we find that the services received by Claimant from the IME, at Employer's own request and expense, triggered the extended limitations time period of § 69(B)(1) and rendered Claimant's amended CC-Form 3 timely for purposes of seeking additional compensation. We find the Commission erred in holding otherwise.[5]

¶24 We do not consider the argument by Employer that Claimant's claim for additional compensation must fail because her amended CC-Form 3 did not specifically state that it was a for "additional compensation" as required by the version of § 69(C) in effect on the date of Claimant's injury. This contention was not raised before the ALJ or addressed by the Commission. "An appellate court will not make first-instance determinations of disputed *law or fact* issues. That is the trial court's function in every case – whether in law, equity or on appeal from an administrative body." *Bivins v. State ex rel. Okla. Mem'l Hosp.*, 1996 OK 5, ¶ 19, 917 P.2d 456 (emphasis in original); s*ee also Evers v. FSF Overlake Assoc.*, 2003 OK 53, ¶ 18, 77 P.3d 581; and *Mahmoodjanloo v. Mahmoodjanloo*, 2007 OK 32, ¶ 12, 160 P.3d 951.

¶25 Accordingly, we reverse the decision of the Commission dismissing the amended claim as untimely, and remand for further proceedings. We do not disturb its finding as to Claimant's lower back injury, which was not challenged on appeal.

CONCLUSION

¶26 We find that, for purposes of tolling the statute of limitations and triggering the extended limitations period of AWCA § 69(B)(1), the services of the IME that were requested and paid for by Employer constitute "compensation . . . paid on account of [the] injury" sustained by Claimant. The amended CC-Form 3 filed by Claimant in June 2018 was timely. We reverse the Commission's order affirming an ALJ's finding that Claimant's claim for injury to her cervical and thoracic spine, and spinal cord, is barred by the statute of limitations, and remand for further proceedings.

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

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

P. THOMAS THORNBRUGH, JUDGE:

1. *See* report of Claimant's expert, Dr. Aaron M. McGuire, dated May 9, 2017, record pp. 34-36 (stating at p. 36, ". . . the sole and major cause of the injuries and need for treatment to the lumbar spine . . . is directly related to" the March 9, 2017, work accident); and of Employer's expert Dr. C.B. Pettigrew, dated Aug. 7, 2017, record pp. 52-55 (stating at p. 54, "the sole cause of Ms. Smith's current complaints to her lower back and right hip is the . . . accident on March 9, 2017").

2. White's initial report, dated Jan. 2, 2018, and his supplemental report, dated Feb. 21, 2018, are attached to his June 12, 2018, deposition, which was admitted as Commission's Exhibit 1 at trial.

3. According to the National Institute of Neurological Disorders and Stroke website, https://www.ninds.nih.gov/Disorders/Patient-Caregiver-Education/Fact-Sheets/Chiari-Malformation-Fact-Sheet (last viewed Nov. 22, 2019):

> Chiari malformations are structural defects in the base of the skull and cerebellum, the part of the brain that controls balance. Normally the cerebellum and parts of the brain stem sit above an opening in the skull that allows the spinal cord to pass through it (called the foramen magnum). When part of the cerebellum extends below the foramen magnum and into the upper spinal canal, it is called a Chiari malformation (CM). . . . Most often [CM] is caused by structural defects in the brain and spinal cord that occur during fetal development.

As explained by the IME during his deposition, Claimant's is a "Chiari Type I malformation" of which Claimant was unaware prior to this incident, and which was asymptomatic until her fall at work in March 2017. The fall caused the malformation to become symptomatic, and the development of a "spinal cord syrinx," also called a syringomyelia, which is an accumulation of spinal fluid extending from Claimant's cervical into her thoracic spine. The IME said the condition is "potentially a dangerous problem" that if left untreated, can lead to loss of function in both of Claimant's arms and legs.

4. Amendments to § 78 effective in May 2019 do not affect subsection (C).

5. Another significant problem with the Commission's construction of the term "compensation" is that it would permit an employer to escape any possible liability under § 69(B) simply by unilaterally refusing to pay for a claimant's medical services even if those services were reasonable and necessary or in abrogation of an employer's duty under § 50(A). Such a situation appears to be essentially what happened here, where Employer continued to deny liability even after its own medical expert found that Claimant's lumbar back injury arose out of and in the course of her employment.

2020 OK CIV APP 28

MANDEE JAMES-VANSANDT, Plaintiff/Appellant, vs. SARAH PASSMORE, Defendant/Appellee.

Case No. 117,955. August 16, 2019

APPEAL FROM THE DISTRICT COURT OF ROGERS COUNTY, OKLAHOMA

HONORABLE SHEILA A. CONDREN, JUDGE

AFFIRMED

Brendan M. McHugh, Dana Jim, Claremore, Oklahoma, for Plaintiff/Appellant,

W. Joseph Pickard, Lauren M. Metzger, SWEET LAW FIRM, Tulsa, Oklahoma, for Defendant/Appellee.

Kenneth L. Buettner, Judge:

¶1 Plaintiff/Appellant Mandee Vansandt (Mother) appeals from a grant of summary judgment in favor of Defendant/Appellee Sarah Passmore (Dr. Passmore).[1] Following a criminal trial for child neglect in which Mother

was adjudicated not guilty, and to which Dr. Passmore contributed as an examining physician for the minor child, T.J. (Child), Mother brought a civil suit against Dr. Passmore for malicious prosecution and intentional infliction of emotional distress. Determining that Dr. Passmore was statutorily presumed immune from civil suit for her reporting of potential child abuse, the trial court held that Mother failed to overcome the presumption. The trial court granted summary judgment in favor of Dr. Passmore. Mother appeals. We affirm the ruling of the trial court.

¶2 Child was born August 14, 2012. On January 11, 2013, Child was admitted to Saint Francis Hospital with a bulging fontanel and reported episodes of brachycardia. Upon examination, it was determined that Child had a subdural hematoma and several broken bones. Suspecting possible child abuse, the Saint Francis physicians requested that Dr. Passmore examine Child to determine whether signs of child neglect were present. After examining Child, reviewing Child's medical records, and speaking with Child's parents, Dr. Passmore determined that Child's injuries could not have been caused by the explanations given by the parents and that Child's injuries were likely a result of abusive head trauma. A social worker at Saint Francis Hospital alerted DHS and law enforcement. A police investigation resulted in the arrest and charging of Child's parents for child neglect.

¶3 Following a criminal trial in early 2014, a jury adjudicated both parents not guilty on charges for child neglect. The parents filed this action against Dr. Passmore August 7, 2014, alleging malicious prosecution and intentional infliction of emotional distress. The case was removed to federal court November 2, 2015. Determining that it lacked subject matter jurisdiction, the federal district court remanded the case to state court September 20, 2016. The father of Child voluntarily dismissed his claims with prejudice May 7, 2018. Dr. Passmore moved for summary judgment against Mother July 2, 2018. Following a hearing on the motion on October 10, 2018, the trial court granted summary judgment in favor of Dr. Passmore December 6, 2018. In so ruling, the trial court held that Mother had not overcome the presumption of good faith and had failed to present evidence of malice. Mother moved for reconsideration. The trial court granted Mother's motion for reconsideration as to her claim for intentional infliction of emotional distress, but ultimately sustained summary judgment in favor of Dr. Passmore April 4, 2019. Mother appeals.

¶4 A trial court should grant summary judgment where there is no dispute as to a material fact and the moving party is entitled to judgment as a matter of law. *Wood v. Mercedes-Benz of Okla. City,* 2014 OK 68, ¶ 4, 336 P.3d 457. The trial court should view all facts and inferences in the light most favorable to the non-moving party. *Id.* Summary judgment is not appropriate where reasonable persons might reach different conclusions based upon the undisputed evidence. *Id.* In attempting to show the existence of a question that must be tried, the party may not rely on bald contentions that facts exist to defeat the motion." *Okla. Dep't of Sec. ex rel. Faught v. Wilcox*, 2011 OK 82, ¶ 19, 267 P.3d 106 (citing *Roberson v. Waltner,* 2005 OK CIV APP 15¶ 8, 108 P.3d 567). The standard of review for a grant of summary judgment is *de novo. Carmichael v. Beller,* 1996 OK 48, ¶ 2, 914 P.2d 1051. "Under the *de novo* standard, this Court is afforded 'plenary, independent, and non-deferential authority to examine the issues presented.'" *Wood*, 2014 OK 68, ¶ 4, 336 P.3d 457 (citing *Harmon v. Cradduck*, 2012 OK 80, ¶ 10, 286 P.3d 643).

¶5 On appeal, Mother argues that the trial court erred in granting summary judgment because a substantial issue as to a material fact remained regarding Dr. Passmore's good faith in reporting the potential abuse of Child.[2] Below, the trial court determined that Dr. Passmore was statutorily immune from civil suit for her reporting of suspected abuse of Child. Under 10 O.S. 2011 § 1-2-104, "Any person who, in good faith and exercising due care, reports suspected child abuse or neglect, or who allows access to a child by persons authorized to investigate a report concerning the child shall have immunity from any liability, civil or criminal, that might otherwise be incurred or imposed." Good faith is presumed under the statute. *Id.*

¶6 In *Myers v. Lashley,* 2002 OK 14, 44 P.3d 553, the Oklahoma Supreme Court explained the policy rationale behind § 1-2-104:

> Oklahoma's child abuse reporting laws express the State's strong public interest in protecting children from abuse by the policy of mandatory reporting of actual and suspected child abuse or neglect to appropriate authorities and agencies. The statu-

> tory scheme imposes upon all health care professionals (teachers as well as all other persons) an obligation to report in good faith all suspected instances of child abuse to [DHS]. No privilege or contract will relieve any person from the legally mandated reporting requirement.

Id. ¶ 11 (footnotes omitted). With the protection of children being the priority, this Court is reluctant to chip away at the protections afforded to those care givers who suspect and report abuse in good faith. *Kremeier v. Transitions, Inc.*, 2015 OK CIV APP 18, ¶ 17, 345 P.3d 1126. In order to have immunity from suit, a person reporting child abuse need only have "knowledge sufficient to support a good faith report of suspected abuse – which may, of course, be based on circumstantial factors indicating that . . . abuse is reasonably likely and potential . . . ." *Id.*

¶7 In alleging Dr. Passmore did not act in good faith in reporting the potential abuse of Child, Mother asserts that Dr. Passmore changed her diagnosis and generally "jumped to the conclusion [that Child was abused]." Specifically, Mother alleges that Dr. Passmore first concluded that Child suffered from shaken baby syndrome, but that she then changed her diagnosis to abusive head trauma. However, Mother did not present any evidence in support of this contention. In fact, Dr. Passmore's report indicates the opposite – that Dr. Passmore was consistent in her diagnosis of abusive head trauma. Mother further alleges that Dr. Passmore recklessly ignored other possible diagnoses, such as metabolic bone disease – the diagnosis supported by Mother's expert witness during the criminal trial. But as indicated in her official report, Dr. Passmore inquired into whether Child had a family history of easy bruising or bone softening diseases and was told there was none.

¶8 Mother has not presented evidence sufficient to overcome the presumption of Dr. Passmore's good faith in reporting suspected abuse of Child. Though medical opinions regarding T.J.'s injuries may differ, Mother has not presented evidence indicating Dr. Passmore acted in bad faith in concluding that the injuries were consistent with abusive head trauma. As demonstrated by Dr. Passmore's report, there is evidence that she had at least "knowledge sufficient to support a good faith report of suspected abuse." Absent evidence other than Mother's bald assertions that she acted in bad faith, Dr. Passmore was entitled to the statutorily granted immunity for a person reporting suspected child abuse to the proper authorities. According to the evidence in the record, Dr. Passmore acted upon her best judgment and medical opinion. Though a jury ultimately determined there was not evidence sufficient to support the conviction of Child's parents for neglect, we will not disincentivize care givers from reporting suspected child abuse by waiving their statutory immunity absent sufficient evidence overcoming the presumption of good faith. We therefore find that there was no controversy as to a material fact and that Dr. Passmore was entitled to judgment as a matter of law.

¶9 AFFIRMED.

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

Kenneth L. Buettner, Judge:

1. The father, Clarence James Vansandt, was voluntarily dismissed with prejudice from this action May 7, 2018.

2. Mother's additional issues on appeal, including that the trial court erred by denying Mother the opportunity to amend her petition to add a negligence claim, are rendered moot if Dr. Passmore is deemed statutorily immune from suit. Because we conclude Dr. Passmore is immune, as explained below, we do not take up Mother's additional issues on appeal.

2020 OK CIV APP 29

GENE WISHON and SHIRLEY WISHON, Plaintiffs/Appellants, vs. BRIAN SANDERS, AMY L. SANDERS, and UNITED STATES OF AMERICA, on behalf of its agency, Farm Service Agency United States Department of Agriculture, Defendants/Appellees.

Case No. 118,050. April 9, 2020

APPEAL FROM THE DISTRICT COURT OF SEMINOLE COUNTY, OKLAHOMA

HONORABLE TIMOTHY L. OLSEN, JUDGE

AFFIRMED AS MODIFIED AND REMANDED

Terry W. Tippens, Doneen Douglas Jones, FELLERS, SNIDER, BLANKENSHIP, BAILEY & TIPPENS, P.C., Oklahoma City, Oklahoma, for Plaintiffs/Appellants,

Ed Cadenhead, THE CADENHEAD LAW FIRM, P.C., Seminole, Oklahoma, and

Jerry Colclazier, Amie R. Colclazier, COLCLAZIER & ASSOCIATES, Seminole, Oklahoma, for Defendants/Appellees.

Bay Mitchell, Presiding Judge:

¶1 Plaintiff/Appellant Shirley Wishon (Wishon) appeals from an order of the trial court denying her motion for a writ of assistance to recover real property and finding her 2011 quiet title judgment against Defendants/Appellees Brian and Amy Sanders (the Sanders) was dormant under 12 O.S. 2011 §735. After de novo review, we find Oklahoma's dormancy provision does not apply to quiet title judgments. However, because the 2011 action only quieted title and does not appear to have properly adjudicated Wishon's right to possession, we find the court properly denied the writ of assistance. Wishon may seek a writ of assistance in any case in which the court has properly ordered possession of the property or she must bring a new action to recover possession. We affirm.

¶2 The real property at issue in this case – several tracts of land in Seminole County (the Subject Property) – has been the subject of numerous lawsuits between the parties. The litigation began in Kingfisher County in case no. CJ-2003-27. Gene Wishon (now deceased) and Shirley Wishon sued Defendant/Appellee Brian Sanders to recover on a promissory note and to enforce obligations related to unpaid debts of a company in which Gene and Brian had been members. The Wishons filed a *lis pendens* on the Subject Property along with the lawsuit. After recovering judgments totaling $1,082,381.03, the Wishons moved to execute against the Subject Property and purchased the property at a sheriff's sale. Sanders did not appeal the order confirming the sheriff's sale. The Kingfisher County district court ordered the court clerk to issue of a writ of assistance so that the Wishons could take possession of the property. The writ, however, was returned by the sheriff as "unable to serve."

¶3 Since then, the Sanders have taken various steps to attempt to retain title and possession of the Subject Property.[1] Wishon has obtained two quiet title judgments in Seminole County to defeat the Sanders' various claims to the property and to remove apparent clouds on the title created by the Sanders' actions. Both orders quieting title were affirmed on appeal. *See Wishon v. Sanders*, Case No. 109,893 (decided October 17, 2012) and *Wishon v. Sanders,* Case No. 114,977 (decided February 16, 2017).

¶4 Although title to the Subject Property has been quieted twice, Wishon has been unable to obtain possession of the property. Wishon recently filed motions seeking writs of assistance to recover possession of the property in each of the three actions discussed above. This appeal springs from the first quiet title action. The order quieting title in this case was entered on August 24, 2011. Wishon challenges the court's finding that she can no longer seek to enforce the judgment because it has gone dormant pursuant to 12 O.S. 2011 §735.

¶5 The interpretation and effect of Oklahoma's dormancy statute present questions of law, which are reviewed *de novo. See Hub Partners XXVI, Ltd. v. Barnett,* 2019 OK 69, ¶6, 453 P.3d 489. Under the *de novo* standard of review, we have plenary, independent, and non-deferential authority to determine whether the trial court erred in its legal rulings. *Id.* The fundamental purpose of statutory construction is to determine and give effect to legislative intent. *Humphries v. Lewis,* 2003 OK 12, ¶7, 67 P.3d 333. "Generally, the plain language of a statute dictates its meaning." *McNeill v. City of Tulsa*, 1988 OK 2, ¶9, 953 P.2d 329. However, when the legislative intent cannot be determined from the statutory language due to ambiguity or conflict, rules of statutory construction should be employed. *Keating v. Edmondson*, 2001 OK 110, ¶8, 37 P.3d 882. Legislative intent is ascertained from the whole act in light of its general purpose and objective, and we must consider relevant provisions together to give full force and effect to each. *Id.* Legislative purpose and intent may also be ascertained from the language in the title to a legislative enactment. *Naylor v. Petuskey,* 1992 OK 88, ¶4, 834 P.2d 439.

¶6 Oklahoma's dormancy statute is located in Title 12, Chapter 13, which is titled "Executions." Section 735 is grouped with six other statutes under the subchapter titled "General Provisions." All of the statutes grouped with §735 address executions. *See* 12 O.S. §731 (executions defined and how issued); §732 (kinds of execution); §733 (property subject to levy); §734 (property bound after seizure); §736 (writs of execution); and §737 (priority among execution). The remainder of the provisions in Chapter 13 address more specifically the procedures and rules for various methods of execution.

¶7 The dormancy statute is also focused on executions. Section 735 provides as follows:

> A. A judgment shall become unenforceable and of no effect if, within five (5) years after the date of filing of any judgment that now is or may hereafter be filed in any court of record in this state:

1. Execution is not issued by the court clerk and filed with the county clerk as provided in Section 759 of this title;

2. A notice of renewal of judgment substantially in the form prescribed by the Administrative Director of the Courts is not filed with the court clerk;

3. A garnishment summons is not issued by the court clerk; or

4. A certified copy of a notice of income assignment is not sent to a payor of the judgment debtor.

B. A judgment shall become unenforceable and of no effect if more than five (5) years have passed from the date of:

1. The last execution on the judgment was filed with the county clerk;

2. The last notice of renewal of judgment was filed with the court clerk;

3. The last garnishment summons was issued; or

4. The sending of a certified copy of a notice of income assignment to a payor of the judgment debtor.

C. This section shall not apply to judgments against municipalities or to child support judgments by operation of law.

12 O.S. 2011 §735. In sum, §735 requires enforcement (or active attempts at enforcement) of a judgment within five years. A party must execute on his judgment, obtain a garnishment summons, send a certified copy of an income assignment, or file a renewal of judgment within five years of the judgment. If more than five years have passed since the last execution, garnishment summons, income assignment, or renewal, the judgment becomes unenforceable.

¶8 An execution is a process of the court through which the sheriff is ordered to enforce a judgment. 12 O.S. 2011 §731; Black's Law Dictionary 650, (9th ed. 2009). There are three types of executions: (1) against the judgment debtor's property; (2) for the delivery of real or personal property; and (3) special executions. The first type of execution is commonly referred to as a "general execution," meaning that any non-exempt property of the judgment debtor may be executed upon and sold for the payment of judgment debts. *See* 12 O.S. 2011 §733. The second kind of execution is used where the judgment provides for recovery of specific real or personal property. The third kind of execution, a special execution, is one that directs a levy upon a specific piece of property. *See Okla. Salvage & Supply Co.*, 1926 OK 595, ¶5, 251 P. 1006 ("A special execution is one that directs a levy upon some special property, while a general execution is one that makes no such requirement but demands a levy upon the debtor's property generally.").

¶9 Interpreting the dormancy statute as applying to *all* judgments is problematic because it requires us to assume that all judgments may be enforced through execution. A quiet title judgment does not require or allow for execution because a quiet title judgment, standing alone, does not provide for any monetary award or award possession of the property. *See Schultz v. Evans*, 1951 OK 61, ¶13, 228 P.2d 626 ("The purpose of an action to quiet title . . . is to determine who is the real owner of the property and to put to rest all adverse claims.") (citation omitted) and *Krosmico v. Pettit*, 1998 OK 90, n. 1, 968 P.2d 345 ("A party . . . claiming right of possession obtains relief by an action in ejectment[.]"). For the same reason, garnishment summons and income assignments are not necessary or available to effectuate a quiet title judgment.

¶10 Although technically, a party could file a renewal of the quiet title judgment every five years, no published decision in Oklahoma has imposed such a requirement, and because of the nature of quiet title judgments, we will not do so here. "[T]he judgment rendered [in a quiet title action] is final and conclusive as against the parties thereto and their privies." *Schultz v. Evans,* 1951 OK 61, ¶13, 228 P.2d 626 (citation omitted). A quiet title judgment simply clears and removes any clouds on title to real property. Nothing more is required to preserve it.[2]

¶11 The statute does not address whether judgments that cannot be executed upon may become dormant, and, if so, how to prevent dormancy of those judgments. Statutory construction that would lead to an absurdity must be avoided, and a rational construction should be given to a statute if the language fairly permits. *Ledbetter v. Oklahoma Alcoholic Beverage Laws Enforcement Comm'n.,* 1988 OK 117, ¶7, 764 P.2d 172. Because none of the alternatives offered by §735 for keeping a judgment active are available or applicable to quiet title judgments, application of §735 to a quiet title judgment would lead

to an absurd result. Accordingly, we must give §735 a rational construction if fairly permitted.

¶12 In *North v. Haning*, 1950 OK 280, 229 P.2d 574, the Oklahoma Supreme Court noted the following regarding §735:

> We think it clear that the intent and purpose of section 735 was to require that when there has been a final determination of the rights of the parties in an action, that there shall be an exercise of such rights as determined within five years, or that said rights shall become dormant and may not be exercised, **or more specific, that when there has been a final determination of the rights of the parties in an action which includes a right to have issue of the process of the court against the estate of any person, or against a particular property**, that upon a failure to have such general or special execution issue within five years, the right to such process shall be lost.

Id., ¶13 (emphasis added). We agree with the Court's clarification: the dormancy provision applies to judgments (final determinations of the rights of the parties in an action) *which include the right to execute on the judgment.* Because a quiet title judgment does not require or allow for execution, it is not subject to dormancy.

¶13 We acknowledge that the dormancy statute uses the word "judgment" broadly and, in Oklahoma, "judgment" is also broadly defined as "the final determination of the rights of the parties in an action." *See* 12 O.S. 2011 §681. However, we find support for our conclusion from the whole act in light of its general purpose and objective and after consideration of all relevant provisions together. *See Keating*, ¶8. Title 12, Chapter 13 concentrates on the procedures and rules regarding executions. Accordingly, limiting 735's application to judgments which include the right to execute does not defeat the general purpose and objective of the dormancy provision, which is to require those with the right to enforce a judgment to timely do so. We also acknowledge §735 notes only two exceptions to the dormancy statute – judgments against municipalities and judgments for child support – and quiet title judgments are not an included exception. *See* 12 O.S. 2011 §735(C). However, we read subsection (C) as merely carving out two types of executable judgments that are not subject to dormancy.

¶14 The court here erred by finding Wishon's quiet title judgment is dormant. And, as explained, a quiet title judgment cannot become dormant. But that does not mean the writ of assistance should have been issued. The writ of assistance, the denial of which is the order on appeal, must be based on a proper determination of the right to possession (ordinarily in an ejectment action). The trial court's 2011 judgment quieted title to the property, but the right to possession does not appear to have been litigated.[3] That being the case, denying the writ of assistance was proper.[4] The right to possession must be properly litigated and determined before a writ of assistance should issue. We AFFIRM the denial of the writ for the reasons stated and REMAND for further proceedings to determine Wishon's right to possession.

¶15 AFFIRMED AS MODIFIED AND REMANDED

SWINTON, V.C.J., and BELL, J. (sitting by designation), concur.

Bay Mitchell, Presiding Judge:

1. Specifically, before the judgments were entered in the Kingfisher County proceeding, Brian Sanders deeded the property to his wife, Amy Sanders. The Sanders claimed the transfer rendered Wishon's interest obtained at the sheriff's sale subordinate to Amy's. In addition, in 2013, Brian Sanders reinstated the parties' former company and filed a notice of after-acquired title on the company's behalf.

2. Although a party may record his quiet title judgment, recording is not *required. See* 16 O.S. 2011 §31 (noting that any judgment or decree adjudging real estate interests "*may* be filed for record and recorded in the office of the register of deeds[.]") (emphasis added); *see also Hess v. Excise Bd. of McCurtain Cnty.*, 1985 OK 28, ¶7, 698 P.2d 930 (noting that "may" usually denotes "permissive or discretional, and not mandatory, action or conduct[.]").

3. Although the quiet title order notes that the Wishons are entitled to sole possession of the property, the record indicates possession was not properly pled or actually litigated in this case. "[A] judgment outside the scope of the issues presented for adjudication by the trial court is of no force and effect, or *coram non judice*, and void at least insofar as it goes beyond the issues properly presented." *In re Guardianship of Stanfield*, 2012 OK 8, n. 52, 276 P.3d 989.

4. "It is well settled that a correct judgment will not be disturbed on review, even when the trial court applied an incorrect theory or reasoning in arriving at its conclusion; an unsuccessful party cannot complain of trial court's error when he would not have been entitled to succeed anyway." *Harvey v. City of Okla. City*, 2005 OK 20, ¶12, 111 P.3d 239.

April 9, 2020

APPEAL FROM THE DISTRICT COURT OF SEMINOLE COUNTY, OKLAHOMA

HONORABLE TIMOTHY L. OLSEN, JUDGE

AFFIRMED AS MODIFIED AND REMANDED

Terry W. Tippens, Doneen Douglas Jones, FELLERS, SNIDER, BLANKENSHIP, BAILEY & TIPPENS, P.C., Oklahoma City, Oklahoma, for Plaintiffs/Appellants,

Ed Cadenhead, THE CADENHEAD LAW FIRM, P.C., Seminole, Oklahoma, and

Jerry Colclazier, Amie R. Colclazier, COLCLAZIER & ASSOCIATES, Seminole, Oklahoma, for Defendants/Appellees.

Bay Mitchell, Presiding Judge:

¶1 Plaintiff/Appellant Shirley Wishon (Wishon) appeals from an order of the trial court denying her motion for a writ of assistance to recover real property and finding her 2011 quiet title judgment against Defendants/Appellees Brian and Amy Sanders (the Sanders) was dormant under 12 O.S. 2011 §735. After de novo review, we find Oklahoma's dormancy provision does not apply to quiet title judgments. However, because the 2011 action only quieted title and does not appear to have properly adjudicated Wishon's right to possession, we find the court properly denied the writ of assistance. Wishon may seek a writ of assistance in any case in which the court has properly ordered possession of the property or she must bring a new action to recover possession. We affirm.

¶2 The real property at issue in this case – several tracts of land in Seminole County (the Subject Property) – has been the subject of numerous lawsuits between the parties. The litigation began in Kingfisher County in case no. CJ-2003-27. Gene Wishon (now deceased) and Shirley Wishon sued Defendant/Appellee Brian Sanders to recover on a promissory note and to enforce obligations related to unpaid debts of a company in which Gene and Brian had been members. The Wishons filed a *lis pendens* on the Subject Property along with the lawsuit. After recovering judgments totaling $1,082,381.03, the Wishons moved to execute against the Subject Property and purchased the property at a sheriff's sale. Sanders did not appeal the order confirming the sheriff's sale. The Kingfisher County district court ordered the court clerk to issue of a writ of assistance so that the Wishons could take possession of the property. The writ, however, was returned by the sheriff as "unable to serve."

¶3 Since then, the Sanders have taken various steps to attempt to retain title and possession of the Subject Property.[1] Wishon has obtained two quiet title judgments in Seminole County to defeat the Sanders' various claims to the property and to remove apparent clouds on the title created by the Sanders' actions. Both orders quieting title were affirmed on appeal. *See Wishon v. Sanders*, Case No. 109,893 (decided October 17, 2012) and *Wishon v. Sanders,* Case No. 114,977 (decided February 16, 2017).

¶4 Although title to the Subject Property has been quieted twice, Wishon has been unable to obtain possession of the property. Wishon recently filed motions seeking writs of assistance to recover possession of the property in each of the three actions discussed above. This appeal springs from the first quiet title action. The order quieting title in this case was entered on August 24, 2011. Wishon challenges the court's finding that she can no longer seek to enforce the judgment because it has gone dormant pursuant to 12 O.S. 2011 §735.

¶5 The interpretation and effect of Oklahoma's dormancy statute present questions of law, which are reviewed *de novo. See Hub Partners XXVI, Ltd. v. Barnett,* 2019 OK 69, ¶6, 453 P.3d 489. Under the *de novo* standard of review, we have plenary, independent, and non-deferential authority to determine whether the trial court erred in its legal rulings. *Id.* The fundamental purpose of statutory construction is to determine and give effect to legislative intent. *Humphries v. Lewis,* 2003 OK 12, ¶7, 67 P.3d 333. "Generally, the plain language of a statute dictates its meaning." *McNeill v. City of Tulsa,* 1988 OK 2, ¶9, 953 P.2d 329. However, when the legislative intent cannot be determined from the statutory language due to ambiguity or conflict, rules of statutory construction should be employed. *Keating v. Edmondson*, 2001 OK 110, ¶8, 37 P.3d 882. Legislative intent is ascertained from the whole act in light of its general purpose and objective, and we must consider relevant provisions together to give full force and effect to each. *Id.* Legislative purpose and intent may also be ascertained from the language in the title to a legislative enactment. *Naylor v. Petuskey,* 1992 OK 88, ¶4, 834 P.2d 439.

¶6 Oklahoma's dormancy statute is located in Title 12, Chapter 13, which is titled "Executions." Section 735 is grouped with six other statutes under the subchapter titled "General Provisions." All of the statutes grouped with §735 address executions. *See* 12 O.S. §731 (executions defined and how issued); §732 (kinds of execution); §733 (property subject to levy); §734 (property bound after seizure); §736 (writs of execution); and §737 (priority among execution). The remainder of the provisions in Chapter 13 address more specifically the procedures and rules for various methods of execution.

¶7 The dormancy statute is also focused on executions. Section 735 provides as follows:

> A. A judgment shall become unenforceable and of no effect if, within five (5) years after the date of filing of any judgment that now is or may hereafter be filed in any court of record in this state:
>
> 1. Execution is not issued by the court clerk and filed with the county clerk as provided in Section 759 of this title;
>
> 2. A notice of renewal of judgment substantially in the form prescribed by the Administrative Director of the Courts is not filed with the court clerk;
>
> 3. A garnishment summons is not issued by the court clerk; or
>
> 4. A certified copy of a notice of income assignment is not sent to a payor of the judgment debtor.
>
> B. A judgment shall become unenforceable and of no effect if more than five (5) years have passed from the date of:
>
> 1. The last execution on the judgment was filed with the county clerk;
>
> 2. The last notice of renewal of judgment was filed with the court clerk;
>
> 3. The last garnishment summons was issued; or
>
> 4. The sending of a certified copy of a notice of income assignment to a payor of the judgment debtor.
>
> C. This section shall not apply to judgments against municipalities or to child support judgments by operation of law.

12 O.S. 2011 §735. In sum, §735 requires enforcement (or active attempts at enforcement) of a judgment within five years. A party must execute on his judgment, obtain a garnishment summons, send a certified copy of an income assignment, or file a renewal of judgment within five years of the judgment. If more than five years have passed since the last execution, garnishment summons, income assignment, or renewal, the judgment becomes unenforceable.

¶8 An execution is a process of the court through which the sheriff is ordered to enforce a judgment. 12 O.S. 2011 §731; Black's Law Dictionary 650, (9th ed. 2009). There are three types of executions: (1) against the judgment debtor's property; (2) for the delivery of real or personal property; and (3) special executions. The first type of execution is commonly referred to as a "general execution," meaning that any non-exempt property of the judgment debtor may be executed upon and sold for the payment of judgment debts. *See* 12 O.S. 2011 §733. The second kind of execution is used where the judgment provides for recovery of specific real or personal property. The third kind of execution, a special execution, is one that directs a levy upon a specific piece of property. *See Okla. Salvage & Supply Co.,* 1926 OK 595, ¶5, 251 P. 1006 ("A special execution is one that directs a levy upon some special property, while a general execution is one that makes no such requirement but demands a levy upon the debtor's property generally.").

¶9 Interpreting the dormancy statute as applying to *all* judgments is problematic because it requires us to assume that all judgments may be enforced through execution. A quiet title judgment does not require or allow for execution because a quiet title judgment, standing alone, does not provide for any monetary award or award possession of the property. *See Schultz v. Evans*, 1951 OK 61, ¶13, 228 P.2d 626 ("The purpose of an action to quiet title . . . is to determine who is the real owner of the property and to put to rest all adverse claims.") (citation omitted) and *Krosmico v. Pettit*, 1998 OK 90, n. 1, 968 P.2d 345 ("A party . . . claiming right of possession obtains relief by an action in ejectment[.]"). For the same reason, garnishment summons and income assignments are not necessary or available to effectuate a quiet title judgment.

¶10 Although technically, a party could file a renewal of the quiet title judgment every five years, no published decision in Oklahoma has imposed such a requirement, and because of the nature of quiet title judgments, we will not do so here. "[T]he judgment rendered [in a quiet title action] is final and conclusive as against the parties thereto and their privies." *Schultz v. Evans,* 1951 OK 61, ¶13, 228 P.2d 626 (citation omitted). A quiet title judgment simply clears and removes any clouds on title to real property. Nothing more is required to preserve it.[2]

¶11 The statute does not address whether judgments that cannot be executed upon may become dormant, and, if so, how to prevent dormancy of those judgments. Statutory construction that would lead to an absurdity must be

avoided, and a rational construction should be given to a statute if the language fairly permits. *Ledbetter v. Oklahoma Alcoholic Beverage Laws Enforcement Comm'n.*, 1988 OK 117, ¶7, 764 P.2d 172. Because none of the alternatives offered by §735 for keeping a judgment active are available or applicable to quiet title judgments, application of §735 to a quiet title judgment would lead to an absurd result. Accordingly, we must give §735 a rational construction if fairly permitted.

¶12 In *North v. Haning*, 1950 OK 280, 229 P.2d 574, the Oklahoma Supreme Court noted the following regarding §735:

> We think it clear that the intent and purpose of section 735 was to require that when there has been a final determination of the rights of the parties in an action, that there shall be an exercise of such rights as determined within five years, or that said rights shall become dormant and may not be exercised, **or more specific, that when there has been a final determination of the rights of the parties in an action which includes a right to have issue of the process of the court against the estate of any person, or against a particular property**, that upon a failure to have such general or special execution issue within five years, the right to such process shall be lost.

Id., ¶13 (emphasis added). We agree with the Court's clarification: the dormancy provision applies to judgments (final determinations of the rights of the parties in an action) *which include the right to execute on the judgment.* Because a quiet title judgment does not require or allow for execution, it is not subject to dormancy.

¶13 We acknowledge that the dormancy statute uses the word "judgment" broadly and, in Oklahoma, "judgment" is also broadly defined as "the final determination of the rights of the parties in an action." *See* 12 O.S. 2011 §681. However, we find support for our conclusion from the whole act in light of its general purpose and objective and after consideration of all relevant provisions together. *See Keating*, ¶8. Title 12, Chapter 13 concentrates on the procedures and rules regarding executions. Accordingly, limiting 735's application to judgments which include the right to execute does not defeat the general purpose and objective of the dormancy provision, which is to require those with the right to enforce a judgment to timely do so. We also acknowledge §735 notes only two exceptions to the dormancy statute – judgments against municipalities and judgments for child support – and quiet title judgments are not an included exception. *See* 12 O.S. 2011 §735(C). However, we read subsection (C) as merely carving out two types of executable judgments that are not subject to dormancy.

¶14 The court here erred by finding Wishon's quiet title judgment is dormant. And, as explained, a quiet title judgment cannot become dormant. But that does not mean the writ of assistance should have been issued. The writ of assistance, the denial of which is the order on appeal, must be based on a proper determination of the right to possession (ordinarily in an ejectment action). The trial court's 2011 judgment quieted title to the property, but the right to possession does not appear to have been litigated.[3] That being the case, denying the writ of assistance was proper.[4] The right to possession must be properly litigated and determined before a writ of assistance should issue. We AFFIRM the denial of the writ for the reasons stated and REMAND for further proceedings to determine Wishon's right to possession.

¶15 AFFIRMED AS MODIFIED AND REMANDED

SWINTON, V.C.J., and BELL, J. (sitting by designation), concur.

Bay Mitchell, Presiding Judge:

1. Specifically, before the judgments were entered in the Kingfisher County proceeding, Brian Sanders deeded the property to his wife, Amy Sanders. The Sanders claimed the transfer rendered Wishon's interest obtained at the sheriff's sale subordinate to Amy's. In addition, in 2013, Brian Sanders reinstated the parties' former company and filed a notice of after-acquired title on the company's behalf.

2. Although a party may record his quiet title judgment, recording is not *required*. *See* 16 O.S. 2011 §31 (noting that any judgment or decree adjudging real estate interests "*may* be filed for record and recorded in the office of the register of deeds[.]") (emphasis added); *see also Hess v. Excise Bd. of McCurtain Cnty.*, 1985 OK 28, ¶7, 698 P.2d 930 (noting that "may" usually denotes "permissive or discretional, and not mandatory, action or conduct[.]").

3. Although the quiet title order notes that the Wishons are entitled to sole possession of the property, the record indicates possession was not properly pled or actually litigated in this case. "[A] judgment outside the scope of the issues presented for adjudication by the trial court is of no force and effect, or *coram non judice*, and void at least insofar as it goes beyond the issues properly presented." *In re Guardianship of Stanfield*, 2012 OK 8, n. 52, 276 P.3d 989.

4. "It is well settled that a correct judgment will not be disturbed on review, even when the trial court applied an incorrect theory or reasoning in arriving at its conclusion; an unsuccessful party cannot complain of trial court's error when he would not have been entitled to succeed anyway." *Harvey v. City of Okla. City*, 2005 OK 20, ¶12, 111 P.3d 239.

NOTICE OF HEARING ON THE PETITION FOR REINSTATEMENT OF JACQUELINE FORSGREN CRONKHITE, SCBD # 6905 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 Jacqueline Forsgren Cronkhite 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 **Thursday, August 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 CIV APP 30

BANK OF KREMLIN, Plaintiff/Appellee, vs. ARA, L.P., Defendant/Appellant, MARY MILACEK, as Personal Representative of the ESTATE OF KEITH DAVID MILACEK; JAMES LIEBHART; MARY MILACECK; DAVID MILACEK; 21ST MORTGAGE CORP.; KIMBERLY SAVAGE; SHELLY E. SMITH; BOARD OF COUNTY COMMISSIONERS FOR GARFIELD COUNTY, OKLAHOMA; and KEVIN POSTIER, County Treasurer GARFIELD COUNTY, OKLAHOMA, Defendants.

Case No. 118,061. September 20, 2019

APPEAL FROM THE DISTRICT COURT OF GARFIELD COUNTY, OKLAHOMA

HONORABLE PAUL K. WOODWARD, JUDGE

AFFIRMED

David M. Collins, EZZELL & SHEPHERD, P.L.L.C., Enid, Oklahoma, for Plaintiff/Appellee,

Matthew L. Winton, Craig W. Thompson, THOMPSON & WINTON, P.L.L.C., Edmond, Oklahoma, for Defendant/Appellant ARA, L.P.

Kenneth L. Buettner, Judge:

¶1 Defendant/Appellant ARA, LP (ARALP) appeals from a grant of summary judgment in favor of Plaintiff/Appellee Bank of Kremlin (Bank). The trial court held that ARALP wrongfully converted proceeds from the sale of crops harvested from land it leased to a third party because the Bank had a superior interest in the crops. ARALP appeals. Because ARALP did not have an enforceable interest in the crops and Bank had a perfected security interest in the crops, we affirm.

¶2 ARALP entered into a written agreement with decedent Keith D. Milacek (Tenant) July 1, 2010, for the lease of farmland owned by ARALP. Tenant thereafter entered into several financial agreements with Bank and granted Bank a security interest in crops grown upon the leased land. The parties do not dispute that Bank held a security interest in Tenant's crops or that Bank's interest was perfected.

¶3 Tenant defaulted on his lease, owing ARALP $62,972.72 plus interest in delinquent rent due December 1, 2016. Tenant failed to cure. Tenant passed away January 18, 2017, and a personal representative was appointed for his estate (the Estate). As allowed by the lease agreement, ARALP took possession of the land February 6, 2017. ARALP sent notice to Bank of Tenant's default and ARALP's possession of the land. ARALP cultivated the existing crops, harvested them, and sold them at market.

¶4 Bank filed this action against the Estate, ARALP, and related defendants November 17, 2017, foreclosing on several defaulted promissory notes executed by Tenant. In all, Bank alleged the Estate owed it $269,619.60 plus interest. Bank moved for summary judgment against all parties December 17, 2018. In its motion, Bank argued that its interest in the crops had priority over ARALP's interest, and that ARALP had wrongfully converted the crops by harvesting and selling them. Bank sought a judgment against ARALP for $70,106.40. ARALP opposed Bank's motion and filed a counter motion for summary judgment. The trial court granted summary judgment in favor of Bank May 14, 2019, ordering ARALP pay Bank $48,200.32 plus interest for its wrongful conversion of the crops.[1] ARALP appeals.

¶5 The singular question on appeal is whether Bank's interest in the crops had priority over ARALP's interest. A trial court should grant summary judgment where there is no dispute as to a material fact and the moving party is entitled to judgment as a matter of law. *Wood v. Mercedes-Benz of Okla. City*, 2014 OK 68, ¶ 4, 336 P.3d 457. We review *de novo* the issue of which security interest has priority. *Morton v. Watson*, 2016 OK CIV APP 71, ¶ 3, 394 P.3d 275 (citing *Broadway Clinic v. Liberty Mut. Ins. Co.*, 2006 OK 29, ¶6, 139 P.3d 873).

¶6 Agricultural liens are governed by Article 9 of the Uniform Commercial Code (UCC). 12A O.S. 2011 § 1-9-109(a)(2). "Agricultural lien" is defined as "an interest in farm products . . . which secures payment or performance of an obligation for: (i) goods or services furnished in connection with a debtor's farming operation; or (ii) rent on real property leased by a debtor in connection with its farming operation . . . [and] which is created by statute . . . . " *Id.* § 1-9-102(a)(5). "Farm products" are goods "with respect to which the debtor is engaged in a farm operation," and include "crops grown, growing, or to be grown . . . ." *Id.* § 1-9-102(a)(34).

¶7 Here, ARALP asserts that its interest in the crops is superior to Bank's because Tenant could have only granted an interest as great as or less than Tenant's interest in the land. ARALP argues that when Tenant defaulted on his lease and ARALP canceled Tenant's lease and took possession of the land that any interest in the land Tenant had granted to third parties similarly extinguished. This would be true insofar as any interest Tenant granted to third parties in the *land itself*. A property interest in crops, however, is not an interest in real property. Instead, as cited above, crops are goods encompassed by the UCC. As such, the priority of the Bank and ARALP's interests are controlled by Article 9.

¶8 Ordinarily, the priority of security interests and agricultural liens encompassed by Article 9 would be determined according to 12A O.S. 2011 § 1-9-322(a)(2), which states that "[a] perfected security interest or agricultural lien has priority over a conflicting unperfected security interest or agricultural lien . . . ." However, Article 9 provides particular rules for the priority of interests pertaining to crops. Section 334(i) of Article 9 provides, "A perfected security interest in crops growing on real property has priority over a conflicting interest of an encumbrancer or owner of the real property if the debtor has an interest of record in or is in possession of the real property." *Id.* § 1-9-334(i).

¶9 The interest in the crops claimed by ARALP is a "landlord's lien"--i.e., a lien arising by operation of statute that attaches to property in satisfaction of unpaid rent. Indeed, Oklahoma law provides: "Any rent due for farming land shall be a lien on the crop growing or made on the premises." 41 O.S. 2011 § 23. ARALP argues that its security interest in the crops has priority because a statutory landlord's lien is not subject to the UCC, meaning that the priority provisions of the UCC would not apply. *Id.* § 1-9-109(d). In support of its argument, ARALP cites to Titles 41 and 42 of the Oklahoma Statutes, which address the landlord-tenant relationship and liens, respectively.

¶10 The inclusion of agricultural liens within the purview of Article 9 of the Revised UCC has given rise to difficulties in determining the rights of creditors and property owners with regard to farm-related financial transactions. See Susan A. Schnieder, *Statutory Agricultural Liens Under Revised Article 9 of the Uniform Commercial Code,* The National Agricultural Law Center (March 2002). In recognizing the potential for conflict between § 334(i) and existing statutes regarding priority of security interests in crops, the Official UCC Comment provides that "[s]tates whose real-property law provides [a different manner of determining priority] should either amend that law directly or override it by enacting subsection (j)." U.C.C. § 9-334, cmt. 12 (Am. Law Inst. & Unif. Law Comm'n 1998). The Oklahoma Legislature chose the latter, enacting subsection (j), which states: "Subsection (i) of this section prevails over any inconsistent provisions of other statutes of this state." *Id.* § 1-9-334(j). The Oklahoma Legislature's adoption of the Revised UCC and its provisions regarding the priority of security interests in crops therefore supplanted all other previously enacted, conflicting statutes.[2]

¶11 Because there is a dearth of Oklahoma Supreme Court case law regarding the priority of agricultural liens under the UCC, we look to the case law of our sister states for guidance. In *Farmland Serv. Coop., Inc. v. S. Hills Ranch, Inc.*, 665 N.W.2d 641 (Neb. 2003), the Supreme Court of Nebraska considered a case with facts nearly identical to those here. *Id.* at 644. There, in exchange for a loan, a tenant-debtor granted a bank security interest in the crops grown on leased farmlands, which the bank perfected. *Id.* at 642. When the bank foreclosed upon the loan, however, it discovered that the crops had been harvested by the landlord-owner in satisfaction of unpaid rent. *Id.* at 643. The landlord relied upon a provision in the lease granting the landlord a security interest in the crops, which the landlord did not perfect. *Id.* Citing to the previous version of the UCC, the Nebraska Supreme Court held that Nebraska law gave priority to a perfected security interest over an unperfected contractual landlord's lien. *Id.* at 648.

¶12 Conversely, in *In re James*, the United States Bankruptcy Court for the Eastern District of Arkansas considered whether a landlord's lien had priority over a perfected security interest in crops. *In re James,* 368 B.R. 800, 802 (Bankr. E.D. Ark. 2006). There, the landlord filed a complaint to foreclose upon a landlord's lien on the crops for past due rent. *Id.* at 802. Prior to the landlord's filing, however, the tenant had granted a security interest in the crops to a bank, which the bank had perfected. *Id.* The Arkansas landlord's lien statute – which was amended after Arkansas's adoption of the Revised UCC – stated that a landlord's lien "shall have priority over a conflicting security

interest in or agricultural lien on the crop regardless of when the conflicting security interest or agricultural lien is perfected." *Id.* at (citing Ark. Code Ann. § 18-41-101 (Michie 2003)). Relying on the statute, the court in *In re James* determined that the landlord's lien had priority. *Id.* at 805.

¶13 The law applicable in this case is different from that in either *Farmland* or *In re James.* In *Farmland*, the court applied the previously effective UCC, which did not include a provision specifically addressing the priority of agricultural liens on crops. *Farmland,* 665 N.W.2d 641, 648 (2003). In *In re James,* the Arkansas Legislature chose the opposite approach as Oklahoma, choosing to amend previously enacted, conflicting statutes rather than enacting § 334(j), which gives §334(i) precedence over its older statutes regarding security interests in crops. *In re James,* 368 B.R. 800, 803 (Bankr. E.D. Ark. 2006); *see also* Ark. Code Ann. § 4-9-334 (West 2001).

¶14 With those distinctions acknowledged, we note one additional distinction, present in both of those cases but absent here: The landlords' interests in the crops attached prior to the banks' attempts to foreclose. In *Farmland,* the lease explicitly granted the landlord a security interest in the crops. In *In re James*, the landlord's lien attached upon filing the action foreclosing on the lease, in accordance with state statute. Neither instance is present here.

¶15 Oklahoma's adoption of the Revised UCC's Article 9 superseded previous statutes regarding agricultural liens insofar as the previous statutes were in conflict with the new Article 9, *City of Sand Springs v. Dep't of Pub. Welfare,* 1980 OK 36, ¶ 28, 608 P.2d 1139 ("Where statutes conflict in part, the one last passed, which is the later declaration of the Legislature, should prevail, superseding and modifying the former statute only to the extent of such conflict."); *Bank of Beaver City v. Barretts' Livestock, Inc.*, 2012 OK 89, ¶ 6 n. 2, 295 P.3d 1088 (applying Revised Article 9 to an agricultural lien on cattle). Drafters of the UCC were careful, however, to distinguish between agricultural liens and security interests. The UCC defines a security interest as "an interest in personal property or fixtures which secures payment or performance of an obligation." 12A O.S. 2011 § 1-201(35). An agricultural lien, on the other hand, is "an interest in farm products . . . which is created by statute . . . ." *Id.* § 1-9-102(a)(5). Throughout Article 9, the UCC drafters include both terms where a provision applies to both security interests and agricultural liens, but omits one or the other when referring to only one type of interest. Regarding attachment, § 1-9-203 states that "a security interest attaches to collateral when it becomes enforceable against the debtor," thereafter describing the instances in which security interests may become enforceable. Notably, § 9-203 does not mention "agricultural liens," meaning that existing statutes regarding the enforcement of agricultural liens remain intact.

¶16 As such, we look to 41 O.S. 2011 § 28, which provides:

> In an action to enforce a lien on crops for rent of farming lands, the affidavit for attachment shall state that there is due from the defendant to the plaintiff a certain sum, naming it, for rent of farming lands, describing the same, and that the plaintiff claims a lien on the crop made on such land. Upon making and filing such affidavit and executing an undertaking as prescribed in the preceding section, an order of attachment shall issue as in other cases, and shall be levied on such crop, or so much thereof as may be necessary; and all other proceedings in such attachment shall be the same as in other actions.

In other words, in Oklahoma, the effort to enforce a landlord's lien on crops for the payment of unpaid rent of farmlands occurs upon the filing of an action pursuant to 41 O.S. 2011 § 27. Here, ARALP did not file an action for Tenant's unpaid rent, but instead took possession of the farmland without court order and cultivated and sold the crops.

¶17 In accordance with § 1-9-334 (i), a perfected security interest in crops has priority over the conflicting interest of the landowner, including an agricultural lien created by 41 O.S. 2011 § 23. The parties do not dispute that Bank maintained a perfected security interest in the crops, which means Bank's interest was superior to ARALP's agricultural lien. As a result, ARALP's harvest and sale of the crops constituted conversion of Bank's property. We affirm the holding of the trial court.

¶18 AFFIRMED.

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

Kenneth L. Buettner, Judge:

1. The trial court came to this number by giving "credit for fertilizer and harvesting costs."

2. Additionally, in arguing that a landlord's lien on crops is not subject to Article 9, ARALP disregards the very text of the UCC, which states that Article 9 shall not apply to a landlord's lien, *"other than an agricultural lien." Id.* § 1-9-109(d)(1). As such, landlord's liens that are agricultural liens are included within the purview of Article 9.

2020 OK CIV APP 31

IN THE MATTER OF THE ESTATE OF DANIEL BENJAMIN HYER, Deceased: SARA BETH HYER, Appellant, vs. BENJAMIN HYER, Appellee.

Case No. 118,080. February 28, 2020

APPEAL FROM THE DISTRICT COURT OF CLEVELAND COUNTY, OKLAHOMA

HONORABLE STEPHEN BONNER, JUDGE

REVERSED

James Blevins, Jr., Carrie Kopp, BLEVINS & ASSOCIATES, PLLC, Purcell, Oklahoma, for Appellant,

Cindee Pichot, CINDEE PICHOT, PC, Noble, Oklahoma, for Appellee.

Bay Mitchell, Presiding Judge:

¶1 In this interlocutory order appealable by right, Appellant appeals from the trial court's order invalidating a deed of homestead from a husband to himself and his wife because the wife did not join in executing the deed. The probate court relied on a narrow reading of 16 O.S. 2011 §4 that would invalidate every deed of homestead from one spouse to another, unless the grantee-spouse also executes the deed. Because decisions of the Oklahoma Supreme Court contradict the trial court's reading of the statute, we reverse.

BACKGROUND

¶2 The relevant facts are undisputed. Daniel Benjamin Hyer, the decedent, owned a piece of real property in Cleveland County prior to his marriage to the Appellant, Sara Beth Hyer. Before his death and after their marriage, Daniel conveyed the property to himself and Sara, as joint tenants with full rights of survivorship. Daniel signed the deed, but Sara did not. The couple occupied the home on the property until Daniel's death approximately sixteen months after he executed the deed.

¶3 After Daniel died, Sara signed and filed in the county records, an affidavit of joint tenancy claiming full ownership of the property via the joint-tenancy deed. However, Sara was apparently aware that Daniel's adult son from a prior relationship, Appellee Benjamin Hyer, intended to claim partial ownership of the property through the decedent's estate. Accordingly, Sara filed a motion in the probate action asking the court to determine the ownership of the property.

¶4 Each side filed briefs with the court below and the court held a hearing. Sara claimed that the property, being held in joint tenancy between herself and the decedent, passed directly to her at her husband's death. The son claimed that the joint-tenancy deed was invalid under 16 O.S. 2011 §4, which requires a conveyance of homestead property to be executed by both a husband and a wife.

¶5 The trial court agreed with the son and invalidated the deed, stating it was "inadequate to establish a joint tenancy for the reason that both the husband and wife did not execute to convey." Sara filed the instant appeal, which the Supreme Court ordered to proceed as an interlocutory order appealable by right pursuant to 58 O.S. 2011 §721(10).

STANDARD OF REVIEW

¶6 When reviewing a probate court's determination that certain property is, or is not, a probate asset, an appellate court will examine and weigh the evidence, but will not disturb the district court's order unless it is clearly contrary to law or against the clear weight of the evidence. *In re Estate of Metz,* 2011 OK 26, ¶5, 256 P.3d 45, 48.

ANALYSIS

¶7 The son's legal position rests on a straightforward reading of the second sentence of 12 O.S. 2011 §4. That sentence presently, and at the time of the execution of the deed at issue here, states:

> No deed, mortgage, or contract affecting the homestead exempt by law, except a lease for a period not exceeding one (1) year, shall be valid unless in writing and subscribed by both husband and wife, if both are living and not divorced, or legally separated, except as otherwise provided for by law.[1]

Id. The decedent's son argues for a strict construction of the statutory language. His argument is that because it is undisputed that the property at issue was the homestead of the decedent, and it is further undisputed that the

deed in question was not executed by both the husband and the wife, the deed is not valid. Without the deed, the property remains in the estate, and the trial court's decision must be affirmed. This argument, though tempting in its simplicity and in its singular reliance on the language of the statute, would require us to ignore applicable Oklahoma Supreme Court precedents, which we cannot do.

¶8 From prior to statehood, the Supreme Court has consistently held that the statute requiring both spouses to convey an interest in their homestead does not apply when the deed is between the spouses only. In *Hall v. Powell*, 1899 OK 50, 57 P. 168, the Court interpreted a prior, but substantively similar statute.[2] The Court upheld a deed of homestead from a husband to a wife that was not executed by the wife, stating the husband "had a perfect right to convey the land to his wife, although he signed it by himself alone." *Id.* ¶4. The Court there took the case of a deed between spouses entirely out of the statute, holding that "[t]he case of a deed to the wife is not within the spirit of this section, which surely cannot intend that the wife should do the vain and absurd thing of executing, as grantor, a deed to herself as grantee." *Id.* ¶5 (quoting *Harsh v. Griffin*, 34 N.W. 441 (Iowa 1887) (internal quotations omitted)).

¶9 Although the legislature has modified the statute over the years, the Court has never wavered from this interpretation. In B*rooks v. Butler,* 1939 OK 132, 87 P.2d 1092, the Supreme Court upheld a husband's unilateral conveyance of a mortgage of the homestead to his wife. In upholding a challenge to the mortgage brought by the husband's heirs after his death, the Court focused on the purpose behind the statutory homestead protection and the constitutional provision it implements.[3] The Court said:

> The manifest purpose of the foregoing constitutional provision is to protect the homestead interest. The homestead interest is for the benefit of both the husband and the wife. If the execution of the mortgage did not destroy the homestead interest the mortgage is valid. It follows, therefore that when [the husband] executed the mortgage to the wife ... there was nothing in the execution thereof which attempted to or did affect the homestead interest. The mortgage was therefore not void under the foregoing constitutional or statutory provision.

Id. at ¶17, 1096.

¶10 In *Howard v. Stanolind Oil & Gas Co.*, 1946 OK 56, 169 P.2d 737, the Supreme Court refused to invalidate a deed of homestead executed by a husband in favor of his wife, even though it was signed by the husband alone. *Id.* ¶36. The Court held, citing the two prior cases discussed above, that "[c]onveyance of the homestead from one spouse to the other is not a sale of the homestead within the meaning of Sec. 2, Art. XII, Constitution, and is valid though signed only by the spouse holding the legal title." *Id.*[4]

¶11 Notably, the Legislature again amended the law in 1953 and in doing so, removed the language inserted in 1945, *see supra,* note 4, and added a new exception which blessed all unilateral conveyances – whether between spouses or to third parties – if the instrument is filed of record and not challenged for ten years.[5] Despite this change, the Supreme Court continued to recognize that a conveyance from one spouse to the other did not require the signature of the grantee-spouse.

¶12 In *Atkinson v. Barr,* 1967 OK 103, 428 P.2d 316, the Supreme Court was faced with two unilateral deeds of homestead, which the wife owned as separate property. The first was a quitclaim deed from a husband to the wife, and the second was a warranty deed from the wife to third parties (her children from a prior marriage). *Id.* ¶6. The Court directly addressed the validity of warranty deed under 16 O.S. 1961 §4, and held that it was invalid for want of the husband's signature. *Id.* ¶18 ("It is our conclusion that the warranty deed was void because [the husband] did not sign it and such conclusion by the trial court was correct."). Although the Court did address the quitclaim deed, it did not address its validity under §4, but rather decided whether the deed, under the peculiar facts of that case, amounted to an unenforceable subversion of the forced-heir statute. *Atkinson*, ¶23. Finding that it was, the court permitted the husband's heirs to inherit their intestate share despite the existence of the deed. *Id.* ¶19.

¶13 In *Grenard v. McMahan*, 1968 OK 75, 441 P.2d 950, the Court more directly addressed whether, post-1953 amendment, a unilateral conveyance of homestead property from one spouse to the other required the signature of the grantee-spouse. In that case, a wife owned a piece of homestead property outright. *Id.* ¶2. In 1965, she conveyed the property to her hus-

band for life, with the remainder to her daughters from a previous marriage. *Id.* In affirming the trial court's decision to invalidate the deed under the statute, the Court specifically rejected the daughters' argument that the deed qualified as a simple conveyance from one spouse to the other. *Id.* ¶4-5. In doing so, the Court found that the prior exception for conveyances between spouses remained valid, but that the conveyance of the remainder interest took that case out of that exception:

> Defendants cite *Hall v. Powell*, [1899 OK 50], 57 P. 168; *Brooks v. Butler,* [1939 OK 132], 87 P.2d 1092, and *Howard v. Stanolind Oil & Gas Co.,* [1946 OK 56], 169 P.2d 737, for the proposition that a deed or mortgage of the homestead from one spouse to another is valid even though the instrument is not subscribed by both. Admittedly, this is the holding in the cited cases, ***and they are correct under the facts therein stated where no conveyance of the homestead was made to third persons.*** They are not applicable to the present situation. In the instant case the deed is a conveyance to third persons and, as such, is a deed relating to the homestead.

Id. ¶5 (emphasis supplied).

¶14 The trial court's decision in the instant case invalidated the deed in question because it was not executed by both the wife and the husband. However, the trial court's strict reading of 16 O.S. 2011 §4 is inconsistent with **all** of the Supreme Court opinions interpreting the language of the various iterations of the statute at issue. Although the Supreme Court has consistently rejected conveyances of homestead property to third parties where they are not executed by both spouses,[6] the Court has consistently held that a spouse **need not** execute an instrument as a grantor where that same spouse is a grantee in the instrument.

¶15 REVERSED.

SWINTON, V.C.J., concurs.

GOREE, J. (sitting by designation), concurs and writes separately:

¶1 I concur and add my opinion that the language of the statute supports the conclusion that it does not apply. Title 16 O.S. Supp.2011 §4 invalidates deeds that are not subscribed by both husband and wife if they are "affecting the homestead." The word "affecting" denotes prejudicial effect or legal threat. The deed at issue had no adverse effect on the homestead because the husband granted his interest to both himself and his spouse – it was not a deed affecting the homestead within the meaning of the statute. The cardinal rule of statutory interpretation is to ascertain and give effect to the legislative intent and purpose as expressed by the statutory language. Odom v. Penske Truck Leasing Co., 2018 OK 23, ¶17, 415 P.3d 521, 528.

Bay Mitchell, Presiding Judge:

1. There are several exceptions that are in fact "otherwise provided by law," but none are invoked in this case.

2. The statute in existence at the time of *Hall* was as follows:

> All instruments other than leases for the period of one year, affecting the title to realty occupied as the homestead of a family, shall be void, unless the husband and wife join in the execution and acknowledge the instrument conveying the same.

Hall, ¶1 (quoting section 21, ch. 21, title "Conveyances," Statutes Oklahoma, 1893). Subsequently,the requirement was re-codified in §1143 of the Revised Laws of 1910, which was quite similar to the version that persists today:

> [N]o deed, mortgage or contract relating to the homestead exempt by law, except a lease for a period not exceeding one year, shall be valid unless in writing and subscribed by both husband and wife, where both are living and not divorced or legally separated, except to the extent hereinafter provided.

R.L. 1910, § 1143.

The statute was amended in 1945, 1953, 1973, 1983, and 1997. The effect of the 1945 and 1953 amendments are important to the son's argument here, and will be discussed below. The 1973, 1983, and 1997 amendments either added exceptions that are not relevant here or made stylistic changes to the law.

3. The Oklahoma Constitution, states as follows:

> The homestead of the family shall be, and is hereby protected from forced sale for the payment of debts, except for the purchase money therefor or a part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon; **nor shall the owner, if married, sell the homestead without the consent of his or her spouse, given in such manner as may be prescribed by law;** Provided, Nothing in this article shall prohibit any person from mortgaging his homestead, the spouse, if any, joining therein; nor prevent the sale thereof on foreclosure to satisfy any such mortgage.

Okla. Const. art. XII, §2 (emphasis added).

4. The son argues that the holding in *Howard* should be ignored because the statute had been amended in 1945, prior to the decision in *Howard,* to specifically allow a deed of homestead from one spouse to the other without the grantee-spouse's signature. The amended statute maintained the basic requirement that a spouse join in a conveyance of homestead, but added the following, directly-applicable exception:

> ... and except that all such deeds, mortgages or contracts, when executed by one spouse as grantor to the other spouse as grantee shall be valid and need not be subscribed by both husband and wife....
>
> Section 2. All deeds, mortgages, or contract [*sic*] relating to the homestead heretofore executed by one spouse as grantor to the other spouse as grantee are hereby validated, whether or not subscribed by both husband and wife.

1945 Okla. Sess. Laws 40 (West).

The son's argument in this regard is wrong for two reasons. First, the Court in H*oward* was not interpreting the 1945 amendment, as the deed in question was executed in 1921 and filed of record in 1924. The Court specifically cites to the version of the statute that existed in 1931. *Id.* ¶4. Additionally, even had the Court had treated the 1945 amendment as if it had retroactive effect, the amendment did not change the law, but simply codified the already existing case law, as established by *Hall* and *Brooks.* The importance of the 1945 amendment is not the amendment itself, but that a 1953 amendment removed the language added in 1945, a development that is discussed below.

5. The new law read as follows:

> [N]o deed, mortgage or contract relating to the homestead exempt by law, except a lease for a period of one (1) year, shall be valid unless in writing and subscribed by both husband and wife where both are living and not divorced, or legally separated,

except to the extent hereinafter provided. And provided that notwithstanding anything in this Section to the contrary, a deed relating to the homestead shall be valid without the signature of the grantor's spouse, and the spouse shall be conclusively deemed to have consented thereto, where the same shall have been duly recorded in the office of the county clerk of the county where the real estate is situated for a period of ... ten (10) years, and no action shall have been instituted within said time in any court of record having jurisdiction seeking to cancel, avoid or invalidate such deed relating to the homestead by reason of alleged homestead character of the real estate at the time of such conveyance.

1953 Okla. Sess. Laws 64 (West).

6. The Appellant cites *Hill v. Discover Bank*, 2008 OK CIV APP 111, 213 P.3d 835, in support of reversal. We agree that the decision does support reversal, but note that the case appears to be wrongly decided insofar as it held that a deed of homestead property ***to third parties*** need not be executed by both a husband and wife. Although this case is distinguishable in that the operative deed here is between spouses and not to third parties, we note that *Hill* appears to be in direct conflict with the Supreme Court precedent cited above and has, therefore, been justly criticized by the real property bar. *See* Marital Homestead Rights Protection: Impact of *Hill v. Discover Card*? Kraettli Q. Epperson, 80 Okla. B.J. 2409 (2009).

2020 OK CIV APP 32

OKLAHOMA QUARTER HORSE RACING ASSOCIATION, Plaintiff/Appellant, vs. OKLAHOMA HORSE RACING COMMISSION, Defendant/Appellee, and THOROUGHBRED RACING ASSOCIATION OF OKLAHOMA, Defendant.

Case No. 118,147. March 24, 2020

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE RICHARD OGDEN, TRIAL JUDGE

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS

Joseph H. Bocock, BOCOCK LAW, PLLC, Oklahoma City, Oklahoma, for Plaintiff/Appellant

James W. Rucker, Wendi K. Morse, OKLAHOMA DEPARTMENT OF AGRICULTURE, FOOD AND FORESTRY, Oklahoma City, Oklahoma, for Defendant/Appellee

DEBORAH B. BARNES, PRESIDING JUDGE:

¶1 Oklahoma Quarter Horse Racing Association (OQHRA) appeals from an order of the district court dismissing its petition for judicial review of a final agency order. Based on our review, we reverse and remand for further proceedings.

BACKGROUND

¶2 In its petition, OQHRA requests judicial review of a "Declaratory Ruling" of the Oklahoma Horse Racing Commission (the Commission) determining, as described by OQHRA, the "distribution of proceeds from Breakage and Unclaimed Ticket Proceeds during non-race days."[1] OQHRA asserts in its petition that the Commission's determinations in its Declaratory Ruling fail to comply with certain statutes and regulations. Among other things, OQHRA asserts the Commission's determination that the distribution of certain breakage and unclaimed ticket proceeds[2] "shall be split ninety percent Thoroughbred and ten percent Quarter Horse, Paints, and Appaloosas at Remington Park and Will Rogers Downs," constitutes an improper departure from the division of these proceeds established by regulation in 2010.

¶3 The Commission filed a special entry of appearance and motion to dismiss in the district court,[3] asserting OQHRA failed to comply with a requirement set forth in § 318(C) of the Oklahoma Administrative Procedures Act (OAPA), 75 O.S. 2011 §§ 250-323. Section 318(C) provides, in pertinent part, that "[c]opies of the petition shall be delivered in person or mailed, postage prepaid, to the agency and all other parties of record, and proof of such delivery or mailing shall be filed in the court within ten (10) days after the filing of the petition." 75 O.S. 2011 § 318(C).

¶4 Although a copy of the petition, which was filed in the district court on March 18, 2019, was sent to the Commission by certified mail placed in the mailbox on March 27 – nine days after the filing of the petition[4] – the Commission asserts the legislative intent of § 318(C) "requires that a Petition for Judicial review . . . be served either in person or by mail and that proof of such service be filed with the Court within 10 days of the filing of the Petition." The Commission asserts that, although mailing occurred within ten days of the filing of the petition, because it is undisputed that proof of service – here, the certified mail receipt – was filed by OQHRA in the district court more than ten days after the filing of the petition, on April 3, 2019, the petition should be dismissed due to a lack of compliance with § 318(C), a lack of compliance which the Commission further asserts deprived the district court of jurisdiction.

¶5 In response, OQHRA asserts proof of mailing was filed in the district court more than ten days after the filing of the petition merely "because the post office [had not sent] us the card yet" – referring to the certified mail receipt. OQHRA asserts

> the return receipt was served Thursday, March 28 or Friday, March 29 (the receipt is undated). The receipt would likely not be in the hands of counsel until Monday, April 1 or Tuesday, April 2. The return of service was filed [in the district court on] April 3, 2019.

¶6 At the hearing on the motion to dismiss, counsel for OQHRA described the Commission's interpretation of § 318(C) as "odd" because OQHRA timely mailed a copy of the petition to the Commission, yet it would have been impossible for OQHRA to comply with the Commission's reading of § 318(C) even if OQHRA had filed proof of service on the earliest possible date. Counsel for OQHRA stated at the hearing that § 318(C) "gives you ten days to mail it – and it doesn't say serve it. It says mail it. Okay? – then you have ten days to mail it." Counsel for OQHRA further asserted that, regardless, "it's a procedural matter; it's not a [jurisdictional] matter."

¶7 The district court, relying on *Williams v. Board of Oklahoma Polygraph Examiners,* 2010 OK CIV APP 100, 241 P.3d 654, *cert. denied,* and the two Oklahoma Court of Civil Appeals decisions cited in *Williams*,[5] agreed with the Commission. In its order, the district court determined that § 318(C) "requires that copies of the petition for judicial review filed in conformity with the [OAPA] be served either in person or by mail and that proof of such service be filed in the court within ten (10) days after the filing of the petition." The court further stated: "While the statute appears to be draconian, the failure to file the return of service within 10 days of the filing of the Petition deprives the trial court of jurisdiction."

¶8 OQHRA appealed and, during the pendency of this appeal, the Oklahoma Supreme Court entered orders denying OQHRA's motion to retain this appeal in the Supreme Court and stating that this case shall proceed as an accelerated appeal pursuant to Rule 1.36 of the Oklahoma Supreme Court Rules.[6]

STANDARD OF REVIEW

¶9 "When reviewing a trial court's dismissal of an action an appellate court examines the issues *de novo." Rogers v. QuikTrip Corp.,* 2010 OK 3, ¶ 4, 230 P.3d 853 (footnote omitted). In particular, the issues presented on this appeal are issues of statutory interpretation. *See Samman v. Multiple Injury Tr. Fund*, 2001 OK 71, ¶ 8, 33 P.3d 302 (Statutory interpretation "demands a *de novo* review standard" pursuant to which this Court "has plenary, independent and non-deferential authority to examine a trial court's legal rulings." (footnotes omitted)).

ANALYSIS

¶10 In the case relied upon by the district court – *Williams v. Board of Oklahoma Polygraph Examiners,* 2010 OK CIV APP 100, 241 P.3d 654 – this Court was confronted with an earlier version of § 318(C), and we construed that version as requiring service to be accomplished, and proof of service to be filed in the district court, within ten days of the filing of the petition. We further concluded that these requirements are jurisdictional.

¶11 The operative facts in *Williams* are nearly identical to those in the present case. The plaintiff in *Williams* filed a petition for judicial review on April 20, 2009.[7] Ten days later, he "filed a document entitled Notice of Pending Service" stating that to the extent he was

> required [under § 318(C)] to serve [the defendant] and file proof of such service within ten days after the filing of the petition, . . . he could not timely meet [these requirements] because he attempted to effect service on [the defendant] via certified mail return receipt requested, but ha[d] not yet received the return receipt back from the post office reflecting service.

Williams, ¶ 3 (internal quotation marks omitted).

¶12 Despite the filing of this notice, and despite the plaintiff "subsequently fil[ing] a notice of service on May 5, 2009,[8] confirming service on [the defendant]" obtained via certified mail on Friday, May 1, 2009 – i.e., eleven days after the filing of the petition – the *Williams* Court concluded that the plaintiff's failure to effect and file proof of service within ten days of the filing of the petition prevented the district court from having subject matter jurisdiction. Thus, the *Williams* Court concluded the district court properly dismissed the plaintiff's petition for judicial review.

¶13 We are not persuaded that the construction of § 318(C) in *Williams* applies to the present case. As indicated above, the *Williams* Court was confronted with an earlier version of § 318(C) which required that "proof of service" be filed in the district court within ten days of the filing of the petition for judicial review. That is, the version of § 318(C) appli-

cable to the circumstances in *Williams* provided, in part, that "[c]opies of the petition *shall be served* upon the agency and all other parties of record, and *proof of such service* shall be filed in the court within ten (10) days after the filing of the petition." 75 O.S. 2001 § 318(C) (emphasis added). Approximately one year after mandate issued in *Williams*, § 318(C) was amended by the Legislature. As quoted above, § 318(C) now states that "[c]opies of the petition *shall be delivered in person or mailed*, postage prepaid, to the agency and all other parties of record, and proof of such delivery or mailing shall be filed in the court within ten (10) days after the filing of the petition." 75 O.S. 2011 § 318(C) (emphasis added).

¶14 Our "primary goal" when interpreting a statute is "to ascertain and follow the intention of the Legislature." *City of Tulsa v. State ex rel. Pub. Employees Relations Bd.*, 1998 OK 92, ¶ 14, 967 P.2d 1214.

> By amending a statute the legislature may have intended (a) to change existing law or (b) to clarify ambiguous law. Its precise intent is ascertained by looking to the circumstances that surround the change. If the earlier statute definitely expressed an intent or had been judicially interpreted, the Legislature's amendment is presumed to have changed an existing law, but if the meaning of the earlier statute was in doubt, or where uncertainty as to the law's meaning did exist, a presumption arises that the amendment was designed to more clearly express the legislative intent that was left indefinite by the earlier text

Polymer Fabricating, Inc. v. Employers Workers' Comp. Ass'n, 1998 OK 113, ¶ 15 n.18, 980 P.2d 109 (citation omitted).

¶15 The result reached in *Williams*, although consistent with the language found in the earlier version of § 318(C), was harsh, especially when viewed in light of the first sentence of 75 O.S. § 318, which provides, in emphatic language, that "[a]ny party aggrieved by a final agency order in an individual proceeding is entitled to certain, speedy, adequate and complete judicial review thereof pursuant to the provisions of this section and Sections 319, 320, 321, 322 and 323 of this title." 75 O.S. 2011 § 318(A)(1). By removing the words *served* and *service* from § 318(C), and replacing them with *delivered in person or mailed*, we presume the Legislature was aware of, and responding to, the interpretation of § 318(C) set forth in *Williams.* "When ascertaining legislative intent the Court must presume that when adopting the amendment, the legislature had knowledge of the law as it previously existed and had in mind the judicial construction which had been placed on that law." *Prettyman v. Halliburton Co.*, 1992 OK 63, ¶ 21, 841 P.2d 573 (citations omitted). "The old law should be considered, the evils arising under it, and the remedy provided by the amendment, and that construction of the amended act should be adopted which will best repress the evils and advance the remedy." *Poafpybitty v. Skelly Oil Co.*, 1964 OK 162, ¶ 14, 394 P.2d 515 (emphasis omitted) (citation omitted).

¶16 Following *Williams,* an inconsistency existed between the general intent set forth in § 318(A)(1), and the stringent requirements of § 318(C) which, in *Williams,* deprived the plaintiff of his § 318(A)(1) "entitle[ment] to certain, speedy, adequate and complete judicial review" of an agency's decision despite prompt mailing of the petition by certified mail. Indeed, as the circumstances in both *Williams* and the present case reveal, the ability to comply with the interpretation of § 318(C) adopted in *Williams* can be rendered impossible by circumstances substantially outside the control of a plaintiff who has chosen to accomplish service by mail.

¶17 Given the text, as well as the context, of the amendment to § 318(C), we conclude that the Legislature intended to remove the requirement that service occur within ten days and chose, instead, to replace it with less stringent requirements. Pertinent to the present case, § 318(C) requires that "[c]opies of the petition shall be . . . mailed, postage prepaid," within ten days.

¶18 Furthermore, although we agree with the Commission that the current version § 318(C) sets forth in mandatory language that the plaintiff also file "proof of such . . . mailing" in the district court, this requirement must also be contrasted with the earlier version of § 318(C) in order to effectuate the intent of the Legislature. As explained above, service itself need no longer occur within ten days as it did under the older version of § 318(C). Accordingly, where a party chooses, as in the present case, to satisfy the requirement of filing proof of mailing in the district court by filing a certified mail receipt, it would be absurd to require that this filing occur within ten days of the filing of the petition. Were we to interpret § 318(C) in

such a manner, the Legislature's amendment to § 318(C) would be rendered vain and useless. "The Legislature will not be presumed to have intended an absurd result, and a statute should be given a sensible construction, bearing in mind the evils intended to be avoided or the remedy afforded." *AMF Tubescope Co. v. Hatchel*, 1976 OK 14, ¶ 21, 547 P.2d 374 (citation omitted). "[T]he Legislature is never presumed to have done a vain and useless thing." *Bryant v. Comm'r of the Dep't of Pub. Safety*, 1996 OK 134, ¶ 11, 937 P.2d 496 (footnote omitted).

¶19 It must also be observed that not only has the Legislature set forth in emphatic terms in § 318(A)(1) that parties aggrieved by a final agency order are entitled to certain, speedy, adequate and complete judicial review, but the Legislature has also set forth in a separate provision – § 318(B)(2) – the requirements necessary in order for such a review proceeding to be "instituted" under the OAPA:

> [P]roceedings for review *shall be instituted* by filing a petition, in the district court of the county in which the party seeking review resides or at the option of such party where the property interest affected is situated, naming as respondents only the agency, such other party or parties in the administrative proceeding as may be named by the petitioner or as otherwise may be allowed by law, within thirty (30) days after the appellant is notified of the final agency order as provided in Section 312 of this title.

75 O.S. 2011 § 318(B)(2) (emphasis added). *See Rogers v. QuikTrip Corp.*, 2010 OK 3, ¶ 11 ("When possible, different provisions must be construed together to effect a harmonious whole and give intelligent effect to each."); *S. Tulsa Citizens Coal., L.L.C. v. Ark. River Bridge Auth.*, 2008 OK 4, ¶ 15, 176 P.3d 1217 ("Legislative acts are to be construed in such manner as to reconcile the different provisions, render them consistent and harmonious, and give intelligent effect to each." (footnote omitted)).

¶20 There is no dispute that OQHRA complied with the requirements set forth in § 318 (B)(2). Consequently, the review proceeding was properly "instituted" in the district court under § 318. Moreover, with regard to the separate requirements of § 318(C), there is no dispute that OQHRA mailed copies of the petition within ten days as required by the current version of § 318(C), and that OQHRA then promptly filed the certified mail receipt in the district court. Although this filing in the district court was accomplished more than ten days after the filing of the petition, we decline to interpret the current version of § 318(C) in a manner that would render the Legislature's amendment to that provision futile. Indeed, as stated above, the facts of the present case pertinent to the requirements of § 318(C) are nearly identical to those presented in *Williams*.[9] Were we to reach the same result as was reached in that case, we would fail to give effect to the intent of the Legislature in amending § 318(C). *See City of Tulsa*, 1998 OK 92, ¶ 18 ("[I]t is the duty of a court to give effect to legislative acts, not to amend, repeal or circumvent them." (citation omitted)). We, therefore, conclude OQHRA complied with the requirements of 75 O.S. 2011 § 318(C).[10]

CONCLUSION

¶21 We conclude OQHRA complied with the applicable version of § 318(C). Therefore, we reverse the district court's order sustaining the Commission's motion to dismiss, and we remand this case to the district court for further proceedings.

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

RAPP, J., and FISCHER, J., concur.

DEBORAH B. BARNES, PRESIDING JUDGE:

1 The Commission sets forth the following background events in its Declaratory Ruling:

> 1. In January of 2017, the Commission became aware of a controversy involving the distribution of breakage and unclaimed ticket proceeds generated outside live race meets and a related disagreement between horsemen's representative associations.
>
> 2. Between January and April 2017, legal counsel for the Commission communicated with interested horsemen's representative associations and their attorneys in an attempt to clarify or resolve the controversy and disagreement. The attempt at resolution was unsuccessful.
>
> 3. The Commission invited the horsemen's representative associations to submit briefs and present oral arguments on the subject of breakage to the Commission at the Commission's regular meeting on May 18, 2017.
>
> 4. The Commission issued a Declaratory Ruling dated June 27, 2017[,] formalizing its unanimous decision at the May 18, 2017 regular meeting of the [Commission]. That Declaratory Ruling determined that the distribution to be used is ninety (90) percent Thoroughbred and ten (10) percent Quarter Horse, Paints and Appaloosas with further distribution to be on a pro rata basis by using a per breed ratio based upon the number of races per breed specified in the race track's current Organization License Order.
>
> 5. On October 30, 2018[,] the Commission's June 27, 2017 Declaratory Ruling was voided by Order of the District Court of Oklahoma County . . . . The Court's narrow ruling, filed December 4, 2018, found that the Commission's Declaratory Ruling should be voided due to the failure of the record to reflect the disclosure of the interest of one of the commissioners in a party to the proceeding which the Court determined was in violation of the Oklahoma Code of Judicial Conduct . . . .

In the Declaratory Ruling, the Commission further explains that the matter was scheduled for reconsideration in January 2019, and that, upon reconsideration, the Commission determined as follows:

> [D]istribution of breakage and unclaimed ticket proceeds generated outside of a race meeting and designated for use as purse supplement and awards shall be split ninety percent Thoroughbred and ten percent Quarter Horse, Paints, and Appaloosas at Remington Park and Will Rogers Downs and 42 percent Thoroughbred, 42 percent Quarter Horse and 16 percent Paints and Appaloosas at Fair Meadows Tulsa [effective as of January 1, 2011].

2. The proceeds in question are articulated in the Declaratory Ruling as including only "breakage and unclaimed ticket proceeds generated outside live race meets."

3. We note that Defendant Thoroughbred Racing Association of Oklahoma was dismissed from this case.

4. Counsel for the Commission acknowledged at the hearing on the motion to dismiss that "this was mailed on the 27th, again according to the USPS tracking. That's one or two days before the drop-dead date …." *See also* R. Tab 5, p. 3 ("The Certified mail was sent March 27th …."). Rules pertaining to the computation of time are set forth in the OAPA as follows:

> In computing any period of time prescribed or allowed by the [OAPA], the day of the act, or event, from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday as defined by the Oklahoma Statutes or any other day when the receiving office does not remain open for public business until 4:00 p.m., in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday as defined by the Oklahoma Statutes, or any other day when the receiving office does not remain open for public business until 4:00 p.m. . . .

5. In reaching its conclusion, the *Williams* Court relied upon two decisions of the Oklahoma Court of Civil Appeals, *Oklahoma Foundation for Medical Quality v. Department of Central Services*, 2008 OK CIV APP 30, 180 P.3d 1, *cert. denied*, and *Klopfenstein v. Oklahoma Department of Human Services*, 2008 OK CIV APP 16, 177 P.3d 594, but did not rely on any decisions of the Oklahoma Supreme Court. According to the parties in the present case, the Oklahoma Supreme Court has not yet addressed issues directly pertaining to the appropriate construction of § 318(C).

6. Appeals assigned to the accelerated docket pursuant to Oklahoma Supreme Court Rule 1.36, 12 O.S. Supp. 2013, ch. 15, app. 1, stand submitted without appellate briefing.

7. The plaintiff in *Williams* sought review of a decision of the Board of Oklahoma Polygraph Examiners.

8. Proof of service was filed in *Williams* fifteen days after the filing of the petition. In the present case, proof of service was filed sixteen days after the filing of the petition.

9. In fact, in the present case it is possible that service occurred within ten days, whereas in *Williams* service occurred on the eleventh day. As quoted above, according to OQHRA, "the return receipt was served Thursday, March 28 [i.e., on the tenth day following the filing of the petition] or Friday, March 29 (the receipt is undated)."

10. Having reached this conclusion, we need not address the issue of whether the current version of § 318(C) should be given the "jurisdictional brand," *see Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011), such that, in a case properly "instituted" under § 318, failure to comply with the requirements set forth in § 318(C) – requirements which appear to pertain solely to notice – would nevertheless deprive a district court of subject matter jurisdiction. We are compelled to note, however, that such a conclusion would potentially lead to drastic consequences and the waste of judicial resources "[s]ince subject matter jurisdiction . . . cannot be waived by the parties or conferred upon the court by their consent and it may be challenged at any time in the course of the proceedings." *In re A.N.O.*, 2004 OK 33, ¶ 9, 91 P.3d 646 (citations omitted). Such a conclusion, in order to be proper, would need to be consistent with the intent of the Legislature as expressed in § 318 construed as a consistent whole. *Cf. Henderson*, 562 U.S. at 435 ("Because the consequences that attach to the jurisdictional label may be so drastic, we have tried in recent cases to bring some discipline to the use of this term"; thus, even if a rule is "important and mandatory," it "should not be given the jurisdictional brand" such that a lack of compliance results in a lack of subject-matter jurisdiction unless there is "'clear' indication that [the lawmaking body] wanted the rule to be 'jurisdictional.'" (citation omitted)).

2020 OK CIV APP 33

JAMES ROWE &/or AUTO MEDIC CAR CARE and FARMERS ALLIANCE MUTUAL INSURANCE COMPANY, Petitioners, vs. THERESA ROWE and THE WORKERS' COMPENSATION COURT OF EXISTING CLAIMS, Respondents.

Case No. 118,249. April 30, 2020

PROCEEDING TO REVIEW AN ORDER OF THE WORKERS' COMPENSATION COURT OF EXISTING CLAIMS

HONORABLE MARGARET BOMHOFF, TRIAL JUDGE

SUSTAINED IN PART, VACATED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS

Richard W. Wassall, STEIDLEY & NEAL, P.L.L.C., Tulsa, Oklahoma, for Petitioners

C. Scott Beuch, Oklahoma City, Oklahoma, for Respondents

KEITH RAPP, JUDGE:

¶1 James Rowe and Auto Medic Car Care (Employer) and Employer's workers' compensation insurer, Farmers Alliance Mutual Insurance Co. (Insurer), appeal a decision of the Three-Judge Panel of the Workers' Compensation Court of Existing Claims (Panel). The Panel's decision affirmed the trial court's Order awarding Theresa Rowe (Claimant) death benefits.

BACKGROUND

¶2 This appeal presents two issues. The first issue is whether Claimant's action is barred because Claimant did not file a timely request for a hearing before the workers' compensation court. The facts pertaining to this issue are not disputed.

¶3 The second issue is whether the work-related injury was the cause of death of Dwight Freeman Rowe. This issue involves the medical evidence submitted by Employer and by Claimant.

¶4 Dwight Rowe worked for his brother. He sustained a work-related injury when a vehicle pinned him against a workbench. The injury occurred on April 6, 1981. His injury left him as a paraplegic. He was adjudicated permanently disabled on July 11, 1995.

¶5 Employer's insurer has provided medical benefits since and to the time of death. Insurer paid the last medical benefit payment on April 22, 2015.

¶6 Dwight Rowe died on March 30, 2014. Claimant is his surviving spouse. On October 31, 2014, Claimant filed her claim for death benefits. Claimant did not file a Form 9, Motion to Set for Trial, until June 21, 2017. Employer filed an answer. In the answer, Employer claimed that the death was not caused by the work-related injury but by refusals to accept medical treatment. Next, the answer defended on the ground that the motion for a trial setting was filed more than two years after the filing of the claim. Thus, Employer argued the two-year statute in effect on the date of death controlled. Claimant argued that the five-year period provided by the statute in effect on the date of injury controlled.[1]

¶7 The trial court originally applied the two-year limitation of current statutory law. The Panel reversed and the trial court then awarded Claimant her death benefits. The Panel affirmed and this appeal followed.

STANDARD OF REVIEW

¶8 The issue arising from the late filing of the Form 9 requires interpreting statutory law and decisions of the Oklahoma Supreme Court. Thus, a question of law is presented which calls for a *de novo* review of the legal rulings of the Panel. *Neil Acquisition, L.L.C. v. Wingrod Inv. Corp.*, 1996 OK 125, n.1, 932 P.2d 1100.

¶9 Employer proposed the clear weight of the evidence standard in 85 O.S.2011, § 340(D) regarding the issue of the cause of death. Claimant did not disagree. This Court will utilize this standard for this issue.

ANALYSIS

A. Sufficiency of the Evidence

¶10 Dwight Rowe's injury left him as a paraplegic. He lived for more than thirty years after the injury. Employer and Insurer maintain that his death from sepsis and malnutrition were attributed to his noncompliance with and refusal of medical treatment. Their physician's report provided a medical opinion that his cause of death was not from the injury but was the result of noncompliance leading to complications and death.

¶11 Claimant's medical report concluded that the injury ultimately caused the death. Claimant's medical report described the severity of the injury and the severe consequences flowing from that injury. The significant causes of death listed on the death certificate were severe chronic decubitus ulcers, paraplegia, chronic kidney disease, and chronic nephrostomy tube. In his deposition, Claimant's physician described the severity of the consequences of Dwight Rowe's injury. He stated that most people die much earlier in such cases. The ulcers, the kidney disease, other consequences of the injury to his physical person, and the treatments all contributed to death. He described the extraordinary medical efforts involved in treatment and which do not ultimately prevent death. As the physician said:

> I mean, this is going to be what kills him, whether it's, you know, three months, nine months, five years down the road. I mean, this is what happens. It's the nature of the beast.

Claimant's Ex. 1, p. 18.

¶12 The trial court and Panel had sufficient evidence regarding cause of death and their conclusion is not against the clear weight of the evidence. The conclusion that Dwight Rowe's death was the result of his work-related injury is not disturbed.

B. Deadline to Request a Hearing

¶13 There are two statutes involved. The first is 85 O.S.1981, § 43(B). This statute was in effect on the date of Dwight Rowe's injury. Section 43 deals, in part, with dismissal of a workers' compensation claim for want of prosecution. The provision at issue here reads:

> When a claim for compensation has been filed with the Administrator as herein provided, unless the claimant shall in good faith request a hearing and final determination thereon within five (5) years from the date of filing thereof or within five (5) years from the date of last payment of compensation or wages in lieu thereof, same shall be barred as the basis of any claim for compensation under the Workers' Compensation Act and shall be dismissed by the Court for want of prosecution, which action shall operate as a final adjudication of the right to claim compensation thereunder. Provided, that any claims heretofore filed and pending on the effective date of

> the Workers' Compensation Act before the State Industrial Court shall likewise be barred after the expiration of five (5) years from the filing date or within five (5) years from the date of last payment of compensation or wages in lieu thereof.

¶14 The second statute, 85 O.S.2011, § 318(E), was in effect on the date Claimant filed her claim for death benefits. This statute provides:

> E. When a claim for compensation has been filed with the Administrator of the Workers' Compensation Court as provided in this act, unless the claimant shall in good faith request a hearing for benefits within two (2) years from the date of filing thereof or within two (2) years from the date of last payment of medical treatment or compensation or wages in lieu thereof, same shall be barred and shall be dismissed by the Court for want of prosecution, which action shall operate as a final adjudication of the right to claim benefits thereunder.

¶15 It is undisputed that the Form 9 request for a trial was filed outside any two-year period of Section 318(E). When first presented with the issue, the Panel ruled:

> THE APPEALS PANEL FINDS THE PROPER STATUTE IN THIS MATTER IS THE FIVE (5) YEAR STATUTE PURSUANT TO THE DATE OF INJURY ON APRIL 6, 1981. THE PANEL FINDS THE STATUTE IN QUESTION IS A SUBSTANTIVE RIGHT NOT A PROCEDURAL ONE. UNDER ARTICLE 5 §541 OF THE OKLAHOMA CONSTITUTION ACCRUED RIGHTS AND PROCEEDINGS BEGUN PURSUANT TO STATUTE ARE PROTECTED AGAINST REPEAL OF THOSE STATUTES. THEREFORE, THE PANEL FINDS THE CLAIM HAS BEEN PROSECUTED TIMELY AND REMANDS BACK TO THE TRIAL COURT TO DETERMINE COMPENSABILITY ISSUES.

¶16 It is well-settled that an injured worker's rights under the law are established by the law in effect on the date of injury. *Williams Companies, Inc. v. Dunkelgod*, 2012 OK 96, ¶ 14, 295 P.3d 1107, 1111. The Opinion in *Dunkelgod* reviewed Section 43(B) and prior decisions in that context. The Court's Opinion stated:[2]

> In *King*, we cited to *Cole v. Silverado Foods, Inc.*, 2003 OK 81, 78 P.3d 542, which addressed the effect of an amendment to 85 O.S. §43(B) decreasing the length of time in which a claimant must request the adjudication of a pending claim. The effect of the amendment in that case was to foreclose the claimant's right to have her claim heard. We held that the amendment of § 43(B) in that case was much more than a remedial, procedural action which impacted only the time in which a claim could be brought. Its impact would have destroyed the claimant's substantive right to receive a portion of her unadjudicated "statutorily 'recoverable compensation.'" *Cole*, ¶12, 78 P.3d at 548, citing *Magnolia Petroleum Co. v. Watkins*, 1936 OK 372, 57 P.2d 622, 623, 177 Okl. 30. Significantly, we also found the statute allows an employer to invoke the same lapse of time to defeat its own statutory liability, i.e., a "liability-defeating defense," for unadjudicated benefits. *Cole*, ¶11-12, 78 P.3d at 547-548. We said:
>
> > Section 43(B) stands as an employer's liability-defeating defense against an employee's untimely quest for permanent disability's adjudication. A statutory defense constitutes an accrued right. To modify one's defense against a claim changes its character and potency. That change decreases here the time period from five to three years during which an employer may extinguish its liability. Retroactive application of § 43(B) would make the employer's defense much more extensive than it stood at the time the claim was brought. The amendment also affects the merits of Cole's claim. She would have to confront a different defense. **Because the amendment refashions § 43(B) into a different and more extensive liability-defeating mechanism, it destroys the claimant's right to present her claim free from being subjected to new and more extensive instruments of destruction. Inasmuch as the amended version of § 43(B) operates here on rights in existence, its terms are subject solely to prospective application. [emphasis added].**
>
> *Cole v. Silverado*, ¶ 13, 78 P.3d at 548.
>
> *Williams Companies, Inc. v. Dunkelgod*, 2012 OK 96, ¶ 15, 295 P.3d at 1112.

¶17 In *Cole*, the Court addressed whether the five-year deadline to request a hearing, or an intervening statute's three-year deadline, applied to an *injured employee*. The Court ap-

plied the same rationale as in *Dunkelgod* and held that the date of injury controlled so the five-year deadline applied.

¶18 Thus, clearly, Dwight Rowe would have five years to seek a hearing. However, *Dunkelgod* does not directly answer whether Claimant here, as surviving spouse, has the identical rights as the injured employee with respect to the deadline for requesting a hearing. Of course, the facts in *Dunkelgod* involved an injured employee and not a survivor. Nevertheless, the above quoted Opinion contains the statement, "The date of injury or death also determines the compensation allowed a particular claimant." *Dunkelgod*, 2012 OK 96, ¶ 14, 295 P.3d at 1111 (emphasis added).

¶19 The Court cited the case of *Independent School District No. 89 v. McReynolds,* 1974 OK 136, 528 P.2d 313. There, the claim was for death benefits and the issue was whether those benefits were calculated on the date of injury or the date of death. The Court ruled that the date of death controlled. The Court distinguished the cause of action that belonged to the injured employee from the cause of action belonging to survivors. The causes are separate, independent causes. The former is derived from common law, whereas the latter is statutory. *McReynolds,* 1974 OK 136, ¶¶ 21-24, 528 P.2d at 316-17.

¶20 In *In re Death of Knight,* 1994 OK 74, ¶ 3, 877 P.2d 602, 603, the Court stated the issue for decision and the holding.

> The sole issue to be decided in this proceeding is which date – the date of an employee's last hazardous exposure or the date of death – controls the amount of recovery for death benefits under the Workers' Compensation Act. We hold that the maximum amount of death benefits payable to a beneficiary under 85 O.S. 1991 § 22 (8) must be based upon the State's Average Weekly Wage in effect at the time of the employee's death.

¶21 The Court provided the premise for the Court's holding.

> The right of beneficiaries to claim death benefits under the Workers' Compensation Act does not accrue until the time of the employee's death from an occupational illness or injury.

In re Death of Knight, 1994 OK 74, ¶ 11, 877 P.2d at 605.

¶22 The problem with the Panel's broad statement, set out above, is that there is an underlying assumption that *both* the injured worker and the survivor in case of death have the same substantive rights under the statutes. In other words, the Panel's conclusion assumes that there is a homogeneous bundle of rights under the workers' compensation statutory scheme which accrue on the date of injury to not only the injured worker but also to the worker's survivor in the event of a death related to the injury.

¶23 However, under the Oklahoma Supreme Court's separate, independent causes of action rationale, the claim for death benefits would not exist until death. The date of death would control. In that case, Claimant's duty to request a hearing would have a two-year deadline.

¶24 Therefore, based upon the foregoing review of Oklahoma Supreme Court Opinions, this Court holds that Claimant's quest for death benefits is governed by the law in effect on the date of her husband's death. Consequently, she had two years to file a request for hearing and the Panel erred in ruling otherwise.

¶25 Although this Court's holding requires reversal of the Panel's decision, it does not require that an Order be entered at this time denying Claimant her death benefits.

¶26 Employer and its Insurer characterize the statute as a statute of repose. It is not.[3] Cole, 2003 OK 81, 78 P.3d 542, n.23; *McClish v. Woodarts Inc.*, 2014 OK CIV APP 41, 324 P.3d 409. As a statute of limitations, the running of the period of limitation can be tolled. *Id.* Here, Claimant has argued that the delay was the result of Insurer's not providing health records in a timely manner and when provided they were in a format that could not be translated without special assistance. As a result, counsel was delayed in obtaining a medical report and the report is a necessary element before he could reasonably request a hearing.

¶27 Whether the running of the statute has been tolled is a fact dependent issue. These facts have not been ascertained below. An appellate court does not make first instance determinations of facts. *Bivins v. State ex rel. Oklahoma Memorial Hosp.*, 1996 OK 5, ¶ 19, 917 P.2d 456, 464. Therefore, this Court vacates the Order of the three-judge panel and remands

the cause for further proceedings to determine whether there was a tolling of the statute and, if so, whether the request for a hearing was then timely.

CONCLUSION

¶28 Claimant seeks death benefits as the surviving spouse of an injured employee. There is a conflict in the evidence as to whether the employee's injury was the cause of death. The trial court's and Panel's conclusions that the death resulted from the injury is not against the clear weight of the evidence. This conclusion is not disturbed.

¶29 The statute in force when Claimant filed for death benefits required that she request a hearing within two years or the case would be dismissed. The request for hearing was not filed within two years. With respect to death benefits, the date of death and not the date of injury controls. If the date of injury did control, Claimant would have five years to request a hearing and her request here would have been timely.

¶30 The Panel ruled that the date of injury controlled. This ruling is erroneous and requires reversal. However, Claimant argued that there were circumstances caused by Employer and Insurer which caused or contributed to the delay. The statute providing for a two-year deadline is not a statute of repose. Therefore, this Court finds that the cause must be remanded for further proceedings to factually determine whether the statutory time was tolled, and, if so, whether the filed request for hearing was then timely.

¶31 The Panel's decision necessarily rejecting the argument of Employer and Insurer that the injury was not the cause of death is sustained. The Panel's decision that the filing of the request for relief was not governed by the statute in force when the claim arose is vacated. Thus, Claimant had two years to request relief. The cause is remanded for further proceedings in accord with this Court's Opinion.

¶32 **SUSTAINED IN PART, VACATED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS.**

BARNES, P.J., and FISCHER, J., concur.

KEITH RAPP, JUDGE:

1. Claimant also argued that the delay was attributed to Employer's delay in providing medical records, coupled with difficulty in transcribing the records from the recording provided. The decisions below do not appear to have been influenced by this argument.

2. The quoted language forming the Panel's ruling finds general support in *Dunkelgod*.

3. The Court in *Cole* explained:

> A. statute of repose bars a suit a fixed number of years after the defendant acts in some manner (generally in the design or manufacture of a product), even if the repose period ends before a plaintiff suffers injury. Although statutes of repose and statutes of limitations bear some similarities to one another, each also possesses distinct characteristics. While both are designed to provide repose for a defendant, a statute of limitations places a limit on a plaintiff's time to bring an action. After the prescribed time period has lapsed, a statute of limitations extinguishes the remedy for the redress of an accrued cause of action. This is not so with a statute of repose. *The latter bars potential liability by limiting the time during which a cause of action may arise.* It serves to bar a claim even before it accrues. A statute of limitations will punish those who sleep on their rights, while a statute of repose will bar recovery, despite a plaintiff's diligent efforts to assert the claim.

Cole, 2003 OK 81, 78 P.3d 542, n.23 (citations omitted).

2020 OK CIV APP 34

NATHAN TYLER SIMPSON, Plaintiff/Appellant, vs. STATE OF OKLAHOMA ex rel. DEPARTMENT OF PUBLIC SAFETY, Defendant/Appellee.

Case No. 118,512. April 23, 2020

APPEAL FROM THE DISTRICT COURT OF TEXAS COUNTY, OKLAHOMA

HONORABLE A. CLARK JETT, TRIAL JUDGE

REVERSED

Christopher J. Liebman, Guymon, Oklahoma, for Plaintiff/Appellant

Garrett L. McKibben, ASSISTANT GENERAL COUNSEL, OKLAHOMA DEPARTMENT OF PUBLIC SAFETY, Oklahoma City, Oklahoma, for Defendant/Appellee

DEBORAH B. BARNES, PRESIDING JUDGE:

¶1 Nathan Tyler Simpson appeals from the district court's order filed on November 22, 2019, sustaining the revocation of his driver's license and denying his request for modified driving privileges. Based on our review, we conclude Mr. Simpson's driver's license was improperly revoked. Therefore, we reverse the district court's order and hereby reinstate Mr. Simpson's driving privileges.

BACKGROUND

¶2 On June 2, 2017, Mr. Simpson was arrested in Texas County, Oklahoma. As set forth in the Information filed on June 5, 2017, Mr. Simpson was charged in Texas County Case No. CF-2017-181 with one felony count of possession of a controlled dangerous substance, marijuana, in addition to four other counts.

¶3 As set forth in the Felony Plea filed in November 2018, Mr. Simpson ultimately pled no contest to this possession charge, but the four other counts were dismissed. This is reflected in the Judgment and Sentence filed in February 2019.[1]

¶4 An Abstract of Court Record was subsequently sent to the Oklahoma Department of Public Safety (DPS). The Abstract states that Mr. Simpson committed the crime of "possess[ion] [of] marihuana (*using motor vehicle*) (2nd or subsequent)." (Emphasis added.)

¶5 Upon receiving the Abstract, DPS issued an order immediately revoking Mr. Simpson's driver's license for a period of 36 months pursuant to 47 O.S. Supp. 2013 § 6-205, which provides, in pertinent part, as follows:

> A. [DPS] shall immediately revoke the driving privilege of any person, whether adult or juvenile, upon receiving a record of conviction, in any municipal, state or federal court within the United States of any of the following offenses, when such conviction has become final:
>
> . . . ;
>
> 6. A misdemeanor or felony conviction for unlawfully possessing, distributing, dispensing, manufacturing, trafficking, cultivating, selling, transferring, attempting or conspiring to possess, distribute, dispense, manufacture, traffic, sell, or transfer of a controlled dangerous substance as defined in the Uniform Controlled Dangerous Substances Act while using a motor vehicle[.]

(Emphasis added.)

¶6 Mr. Simpson initiated the present case by filing a Petition for Appeal or Modification challenging the DPS revocation in the district court. His primary argument is that because nothing in the Judgment and Sentence or in the Plea indicates he committed his crime while using a motor vehicle, his license was improperly revoked under § 6-205.

¶7 In its order filed in November 2019, the district court sustained the revocation of Mr. Simpson's driver's license and also denied Mr. Simpson's request for modified driving privileges.

¶8 Mr. Simpson now appeals from that portion of the district court's order sustaining the revocation of his driver's license.

STANDARD OF REVIEW

¶9 The issues presented on appeal are issues of statutory interpretation. Issues of statutory interpretation are issues of law and, thus, are reviewed *de novo*. "Statutory interpretation is a question of law and is subject to *de novo* review. . . . *De novo* review is a 'non-deferential, plenary, and independent review of the trial court's legal ruling.'" *Raymond v. Taylor,* 2017 OK 80, ¶ 9, 412 P.3d 1141 (citations omitted).

ANALYSIS

I. Preliminary Issue Regarding Scope of Review

¶10 In a Court Minute filed in September 2019, the district court concluded it "is not vested with original jurisdiction to hear this appeal." This determination, however, is not reflected in the district court's final order on appeal, nor does DPS assert in its Answer Brief that the district court lacked jurisdiction. DPS argues, instead, that district courts "have incredibly limited jurisdiction in these post-conviction matters" involving mandatory revocations.

¶11 Mr. Simpson filed his Petition for Appeal or Modification in the district court pursuant to 47 O.S. 2011 & Supp. 2019 § 6-211. Section 6-211 provides, in part, as follows:

> A. Any person denied driving privileges, or whose driving privilege has been canceled, denied, suspended or revoked by [DPS], *except where such cancellation, denial, suspension or revocation is mandatory, under the provisions of Section 6-205 of this title,* or disqualified by [DPS], under the provisions of Section 6-205.2 or 761 of this title, shall have the right of appeal to the district court as hereinafter provided.

(Emphasis added.)[2] However, § 6-211 further provides as follows:

> F. Upon a hearing relating to a revocation or disqualification pursuant to a conviction for an offense enumerated in Sections 6-205, 6-205.2 or 761 of this title, *the court shall not consider the propriety or merits of the revocation or disqualification action, except to correct the identity of the person convicted as shown by records of [DPS].*

47 O.S. Supp. 2019 § 6-211(F) (emphasis added).[3]

¶12 Pursuant to § 6-211(F), we agree with DPS that it is the intent of § 6-211 that district courts have jurisdiction to undertake a review, albeit a limited one, of driver's license revoca-

tions made pursuant to the mandatory provisions in § 6-205.[4] We conclude that this review consists of verifying that the appropriate correlation exists between the person challenging the mandatory revocation, on the one hand, and a conviction necessitating mandatory revocation, on the other.

II. While Using a Motor Vehicle

¶13 DPS issued its order revoking Mr. Simpson's driver's license on the basis that the Abstract from Texas County stated he received a felony conviction for unlawfully possessing a controlled dangerous substance while using a motor vehicle. As stated above, however, nothing in the Judgment and Sentence or in the Plea indicates Mr. Simpson committed his crime while using a motor vehicle. Even in the lengthiest description of the crime in these documents (set forth in the "Offer of Proof" in the Plea), it is merely stated: "On June 2, 2017 in Guymon, OK, Defendant had possession of marijuana without lawful excuses after previous controlled substances convictions . . . ." Although the Plea states that the court found "[a] factual basis exists for the plea[]," no mention is made in the Plea or Judgment and Sentence of the use of a motor vehicle or that the possession occurred while using a motor vehicle.

¶14 DPS asserts on appeal that "[d]espite the contents of the actual final order of the . . . criminal findings, the Texas County Court Clerk sent to DPS an abstract marking a plea of guilty" that states the possession conviction occurred while using a motor vehicle. DPS states that "a court clerk is responsible for sending an abstract to DPS after a conviction of [a] moving traffic offense," and "[t]he Texas County Court Clerk, per their duty, sent to DPS an abstract which reflected a conviction of possession of marijuana while operating a motor vehicle." DPS states: "The judgment and sentence in the criminal case may not have mentioned the offense being done 'while operating a motor vehicle'; however, the abstract did and [that] is what DPS is bound to adhere to." DPS states that Mr. Simpson is effectively arguing that "there be a mandate that DPS change its policy to include researching every final order that stems from a conviction while operating a motor vehicle. That would be practically impossible and in complete disregard [of] statute."

¶15 Although it may be prudent and efficient for DPS to rely on the description of crimes provided by court clerks in the abstracts, we conclude that a § 6-205(A)(6) revocation may, nevertheless, be successfully challenged on appeal if DPS is unable to show that that description is supported by the underlying plea and judgment.[5]

¶16 In the present case, and regardless of the contents of preliminary documents, such as the dismissed charges, in the underlying criminal proceeding,[6] it is undisputed that the Plea and the Judgment and Sentence fail to support the description of the conviction in the abstract with regard to the use of a motor vehicle. As stated above, although the scope of review on appeal from mandatory license revocations of the kind at issue in the present case is limited under 47 O.S. § 6-211(F), that review includes the ability to examine the correlation between the person challenging the license revocation and a conviction necessitating such a revocation. In the absence of any resolution regarding the issue of the use of a motor vehicle in the Plea or the Judgment and Sentence, we conclude Mr. Simpson's license was improperly revoked under 47 O.S. § 6-205(A)(6) for unlawfully possessing a controlled dangerous substance while using a motor vehicle.[7]

CONCLUSION

¶17 We reverse the district court's order filed in November 2019, and hereby reinstate Mr. Simpson's driving privileges.

¶18 **REVERSED**.

RAPP, J., and FISCHER, J., concur.

DEBORAH B. BARNES, PRESIDING JUDGE:

1. Due to the existence of prior offenses, Mr. Simpson was "sentenced to a term of 10 years in the state penitentiary . . . with all but the first 60 days suspended pursuant to the rules and conditions of probation as entered by the court, with credit for time served."

2. Separate divisions of this Court have interpreted § 6-211(A) to imply that district courts lack jurisdiction to review appeals from mandatory revocation orders. *See Phillips v. State ex rel. Department of Public Safety*, 1992 OK CIV APP 51, ¶¶ 9 & 10, 831 P.2d 3 (Citing only to subsection A of § 6-211, the *Phillips* Court stated it "agree[s] with DPS that the district court had no jurisdiction to hear Phillips' appeal" "from a drivers license revocation mandated by 47 O.S. Supp. 1990 § 6-205(A)(2)."); *Williams v. State ex rel. Dep't of Pub. Safety*, 1990 OK CIV APP 27, ¶ 9, 791 P.2d 120 (Citing only to subsection A of § 6-211, the *Williams* Court stated that "when an enumerated felony conviction occurs a license revocation becomes mandatory without the right to appeal to the district court," and "[DPS's] revocation is simply a ministerial function after 'receiving a record of such operator's or chauffeur's conviction.'" (footnote omitted)).

3. The same provision was previously set forth in 47 O.S. 2011 § 6-211(G).

4. Such review was undertaken in a recent appeal that arose from a prior revocation order against Mr. Simpson. In *Simpson v. Commissioner of Department of Public Safety*, 2018 OK CIV APP 28, 416 P.3d 1078, although the Court did not explicitly address this issue, the Court reviewed DPS's previous mandatory revocation of Mr. Simpson's driver's license to, among other things, ensure that it complied with the mandatory revocation statute. Our interpretation of the relevant

statutory provisions is also roundly supported by the Court's reasoning in *Kennedy v. State, ex rel., Department of Public Safety*, 2005 OK CIV APP 35, 114 P.3d 499, as follows:

> The limitation imposed by preclusion of an appeal [in cases such as *Phillips*, 1992 OK CIV APP 51,] *proceeds with the assumption that a conviction exists*. Thus when, as in *Phillips*, a conviction has in fact occurred and a revocation of the convicted person's driving privilege is a consequence of the conviction, then the act of revocation is immune from judicial review according to the statute.
>
> This immunity does *not* apply when the question is whether a conviction exists. Thus, *if* the driver is challenging the premise for the revocation, that is, the existence of a conviction, then the statute does not preclude an appeal on that narrow issue.
>
> Therefore, this Court holds that the district court has a limited range of jurisdiction to hear Kennedy's case.

Kennedy, ¶¶ 17-19 (footnote omitted).

5. We note that 47 O.S. 2011 § 18-101(D) provides that an "abstract" sent to DPS from a judicial officer of the jurisdiction of the criminal proceeding is to be on a form furnished by DPS, and, moreover, it appears to mandate that the abstract "shall include . . . the plea" and "the judgment." That is, § 18-101(D) states: "The abstract shall be made upon a form furnished by [DPS] and shall include," among other things, "[t]he nature and date of the offense, the date of hearing, the plea, the judgment, or, if bail was forfeited, the amount of the fine or forfeiture[.]" It would make little sense to interpret the use of the word "or" in § 18-101(D) as indicating that, for example, providing "the date of hearing" alone satisfies its demands; rather, it appears that the word "or" is used here to separate those circumstances in which "bail was forfeited" – in which case the abstract shall contain "the amount of the fine or forfeiture" – but in all other circumstances the abstract shall include "[t]he nature and date of the offense, the date of hearing, the plea, [and] the judgment[.]"

6. Mr. Simpson was charged with, for example, failure to wear a seat belt and improper tag, but these charges *were dismissed*. What is clear is that there is absolutely no indication in the Plea or the Judgment and Sentence of the use of a motor vehicle, and this issue of fact (as to whether Mr. Simpson committed his crime "while using a motor vehicle") remains unresolved. *See Kennedy*, 2005 OK CIV APP 35, ¶ 26 ("All convictions require an adjudication of guilt by a court based upon a plea or a verdict." (citation omitted)).

7. Having reached this determination on statutory grounds, we need not address Mr. Simpson's due process argument. *See Brown v. Claims Mgmt. Res. Inc.*, 2017 OK 13, ¶ 26, 391 P.3d 111 ("This Court notes a general rule: where legal relief is available on alternative, non-constitutional grounds, we avoid reaching a determination on the constitutional basis.").

2020 OK CIV APP 35

DONNA JO FLETCHER, Petitioner/Appellee, vs. MARK ALLEN KELLEY, Respondent/Appellant.

Case No. 117,229. November 25, 2019

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

HONORABLE STEPHEN R. CLARK, TRIAL JUDGE

AFFIRMED IN PART, REVERSED IN PART AND REMANDED FOR FURTHER PROCEEDINGS

N. Scott Johnson, Patrick H. McCord, N. SCOTT JOHNSON & ASSOCIATES, P.L.L.C., Tulsa, Oklahoma, for Petitioner/Appellee

Carl P. Funderburk, FUNDERBURK AND ASSOCIATES, P.L.L.C., Tulsa, Oklahoma, for Respondent/Appellant

JANE P. WISEMAN, VICE-CHIEF JUDGE:

¶1 Mark Allen Kelley appeals a trial court order granting attorney fees and costs to Donna Jo Fletcher for matters arising after an order establishing paternity was entered. After review, we conclude there is a statutory basis for the attorney fee award and affirm the trial court's decision to award fees and costs, but reverse as to the amount and remand for further proceedings to determine the amount.

FACTS AND PROCEDURAL BACKGROUND

¶2 On November 18, 2014, a decree of paternity was filed that (1) established Kelley is the natural, biological father of CKF, (2) awarded Fletcher sole custody of CKF, (3) awarded Kelley visitation each Tuesday and Thursday from 4:00 p.m. to 7:30 p.m., alternating weekends from Saturday morning through Sunday afternoon, and alternating holidays, and (4) ordered Kelley to pay child support. The decree also provided, "If [Kelley] files a Motion to Modify and if the Court agrees that based upon all the circumstances that are available at that time, the court will consider [Kelley's] request with regard to modifications of custody or visitation." The court-ordered visitation to be monitored by either Carrie Short or another professional approved by Short to determine if CKF is adjusting to the new visitation schedule.

¶3 About a week later on November 26th, an order was filed reciting Kelley had agreed to pay Fletcher $5,000 for attorney fees, to be paid at $1,000 a month for 5 months, beginning in December 2014. The order states that Fletcher "agrees not to pursue the balance of the attorney's fees incurred by her in this matter, and shall not file an application with the Court."

¶4 On October 7, 2015, Fletcher filed a "Motion to Set Expedited Visitation Review Hearing" alleging "Short has issued a report regarding her monitoring of the minor child during the new visitation schedule, which reflects she has concerns about the minor child's development and adjustment to the current visitation schedule." According to an agreed order to modify visitation filed on February 10, 2016, the parties agreed Kelley should have visitation each Tuesday from 4:00 p.m. until 7:00 p.m., and alternating weekends from 10:00 a.m. Saturday until 2:00 p.m. Sunday. A review hearing was set for May 16, 2016.

¶5 Kelley filed a motion to modify child support in April 2016, claiming a modification was needed because he had been laid off from work.

¶6 On July 12, 2016, an "Order Adopting Recommendations of Carrie Short" was filed ordering Kelley to "continue working with his individual therapist to extinguish his animosity toward" Fletcher and setting out a detailed exchange protocol and other instructions. Three days later, Kelley filed a motion to replace Short as the visitation monitor alleging Short favors Fletcher and is biased against him.

¶7 On January 3, 2017, Kelley filed a motion to restore the previous court-ordered visitation schedule and Fletcher objected. The trial court denied Kelley's request to replace Short. An agreed order modifying child support was filed on April 17, 2017.

¶8 On May 23, 2017, Fletcher field an application for an emergency order to require therapeutic supervised visitation claiming Kelley's obstinate conduct necessitated supervised visitation. The trial court granted Fletcher's request for an emergency order, suspended the visitation schedule, and ordered any visitation by Kelley to be supervised by a professional at Rebound Mental Health. After a hearing, the trial court on July 11, 2017, continued supervision of Kelley's visitation at Rebound Mental Health or by another individual agreed to by the parties. On July 20, 2017, Kelley filed a motion for an expedited hearing to appoint a "therapeutic therapist" of his choosing.

¶9 Fletcher filed an application for attorney fees on July 31, 2017, seeking attorney fees and costs pursuant to 43 O.S. § 110. She alleged she incurred substantial attorney fees and costs in the amount of $17,197.87, plus additional fees and costs incurred at the hearing on the issue, due to Kelley's behavior and his numerous filings necessitating a response from her. The time records attached show Fletcher had incurred $17,197.87 in attorney fees and costs beginning December 9, 2014, a time period after the time – November 26, 2014 – the parties had agreed on an amount of attorney fees for the paternity proceedings.

¶10 An order filed September 18, 2017, requires Dr. Bart Trentham to supervise Kelley's visitation and Carrie Short to remain as the child monitor. The order restrains and enjoins Kelley from contact with the minor child outside of therapeutic, supervised visitation.

¶11 On December 5, 2017, Kelley filed an application asking the trial court to appoint a public defender for CKF, alleging "Public defender is necessary do [*sic*] to allegations of mother that father is harmful to child during exchanges per Carrie Short."

¶12 That same month, Fletcher filed an application to dismiss Kelley's application to alternate tax exemption claiming his application is deficient on its face as failing to comply with Rule 4 of the District Court Rules. Fletcher further claimed Kelley was behind on child support, he continues to pay the previous rate set by the court rather than the increased rate effective in January 2017, and he has failed to reimburse Fletcher for medical, therapy, and child care expenses. Fletcher filed a motion to dismiss Kelley's application for the appointment of a public defender for failure to comply with Rule 4. In the alternative, Fletcher denied that a public defender was necessary.

¶13 The trial court issued a series of orders ruling on the motions. In a document titled "Decision" filed on June 14, 2018, the trial court ordered Kelley to pay Fletcher $12,000 for attorney fees and costs. The trial court stated it "performed a judicial balancing of the equities" in reaching its decision. On June 14, 2018, the trial court ordered the appointment of a public defender for CKF. In a separate order, the trial court denied Kelley's application to alternate the tax exemption. In its later-filed order awarding attorney fees and costs, filed July 12, 2018, the court stated, "That the time period from December 9, 2014 to December 30, 2015, appears to involve a reasonable amount of time that either party should expect to be responsible for in this setting, particularly since the matter was concluded with an Agreed Order." The court continued: "After December 30, 2015, it appears things begin to deteriorate as multiple problems arose. [Kelley] filed several motions after the *Application*, including a request for the appointment of a Public Defender which the Court granted over [Fletcher's] objection." The court stated it "performed a judicial balancing of the equities" and awarded Fletcher a judgment against Kelley for $12,000, to be paid at the rate of $150 per month beginning in July 2018.

¶14 Kelley appeals from the order awarding attorney fees and costs to Fletcher.

STANDARD OF REVIEW

¶15 Kelley challenges the court's authority to make the award. "Whether a party has a right to recover a statutory attorney's fee is a legal question, and will be reviewed *de novo* by this

Court." *State ex rel. Dep't of Transp. v. Cedars Grp., L.L.C.*, 2017 OK 12, ¶ 10, 393 P.3d 1095.

¶16 We also examine a question of statutory construction as a question of law requiring *de novo* review. *Arrow Tool & Gauge v. Mead*, 2000 OK 86, ¶ 6, 16 P.3d 1120.

ANALYSIS

¶17 "The rule that 'each litigant bears the cost of his/her legal representation and our courts are without authority to assess and award attorney fees in the absence of a specific statute or a specific contract therefor between the parties' is 'firmly established in this jurisdiction.'" *Jones v. Pack*, 2018 OK CIV APP 3, ¶ 15, 408 P.3d 628 (quoting *Boatman v. Boatman*, 2017 OK 27, ¶ 16, 404 P.3d 822). On appeal, Kelley asserts: "There was never a motion to modify filed to invoke the jurisdiction of the court nor ruled on in order to have a prevailing party to consider awarding attorney fees." He asserts the paternity order, filed on November 18, 2014, provides: "**In accordance with law**, if Father files a Motion to Modify and if the Court agrees that based upon all the circumstances that are available at that time, the court will consider Father's request with regard to modifications of custody or visitation." He claims the only motion to modify that has been filed was a motion to modify child support, which was resolved by an agreed order. He claims "there was never a proper filing to invoke the jurisdiction of the Court" and without "jurisdiction by the Court there can be no awarding of attorney fees." He asserts the trial court failed to make specific findings regarding the balancing of the equities. He further asserts 43 O.S. § 110(E) cannot be a basis for awarding attorney fees because this is a paternity action, not a dissolution of marriage action.

¶18 Title 43 O.S.2011 § 110(E) provides:

> The court may in its discretion make additional orders relative to the expenses of any such subsequent actions, including but not limited to writs of habeas corpus, brought by the parties or their attorneys, for the enforcement or modification of any interlocutory or final orders in the dissolution of marriage action made for the benefit of either party or their respective attorneys.

He contends that "with no Motion to Modify being filed, there cannot be a prevailing party and therefore the awarding of attorney fees and costs should not have been granted." Although we agree with Kelley that § 110 is not applicable, the trial court did not lack jurisdiction to hear matters arising after the paternity determination, and other statutory grounds exist to award attorney fees and costs.

¶19 In *McKiddy v. Alarkon*, 2011 OK CIV APP 63, 254 P.3d 141, although the parties appeared to agree that § 110 applied to a request for attorney fees, the Court held that "because Father and Mother were never married and, hence, were never 'grant[ed] a decree of dissolution of marriage, annulment of a marriage, or legal separation,' § 110 is inapplicable to this case and cannot form the basis of an award of attorney's fees to Mother." *Id.* ¶¶ 14-15. The Court, however, quoted *Dixon v. Bhuiyan*, 2000 OK 56, ¶ 9, 10 P.3d 888, for the proposition: "'If the trial court reaches the correct result but for the wrong reason, its judgment is not subject to reversal. Rather th[is] Court is not bound by the trial court's reasoning and [we] may affirm the judgment below on a different legal rationale.'" *Id.* ¶ 16. The Court found that other statutory provisions supported the award of attorney fees and affirmed the trial court's award to the mother. *Id.* ¶ 26.

¶20 Statutory authority exists for the award of attorney fees in a paternity case like this one. Title 10 O.S.2011 § 7700-636(C) provides that a trial court may award attorney fees and costs in paternity actions. Section 7700-636 states:

> A. The court shall issue an order adjudicating whether a man alleged or claiming to be the father is the parent of the child.
>
> B. An order adjudicating parentage shall identify the child by name and date of birth.
>
> C. Except as otherwise provided in subsection D of this section, the court may assess filing fees, reasonable attorney fees, fees for genetic testing, other costs, and necessary travel and other reasonable expenses incurred in a proceeding under this Article. The court may award attorney fees, which may be paid directly to the attorney, who may enforce the order in the attorney's own name.

10 O.S.2011 § 7700-636. The parties, however, had previously agreed to an attorney fee award for the proceedings to establish paternity. The fees at issue in this appeal were incurred during the post-establishment-of-paternity pro-

ceedings for issues involving visitation, child support, and related problems.

¶21 Title 43 O.S. Supp. 2019 § 109.2(B) provides that in an action to determine parentage, where the parties are the child's parents, "the court may determine which party should have custody of said children, may award child support to the parent to whom it awards custody, and may make an appropriate order for payment of costs and attorney fees." In *Jones v. Pack,* 2018 OK CIV APP 3, 408 P.3d 628, this Court considered whether a trial court appropriately awarded attorney fees when a father sought visitation when no visitation was provided in an agreed order establishing paternity and setting child support or in a subsequent order modifying the father's child support obligation. *Id.* ¶¶ 2-4. The mother filed a special appearance to object to the Oklahoma court's jurisdiction because she and the child were Arkansas residents. *Id.* ¶ 5. The trial court dismissed father's action due to lack of jurisdiction. *Id.* ¶ 6. The mother sought an award of attorney fees and costs saying the father should have filed his visitation request in Arkansas, and the trial court awarded mother $2,195 in attorney fees. *Id.* ¶¶ 7, 12.

¶22 This Court noted in *Jones* that attorney fees could not be awarded pursuant to 10 O.S.2011 § 7700-636 because the trial court was considering the father's request for visitation and the fees were not incurred to determine parentage. *Id.* ¶ 20. The Court also rejected an award of attorney fees pursuant to 43 O.S. Supp. 2016 § 109.2 as "no custody or child support decisions were made as a result of Father's petition to establish visitation." *Id.* ¶ 19. Here, however, unlike the trial court in *Jones,* the court issued an order regarding child support after the parentage and custody order was entered. We conclude that an award of attorney fees is supported by § 109.2.

¶23 At the attorney fee hearing, the attorneys for the parties stipulated to the hourly rate and the number of reasonable hours expended. However, the applicable statutory authority to award fees and costs, § 109.2, allows only fees and costs attributable to resolution of custody or child support issues. Although this appears to deviate from the broader attorney fee coverage provided by § 110 in post-decree dissolution of marriage issues, we conclude the statutory coverage of § 109.2 as to fees and costs in paternity cases applies only to issues of custody and child support. We are aware of no authority to award fees or costs falling outside these parameters established by the Legislature, and until this provision is changed legislatively, we are bound by the statute's clear language. "The primary goal of statutory interpretation is to ascertain and, if possible, give effect to the intention and purpose of the Legislature as expressed by the statutory language." *Cattlemen's Steakhouse, Inc. v. Waldenville*, 2013 OK 95, ¶ 14, 318 P.3d 1105. "If the language is plain and clearly expresses the legislative will, further inquiry is unnecessary." *Id.* "The Legislature has the power to change, alter, or amend a statute" and "[t]his Court may not, through judicial fiat, change, modify, or amend the expressed intent of the Legislature." *White v. Lim,* 2009 OK 79, ¶ 16, 224 P.3d 679. As a result, the amount of the award must be recalculated pursuant to the pertinent statutory authority. We thus reverse as to the amount and remand that issue to the trial court for re-examination.

CONCLUSION

¶24 We affirm the award of attorney fees and costs to Fletcher, but pursuant to 43 O.S. Supp. 2019 § 109.2, we reverse as to the amount and remand for the trial court to determine the appropriate amount consistent with this Opinion.

¶25 **AFFIRMED IN PART, REVERSED IN PART AND REMANDED FOR FURTHER PROCEEDINGS.**

BARNES, P.J., and RAPP, J., concur.

2020 OK CIV APP 36

BILLY D. THOMPSON, Petitioner/ Appellant, vs. TERESA M. THOMPSON, Respondent/Appellee.

Case No. 117,359. May 29, 2020

APPEAL FROM THE DISTRICT COURT OF LOGAN COUNTY, OKLAHOMA

HONORABLE LOUIS A. DUEL, TRIAL JUDGE

REVERSED

Billy D. Thompson, Crescent, Oklahoma, *Pro Se*

Edmond Geary, Geary Law Firm, Oklahoma City, Oklahoma, for Respondent/Appellee

JANE P. WISEMAN, CHIEF JUDGE:

¶1 Billy D. Thompson (Husband) appeals a trial court order awarding attorney fees to Teresa M. Thompson (Wife). The primary issue

on appeal is whether the award was an abuse of discretion. After review, we conclude that it was and reverse the decision of the trial court.

BACKGROUND

¶2 Husband filed a petition for divorce on May 29, 2013. The case was not tried until August 2016 and the decree of dissolution of marriage was not filed until March 14, 2017. The decree said the parties' business, Thompson Engine, which is heavily dependent on the oil business, "is extremely debt heavy and asset poor," with monthly income down from $16,000 to $5,200. The court found Husband and Wife own Thompson Engine equally, a business it valued at $55,357, and awarded Husband the business and awarded Wife $27,678.50 for her interest in the business, to be paid by Husband at $300 a month. Thompson Engine operates from the marital home and surrounding property, whose net equity the trial court determined to be $149,000 and awarded it to Husband. The court found the parties owned debt-free a separate 80-acre tract of land which the trial court ordered sold. After payment of the parties' tax debts of $61,685, the remainder of the proceeds from the sale of the tract of land, approximately $141,314, was to be paid to Wife. The trial court ordered Husband to continue to pay Wife monthly support of $2,000 until the tract was sold. The court also awarded each party a 25 percent share of their previous collective 50 percent share in Taylor Petroleum.

¶3 Wife filed a motion for attorney fees on April 7, 2017, seeking $66,540 for attorney fees and $937.19 for expenses and costs. Husband also filed a motion for attorney fees.

¶4 In its order the trial court stated:

> If ever there were an occasion where one party to a case was responsible for prolonging litigation creating extra expense for both parties it would be in the case at bar.
>
> Throughout the litigation of this case this Court held nearly 30 hearings. The majority of the hearings were at the request of [Wife]. Now [Wife] is before this Court asking for attorney fees.
>
> At the onset of this case the Court awarded [Wife] $10,000.00 in suit money to proceed with her case. [Wife] was awarded spousal support in the amount of 2300.00 per month. That amount was later reduced to 2000.00 per month.
>
> Only because of the disparity between the incomes of the parties would this Court contemplate granting [Wife] attorney fees. For that reason the Court sustains [Wife's] Motion for Attorney Fees and awards [Wife] an additional $5,000.00 in attorney fees. [Husband] is given sixty (60) days from the date of this order to comply.

¶5 Husband appeals.

STANDARD OF REVIEW

¶6 "An award of attorney fees and costs by the trial court will not be disturbed in the absence of an abuse of discretion." *Hester v. Hester*, 1983 OK 50, ¶ 7, 663 P.2d 727. "An abuse of discretion occurs when a court bases its decision on an erroneous conclusion of law, or where there is no rational basis in evidence for the ruling." *U.S. Bank Nat'l Ass'n v. Baber*, 2012 OK 55, ¶ 4, 280 P.3d 956.

ANALYSIS

¶7 Title 43 O.S.2011 § 110(D) provides, "Upon granting a decree of dissolution of marriage … the court may require either party to pay such reasonable expenses of the other as may be just and proper under the circumstances." "Counsel-fee allowances, which never depend on one's status as prevailing party in the case, must be granted only to that litigant who qualifies for the benefit through the process of a *judicial balancing of the equities*." *Thielenhaus v. Thielenhaus*, 1995 OK 5, ¶ 19, 890 P.2d 925. In *Husband v. Husband*, 2010 OK CIV APP 42, ¶ 35, 233 P.3d 383, the Court explained:

> An award of attorney fees does not depend on any one factor such as status as the prevailing party or the financial means of a party. In considering what is just and proper under the circumstances, the court in the exercise of its discretion should consider the totality of circumstances leading up to, and including, the subsequent action for which expenses and fees are being sought. Such circumstances should include, but not be limited to: the outcome of the action; whether either party unnecessarily complicated or delayed the proceedings, or made the subsequent litigation more vexatious than it needed to be; and finally, the means and property of the respective par-

ties. *Finger v. Finger,* 1996 OK CIV APP 91, ¶ 14, 923 P.2d 1195, 1197-98.

"[C]onsiderable disparity in the respective incomes and net worths of the parties . . . is one of the factors that may be taken into account." *Abbott v. Abbott,* 2001 OK 31, ¶ 12, 25 P.3d 291.

¶8 According to the trial court, the disparity in income was the sole reason it granted Wife's request. This award was made despite the trial court's conclusion referring to Wife that "[i]f ever there were an occasion where one party to a case was responsible for prolonging litigation creating extra expense for both parties it would be in the case at bar." The trial court said that most of the nearly 30 hearings held by the court were at Wife's instigation. Income disparity can be a consideration in awarding attorney fees, but it clearly should not have been the only dispositive factor when other more material, determinative circumstances dictate a different outcome. Husband had previously paid at least $10,000 in attorney fees for Wife. Wife received half of the value of the parties' business as well as all proceeds, approximately $141,000, from the sale of the 80-acre tract, leaving her with substantial resources to pay her attorney fees. Examining her conduct in the course of this unnecessarily protracted litigation, in which as the trial court found, she "was responsible for prolonging litigation creating extra expenses for both parties," can only lead to the conclusion that this award is neither justified nor equitable.

CONCLUSION

¶9 We conclude the trial court abused its discretion in granting attorney fees and costs to Wife solely on the basis of income differential when a balancing of the equities dictates that the request be denied. Accordingly, the decision to grant Wife attorney fees and costs is reversed.

¶10 Husband's request in his appeal brief for appeal-related attorney fees does not comply with Supreme Court Rule 1.14, 12 O.S. Supp. 2013, ch. 15, app. 1, and is denied without prejudice to its reassertion in compliance with the Rule.

¶11 **REVERSED**.

THORNBRUGH, P.J., and HIXON, J., concur.

2020 OK CIV APP 37

SOUTHWEST CASING, LLC, Plaintiff/Appellee, vs. DANNY FOSTER, SARAH FOSTER, and LOREN FOSTER, Defendants/Appellants.

Case No. 117,512. May 22, 2020

APPEAL FROM THE DISTRICT COURT OF GARFIELD COUNTY, OKLAHOMA

HONORABLE DENNIS HLADIK, JUDGE

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS

Michael D. Roberts, ROBERTS LAW OFFICE, Enid, Oklahoma, for Plaintiff/Appellee,

Jonathan F. Benham, RIFFEL LAW FIRM, PLLC, Enid, Oklahoma, for Defendants/Appellants.

Bay Mitchell, Presiding Judge:

¶1 Defendants/Appellants Danny Foster, Sarah Foster, and Loren Foster (the Fosters) appeal from the trial court's order denying their motion to vacate default judgment. The trial court entered default judgment in favor of Plaintiff/Appellee Southwest Casing, LLC (SW Casing) without SW Casing having filed a motion. Rule 10 of the Rules for District Courts, 12 O.S. 2011, ch. 2, app. (Rule 10) "mandates that a motion must be filed in all instances, even when a party fails to make an appearance[,]" and the failure to do so constitutes "an irregularity in the proceedings" pursuant to 12 O.S. 2011 §1031(3). *Schweigert v. Schweigert,* 2015 OK 20, ¶15, 348 P.3d 696. The trial court abused its discretion by failing to vacate the default judgment. We reverse and remand for further proceedings.

¶2 SW Casing initiated this lawsuit on October 17, 2017. It alleged Defendant Danny Foster was an employee of SW Casing's predecessor-in-interest and claimed the Fosters refused to pay SW Casing for a 2012 Chevrolet 3500 truck the Fosters allegedly sold without SW Casing's knowledge.[1] The Fosters did not file an answer, and no attorney entered an appearance on their behalf. The trial court entered a default judgment against the Fosters in the amount of $28,500 on May 22, 2018. The court's order states default judgment was entered after a hearing "on the request of [SW Casing]," but the record shows SW Casing did not file a motion for default judgment. The Fosters moved to vacate the default judgment on June

20, 2018. They argued the default judgment was irregular under 12 O.S. 2011 §1031(3) because SW Casing failed to obtain proper service, file a motion for default judgment, or provide notice before the judgment was entered. After a hearing, the trial court denied the Fosters' motion to vacate.

¶3 We review a district court's order vacating or refusing to vacate a judgment for abuse of discretion. *Ferguson Enters., Inc. v. H. Webb Enters., Inc.*, 2000 OK 78, ¶5, 13 P.3d 480. Although a trial court is vested with wide discretion in denying a motion to vacate, its order will be reversed if the trial court is deemed to have erred with respect to a pure, simple and unmixed question of law. *See Jones, Givens, Gotcher & Bogan, P.C. v. Berger,* 2002 OK 31, ¶5, 46 P.3d 698.

¶4 In *Schweigert*, the Oklahoma Supreme Court examined the language of District Court Rule 10 and concluded:

> Rule 10 provides not only that a motion must be filed and notice given to a party who has appeared, but that the motion must be filed even if no notice was required . . . ***a motion must be filed in all instances,*** even when a party fails to make an appearance, and the motion must recite what notice was given, and, if none were given, the reason therefore.

Schweigert, 2015 OK 20, ¶15 (emphasis added).[2] The Court found the failure to file a motion prior to the entrance of default judgment constitutes "an irregularity in the proceedings" under 12 O.S. 2011 §1031(3) "that le[aves] the district court without means of determining whether [the plaintiff] was required to give notice, and, if so, whether the notice conformed to due process prerequisites of entering judgment." *See id.*, ¶¶8 & 15.

¶5 Here, the trial court entered default judgment after a hearing upon SW Casing's request, but SW Casing did not file a motion for default judgment as was required. SW Casing does not respond to the Fosters' argument that the court should have vacated the judgment due to this irregularity.[3] Rule 10 "mandates that a motion must be filed in all instances, even when a party fails to make an appearance, and the motion must recite what notice was given, and, if none were given, the reason therefore." *Schweigert*, 2015 OK 20, ¶15. The trial court, accordingly, abused its discretion by failing to vacate the default judgment pursuant to §1031(3) where no motion was filed before the entrance of judgment.

¶6 The decision of the trial court is reversed, the default judgment is vacated, and the case is remanded for further proceedings.

¶7 REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

GOREE, J., concurs

SWINTON, V.C.J., dissents.

¶1 I respectfully dissent and would reverse on other grounds. The majority finds that *Schweigert* and *Asset Acceptance LLC* require the Plaintiff to file a motion for default judgment when the Defendant fails to respond to the Petition. However, both cases are distinguishable from the case at issue and would create new legal requirements for Plaintiffs that are not found in District Court Rule 10.

¶2 The plain language of Rule 10 includes in the last paragraph "Notice of taking default is not required where the defaulting party has not made an appearance." Here, the Defendant did not appear in any context before judgment was taken. In *Schweigert* the court found the Father's appearance at the Temporary Hearing in a domestic court setting was sufficient to require notice before a default. Likewise, in *Asset Acceptance LLC*, the court found the use of a modified summons altered the Plaintiff's responsibilities to notify the court before taking judgment against the Defendant.

¶3 In the present case, I would reverse and follow the language of *Asset Acceptance LLC*, and find that because the summons was served with the wrong case number and that for the second named Defendant, no service was had due to his international travel. The majority ruling would require the added cost for a motion for default in every case where a Defendant does not respond and that is a requirement not found in District Court Rule 10.

Bay Mitchell, Presiding Judge:

1. Presumably, SW Casing also intends to allege ownership of the truck, although the petition does not directly state as such.

2. Rule 10 provides, in pertinent part:

> In matters in default in which an appearance, general or special, has been made or a motion or pleading has been filed, default shall not be taken until a motion therefore has been filed in the case and five (5) days notice of the date of the hearing is mailed or delivered to the attorney of record for the party in default or to the party in default if he is unrepresented or his attorney's address is unknown. If the addresses of both the party and his attorney are unknown, the motion for default judgment may be heard and a default judgment rendered after the motion has been regularly set on the motion and demurrer docket. It

shall be noted on the motion whether notice was given to the attorney of the party in default, to the party in default, or because their addresses are unknown, to neither. . . .

Notice of taking default is not required where the defaulting party has not made an appearance.

Rule 10 of the Rules for District Courts, 12 O.S. 2011, ch. 2, app.

3. SW Casing focuses on case law holding that notice of taking a default judgment is not required where the defaulting party has not made an appearance or filed any pleadings. *See Bovasso v. Sample,* 1982 OK 84, 649 P.2d 521 and *Bailey v. Campbell*, 1991 OK 67, 862 P.2d 461. We also acknowledge the first sentence of the second paragraph of Rule 10 which also says "Notice of taking default is not required where the defaulting party has not made an appearance." That appears to be the law. Although "notice" may have not been required in the instant case, *Schweigert* makes it clear that **a motion was required**. It may be an unsettled question of law, but, arguably, as here, where there has been no appearance made, the motion for default judgment would **not** then have to be served on the defaulting parties.

2020 OK CIV APP 38

THE EDMOND PUBLIC WORKS AUTHORITY, an Oklahoma Public Trust, Plaintiff/Appellant, and COVELL PARTNERS IN DEVELOPMENT, L.L.C., an Oklahoma Limited Liability Company, Plaintiff, vs. LEONARD SULLIVAN, OKLAHOMA COUNTY ASSESSOR, Defendant/Appellee, and THE COUNTY BOARD OF EQUALIZATION, Defendant.

Case No. 117,690; Comp. w/117,691
May 28, 2020

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE DON ANDREWS, TRIAL JUDGE

AFFIRMED

Leslie V. Batchelor, Bradley E. Davenport, CENTER FOR ECONOMIC DEVELOPMENT LAW, Oklahoma City, Oklahoma, for Plaintiff/Appellant

David W. Prater, DISTRICT ATTORNEY, Gretchen Crawford, ASSISTANT DISTRICT ATTORNEY, OKLAHOMA COUNTY, DISTRICT ATTORNEY'S OFFICE, Oklahoma City, Oklahoma, for Defendant/Appellee

KEITH RAPP, JUDGE:

¶1 The plaintiff, Edmond Public Works Authority (EPWA), 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 *Covell Partners in Development, L.L.C. v. Leonard Sullivan, Oklahoma County Assessor,* Case No. 117,691.

BACKGROUND

¶2 The pertinent facts are not in dispute. EPWA is an Oklahoma public trust. EPWA owns a tract of land in Edmond. Covell Partners in Development, L.L.C. (Covell) and EPWA entered into a thirty-year lease agreement (Lease) whereby Covell leased the tract from EPWA effective April 25, 2016. The Lease is a petition and summary judgment exhibit. The Lease provisions and the fact that the real property covered by the Lease are tax exempt are not in dispute. After entering the Lease, Covell built a Hotel-Conference Center on the property covered by the Lease.

¶3 Covell agreed in the Lease to operate the Hotel-Conference Center. The Lease references additional agreements concerning development of the Hotel-Conference Center which are not in the Record.

¶4 In April 2018, Assessor designated the Hotel-Conference Center as personal property and placed that property on the tax rolls with an assessed value of $1,881,337.00. Assessor did not place the tract of land or the leasehold on the tax rolls because EPWA property is tax exempt by law.

¶5 Covell pursued and exhausted its administrative remedies in an unsuccessful challenge to the assessment. Covell and EPWA then filed this action in District Court. All parties filed motions for summary judgment and the basic facts are not disputed. The trial court sustained Assessor's motion and denied the joint motion of EPWA and Covell.

¶6 The issue is whether the Hotel-Conference Center are part of the real property owned by EPWA and thus tax exempt. The Hotel-Conference Center are obviously affixed to the real estate. Thus, citing statutory and case law authority, EPWA and Covell argued for the general rule that personal property affixed to real estate becomes part of the real estate. Citing other authority, as well as the Lease provisions, Assessor distinguished Plaintiffs' authority and maintained that the hotel and conference center facilities are personal, taxable property belonging to Covell.

¶7 The Lease contains the following provisions.

¶8 The Lease is titled Second Amended and Restated Hotel-Conference Center *Ground Lease.* (Emphasis added). The term "Ground Lease" is

used in the recitals with reference to prior and other agreements.

¶9 The Lease definitions in Lease Paragraph 1 define "Building" to be "All improvements to the Leased Premises, including . . . the Hotel-Conference Center . . . together with all other structures, facilities, fixtures, appurtenances, equipment, sidewalks, pavement, landscaping, and all similar and related items and improvements located on, under and over the Leased Premises."

¶10 The "Leased Premises" are defined by the legal description of the real estate. In addition, the definition is: "The land upon which the Hotel-Conference Center are [sic] to be located."

¶11 The definitions paragraph references a $4.8 million-dollar loan from EPWA to Covell to develop the project together with a security agreement, mortgage and promissory note. These documents are not in the Record, but clearly pertain to the Hotel-Conference Center.

¶12 Paragraph 4.1 indicates that Covell may sell the "Building" on approval of EPWA. The word "Building" is defined in Lease Paragraph 1 and is set forth above.

¶13 Paragraph 5 provides that Covell is responsible to fully insure the Hotel-Conference Center. Also, Covell is obligated to improve the Leased Premises without reimbursement from EPWA. Paragraph 5.13 permits Covell to mortgage its leasehold interest.

¶14 Paragraph 5.15 provides: "Improvements. During the Term, *ownership of the Building shall remain with Tenant*." (Emphasis added).

¶15 Paragraph 5.17 gives Covell the option to purchase the "Leased Premises." The term "Leased Premises" is defined above as the land where the Hotel-Conference Center is to be located. Paragraph 6 provides that EPWA has a "put option" to require Covell to purchase the "Leased Premises." Paragraph 6 further provides that the exercise of the put option will not affect Covell's obligations under the loan documents mentioned above.

¶16 The termination clause in Paragraph 7.1.1 provides, in part: "Landlord . . . may terminate this Lease . . . Tenant will immediately surrender the Building and the Leased Premises."

¶17 The Lease contains a condemnation clause in Paragraph 9. This paragraph allocates condemnation proceeds and distinguishes "Leased Premises" from "Building." EPWA will receive the first money in an amount equal to the value of the "Leased Premises" taken. The balance goes to Covell.

¶18 After the trial court denied Plaintiffs' joint motion and sustained Assessor's motion, Plaintiffs filed separate appeals. This is EPWA's appeal.

STANDARD OF REVIEW

¶19 "Summary judgment is properly granted when there are no disputed questions of material fact and the moving party is entitled to judgment as a matter of law. When summary judgment involves only legal questions, the standard of review of a trial court's grant of summary judgment is *de novo." South Tulsa Citizens Coalition, L.L.C. v. Arkansas River Bridge Authority*, 2008 OK 4, ¶ 10, 176 P.3d 1217, 1220.

¶20 "Issues of law are reviewable by a de novo standard. An appellate court claims for itself plenary, independent and non-deferential authority to re-examine a trial court's legal rulings." *Neil Acquisition, L.L.C. v. Wingrod Investment Corp.*,1996 OK 125 n.1, 932 P.2d 1100.

ANALYSIS AND REVIEW

A. Summary of Parties' Arguments

¶21 The argument presented by EPWA begins with the undisputed fact that the Hotel-Conference Center is affixed to the tax-exempt real estate. Therefore, by statute, for purposes of *ad valorem* taxes the Hotel-Conference Center is also tax exempt. EPWA relies upon two statutory provisions contained in the Oklahoma taxing statutes in Article 28 *Ad Valorem* Tax Code.

¶22 The first is 68 O.S.2011, §2806(A)(emphasis added), which provides:

> A. Real property, *for the purpose of ad valorem taxation*, shall be construed to mean the land itself, and all rights and privileges thereto belonging or in any wise appertaining, such as permanent irrigation, or any other right or privilege that adds value to real property, and all mines, minerals, quarries and trees on or under the same, and all buildings, structures and improvements or other fixtures, including but not limited to improvements such as barns, bins or cattle

pens, or other improvements or fixtures of whatsoever kind thereon, exclusive of such machinery and fixtures on the same as are, for the purpose of *ad valorem* taxation, defined as personal property.

The second is 68 O.S. Supp. 2019, §2807(2)(b) and (c)(emphasis added).

> Personal property, *for the purpose of ad valorem taxation,* shall be construed to include:
>
> . . .
>
> b. all improvements, including elevators and other structures, upon lands, the title to which is vested in any railway company or other corporation whose property is not subject to the same mode and rule of taxation as other property; and
>
> c. all improvements on leased lands that do not become a part of the realty.

¶23 EPWA cites *Oklahoma Indus. Auth. v. Barnes,* 1988 OK 98, 769 P.2d 115, a case dealing with the predecessor statutes. The issue in *Barnes* was whether a private leasehold estate in tax-exempt property may be taxed to the lessee. The Court held that the leasehold was not subject to taxation when the fee estate was exempt. The Court rejected the argument that failure to tax the leasehold created a *de facto,* unauthorized exemption. The issue and specific holding in *Barnes* do not apply here because Assessor did not assess Covell's lease with EPWA.

¶24 EPWA cites *Keyes v. Penn Square Mall Limited Partnership*, 1992 OK CIV APP 21, 827 P.2d 909. Keyes was the assessor. Penn Square leased the property from a third party. The property contained buildings and other improvements. The assessor proposed to tax the improvements as personal property, but the trial court ruled that the assessment must be as real property. The Court of Civil Appeals affirmed.

¶25 The Appellate Court rejected the assessor's argument that improvements to real property not owned by Penn Square are not subject to the same mode and rule of taxation and thus should be taxed as personal property. The Court looked to the statutory definition of real property, which included buildings and improvements on the real property.

¶26 However, it is significant that, when rejecting the Penn Square assessor's argument, the Court distinguished the case of *Central Coal & Lumber Co. v. Board of Equalization,* 1918 OK 329, 173 P. 442. Central Coal, a private company, had leased land from Native American Tribes and the land was tax exempt. Central Coal built houses on the property and the houses were determined to be personal property. The assessment was sustained because the Native American lands were not subject to the same mode and rule of taxation as the private property owned by Central Coal. The record in this case demonstrated that Central Coal had charge of the houses and exercised supervision and ownership over them and that it rented the houses to its employees and collected the rents. Thus, the houses were personal property.

¶27 Here, Assessor argues that the mode and rule of taxation distinction applies. Thus, EPWA is a tax-exempt entity, as were the Native American Tribes. Covell is a private entity just as was Central Coal. Therefore, Assessor concludes that the mode and rule of taxation are different for Covell and EPWA. The Historical and Statutory Notes of Title 68 O.S. Supp. 2019, § 2807(2) provide that Laws 2006 rewrote Paragraph 2, but retained the "mode and rule of taxation" language.

¶28 Next are the parties' arguments regarding the legal effect of the Lease terms summarized above. Assessor maintains that the Lease terms separate ownership of the real estate from the Hotel-Conference Center improvements and buildings. The Lease terms reinforce the argument that the Hotel-Conference Center is both not part of the realty and also not the subject of the same mode and rule of taxation.

¶29 EPWA cites *Davis v. Taylor,* 1944 OK 294, 153 P.2d 231. The record in *Davis* provided an ownership history. The land had been owned by a private corporation, Oklahoma Coal Company. That company built several buildings, including storage and residences. In 1932, Taylor bought a storeroom building and made it his residence. In 1939, Theodore Davis acquired all of the land from the County after the land was sold for delinquent taxes. He then conveyed the land to the defendant, Boyd Davis.

¶30 Boyd Davis obtained possession from Taylor through forcible entry and detainer. The subject building had become dilapidated and Taylor asked to remove the lumber of the storeroom where he had resided. Davis denied the

request and removed the structure. Taylor sued for conversion and prevailed at trial.

¶31 The Oklahoma Supreme Court reversed. On appeal, Davis successfully argued that the building was subject to taxation as real property and therefore ownership passed to him by virtue of the tax deed and subsequent conveyance. The Court quoted a prior version of Section 2806(A) providing that real property included buildings. The Court then added that a contrary agreement between landlord and tenant does not affect the right of the taxing authority. Thus here, EPWA maintains that the Lease provisions, including the ownership provision, do not override the statute.

¶32 The *Davis* Opinion does not recite that, in fact, there was an agreement between Taylor and the Oklahoma Coal Company. Also, the Opinion does not recite any specifics of any agreement. On its facts, *Davis* stands for the proposition that when a property owner places buildings on the owner's real property the buildings become taxable as part of the real estate. The case does not serve as precedent for the situation here, where the private entity owner of the buildings placed the buildings on the property of the public entity owner of the real estate and the public entity owner of the real estate agrees that the private entity owner of the buildings will continue to be the owner of the buildings.

B. Decision

¶33 This case involves a specific statute involving the *ad valorem* tax code and its definitions of real and personal property. Thus, while these definitions might have antecedents in general property and fixture statutes and common law, the definitions in the statute apply for purposes of the *ad valorem* tax code. Moreover, the *ad valorem* tax code is a set of special, or specific, statutes and thus control over any general statute. *Multiple Injury Trust Fund v. Coburn,* 2016 OK 120, 386 P.3d 628.

¶34 Because this is a claim for exemption, the statutes are construed against the claim for exemption. *Phillips Petroleum Co. v. Oklahoma Tax Comm'n*, 1975 OK 146, 542 P.2d 1303. A provision for an exemption is strictly construed against the party claiming the exemption. *Austin, Nichols & Co. v. Oklahoma Co. Bd. of Tax-Roll Corrections*, 1978 OK 65, 578 P.2d 1200.

¶35 Next, the Legislature does not have the power to exempt private property from taxation unless the State Constitution so permits. Okla. Const., Art 5, §§ 46, 50. The Legislature also may not enlarge exemptions recognized in the Constitution. *Home-Stake Production Co. v. Board of Equalization*, 1966 OK 115, 416 P.2d 917.

¶36 The EPWA-Covell facts are not in dispute. The real estate owned by EPWA is tax exempt, as is the Leasehold estate. EPWA owns the real estate. The Hotel-Conference Center is a "building" and an "improvement" according to the Lease. The Hotel-Conference Center is physically attached to EPWA's real estate. Covell owns the Hotel-Conference Center according to the express terms of the Lease. On its own, Covell is not entitled to an *ad valorem* tax exemption and its property, for such tax purposes, is subject to a different mode and rule of taxation than the property of EPWA.

¶37 Thus, in order for Covell to have a tax exemption, this Court would have to conclude that the Hotel-Conference Center is not only affixed to EPWA's property but is also owned by EPWA. This Court interprets 68 O.S. Supp. 2019, §2807(2)(b) to include separate owners and to apply here. The *Central Coal & Lumber Co*. case is an example. Title 68 O.S. Supp. 2019, §2807(2)(c) presents the case where ownership is not divided when the improvements are affixed to the property. *See Davis v. Taylor* as an example.

¶38 In the absence of ownership of the Hotel-Conference Center by EPWA, the result would be the grant of a tax exemption to a property owner, Covell, that is not entitled to such exemption on its own. Moreover, the cited provisions of the *ad valorem* tax code would have to be construed to mean that the Legislature granted an exemption to an unqualified entity and unqualified property, which it cannot do.

CONCLUSION

¶39 Therefore, the trial court did not err by denying summary judgment to EPWA and granting summary judgment to Assessor. The judgment of the trial court is affirmed.

¶40 **AFFIRMED**.

BARNES, P.J., and FISCHER, J., concur.

2020 OK CIV APP 39

BRADLEY ALBURTUS and BOBBIE ALBURTUS, Plaintiffs/Appellants, vs. INDEPENDENT SCHOOL DISTRICT No. 1

OF TULSA COUNTY, OKLAHOMA, Defendant/Appellee.

Case No. 118,670. May 29, 2020

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

HONORABLE WILLIAM D. LAFORTUNE, JUDGE

REVERSED AND REMANDED

Chris Knight, Tulsa, Oklahoma, for Plaintiffs/Appellants,

Matthew P. Cyran, ROSENSTEIN, FIST & RINGOLD, Tulsa, Oklahoma, for Defendant/Appellee.

Kenneth L. Buettner, Judge:

¶1 Plaintiffs/Appellants Bradley and Bobbie Alburtus (Appellants) appeal from an order dismissing with prejudice their claims against Defendant/Appellee Independent School District No. 1 of Tulsa County (School). School asserted it was immune from suit because Appellants failed to give the notice required under the Governmental Tort Claims Act (GTCA). The record shows School told Appellants to deal with School's insurer, School approved and paid part of Appellants' claim, and School's insurance agent indicated to Appellants' counsel their written notice was sufficient to trigger the GTCA timelines; only after Appellants filed suit did School change its position and assert the notice was insufficient. On *de novo* review, we hold Appellants' notice of claim was sufficient under the facts presented here. We reverse and remand for further proceedings.

¶2 In their 2019 Petition, Appellants asserted Bradley Alburtus was injured in 2016 when, as a result of negligence, one of School's buses rear-ended his truck, causing physical and economic damages.[1] Appellants asserted they had complied with the requirements of the GTCA before filing suit.

¶3 School responded with its motion to dismiss, asserting Appellants had never given School the written notice of tort claim required by the GTCA. School asserted Appellants had communicated with School's insurer, but they had not given any notice to School, and their time to do so had expired so their claims were barred as a matter of law.

¶4 Appellants countered that they had substantially complied with the GTCA's notice requirement by giving written notice to the insurance representative School told them to contact. Appellants further asserted that School was estopped from challenging the notice because in response to their counsel's question, School's insurance representative had stated that the GTCA's 90 day period for School to pay or deny the claim had begun and Appellants' Petition was timely based on that statement. Appellants finally asserted the fact that School had paid his property damage claim showed School had notice of his claim.

¶5 Appellants attached Bradley Alburtus's affidavit, in which he averred the collision occurred November 7, 2016; he called Tulsa Public Schools and spoke to a woman who told him School does not do anything with regard to traffic collision claims and to submit everything to a company called ASC; Alburtus called ASC and spoke to Bob J. Collier; at Collier's request, Alburtus emailed Collier November 8, 2016, and gave him information about his truck and insurance as well as contact information; during November 2016, Alburtus and Collier exchanged calls and emails, including Collier giving Alburtus a claim number and Alburtus stating "please let this email serve as notice that I will be filing a bodily injury claim with your company, ..."; Alburtus emailed Collier November 25, 2015 advising him of his medical expenses to date and demanding payment by December 15, 2016; Collier emailed Alburtus December 1, 2016 and stated "as far as (bodily injury), we can't do anything with it until you('re) done treating, then we will have to audit the billing, . . . since you're dealing with a school and (taxpayers') money, it's a bit different (than) if you were dealing with a private insurance company"; Collier and Alburtus settled his property damage claim and Alburtus signed the release December 9, 2016, on which he wrote that it was not intended to release his bodily injury claim; Collier never told him he needed to submit notice to anyone else and after he did not receive an offer to settle his bodily injury claim, he hired his counsel. Appellants attached the email correspondence between Collier and Bradley Alburtus, as well as the release naming School and Brad Alburtus as the parties to the agreement.

¶6 Appellants also attached the affidavit of their counsel, Chris Knight, who averred that Appellants hired him after settling the proper-

ty damage claim; Knight believed Alburtus's November 25, 2016 email outlining all of his damages may have been sufficient to be the required written notice to trigger the 90 day claim review period; Knight called Collier and asked if the 90 days had begun or if he still had one year from the date of the collision to submit written notice of the claim, and Collier responded that he considered the cumulative effect of all of the emails between Bradley Alburtus and Collier to constitute the required written notice and that the 90 days was running; Knight told Collier he would therefore set a calendar reminder to file suit 180 days after the 90 day period expired; based on Collier's statement, Knight decided the safest day to consider the 90 days beginning was November 8, 2016, and after that 90 day period he filed suit within 180 days. Appellants also attached a December 20, 2016 letter from Knight to Collier which stated he was representing Alburtus and included the date of the accident, the name of the insured (Tulsa Public Schools), and the claim number. Appellants also requested additional time in which to obtain discovery to support their response to the motion to dismiss, which the trial court denied.

¶7 School replied that none of those facts were relevant because Appellants never submitted written notice to School's clerk, as required by the GTCA. School did not attach any evidentiary materials countering Appellants' assertions.

¶8 Following a hearing, the trial court granted the motion to dismiss with prejudice, finding that Appellants never gave written notice of their claim to School as required by the GTCA and therefore the court lacked jurisdiction. In the hearing transcript, the trial court acknowledged cases finding substantial compliance with the notice requirements had not been overruled. The court indicated counsel for Appellants had done nothing wrong and Appellants had "an excellent set of facts" for appeal.

¶9 Although Appellants attached evidentiary materials to their response to the motion to dismiss, because School sought dismissal based on lack of jurisdiction, the motion was not converted to one for summary judgment. *Ford v. Tulsa Public Schools*, 2017 OK CIV APP 55, ¶8, 405 P.3d 142.[2] An order dismissing a Petition is subject to *de novo* review. *Id.*, citing *Wilson v. State ex rel. State Election Bd.*, 2012 OK 2, ¶4, 270 P.3d 155. We "must take as true all of the challenged pleading's allegations together with all reasonable inferences that can be drawn from them. . . . Motions to dismiss are generally disfavored and granted only when there are no facts consistent with the allegations under any cognizable legal theory or there are insufficient facts under a cognizable legal theory." *Wilson,* at ¶4.

¶10 "The [GTCA] provides the exclusive remedy for an injured plaintiff to recover against a governmental entity in tort. . . . The GTCA narrowly structures the method and time frame for bringing a tort claim against the State. . . .The claimant is generally required to give notice and file a formal action within the prescribed statutory time period." *Watkins v. Central State Griffin Memorial Hospital*, 2016 OK 71, ¶21, 377 P.3d 124.

¶11 Section 156 of the GTCA outlines the notice requirement. "A claim against the state or a political subdivision shall be forever barred unless notice thereof is presented within one (1) year after the loss occurs." 51 O.S.Supp.2012 §156(B). "A claim against a political subdivision shall be in writing and filed with the office of the clerk of the governing body." 51 O.S. Supp.2012 §156(D). The record here shows no dispute that what Appellants believed was notice was submitted in writing and within one year of the loss and Appellants filed suit within the statutory time allowed following the purported notice. The only question is whether the submission of written notice to Collier was effective notice to School.

¶12 At least two Oklahoma Supreme Court decisions have found notice given to an insurance agent may satisfy Section 156 in certain circumstances.

> The view that notice to the insurance agent constitutes substantial compliance is in accord with our recent decision of *Conway …. We reiterate that the notice to the insurance carrier is not an authorized procedure under the Act, but with respect to the purposes sought to be accomplished under the notice provisions, the appellee was not prejudiced by the manner of imparting notice.*

Lucas v. Independent Public School Dist. No. 35 of Holdenville, 1983 OK 121, ¶6, 674 P.2d 1131, citing *Conway v. Ohio Cas. Inc. Co.*, 1983 OK 83, 669 P.2d 766 (both superseded on other grounds in *Minie v. Hudson*, 1997 OK 26, 934 P.2d 1082; emphasis added). And in at least one case, a city has asserted a letter to an insurance agent was notice of a claim which triggered the 90

day claim review period as support for its assertion the limitations period had expired. *See Duncan v. City of Stroud*, 2015 OK CIV APP 28, 346 P.3d 446. There the Court of Civil Appeals found the letter did not trigger the 90 day period in part because it did not include a demand and therefore was not an adequate notice of claim under the GTCA.

¶13 The Oklahoma Supreme Court's most recent decision on what constitutes notice of a claim for purposes of the GTCA is *I.T.K. v. Mounds Public Schools,* 2019 OK 59, 451 P.3d 125. One of the questions presented in I.T.K. was whether a written notice of claim given to a school superintendent satisfied §156.[3] The court found that it did. The court noted the history of cases on substantial compliance with the notice requirements and did not expressly overrule those cases. The plaintiff in *I.T.K.* urged that following *Minie, supra*, the written notice of claim could be given to anyone, so long as the school district obtained knowledge of the claim. The court rejected that argument, as well as the school's argument that the notice could only be given to the clerk of the governing body to be valid. *I.T.K.*, at ¶19. In *I.T.K.*, the Oklahoma Supreme Court ruled against a literal reading of Section 156(D), holding

> . . . the plain language in 51 O.S. § 156(D) makes filing the GTCA notice with "the office of the clerk" of the governing body a mandatory duty. . . . [but] the *manner of filing with the clerks office is not statutorily specified as mandatory,* [so] when a school district is the governing body one issue which arises is *the identity of potential clerks who may receive the notice for filing,* and whether a superintendent is a proper recipient for notice when the superintendent's managerial duties require both representing the board and transmitting to a clerk for filing any financial claims against the school district which the superintendent has received.

I.T.K. at ¶23 (emphasis in original in part and added in part). The court noted "a school district is 'a body corporate' and possesses the usual powers of a corporation for public purposes; it may sue and be sued, and is capable of contracting as well as holding real and personal property." *Id.* at ¶25. The court explained the various types of clerks school districts may employ and the duties of superintendents and recognized:

> Sound operation and functional management by a superintendent includes receiving a GTCA notice on behalf of the board in the course of the superintendent's daily business, and transmitting the notice to the proper clerk for the board. *An employee or agent must act in good faith and in the interest of the employer/principal.* A superintendent is an employee of the school board and also acting on behalf of the board when dealing with the public and managing business affairs of the school district. A superintendent acting in an official capacity may perform an act which binds the board upon its deemed or actual ratification by the board. Generally, a public official exercises power in a manner where neither public nor private rights will be injured or impaired, and employees acting on behalf of a public official have a similar duty. We have explained a public official should not ignore, or injure, or impair a citizen's rights when the official is exercising power involving a statute intended for the protection of a citizen's rights, and a similar duty arises for an official's employee acting on behalf of the official.
>
> *. . . A board of education is aware of monetary claims against the school district because the board has a legal obligation to pay its proper bills and a legal obligation to not pay improper bills.* No one disputes a school superintendent, as executive officer of the board, may have (1) a full or partial managerial and supervisory role, or (2) a mere business relationship role, relating to processing monetary claims by the encumbrance clerk for board.

Id. at ¶¶30-31 (emphasis added). The court concluded a notice submitted to a school superintendent satisfied Section 156.

¶14 While an insurance agent is not the same as a superintendent, the facts presented here show that Collier may have had authority to bind School as its agent, particularly where School directed Appellants to take their claim to him. A school's insurance agent has been held to be an authorized agent whose requests for additional information from a claimant may toll the GTCA limitations period. *Davis v. Indep. School Dist. No. 89 of Okla. County,* 2006 OK CIV APP 72, ¶5, 136 P.3d 1059. *I.T.K.* recognized the statute does not express a particular manner of submitting notice to the clerk of the school. Based on Collier's actions in this case,

submission of the claim to Collier may be treated as written notice to School. Clearly School had notice of the claim when it paid for his property damage because, as noted above, "(a) board of education is aware of monetary claims against the school district because the board has a legal obligation to pay its proper bills and a legal obligation to not pay improper bills." *I. T. K., supra,* at ¶31. Additionally, "the purpose of the notice requirement must be kept in mind in order to prevent a construction which would defeat the ends of justice. The purposes of the notice requirement are to further legitimate interests by promoting prompt investigation; by providing the opportunity to repair any dangerous condition and for speedy and amicable settlement of meritorious claims; and to allow the opportunity to prepare to meet possible fiscal liabilities." *Conway, supra,* citing *Reirdon v. Wilburton Board of Education,* 1980 OK 67, 611 P.2d 239 (both superceded by statute on other grounds in *Minie, supra*). Plainly those purposes were satisfied here, where Appellants filed suit within 270 days from the date of the injury.

¶15 In *I.T.K.*, the court noted its previous holdings that conduct by an insurer or school official may estop a political subdivision from benefitting from the limitations period. *I.T.K.* reiterated that a claimant must plead and prove estoppel, which Appellants asserted in their response to the motion to dismiss. "(W)e cannot permit the senior claims manager's promise 'to be in touch in the near future' to 'lull' (plaintiff), whether intentionally or unintentionally, 'into a false sense of security concerning the applicable denial date under [section] 157 and then rely on the induced delay as a defense to an action.'" *Duncan, supra* at ¶16, citing *Carswell v. Oklahoma State Univ.*, 1999 OK 102, ¶ 13, 995 P.2d 1118, 1122.

¶16 In *Carswell,* OSU sent a letter to the claimant after the 90 days had expired, in which it said her claim was denied effective the date of the letter. After the claimant filed suit within 180 days of that date, the university asserted it was untimely. The court noted its earlier holdings "that a political subdivision may not lull an injured party into a false sense of security concerning the applicable denial date under (§157) and then rely on the induced delay as a defense to an action." *Id.* at ¶13, citing *Vaughan v. City of Broken Arrow,* 1999 OK 47, ¶ 9, 981 P.2d 316; *Cortright v. City of Oklahoma City*, 1997 OK 158, ¶ 9, 951 P.2d 93; *Whitley v. Oologah Indep. School Dist., No. I-4*, 1987 OK 67, ¶ 6, 741 P.2d 455. In this case, School's statement to Appellants that it does not handle motor vehicle collision claims, coupled with Collier's statements to Appellants and their counsel that their 90 days had begun and that their bodily injury claim was being investigated, lulled Appellants into not directing a written notice of claim directly to School.

¶17 Section 157 provides that a party may file suit against a political subdivision if his claim has been denied in whole or in part.[4] As noted above, Collier acted as School's agent in executing a release and paying funds on behalf of School. This fact established that Appellants' claim was denied in part, thus triggering their right to file suit under the GTCA.

¶18 Several facts we must take as true, for purposes of reviewing an order dismissing a petition, warrant reversal under the unique facts presented here: Appellants first contacted School and were told School does nothing with auto collision claims and were directed to contact ACS, which they did; Collier, as agent for School, settled Appellants' property damage claim and affirmatively stated their bodily injury claim remained open and required extra scrutiny because it involved taxpayer dollars; and Collier affirmatively told Appellants' counsel the 90 day period under the GTCA was running, which necessarily declared Appellants had submitted an effective notice of their claim. We hold that because the School, through its agent, approved the claim in part and denied the claim in part, it was too late to object to the adequacy of the notice and School was subject to suit under the terms of the GTCA. Our holding is narrowly limited to the facts presented, where School directed Appellants to its agent, who partially approved and partially denied their claim and who expressly told Appellants the 90 day review period was running and thereby lulled Appellants into not submitting any additional written notice directly to School.[5] We do not hold that written notice to an insurance agent is always effective notice under the GTCA.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

BELL, P.J., and GOREE, J., concur.

Kenneth L. Buettner, Judge:

1. Appellants averred their 2017 action against School failed otherwise than on the merits April 2, 2018, and they filed this action within one year of that date as required by 12 O.S.2011 §100.

2. *Ford* also involved a collision with a Tulsa Public Schools vehicle. In *Ford*, the school attached an affidavit disputing the claimant's allegations regarding notice and another division of this court found there was a dispute of fact on the question of effective notice. As noted above, in this case School did not attach any evidentiary materials to its motion to dismiss.

3. In *I.T.K.*, the plaintiff sent a written notice of claim to the superintendent and to the school's insurer. The superintendent did not forward the letter to the school board. The insurance adjuster responded by letter stating his investigation did not waive any exemptions from liability or time limitations under the GTCA. The plaintiff waited a full year after that letter to contact the insurer again and then filed suit six months after that letter. The plaintiff contended he had sent a letter to the insurer nine months after the notice and contended his unanswered letter tolled the limitations period. The trial court found the letter to the insurance adjuster and superintendent was valid notice under the GTCA, but it found the plaintiff's suit was out of time. The Court of Civil Appeals affirmed the dismissal but found the letter was not valid notice of claim. The Oklahoma Supreme Court affirmed the trial court's finding that the suit was untimely, but it vacated this court's finding that the letter to the insurance adjuster and superintendent did not satisfy §156.

4. Section 157(A) provides " . . . A claim is deemed denied if the state or political subdivision fails to approve the claim in its entirety within ninety (90) days, unless the state or political subdivision has denied the claim or reached a settlement with the claimant before the expiration of that period. . . ."

5. While a school's insurer is under no duty to inform a claimant of the statutory limitations period, a school's agent who affirmatively states a limitations period is running may bind school. *Williams v. Bixby Indep. School Dist.*, 2012 OK CIV APP 86, ¶20, 310 P.3d 1100 and *Carswell, supra.*

Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS
Thursday, July 2, 2020

F-2018-894 — Olubanji Milton Macauley, Appellant, was tried and convicted by a jury, in Case No. CF-2017-1887, in the District Court of Oklahoma County, of Counts 1-7 Possession of a Counterfeit Driver License, After Former Conviction of Two or More Felonies. The Honorable Glenn Jones, District Judge, sentenced Macaulay to ten years imprisonment on each count to run concurrently each to the other. The court granted credit for time served and further imposed various costs and fees. From this judgment and sentence Olubanji Milton Macauley has perfected his appeal. Counts 1 and 4 of the Judgment and Sentence are AFFIRMED. Counts 2, 3, 5, 6 and 7 are REVERSED and REMANDED with instructions to DISMISS. Opinion by: Hudson, J.; Lewis, P.J., Concurs in Results; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs; Rowland, J., Concurs.

RE-2019-191 — Appellant Nathan Zabik entered a plea of guilty to Second Degree Burglary in Cherokee County District Court Case No. CF-2012-101. He was convicted and sentenced to ten years imprisonment, with all ten years suspended. The State filed a Motion to Revoke Suspended Sentence on January 10, 2019. Following a hearing, the trial court revoked seven years of Appellant's suspended sentence. Appellant has perfected the appeal of the revocation of his suspended sentence. AFFIRMED. Opinion by: Kuehn, V.P.J.: Lewis, P.J., Concur; Lumpkin, J., Concur; Hudson, J., Concur; Rowland, J., Concur.

F-2019-30 — Appellant Samuel Keith Carolina was tried by jury for the crimes of Count I – Felon in Possession of a Firearm, and Count II – Gang Association While in Commission of a Gang-Related Offense in Oklahoma County District Court Case No. CF-2017-975. In accordance with the jury's recommendation the trial court sentenced Appellant to ten years imprisonment in Count I and to five years in Count II. The sentences were ordered to run consecutively. From this judgment and sentence Samuel Keith Carolina has perfected his appeal. AFFIRMED. Opinion by: Kuehn, V.P.J.: Lewis, P.J.: Concur; Lumpkin, J.: Concur in Results; Hudson, J.: Concur; Rowland, J.: Recuse.

F-2019-391 — Appellant Thomas Lawrence Calloway was tried by jury for the crimes of Count I – Child Abuse and Count II – Child Neglect in Tulsa County District Court Case No. CF-2018-3454. In accordance with the jury's recommendation the trial court sentenced Appellant to seven years imprisonment in Count I and to five years in Count II. The sentences were ordered to run consecutively. From this judgment and sentence Thomas Lawrence Calloway has perfected his appeal. AFFIRMED. Opinion by: Kuehn, V.P.J.: Lewis, P.J.: Concur; Lumpkin, J.: Concur in Results; Hudson, J.: Concur; Rowland, J.: Concur.

COURT OF CIVIL APPEALS
(Division No. 1)
Tuesday, June 23, 2020

117,794 — Gil Wright, Plaintiff/Counter-Defendant/Appellant/Counter-Appellee, v. Deer Creek Farm Development, LLC, Defendant/Counter-Claimant/Appellee/Counter-Appellant, and Thane Swisher, Defendant. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Thomas E. Prince, Judge. Plaintiff/Counter-Defendant/Appellant/Counter-Appellee Gil Wright appeals judgment in favor of Defendant/Counter-Claimant/Appellee/Counter-Appellant Deer Creek Farm Development, LLC ("Developer"). Wright sued Developer for breach of contract, quantum meruit, and fraud. Developer asserted counterclaims seeking payment on a note (counterclaim I) and damages it incurred as guarantor for another loan on which Wright defaulted (counterclaim II). The trial court entered summary judgment in favor of Developer on both counterclaims, but left determination of damages to the jury. Following trial, the court entered judgment against Wright for damages as determined by the jury on counterclaim I. The trial court found because counterclaim II was permissive, the damages awarded for it could only be used as a set-off, and because the jury found in favor of Developer on Wright's claims, there was no award to

offset. On appeal, Wright asserts counterclaim I was barred by the statute of limitations and Developer contends the trial court erred in finding that all of its counterclaim II damages were limited to use as a set-off. The parties' agreement provided Wright waived the limitations period; additionally, Wright failed to assert the statute of limitations as an affirmative defense in response to Developer's motion for summary judgment on the issue of Wright's liability on its counterclaims. The record shows that only one of Developer's payments on the guaranty was limited to off-setting Wright's recovery. We reverse in part the judgment on counterclaim II and direct the trial court to enter judgment against Wright for $28,624.46, representing the part of the jury's award for counterclaim II that was not limited to offsetting Wright's recovery. AFFIRMED IN PART/REVERSED IN PART. Opinion by Buettner, J., Bell, P.J., and Goree, J., concur.

117,937 — In re Estate of Billy A. Wenzel and Nadine Ernestine Wenzel: Prairie Oil & Gas, LLC, Plaintiff/Appellant, v. Advocate Oil & Gas, L.L.C; David F. Sims; Walter L. Farrington, III; Stamps Brothers Oil and Gas, L.L.C., Keystone Energy, L.L.C.; Grand Oil & Gas, L.L.C.; and Bank 7, Defenants/Appellees. Appeal from the District Court of Grady County, Oklahoma. Honorable Timothy Brauer, Judge. Plaintiff/Appellant Prairie Oil & Gas, L.L.C. (Prairie), appeals a probate court's overruling of its motion for an order *nunc pro tunc* and motion to vacate. Prairie sought to modify or vacate the Final Order of Distribution (Final Order) in the probate proceedings of Nadine Wenzel (Nadine), which purported to distribute mineral interests Prairie alleges that Nadine conveyed during her lifetime to her son, Larry Wenzel, Prairie's predecessor-in-interest. Prairie alleges the Final Order was void for lack of sufficient notice to Larry of the possible distribution of the disputed mineral interests. The trial court overruled both of Prairie's motions. Prairie appeals. Because the Final Order was not void, we AFFIRM. Opinion by Buettner, J.; Bell, P.J., and Goree, J., concur.

118,228 — Prairie Oil & Gas, LLC, Plaintiff/Appellant, Stamp Brothers Oil and Gas, L.L.C.; Lunar Petroleum, L.L.C.; Fairmount Land and Minerals, L.L.C.; Keystone Energy, L.L.C.; Grand Oil & Gas, L.L.C.; Advocate Oil and Gas, L.L.C.; David F. Sims as Trustee of the David F. Sims Survivors Trust A (50%) and the Marilyn W. Sims GST Exempt Family Trust (50%); Walter L. Farrington, III; Thunder Energy, L.L.C.; Continental Exploration, L.L.C.; Bank 7; McClure Creek E&P, L.L.C.; and Scoop I, L.P., Appeal from the District Court of Grady County, Oklahoma. Honorable Z. Joseph Young, Judge. Plaintiff/Appellant Prairie Oil & Gas, L.L.C. (Prairie), appeals a quiet title order regarding certain mineral interests. Prairie sought to quiet title to mineral interests addressed in the probate proceedings of the estate of Nadine Wenzel (Nadine). Prairie alleges the probate court's Final Order distributed mineral interests that were previously conveyed to Nadine's son, Larry Wenzel (Larry) – Prairie's predecessor-in-interest–during Nadine's lifetime. The trial court quieted title in accordance with the probate court's Final Order. Prairie alleges the trial court erred by failing to hold the mineral interests had been conveyed to Larry during Nadine's lifetime. Because the trial court's quieting of title to the Mineral Interests according to the Final Order was clearly against the weight of the evidence, we reverse and remand for further proceedings. Opinion by Buettner, J.; Bell, P.J., and Goree, J., concur.

Friday, June 26, 2020

117,172 — In Re The Marriage of: D. Graves, Petitioner/Appellee/Counter-Appellant, v. C. Graves, Respondent/Appellant/Counter-Appellee. Appeal from the District Court of Tulsa County, Oklahoma. Honorable J. Anthony Miller, Judge. This is an appeal from a proceeding to modify the physical custody provisions of a joint custody plan. Respondent/Appellant/Counter-Appellee, C. Graves (Mother), appeals from the trial court's order modifying and awarding Petitioner/Appellee/Counter-Appellant, D. Graves (Father), primary physical custody of the parties' two teenage daughters. Under the original joint custody plan, the parties were awarded equal time with their two daughters: C.G., born in April 2001, and L.G., born in March 2003. Both children expressed a clear preference to primarily live with Father. Mother asserts the trial court failed to apply the best interests standard required under Oklahoma law and erroneously based its decision solely upon the daughters' stated preference. We hold the trial court did not abuse its discretion or hold contrary to law when it awarded Father with primary physical custody of the children. The trial court's modification order is affirmed. Additionally, both parties appeal from the trial court's order denying their applications for attorney fees. We cannot say the trial court

abused its discretion when it denied both parties' applications for attorney fees and AFFIRM the trial court's order. Opinion by Bell, P.J.; Buettner, J., and Goree, J., concur.

117,7237 — Majid Iranpour Mobarekeh, Plaintiff/Appellant, v. James S. Matthews, Jr., Defendant/Appellee. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Richard Ogden, Judge. Plaintiff/Appellant Majid Iranpour Mobarekeh (Mobarekeh) appeals the award of attorney fees to Defendant/Appellee James S. Matthews, Jr. (Matthews). Because Mobarekeh's Brief in Chief does not address any arguments pertaining to the order awarding attorney fees – the order properly before this court on appeal – any prior arguments regarding the award are deemed waived. We therefore affirm the trial court's grant of attorney fees and costs to Matthews. Opinion by Buettner, J.; Bell, P.J., and Goree, J., concur.

117,7377 — State of Oklahoma, ex rel. Tim Harris, D.A., Plaintiff/Appellee, v. Two Thousand One Hundred and Twenty One Dollars, Five Thousand Five Hundred and Thirty Dollars, and Three Hundred and Twenty Five Thousand and Eighty Dollars, Defendants, and Austin Hingey, Claimant/Appellant. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Caroline Wall, Judge. Claimant/Appellant, Austin Hingey, appeals from the trial court's order granting in part his motion for attorney fees and costs expended in successfully defending, in part, a forfeiture action. In the companion case, handed down February 14, 2020, the State sought the forfeiture of $332,731.00 seized by Tulsa Police Officers while executing three separate search warrants. The State's three forfeiture actions were consolidated for discovery and trial. At the close of trial, the State dismissed one case concerning the seizure of $5,530.00; the jury re-turned a verdict in favor of Claimant regarding the seizure of $2,212.00; and the jury found in favor of Claimant as to $25,080.00 of the $325,080.00 seized at a storage unit in close proximity to illegal drugs. We affirmed the trial court's forfeiture order of $300,000.00. In this proceeding, Claimant sought attorney fees of $46,767.50, plus costs, pursuant to 63 O.S. Supp. 2016 §2-506(S)(1). The trial court found the fees sought were reasonable, but disallowed all fees and costs incurred prior to the effective date of the statute, November 1, 2016. The court also reduced the allowed portion to ten percent (10%): the approximate percentage of the amount of money Claimant was awarded ($32,731.00) out of the entire sum sought to be forfeited ($332,731.00). The award consisted of $3,650.50 in fees, plus pre-judgment interest of $513.86 and litigation costs of $1,026.98, for a total award of $4,164.36. Claimant appeals. We hold, pursuant to §2-506(S)(1), the trial court's award methodology was not clearly erroneous because the award was directly related to the claim on which Claimant prevailed. However, the trial court erred in applying the statute prospectively only. That portion of the trial court's award disallowing attorney fees incurred prior to the enactment of §2-506(S) is reversed and remanded for entry of a new award that includes ten percent (10%) of the previously disallowed attorney fees, plus pre-judgment interest thereon. We reject Claimant's argument he should have been awarded all of his attorney fees in the case involving the seizure of $5,530.00, because the three previously separate forfeiture cases were consolidated and none of Claimant's counsel's billing records specified time spent on any particular case. We also reject Claimant's contention the trial court erred by refusing to award Claimant's counsel his attorney fees for filing and prosecuting his attorney fee application: Claimant never asked for such fees from the trial court, nor did he provide the court with any evidence of the time spent by his lawyer in preparing and prosecuting the fee application. AFFIRMED IN PART, REVERSED IN PART AND REMANDED WITH INSTRUCTIONS. Opinion by Bell, P.J.; Buettner, J., concur and Goree, J., concurs in result.

Monday, June 29, 2020

118,107 — Appellants Abdelkhabir Elaroua (Father) and Chelsey Beals (Mother) appeal a trial court order terminating their parental rights as to their four children. On appeal, Mother and Father allege that the trial court erred by failing to grant Father a continuance of the trial. They also allege that the termination was not supported by clear and convincing evidence, that the termination was not in the best interests of the children, and that Mother's rights would not have been terminated but for her counsel's ineffective assistance. We AFFIRM the termination of Mother and Father's parental rights to the children.

Tuesday, June 30, 2020

117,803 — Lindsey Mae Humphreys, Plaintiff/Appellant, v. Steven Gesiakowski, Defendant/Appellee, Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Martha Oaks, Trial Judge. Lindsey Humphreys, Plaintiff/Appellant, appeals an order modifying child custody and child support. The custody modification is affirmed because Steven Gesiakowski, Defendant/Appellee, demonstrated, pursuant to *Carpenter v. Carpenter,* 1982 OK 38, 645 P.2d 476, and *Weatherall v. Weatherall,* 1969 OK 22, 450 P.2d 497, the revelation of material facts which were unknown to the court at the time of the previous custody determination. The child support modification is reversed because there was no evidence Appellant's diminished income was willful, voluntary, or in bad faith. *Garcia v. Garcia*, 2012 OK 81, 288 P.3d 931. AFFIRMED IN PART, REVERSED IN PART., AND REMANDED WITH INSTRUCTIONS. Opinion by Goree, J.; Bell, P.J., and Buettner, J., concur.

117,904 — Carlos Beltran, Rosa Ramos, and Aurelio Beltran, Plaintiffs/Appellee, v. David Stanley Imports, LLC, d/b/a David Stanley Kia, and BBVA Compass Financial Corporation, Defendants/Appellants, and Marin Valdez Garcia, Defendant. Appeal form the District Court of Oklahoma. Honorable Don Andrews, Judge. Defendants/Appellants David Stanley Imports, d/b/a David Stanley Kia, and Compass Bank d/b/a BBVA Compass (Bank) (collectively, David Stanley) appeal from the trial court's denial of their motion to compel arbitration in this suit brought by Plaintiffs/Appellees Carlos Beltran, Rosa Ramos, and Aurelio Beltran (Beltrans or Buyers). Buyers argued that the arbitration agreement was unconscionable because it required a plaintiff to pay all expenses of arbitration and that Beltran was fraudulently induced to sign the document including the arbitration clause. The trial court found the clause was not unconscionable but that Beltran was fraudulently induced to sign it and it was therefore unenforceable against Buyers. The record shows Buyers do not speak or read English. David Stanley's translator explained some of the terms of the contract but did not tell Beltran he was signing an arbitration clause. Once David Stanley elected to speak, it had a duty to fully disclose the terms of the agreement. On *de novo* review, we affirm the finding that the arbitration clause was unenforceable under these facts. Opinion by Buettner, J.; Bell, P.J., concurs in result and Goree, J., concurring specially.

118,016 — Raymond Greg Chapman, Plaintiff/Appellant, v. City of Tulsa, Oklahoma, a Municipal Corporation, Defendant/Appellee. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Jefferson D. Sellers, Judge. Raymond Chapman, Plaintiff/Appellant, seeks review of the trial court's order granting summary judgment to the City of Tulsa, Defendant/Appellee. Chapman filed suit requesting damages against City for terminating his employment with the City of Tulsa Fire Department. Chapman argues the court erroneously granted judgment against him on his claims for violation of his Constitutional right to due process of law and for breach of contract. We reverse the judgment because there are material questions of fact as to whether City breached the contract. Opinion by Goree, J.; Bell, P.J., and Buettner, J., concur.

Thursday, July 2, 2020

117,548 — In Re: The Estate of Earl E. Goerke, Deceased, Fairmount Land & Minerals, LLC, Appellant, v. Joseph K. Goerke, Appellee. Appeal from the District Court of Blaine County, Oklahoma. Honorable Rick Bozarth, Judge. This appeal concerns a motion to vacate an order *nunc pro tunc* that distributed property in a probate proceeding. In an earlier appeal, this court reversed summary judgment and held that the parties were bound by the probate order *nunc pro tunc* unless it was void. Consequently, Joseph K. Goerke (Joseph), Appellee, filed a motion to partially vacate the order. Fairmount Land & Minerals, LLC (Fairmount), Appellant, intervened. Joseph's motion to partially vacate was granted. Fairmount appealed. REVERSED. Opinion by Goree, J.; Buettner, J., and Mitchell, J. (sitting by designation), concur.

(Division No. 2)
Tuesday, June 23, 2020

117,711 — Pamela D. Copeland, Plaintiff/Appellant, vs. BNL Properties, Inc., an Oklahoma Corporation, Defendant/Appellee. Appeal from the District Court of Oklahoma County, Hon. Don Andrews, Trial Judge. Pamela D. Copeland filed this action asserting she contracted with BNL Properties, Inc., to purchase, rather than rent, a residential property from BNL. The case proceeded to a nonjury trial. Ms. Copeland now appeals from the trial court's judgment sustaining BNL's motion for directed verdict and rejecting her claims for

specific performance and quiet title based on her assertion that she entered into a purchase agreement with BNL. Although the trial court awarded Ms. Copeland an amount representing homeowner's insurance premiums and ad valorem tax payments made by Ms. Copeland during her occupancy of the property, an award that is not contested on appeal, Ms. Copeland argues the trial court abused its discretion. We conclude the trial court's determination that Ms. Copeland failed to prove the parties entered into a purchase agreement is not clearly erroneous. However, we conclude the trial court erred in failing to award, in restitution, all or a portion of a certain non-rental payment made by Ms. Copeland during the first year of her occupancy of the property, and we reverse the trial court's implicit denial of such an award. We remand this case to the trial court to calculate an appropriate award of damages to Ms. Copeland in restitution for this payment, over and above any amounts already awarded to Ms. Copeland for her payment of ad valorem taxes and homeowner's insurance premiums. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS. Opinion from Court of Civil Appeals, Division II, by Barnes, P.J.; Rapp, J., and Fischer, J., concur.

Friday, June 26, 2020

118,715 — Uriel Sandoval, Plaintiff/Appellant, vs. Landon Horn, Defendant/Appellee. Appeal from an Order of the District Court of Oklahoma County, Hon. Thomas E. Prince, Trial Judge. The plaintiff, Uriel Sandoval (Sandoval), appeals an Order dismissing his action with prejudice against the defendant, Landon Horn (Horn). This appeal proceeds under the provisions of Okla.Sup.Ct.R. 1.36, 12 O.S. Supp. 2019, Ch. 15, app. 1. Sandoval was injured in an automobile collision allegedly caused by the negligence of Horn. Sandoval made a claim against CSAA, the insurer. CSAA made a settlement offer for a settlement and release. Sandoval's attorneys did not respond to accept the offer until the Statute of Limitations had expired on the tort claim against Horn. As a result, CSAA declined to pay the offer. Sandoval instituted lawsuits. All have been dismissed by the courts for sundry reasons. One case, a 2018 case in Canadian County, is Sandoval's case directly against CSAA to collect the settlement offer. This was dismissed by the court there, with prejudice for failure to prosecute and noncompliance with a discovery order. Sandoval appealed and this Court affirmed the dismissal with modification to a dismissal without prejudice. Here, Sandoval sued Horn to recover the same settlement offer and the issues are the same as in the 2018 Canadian County case between Sandoval and CSAA. The trial court properly dismissed the action here on the ground that the issues were properly triable in the prior 2018 Canadian County case between Sandoval and CSAA. This Court affirms on that ground. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Rapp, J.; Barnes, P.J., and Fischer, J., concur.

118,224 — Uriel Sandoval, Plaintiff/Appellant, vs. CSAA General Insurance Company, Defendant/Appellee. Appeal from an Order of the District Court of Canadian County, Hon. Paul Hesse, Trial Judge. The plaintiff, Uriel Sandoval (Sandoval) appeals an Order of Dismissal With Prejudice of his action against the defendant, CSAA General Insurance Company (CSAA). Sandoval filed a dismissal without prejudice and the trial court treated it as a motion to dismiss because of its timing. This Order also denied Sandoval's Motion to Dismiss Without Prejudice. Sandoval seeks to compel CSAA to pay a liability insurance offer it made to Sandoval to settle Sandoval's claim against a CSAA insured. CSAA withdrew the offer after it was not accepted prior to the expiration of the Statute of Limitations applicable to Sandoval's claim against the insured. During the course of the proceedings, the trial court sustained CSAA's motion to compel deposition discovery of Sandoval and two witnesses. In addition, a pretrial conference had set a trial date, which was postponed, and a deadline for filing dispositive motions. Sandoval nevertheless filed a second motion for summary judgment outside the deadline. In addition, shortly before the trial date, Sandoval filed a motion to transfer venue and then a dismissal without prejudice. Sandoval's attorneys did not produce the deponents as directed after filing the dismissal. The trial court struck the second motion for summary judgment, denied the venue transfer and treated Sandoval's dismissal as a motion to dismiss and denied that motion. Sandoval did not appear for trial and his attorneys announced that they were not ready to proceed. Then the trial court dismissed the action with prejudice. The judgment and rulings of the trial court are affirmed, with the exception of the dismissal with prejudice. The dismissal is affirmed and modified to dismissal without prejudice. JUDGMENT MODIFIED TO

DISMISSAL WITHOUT PREJUDICE AND, AS MODIFIED, AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Rapp, J.; Barnes, P.J., and Fischer, J., concur.

117,858 — In Re the Marriage of: Stephannie Suzanne White, Petitioner/Appellee, vs. Gordon Marion White, Jr., Respondent/Appellant. Appeal from an Order of the District Court of Payne County, Hon. Katherine E. Thomas, Trial Judge. The Respondent, Gordon Marion White, Jr. (Husband), appeals the Decree of Dissolution of Marriage entered in an action where the Petitioner is Stephannie Suzanne White (Wife). The trial court overlooked two items of marital property, the insurance check and a Toyota minivan. The cause is remanded for the trial court to make disposition of these items and account for this disposition in the award of alimony in lieu of property. Notwithstanding that the Decree does not provide the trial court's findings as to the values of the marital property, it is clear that the trial court used Wife's valuations. Thus, based upon the whole Record, it is possible to ascertain the value of the property each party received and the amount of alimony in lieu of property to equalize the award to Wife. In that regard, this Court concludes that the amount of alimony in lieu of property awarded to Wife is modified, and as modified is affirmed, subject, however, to any adjustment reasonable and necessary as a result of the resolution of the insurance check and the Toyota and its debt. The trial court awarded child support arrearage dating from the date the case was filed in 2011 to the date he began to pay child support pursuant to a support Order. Husband's challenge based upon absence of a calculation of the amount based upon incomes is not supported by the evidence and is rejected. Husband's challenge to jurisdiction and venue is likewise not supported by the Record, but more importantly, Husband admitted under oath in his Answer all of the requisite venue and residence facts. Therefore, the child support arrearage judgment is affirmed. Wife's application for appeal-related attorney fees is denied. AFFIRMED IN PART, MODIFIED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division II, by Rapp, J.; Barnes, P.J., and Fischer, J., concur.

(Division No. 3)
Wednesday, July 1, 2020

117,165 — Arvest Investments, Inc., d/b/a Arvest Wealth Management, an Arkansas corporation, Plaintiff in Interpleader, v. Rita Rae Byfield, Defendant/Appellant, and Earl Nichols, Defendant/Appellee. Appeal from the District Court of Washington County, Oklahoma. Honorable Russel C. Vaclaw, Trial Judge. Plaintiff Arvest Investments, Inc., d/b/a, Arvest Wealth Management (Arvest), filed this interpleader action against defendants, Rita Rae Byfield and her brother, Earl Nichols. Arvest, by court order, maintained the disputed investment account (the Account) on which the defendants' deceased mother and Rita Byfield were joint tenants during the pendency of the case. Mrs. Byfield appeals the trial court's judgment entered after a bench trial that orders payment of the account funds to the defendants' deceased mother's estate. We affirm. Opinion by Swinton, V.C.J.; Mitchell, P.J., and Buettner, J., (sitting by designation) concur.

118,006 — In the Matter of the Adoption of: Z.H., Hervey Herrera, Respondent/Appellant, v. Isaac and Gabrielle Macado, Petitioners/Appellees. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Allen J. Welch, Judge. Respondent/Appellant Hervey Herrera (Father or Appellant) appeals from an order determining that minor child Z.H. is eligible for a step-parent adoption without consent by Petitioner/Appellee Isaac Machado (Appellee or Step-Father), husband of Petitioner/Appellee Gabrielle Machado (Mother or Appellee). Father argues that the trial court erred in determining that the minor child is eligible for a step-parent adoption without his consent because there was not clear and convincing evidence that he "willfully" failed to pay child support and that he was prevented by Mother from having a meaningful and substantial relationship with the minor child. Because we find that the trial court's order is supported by clear and convincing evidence, we affirm. Opinion by Swinton, V.C.J.; Mitchell, P.J., and Buettner, J., (sitting by designation) concur.

Thursday, July 2, 2020

117,156 — In The Matter of The Joe L. Norton, Jr. Revocable Living Trust, Stephen J. Capron, Appellant, v. Austin P. Bond, Appellee. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Kurt Glassco, Judge. Appellant, Stephen Capron, seeks review of the Tulsa County District Court's May 29, 2018 order granting Austin Bond's, guardian ad litem, motion to disqualify Capron from serving as legal counsel to Frances Norton in the probate matter pending before the Tulsa Coun-

ty District Court (PB-2017-359). We AFFIRM the May 29, 2018 order of the Tulsa County District Court disqualifying Stephen Capron as legal counsel for Francis Norton in the probate matter PB-2017-359. AFFIRMED. Opinion by Swinton, V.C.J.; Mitchell, P.J., and Buettner, J. (sitting by designation), concur.

(Division No. 4)
Friday, June 26, 2020

117,977 — Lou Ella Seymore, Plaintiff/Appellant, vs. Oklahoma Employment Security Commission, Oklahoma Employment Security Commission Board of Review, and Preferred Family Healthcare, Defendants/Appellees. Appeal from an order of the District Court of Tulsa County, Hon. Rebecca Brett Nightingale, Trial Judge, affirming the decision of the Oklahoma Employment Security Commission's Board of Review denying Claimant Lou Ella Seymore's application for unemployment benefits. Although it is undisputed Claimant voluntarily quit her job with Employer, she maintains she had good cause to do so. Title 40 O.S. Supp. 2013 § 2-404(A) states, "An individual shall be disqualified for benefits for leaving his or her last work voluntarily without good cause connected to the work, if so found by the Commission." Claimant's evidence establishes that pursuant to § 2-404, she had "good cause" to voluntarily terminate her employment because her pay at the time she voluntarily resigned had been substantially reduced from 160 hours a month to 36 hours a month. And, the evidence shows that Claimant initially notified her supervisor at length six weeks before she resigned of her struggle to get hours and she notified him again in November when the lack of referrals and hours continued. The Appeal Tribunal's finding that "[a]t the time of hire, the claimant was given 40 hours, monthly, to work" is not supported by the evidence, nor is its finding that Claimant "deprived the employer of the opportunity to address her concerns and preserve her employment," and the Board of Review incorrectly affirmed the Appeal Tribunal's findings. As a consequence, we must reverse the trial court's affirmance of the Board of Review's decision and remand to the trial court with instructions to remand the case to the Board of Review to approve Claimant's application for unemployment benefits. REVERSED AND REMANDED WITH INSTRUCTIONS. 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. 1)
Monday, June 29, 2020

118,218 — In the Matter of the Adoption of G.D.S., a Minor Male Child, and A.R.S., a Minor Female Child, Hope Smith, Natural Mother/Appellant, vs. Ira Yount Smith and Catherine Ann Smith, Petitioners/Appellees. Appellant's Petition for Rehearing, filed June 5, 2020, is *DENIED*.

116,270 (Comp. with 117,949) — In Re the Marriage of: Deborah Odez Hicks, Petitioner/Appellant, vs. Andrew Junior Hicks, Respondent/Appellee, and Beau Williams, Real Party in Interest/Appellee. Appellant's Petition for Rehearing, filed June 9, 2020, is *DENIED*.

116,990 — Country Equipment and Used Trucks, L.L.P., Appellant, vs. Mike Armstrong, Personal Representative of the Estate of Ruby Ellen Meyer, Deceased, Appellee. Appellant's Petition for Rehearing, filed June 10, 2020, is *DENIED*.

Tuesday, June 30, 2020

117,175 (Comp. with 118,347) — Bela D. Csendes and Shirley A. Csendes, Plaintiffs/Appellants/Counter-Appellees, vs. Warren Hock, Linca Hock, Franklin Allen and Circle "V" Ranch Estates, Defendants/Appellees/Counter-Appellants, and Virginia Lynn Allen, Defendant/Appellee. Appellants' Petition for Rehearing and Brief in Support, filed June 11, 2020, is *DENIED*.

Friday, July 10, 2020

118,634 — Bobbie Alberda, Successor Trustee of the Margaret Alberda Family Trust, dated February 1st, 2007, Plaintiff/Appellant, vs. Ameristate Bank, Defendant/Appellee. Appellee's Petition for Rehearing, filed June 17th, 2020, is *DENIED*.

(Division No. 3)
Tuesday, June 23, 2020

116,555 — Mark Farris and Jolana Farris, Husband and Wife, Plaintiffs/Appellants, vs. Preston W. Masquelier and Candy Masquelier, Husband and Wife, as Joint Tenants, Defendants/Appellees. Appellees' Petition for Rehearing, filed April 27, 2020, is *DENIED*.

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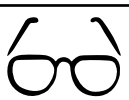

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ESTABLISHED, DOWNTOWN OKC, AV-RATED LAW FIRM with a heavy emphasis in plaintiff's insurance bad faith litigation seeks associate attorney with 2-5 years insurance defense litigation experience. Deposition and trial experience preferred. Competitive salary and benefits, with bonus opportunity. Send replies to Box F, Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

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TOPICS INCLUDE:

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- Understanding the Effects of Drugs in the Blood
- Defending the DUI Drug case
- Cross-Examination of the ARIDE Officer
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