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Journal
Volume 91 — No. 13 — 7/3/2020

Court Issue

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THE OKLAHOMA BAR
Journal

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2019 OK 77

IN THE MATTER OF THE DISCIPLINARY PROCEEDINGS CONCERNING COLEMAN

No. 118,450. June 22, 2020

ORDER

¶1 This matter comes before the Court on June 22, 2020 for consideration of the attached Petition for filing in the Trial Division of the Court on the Judiciary.

¶2 Upon review, the Petition is hereby adopted and the Chief Justice is authorized to execute and to file the Petition in the Court on the Judiciary. This Order shall be attached as an Exhibit to the executed Petition.

¶3 DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 22nd DAY OF JUNE, 2020.

/s/ Noma D. Gurich
CHIEF JUSTICE

Gurich, C.J., Kauger, Winchester, Edmondson, and Kane, JJ.; Kuehn, S.J. and Wiseman, S.J., concur;

Colbert, J. and Reif **(by separate writing)**, S.J., concur in part; dissent in part;

Darby, V.C.J. and Combs, J., recused.

IN THE COURT ON THE JUDICIARY OF THE STATE OF OKLAHOMA

TRIAL DIVISION

THE SUPREME COURT OF THE STATE OF OKLAHOMA,	)	
Petitioner,	)	
vs.	)	**No. CJTD-2020-1**
KENDRA COLEMAN,	)	
Respondent.	)	

PETITION

The Supreme Court of the State of Oklahoma (Petitioner) alleges the following:

I. Authority

1. This Petition is filed pursuant to Oklahoma Constitution, Art. 7-A, §4(a) and Rule 9, 5 O.S.2011, Ch. 1, App. 7. The allegations are based upon information forwarded to the Supreme Court by the Council on Judicial Complaints and the Respondent's responses.

II. Respondent's Judicial Office

2. The Respondent, Kendra Coleman, is now and has been a District Judge in Oklahoma County, in the 7th Judicial District of the State of Oklahoma, exercising judicial power under the provisions of the Constitution and Statutes of the State of Oklahoma at all times material to the allegations contained in this Petition. She was elected to the seat in November of 2018 and took the bench on January 1, 2019. She had no prior judicial experience.

III. Procedural History

3. On October 14, 2019, the Council on Judicial Complaints referred its Findings of Fact, Conclusions of Law, and Recommendation on Complaint Nos. COC-073 and COC-19-114 to the Supreme Court. The complaints primarily involved the Respondent's failure to file tax returns or to pay taxes, violation of Ethics Commission rules governing campaign financing and reporting, and a dispute with the District Attorney regarding recusal. The Council recommended that the Respondent and the alleged violations be made the subject of removal proceedings before the Court on the Judiciary.

4. The Supreme Court entered an Order on December 3, 2019, in *In the Matter of the Disciplinary Proceedings Concerning Coleman,* 2019 OK 77, 454 P.3d 1280, rejecting the Council's recommendation for removal proceedings, but reprimanding the Respondent for failing to comply with Ethics Commission campaign rules, admonishing the Respondent to impress upon the Respondent the imperative of timely addressing all personal legal obligations that arise during or reflect upon her judicial service, and placing the Respondent on Probation with conditions.

5. The conditions required the Respondent to (1) report monthly to the Council concerning the tax delinquencies, (2) complete at least five mentoring sessions with an

experienced Justice or Judge, and (3) comply with all local, state and federal laws, and the Code of Judicial Conduct. The Court deferred final discipline on the felony charge, which arose from the neglect of state tax obligations, until the charge is resolved. The Order authorized the Council to bring any breach of the conditions to the Chief Justice, and provided that the failure to comply with the conditions for deferred final discipline can be the bases for additional discipline.

6. On April 23, 2020, the Council presented the Chief Justice with 8 additional complaints.[1] The Council reported that the Respondent failed to sufficiently report to the Council regarding tax deficiencies, and failed to comply with the Code of Judicial Conduct. The Council again recommended removal proceedings pursuant to 20 O.S.2011, § 1659. On June 1, 2020, the Council filed a supplemental report to the April 23, 2020 filing, primarily regarding the Respondent's failure to follow proper statutory procedure in issuing a direct contempt citation. The Respondent has responded through counsel and contests that she is guilty of any ground for removal, and denies that she has willfully violated the Code of Judicial Conduct.

IV. Violations

7. The Council found that the Respondent, Kendra Coleman, as a duly elected and acting District Judge of the 7th Judicial District, exercising judicial power under the provisions of the Constitution and Statutes of the State of Oklahoma, engaged in conduct prohibited by Art. 7-A, § 1(b) of the Oklahoma Constitution, and 20 O.S.2011, §1404(C). The Council concluded that the allegations of the complaints and discovered by investigation were proven by clear and convincing evidence to the extent necessary to constitute oppression in office, prohibited by Art. 7-A § 1(b) of the Oklahoma Constitution, and violations of Canons 1, 2, and 4 of the Code of Judicial Conduct, 5 O.S.2011, Ch. 1,

App. 4. Violation by a judicial officer of these provisions provides grounds for removal from office under Art. 7-A § 1(b) of the Oklahoma Constitution and 20 O.S.2011, § 1404(C).

[1] COC-19-161, COC-20-008, COC-20-009, COC-20-010, COC-20-012, COC-20-013, COC-20-025, and COC-20-038.

8. The grounds upon which removal from office is sought[2] are as follows:

(1) Gross neglect of duty;
(2) Oppression in office; and
(3) Other grounds specified by the Legislature.

The other grounds specified by the Legislature are violations by a judicial officer of the Code of Judicial Conduct. 20 O.S.2011, § 1404(C).

9. The violations of Canons 1, 2, and 4, of the Code of Judicial Conduct, and the Rules thereunder, include the following:

The preamble of the Code, which provides, "Judges should maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives. They should aspire at all time to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence."

a. Canon 1, which provides, "A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." Rule 1.1 provides that a "judge shall comply with the law, including the Code of Judicial Conduct." Rule 1.2 provides that a "judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and avoid impropriety and the appearance of impropriety."

b. Canon 2, which provides, "A Judge Shall Perform the Duties of Judicial Office Impartially, Competently, and Diligently." Rule 2.3 provides, "A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice." Rule 2.4(C) provides, "A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge." Rule 2.5(A) provides, "A judge shall perform judicial and administrative duties competently and diligently." Rule 2.5(B) provides, "A judge shall cooperate with other judges and court officials in the administration of court business." Rule 2.6(A) provides that a "judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law." Rule 2.8(B) provides that a "judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials and others with whom the judge deals in an official capacity . . . ." Rule 2.11(A)(1) provides, "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances: (1)

The judge has a personal bias or prejudice concerning a party or a party's lawyer, or a personal knowledge of facts that are in dispute in the proceeding." Rule 2.16(A) provides, "A judge shall cooperate and be candid and honest with judicial and lawyer disciplinary agencies." Rule 2.16(B) provides, "A judge shall not retaliate, directly or indirectly, against a person known or suspected to have assisted or cooperated with an investigation of a judge or a lawyer."

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[2] Rule 9, Rules of the Court on the Judiciary.

c. Canon 4, which provides that a "judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the Judiciary." Rule 4.2(A) provides, "A judicial candidate in a public election shall: (1) comply with all applicable election, election campaign, and election campaign fundraising laws and regulations of the State of Oklahoma." Rule 4.4(A) provides, "A judicial candidate subject to public election may establish a campaign committee to manage and conduct a campaign for the candidate, subject to the provisions of this Code. The candidate is responsible for ensuring that his or her campaign committee complies with applicable provisions of this Code and other applicable law." Rule 4.4(B) provides, "A judicial candidate subject to public election shall direct his or her campaign committee: (2) not to solicit or accept contributions for a candidate's current campaign more than 180 days before the beginning of the filing period for the judicial election nor more than 60 days after the last election in which the candidate participated; and (3) Candidates for judicial office subject to public elections shall direct their campaign committees to comply with all applicable statutory requirements for disclosure of campaign contributions, and to file with the Oklahoma Ethics Commission at the time and in the manner specified by the Commission a report stating the name, address, occupation, and employer of each person who has made campaign contributions to the committee in an aggregate value exceeding the amount established by the Oklahoma Ethics Commission for reporting campaign contributions."

10. The Respondent failed to follow statutes relative to issuing contempt citations, failed to file or pay required state and federal tax returns, failed to pay business and personal property taxes, failed to file required campaign finance forms within the required time frame, and failed to pay parking violations. The Respondent refused to recuse in criminal cases when her impartiality could be reasonably questioned. Violations of city, state, and federal statutes, regulations, and ordinances are violations of Rule 1.1 of the Code of Judicial Conduct which requires that a judge shall comply with the law. Moreover, the Respondent lacks the judicial temperament requisite of a judge, and is guilty of oppression in office. The Respondent has violated various other provisions of the Code

of Judicial Conduct based on her failure to follow the law and to appreciate the importance of a fair and impartial judiciary.

11. The Respondent is in violation of probation conditions set by the Oklahoma Supreme Court. The complete disregard of applicable laws and fundamental rights demonstrates a gross neglect of duty. The pattern of conduct demonstrates Respondent's lack of temperament to serve as a judge, and undermines public confidence in the independence, integrity, impartiality and competence of the judiciary in violation of Canons 1, 2, and 4, and the implementing rules of the Code of Judicial Conduct. The Respondent's actions giving rise to these charges appear more fully set forth in the following specific allegations.

V. Violations of City, State, and Federal Laws

Tax Violations

12. The Respondent failed to timely file Oklahoma individual income tax returns for years 2015 through 2018, failed to pay state and federal taxes, failed to pay business personal property taxes, and failed to abide by traffic laws or otherwise pay the fines for doing so. The failure to abide by these laws continued during her tenure as judge in violation of Canon 1 and Rules 1.1 and 1.2 of the Code of Judicial Conduct.

13. On September 17, 2019, the Oklahoma Multi-County Grand Jury indicted Respondent on 4 misdemeanor counts of failure to file an income tax return for the years 2015, 2016, 2017, and 2018, in violation of 68 O.S.2011, § 240. *State v. Kendra Daishon Coleman,* CM-2019-3063. On October 28, 2019, the State of Oklahoma moved to dismiss the misdemeanor case because Count 3, for failure to file an income tax return for year 2017, was refiled as felony case No. CF-2019-4488 on October 28, 2019. The Information alleges that the Respondent knowingly and intentionally failed to file a state

income tax return from October 16, 2018 to September 12, 2019, with the intent to evade payment of state income taxes, contrary to 68 O.S.2011, § 2376(A).

14. Pursuant to 68 O.S.2011, § 2368, Respondent's 2017 Oklahoma individual tax return was due on April 16, 2018. Respondent did not file the 2017 return until September 12, 2019, following a newspaper article detailing the outstanding tax warrants against the Respondent for failure to pay taxes assessed against her as an individual. The time period until September 12, 2019, includes the time period of the Respondent's tenure as an Oklahoma County District Court Judge.

15. The Oklahoma Tax Commission has filed tax warrants reflecting that the Respondent has unpaid tax assessments to the State of Oklahoma for tax years 2011, 2012, 2015, 2016, 2017, and 2018. Under 68 O.S.2011, § 231, a tax imposed by any state tax law shall be delinquent before a tax warrant issues.

16. The Internal Revenue Service has filed tax warrants reflecting that the Respondent has $83,926.18 in unpaid tax assessment to the United States Department of the Treasury.

17. According to the Oklahoma Secretary of State, the Respondent was the managing member of the Gill Law Firm PLLC, and the firm failed to pay the tax due on the assessed value of its business personal property for tax years 2014, 2015, 2016, 2017, and 2018, for a combined total amount of $1,176.74.

Parking Tickets

18. Between 2012 and 2019, the Respondent was issued 65 parking tickets by the City of Oklahoma City.

19. Eight of the 65 parking tickets were issued between November 6, 2018, the

date on which the Respondent won election to her position as a District Judge, and January 14, 2019, the date on which her tenure as a District Judge began.

20. The Respondent paid 2 of the 8 tickets on May 2, 2019, and paid the remaining 6 tickets on September 11, 2019, the date on which a news article revealed the unpaid parking tickets. As of September 11, 2019, all 65 parking tickets have been paid.

VI. Violations of Oklahoma Ethics and Campaign Reporting laws, Code of Judicial Conduct, and Oklahoma Ethics Commission's Rules

Campaign Activities and Reporting

21. The Respondent failed to timely file campaign reports and to operate within the rules of the Oklahoma Ethics Commission, in violation of Canon 4 and Rules 4.2(A) and 4.4 of the Code of Judicial Conduct.

22. On August 29, 2019, Oklahoma County District Attorney David Prater filed Complaint number COC-19-114 alleging Judge Coleman failed to file campaign reports in conformity with Oklahoma Ethics Commission rules and Canon 4 of the Code of Judicial Conduct. Prater alleges that the Respondent has been repeatedly reprimanded and fined for willfully refusing to file timely Campaign Finance Reports. He states that Respondent refused to file her 2018 Partial Quarter Election Report, which was due January 31, 2019, making it impossible to determine who or what group may have contributed to the judge's campaign. Prater alleges the Respondent repeatedly violated Oklahoma Ethics and Campaign Reporting laws and the Code of Judicial Conduct, including willful violation of Rule 3.15, 4.4, and possibly 4.1.

23. Under Rule 4.4 of the Code of Judicial Conduct, a judicial candidate may not solicit or accept campaign contributions more than 180 days before the beginning of the filing period. A candidate may give the candidate's committee unlimited funds, but the

funds are considered contributions per Oklahoma Ethics Rule 2.38 and may not be made more than 180 days before the beginning of the filing period.

24. As set by 26 O.S. § 5-110, the first day of candidate filing for the 2018 elections was April 11, 2018. One hundred and eighty days prior to April 11, 2018, was October 13, 2017. The Respondent's amended filing with the Oklahoma Ethics Commission reported $100 in monetary contributions and $1,776 of in-kind contributions from Kendra Coleman prior to October 13, 2017. A candidate may give his/her committee unlimited funds but the funds are considered contributions per Ethics Rules 2.38 and may not be made more than 180 days before the beginning of the filing period.

25. A candidate must register a committee within 10 days of receiving or spending in excess of $1,000, including the candidate's own funds, per Oklahoma Ethics Rule 2.70. The Respondent's amended filing shows that the Respondent's Candidate Committee exceeded $1,000 in contributions. The Statement of Organization for the Candidate Committee for the Respondent was filed on November 14, 2017, 32 days after the deadline.

26. The Respondent repeatedly missed the filing deadlines for Election Reports as required by Ethics Rule 2.101. The Respondent's Pre-Primary Election Report was due June 18, 2018, but not filed until July 31, 2018; the 2018 Pre-Runoff Election Report was due August 20, 2018, but not filed until August 30, 2018; the 2018 Partial Quarter Election Report was due January 31, 2019, but not filed until September 18, 2019; the 2019 1st Quarter Report was due April 30, but not filed until September 18, 2019; and the 2019 2nd Quarter Report was due July 31, 2019, but not filed until September 18, 2019.

27. Oklahoma Ethics Rule 2.100 provides that any committee that files more than one quarterly Report of Contributions and Expenditures after the date it is due shall be deemed to have intentionally failed to file the report.

28. When the reports were filed on September 18, 2019, they revealed fifteen campaign contributors not previously reported, nine of which were identified as attorneys. At least one of the newly-revealed contributors is an attorney who appeared before the Respondent between January 31, 2019, and September 19, 2019. The reports also indicated that a defense attorney had contributed $1,000 to the Respondent's campaign, and not the $500 previously reported.[3]

VII. Violations of the Code of Judicial Conduct

Refusal to Recuse

29. The Respondent refused to recuse herself in certain cases presented by the Oklahoma County District Attorney so as to avoid the appearance of impropriety, in violation of the Code of Judicial Conduct, 5 O.S.2011, Ch. 1, App. 4, Preamble, Canon 1, Rule 1.2, Canon 2, Rule 2.3, 2.4(C), 2.6(A), 2.8(B), and 2.11(A)(1), and constituting oppression in office, Art. 7, § 1, Okla.Const. In addition, the Respondent's impartiality might reasonably be questioned when the D.A.'s Office was alleging a defense attorney appearing before her may have contributed more than she reported, and that there were undisclosed contributors appearing before her.

30. On May 21, 2019, the Respondent held a hearing on pending motions regarding the admission of evidence in *State of Oklahoma v. Antwon Demetris Burks,* CF-2017-2859. After an unfavorable ruling regarding the admissibility of gruesome photographs, the State orally moved for the Respondent to recuse on the grounds, in part, that an attorney for the defendant had hosted a fundraiser for the Respondent during

[3] In February 2020, Judge Coleman attended a training related to domestic violence that took place in Valencia, California. Judge Coleman's personal attorney is reported to have paid for the training and travel.

her campaign. The Respondent declined recusal, noting that the fact that the attorney had co-hosted the fundraiser was public knowledge.

31. On May 22, 2019, the State filed a motion to disqualify the Respondent from the *Burks* case and a rule 6(B)(3) motion, resulting in the case being reassigned to another judge. This judge then remanded the case back to the Respondent noting that the motion did not comply with Rule 15 and was premature because it had not been first filed with the Respondent. The next day, this judge issued another order remanding the case to a judge other than Respondent, without rescinding the prior remand order.

32. On May 30, 2019, despite the assignment of the case to a different judge, the Respondent held a hearing on the State of Oklahoma's motion to disqualify the Respondent or to transfer the case, and the defendant's motion to strike the State's motions. Respondent denied recusal.

33. The District Attorney's Office made requests for the Respondent to recuse in individual cases involving the State of Oklahoma. During the in camera requests, the Respondent accused the D.A. of acting in bad faith and called the First Assistant disrespectful.

34. On November 12, 2019, the State of Oklahoma *ex rel.* David Prater filed an application to assume jurisdiction and issue a writ of mandamus to the Respondent in Case No. MA-2019-820 before the Court of Criminal Appeals. That Court noted that an Administrative Order of September 12, 2019, by the Presiding Administrative Judge, effectively removed the Respondent from the criminal docket and reassigned her. The Court determined that as a practical matter, the Administrative Order granted the relief requested in the Petition for Writ of Mandamus, leaving no relief left to grant as long as the Administrative Order remains in effect.

VIII. Violations of Contempt Statutes and Oppression in Office

35. The Respondent failed to follow proper constitutional and statutory procedure in issuing or threatening to issue direct contempt citations, and exhibited intemperate demeanor in issuing or threatening to issue direct contempt citations, in violation of Art. 2, § 25, Okla.Const., 21 O.S. § 565.1 and 565.2, Canons 1 and 2, and Rules 1.1, 1.2, 2.5(A), 2.5 (B), 2.6(A), 2.8, and 2.16 of the Code of Judicial Conduct, and constituting oppression in office, Art. 7, § 1, Okla.Const.

A. District Attorney's Office

36. When the Oklahoma District Attorney's Office made requests for the Respondent to recuse in individual cases, the Respondent threatened to hold the Assistant D.A. in contempt for being disrespectful and wasting the Court's time, demonstrating oppression in office.

a. In Case No. CF-2017-2721, the Respondent threatened to hold Assistant District Attorney Jimmy Harmon in contempt for trying to make an argument on the record during an in camera request for Respondent's Recusal.

b. In Case No. CF-2016-1571, the Respondent stated that the Assistant District Attorney's behavior was contemptuous when there was an issue with him and the Judge speaking over each other while making a record regarding a request for disqualification.

B. Mallett

37. The Respondent utilized contempt powers without providing an opportunity to be heard as required by 21 O.S. § 565.1, and constituting oppression in office.

38. On May 14, 2019, Robert Mallett attended a hearing as a spectator, not a named party or witness. His phone made an audible noise during the court proceedings,

and the Respondent ordered him to give his phone to court staff for the remainder of the proceeding.

39. According to the Respondent, Mallett continued to be disrespectful. The Respondent held Mallet in Contempt of Court, sentencing him to 5 days in jail. The Respondent did not allow Mallett an opportunity to be heard prior to the imposition of the direct contempt as required by 21 O.S. § 565.1.

40. At the contempt hearing two days after Mallett commenced his incarceration, the public defender noted the Respondent's lack of compliance with the statutory requirements for issuing a direct contempt citation. The Respondent said she would not change the order.

41. Mallett appealed the direct contempt citation in *In Re: Direct Contempt, Robert Lane Mallett, II v. The Honorable Kendra C. Coleman,* No. 118,047. In January 2020, the appeal was dismissed on the motion of Mallett.

C. Lombard

42. On May 14, 2020, the Respondent issued a direct contempt of court citation to Rebecca Lombard, the petitioner/applicant in PO-2020-903. Witnesses reported that while exiting the courtroom after petitioner's application for a Victim Protection Order was denied by Respondent, petitioner made a statement to the Deputy Sheriff to the effect that someone would have to die to get it approved. Two witnesses refuted that the petitioner's statement or behavior was disruptive or contemptuous.

43. The Respondent did not issue a clear warning that the behavior was impermissible and may result in sanctions. In imposing the punishment for direct contempt, the Respondent told the petitioner that she had the authority to hold her in jail for 180 days for such contemptuous behavior, although she only issued a $200 fine.

IX. Repeated Violations of Code of Judicial Conduct and Terms of Probation, Oppression in Office, and Temperament Unfit for Judicial Office

44. The Respondent has exhibited a pattern of judicial excess and inappropriate behavior in the courthouse in violation of Canon 1, Rules 1.1,1.2, and 1.3, Canon 2, Rules 2.3, 2.5, 2.6(A), 2.8, 2.11(A) of the Code of Judicial Conduct, and constituting oppression in office and gross neglect of duty, Okla.Const. art. 7-1, § 1(b). The conduct has worsened since the issuance of the Supreme Court's probation terms. The Respondent has not complied with the terms of probation.

45. The Respondent alleges she is attempting to arrange a payment schedule to satisfy the tax delinquencies. The Respondent's first report submitted to the Council in January 2020 does not show any payment agreements in place with the Internal Revenue Service, Oklahoma Tax Commission, or Oklahoma County Treasurer. She has taken steps to file returns, but has only made monthly payments in the amount of $25.00 to the Oklahoma Tax Commission for each year's delinquent return, when the total of her Oklahoma individual income tax liabilities was over $22,000. She has not provided an agreement from the Commission that the payment amount was sufficient to cover the minimum payment allowed. The Respondent states her CPA continues to work on a payment plan with the IRS, but she has not advised of any payment arrangements, payment plans, offers in compromise, or settlement agreements, in place with the IRS, Oklahoma Tax Commission, or Oklahoma County Treasurer. She does not state whether she is even attempting to achieve such an arrangement with the Oklahoma Tax Commission or County Treasurer.

46. In February 2020, the Oklahoma Tax Commission filed two additional tax warrants with the Oklahoma County Court Clerk for unpaid liabilities of the Respondent's

2017 and 2018 individual income taxes. The Tax Commission, through a third-party collection's contractor, sought to collect unpaid state income taxes from the Respondent through garnishment and an asset hearing.

47. On January 21, 2020, Capitol One Bank (USA), N.A., sought to collect a debt from the Respondent on a credit card by filing a civil claim in the Oklahoma County District Court.

48. The Respondent failed to obey an order of the Ethics Commission to produce certain documents.

49. The Respondent has shown intemperate treatment of many litigants appearing before her, primarily on VPO matters, and attorneys. Attorneys Richard Morrissette, Skip Kelly, Blake Parrot, and Patrick Lee Neville, Jr. each detailed their inability to effectively present arguments on behalf of their clients because of the Respondent's demeanor. Since the issuance of the Supreme Court's probation terms, the Respondent has made undignified and discourteous comments to pro se litigants and attorneys evidencing a pervasive pattern and practice of such conduct. The Respondent has used her authority from the bench to criticize, intimidate, and humiliate petitioners seeking a VPO. The abuse extends to victims' advocates who seek to appear with and to support the victims seeking a VPO. The Respondent has created an appearance by words and actions to advocates and others that she harbors a bias against advocacy groups.

50. The Respondent exhibited intemperate demeanor in issuing and threatening to issue direct contempt citations. Three of the Council's witnesses have reported that since the submission of the Council's second Findings on April 23, 2020, the Respondent's behavior has worsened and in some instances appeared retaliatory.

51. The Respondent's abusive demeanor toward petitioners, colleagues, and advocates has continued even after the Respondent's training in February 2020 on proper judicial skills for managing domestic violence cases. The Respondent did not request permission from the Chief Justice or Presiding Judge Elliott to attend the training, which is customary, and the Presiding Judge only become aware of her impending absence one and a half business days prior to her departure, leaving him and courthouse staff scrambling to cover her docket.

52. The Respondent refused a request from Judge Prince, during his tenure as Presiding Judge, to be available more often in the courthouse to hear emergency guardianship requests while she was assigned to the probate and guardianship dockets.

53. The Respondent has disregarded the supervisory authority of the Presiding Judges within her judicial district.

X. Witnesses

54. Following are the names and address of the witnesses for the prosecution of this cause:

Witnesses

1. Captain Melissa Abernathy
   Oklahoma County Sheriff's Department
   201 N. Shartel Avenue
   Oklahoma City, OK 73102

2. Caitlin Acosta
   17361 Michael Drive
   Choctaw, OK 73020

3. Deputy Devin Baxter
   Oklahoma County Sheriff's Office
   201 North Shartel
   Oklahoma City, OK 73102

4. Jacob Benedict
First Assistant Public Defender of Okl
320 Robert S. Kerr Ave., #611
Oklahoma City, OK 73102

5. Justice Daniel Boudreau (Ret.)
c/o Dispute Resolution Consultants
1516 S. Boston Avenue, Suite 115
Tulsa, OK 74119

6. Anden Bull
Chief Operating Officer
Palomar
1140 N. Hudson Avenue
Oklahoma City, OK 73103

7. Darla Cheek
Executive Director
Mid-Del Youth and Family Center, Inc
2801 Parklawn Drive, Suite 201
Midwest City, OK 73110

8. David Cheek, Esq.
Cheek & Falcone, PLLC
6301 Waterford Boulevard, Suite 320
Oklahoma City, OK 73118

9. Lieutenant Brad Cowden
Del City Police Department
4517 SE 29th Street
Del City, OK 73115

10. Honorable Ray Elliott
Oklahoma County District Judge
321 Park Avenue, Room 700
Oklahoma City, OK 73102

11. Jimmy Harmon
First Assistant District Attorney, Oklahoma County
320 Robert S. Kerr Ave., #505
Oklahoma City, OK 73102

12. Internal Revenue Service
Small Business/Self Employed Area
Records Administrator
55 N. Robinson Ave.
Oklahoma City, OK 73102

13. Ronald "Skip" Kelly
Attorney at law
Two Broadway Executive Park
205 N.W. 63rd Street, Suite 150
Oklahoma City, OK 73116

14. Ashley Kemp
Executive Director
Oklahoma Ethics Commission
2300 N. Lincoln Blvd., #B5
Oklahoma City, OK 73105

15. Brynna Linkous
1140 N. Hudson Avenue
Oklahoma City, OK 73103

16. Rebecca Lombard
TBD

17. Robert Mallett
C/O Oklahoma County Public Defender's Office
320 Robert S. Kerr Ave., #611
Oklahoma City, OK 73102

18. Laura McDonald
1140 N. Hudson Avenue
Oklahoma City, OK 73103

19. Christina Meyers
2608 N.W. 191st Street
Edmond, OK 73102

20. Candice Milard, Esq.
Milard Law, PLLC
3030 Northwest Expressway
Oklahoma City, OK 73118

21. Richard Morrissette
Attorney at law
7204 S. Pennsylvania Avenue
Oklahoma City, OK 73159

22. Detective Ed Mosier
Oklahoma City Police Department
Domestic Violence Unit
700 Colcord Avenue
Oklahoma City, OK 73102

23. Patrick Lee Neville, Jr., Esq.
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6301 Waterford Boulevard, Suite 320
Oklahoma City, OK 73118

24. Oklahoma Tax Commission
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2501 N. Lincoln Blvd.
Oklahoma City, OK 73105

25. Blake Parrott, Esq.
Baer & Timberlake, PC
4200 Perimeter Center Drive, Suite 100
Oklahoma City, OK 73112

26. David Prater
Oklahoma County District Attorney
320 Robert S. Kerr Ave., #505
Oklahoma City, OK 73102

27. Honorable Thomas Prince
Oklahoma County District Judge
321 Park Avenue, Rm 304
Oklahoma City, OK 73102

28. Cindy Richard
City of Oklahoma City Deputy Municipal Counselor
200 N. Walker Ave.
Oklahoma City, OK 73102

29. Clarissa Smith
1012 N.E. 27th Street
Oklahoma City, OK 73111

30. Renee Troxell
Oklahoma County Court Administrator
321 Park Avenue
Oklahoma City, OK 73102

31. Deputy William Christian Warren
Oklahoma County Sheriff's Office
201 North Shartel
Oklahoma City, OK 73102

XI. Immediate Temporary Suspension

55. Petitioner alleges that the circumstances giving rise to the foregoing facts against Respondent are in serious danger of continuing. There is no evidence the Respondent will voluntarily cease and desist in the performance of those matters which gave rise to the filing of this petition. There is an existing emergency justifying the Trial Division of the Court on the Judiciary of the State of Oklahoma in temporarily suspending Respondent from office pending the determination of the proceedings in this action. Great and irreparable harm and injury will likely occur if Respondent is allowed to continue in the capacity of a District Judge of the Seventh Judicial District of the State of Oklahoma.

56. Petitioner respectfully requests that the Presiding Judge of the Court on the Judiciary issue an order to the Respondent to appear at a date, time and place certain to show cause why she should not be suspended from the exercise of her office with pay pending further proceedings in this cause, and that upon such hearing the Respondent be suspended from such office with pay pending the proceedings in this action.

XII. Relief Requested

57. The Petitioner alleges that the above-enumerated acts by the Respondent warrant discipline by the Court on the Judiciary as authorized by the statutes and the Constitution of the State of Oklahoma. The Petitioner respectfully refers this matter to the Trial Division of the Court on the Judiciary of the State of Oklahoma.

Done this ___ day of June, 2020.

RESPECTFULLY SUBMITTED,

_____

Noma D. Gurich,
Chief Justice of the Supreme Court
of the State of Oklahoma

STATE OF OKLAHOMA)
) ss:
COUNTY OF OKLAHOMA)

NOMA D. GURICH, of lawful age, being first duly sworn upon oath says:

1. That she is the Chief Justice of the Supreme Court of the State of Oklahoma.

2. That she has read the above and foregoing Petition and knows the contents thereof.

3. That she has caused the facts therein set forth to be investigated and that she believes said facts are true.

_____

Noma D. Gurich

Subscribed and sworn to before me this _____ day of June, 2020.

_____
Notary Public

My Commission expires:

_____

REIF, S.J., with whom COLBERT, J., joins, concurring in part and dissenting in part

¶1 I concur in the decision to file a petition invoking the jurisdiction of the Trial Division of the Court on the Judiciary. I believe a trial is necessary to resolve disputed allegations of judicial misconduct on the part of District Judge Kendra Coleman (Respondent). I write separately to emphasize that the allegations of judicial misconduct set forth in the petition are not accusations by this Court, but represent conclusions drawn by the Council on Judicial Complaints, following the Council's investigation of complaints against Respondent.

¶2 As related in the petition, the Council has submitted two reports concerning its investigation of complaints against Respondent. Each of these reports sets forth the particular complaints investigated as well as the findings of fact, conclusions of law and recommendation for discipline.

¶3 The first report dealt with Respondent's failure to timely fulfill personal duties regarding parking tickets, tax returns and campaign reporting, and events involving her conduct as a judge. She has not disputed her neglect of the personal obligations or the occurrence of the events involving her judicial conduct. She has, however, steadfastly maintained that none of these instances constitute a willful violation of the Code of Judicial Conduct or other legal grounds that warrant removal from office. A majority of this Court assumed the truth of the matters set forth in the report and found that Respondent's omissions and conduct did not rise to a ground for removal as a matter of law. The majority did find discipline was appropriate and reprimanded Respondent for failing to timely file campaign reports, admonished her to be diligent in fulfillment of personal obligations and placed her on probation pending resolution of a felony charge related to her failure to file a tax return. One of the conditions of this probation was that Respondent comply with the Code of Judicial Conduct.

¶4 The second report presents a wide ranging group of complaints of misconduct and alleged violations of the Code of Judicial Conduct. They range from the serious (alleged oppressive treatment of attorneys and parties) to the trivial (wearing a tee shirt to a judges meeting and rearranging chairs in her courtroom). Unlike the first report, assuming the truth of the matters set forth in the second report cannot alone lead to the appropriate disposition of the complaints therein. In her response, Respondent has sufficiently raised a question of whether the Council's findings of fact and conclusions of law are the only outcomes that reasonable minds might reach from the record. In addition, Respondent disputes that many of the events transpired as related in the report. Moreover, the disputed issue of whether Respondent violated any provisions in the Code of Judicial Conduct must be independently determined before any decision can be made that Respondent violated her probation. If the Trial Division of the Court on the Judiciary were to find Respondent committed one or more violations of Code of Judicial Conduct as recounted in the second report, such a violation would terminate her probation and be relevant to the ultimate issue of removal.

¶5 Finally, I dissent to recommending suspension pending trial of the complaints against Respondent. Proceedings for removal are penal in nature and predicated upon wrongdoing. Any judge or other elected office holder who is subject to removal proceedings should have the benefit of being presumed innocent and afforded every reasonable measure of due process prior to any sanction being imposed that interferes with performance of the duties of their office.

2020 OK 48

RE: Court Fund Expenditures for Civil Transcripts

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

ORDER

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

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

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

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

/s/ Noma D. Gurich
Chief Justice

ALL JUSTICES CONCUR

2020 OK 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 55

STATE OF OKLAHOMA, ex rel. OKLAHOMA BAR ASSOCIATION, Complainant, v. JULIA MARIE EZELL, Respondent

SCBD 6847. June 16, 2020

BAR DISCIPLINARY PROCEEDING

¶0 Pursuant to Rule 7 of the Rules Governing Disciplinary Proceedings, this summary disciplinary proceeding arises from Respondent's plea of guilty to misdemeanor crimes of using a computer to violate Oklahoma statutes and falsely reporting a crime. This Court issued an Order of Immediate Interim Suspension of Respondent's license to practice law. After a hearing before the Professional Responsibility Tribunal, it recommended that this Court suspend Respondent for one year, effective from the date of her interim suspension.

THE RESPONDENT IS SUSPENDED FOR ONE YEAR EFFECTIVE FROM THE DATE OF INTERIM SUSPENSION AND ORDERED TO PAY COSTS

Gina L. Hendryx, General Counsel of the Oklahoma Bar Association, Oklahoma City, Oklahoma, for Complainant.

Edward Blau, Blau Law Firm, Oklahoma City, Oklahoma, for Respondent.

Winchester, J.

¶1 This is a summary disciplinary proceeding initiated pursuant to Rule 7 of the Rules Governing Disciplinary Proceedings[1] based upon Respondent Julia Marie Ezell's plea of guilty to two misdemeanor counts of (1) Falsely Reporting a Crime in violation of 21 O.S.2011, § 589, and (2) Use of a Computer to Violate Oklahoma Statutes in violation of 21 O.S.2011, § 1958.

¶2 On October 22, 2019, the Oklahoma Bar Association (OBA) notified the Court of Ezell's plea of guilty. On November 4, 2019, this Court entered an Order of Immediate Interim Suspension. On December 16, 2019, this Court assigned the matter to the Professional Responsibility Tribunal (Trial Panel) to hold a hearing on the limited scope of mitigation. On January 28, 2020, the Trial Panel held a Rule 7 hearing. On February 27, 2020, the Trial Panel filed its report, recommending that this Court suspend Ezell for one year, effective from the date of her interim suspension.

I. FACTS

¶3 In 2006, Ezell received her license to practice law in Oklahoma. She practiced law, in good standing, until the date of her interim suspension.

¶4 Ezell became General Counsel for the Oklahoma State Department of Health (OSDH) in November 2017. The agency tasked Ezell with drafting the rules and regulations to govern the implementation of legalized medical marijuana in Oklahoma. Ezell contends interested parties within the Oklahoma state government and the Oklahoma State Board of Health were attempting to influence the promulgation of the administrative rules, pushing to include two unlawful rules which required pharmacists in each dispensary and banning "smokables." Ezell voiced her concerns regarding the unlawful rules, but the interested parties told her to draft the rules to include the two constraints.

¶5 Ezell experienced extreme stress due to the pressure to draft the medical marijuana rules, including those she believed were unlawful, and problems in her personal life. On account of the stress, Ezell began sending threatening emails from a fictitious email address to her official government email address that appeared to be authored by proponents of the medical marijuana referendum. She obtained the fictitious email address from protonmail.com (Proton Mail). From July 8, 2018, until July 12, 2018, Ezell sent ten emails to herself with escalating threats to her safety.

¶6 Ezell immediately reported the first email to an investigator at OSDH. On July 9, 2018, OSDH requested that the Oklahoma State Bureau of Investigation (OSBI) investigate the threatening emails. The Edmond Police Department provided surveillance at Ezell's workplace and home. The Edmond Police Department also escorted Ezell from work and checked Ezell's personal vehicle for a GPS device. The University of Oklahoma Health Sciences Center's Police Department provided Ezell further security while she was at her workplace. OSBI placed pole cameras in Ezell's neighborhood to monitor Ezell's house and the traffic in the neighborhood.

¶7 After OSBI launched its investigation, Ezell continued to send emails with escalating threats to herself. Ezell also provided to OSBI names of individuals that she believed could have access to her phone or be sending her threatening emails. As a result, OSBI obtained information on medical marijuana proponent groups and contacted law enforcement across the United States requesting information on similar threats. OSBI, through the assistance of a Mutual Legal Assistance Treaty (MLAT) request to Switzerland, ultimately determined that the Proton Mail account was registered to Ezell's husband.

¶8 On July 12, 2018, Ezell turned her phone over to OSBI, who performed a forensics examination of the phone. OSBI determined Ezell was responsible for creating the Proton Mail email account and sending the emails at issue. On July 13, 2018, OSBI met with Ezell to discuss the results of the forensics examination of her phone. Ezell continued to implicate other individuals who could be responsible for the emails and did not take responsibility for her actions. It was not until OSBI confronted Ezell with the information gathered from the forensics examination that Ezell admitted her wrongdoing. Ezell then confessed to OSBI that she was responsible for the threatening emails.

¶9 On July 17, 2018, the Oklahoma County District Attorney charged Ezell with two felonies, Presenting False Evidence at Trial and Using a Computer to Violate Oklahoma Statutes, and one misdemeanor, Falsely Reporting a Crime. The Oklahoma County District Attorney eventually dismissed one felony charge and reduced the other felony charge to a misdemeanor. Ezell pled guilty to two misdemeanor counts, Falsely Reporting a Crime and Use of a Computer to Violate Oklahoma Statutes. The district court ordered her to pay $21,810 in restitution for the costs involved in the OSBI investigation, which Ezell paid upon entering her plea of guilty. The district court deferred sentencing until October 15, 2024. Ezell fully paid all court costs, fees, and probation fees in advance.

II. MITIGATION

¶10 After confessing to OSBI regarding her wrongdoing, Ezell resigned from her position as General Counsel of OSDH. Ezell sought inpatient treatment at Oakwood Springs. Less than twenty-four hours later, Oakwood Springs released Ezell from inpatient treatment finding Ezell had no underlying mental issue but was undergoing extreme stress, anxiety, sleep-deprivation, and adjustment disorder. Instead, Ezell sought outpatient treatment four days a week for three and a half hours a day for approximately four weeks. Ezell's treatment centered around learning coping skills for anxiety and stress. Ezell then began private counseling. Ezell continues to attend therapy with Jackie Shaw, who diagnosed Ezell with anxiety and chronic depression. Ms. Shaw recommends that Ezell continues with therapy and medication for her anxiety.

¶11 At the hearing before the Trial Panel, Ezell testified regarding her struggles in her position as General Counsel and her personal life. Ezell attempted to resign from the General Counsel position on two occasions due to the stress of the job, but her supervisor – for various reasons – urged Ezell to stay with OSDH. It was difficult for Ezell to resign from OSDH because she is the sole income provider for her husband and four children, including one child with special needs. Ezell testified her main motivation for sending and reporting the threatening emails was for law enforcement to obtain her cellphone, which contained what she perceived as evidence of the corruption surrounding the promulgation of the medical marijuana rules.

¶12 Ezell presented five character witnesses at the hearing, who all testified Ezell is a well-respected attorney and passionate about helping families with special needs. Ezell expressed remorse and shame for her actions, especially regarding the time and resources spent on the OSBI investigation.

III. STANDARD OF REVIEW

¶13 In disciplinary proceedings, this Court acts as a licensing court in the exercise of our exclusive jurisdiction. *State ex rel. Okla. Bar Ass'n v. Garrett*, 2005 OK 91, ¶ 3, 127 P.3d 600, 602. Our review of the evidence is *de novo*, and the Trial Panel's recommendations are neither binding nor persuasive. *State ex rel. Okla. Bar Ass'n v. Anderson*, 2005 OK 9, ¶ 15, 109 P.3d 326, 330. This Court's responsibility is not to punish an attorney, but to assess the continued fitness to practice law and to safeguard the interests of the public, the courts, and the legal profession. *State ex rel. Okla. Bar Ass'n v. Wilburn*, 2006 OK 50, ¶ 3, 142 P.3d 420, 422.

¶14 This Court also has the responsibility to ensure the record is sufficient for a thorough

inquiry into essential facts and for crafting the appropriate discipline. *State ex rel. Okla. Bar Ass'n v. Adams*, 1995 OK 17, ¶ 4, 895 P.2d 701, 704. We find the record submitted in this proceeding is sufficient for our de *novo* review.

IV. DISCUSSION

¶15 Ezell's plea of guilty to two misdemeanor charges of Falsely Reporting a Crime and Use of a Computer to Violate Oklahoma Statutes serves as the basis for this summary disciplinary proceeding. Rule 7.1 of the Rules Governing Disciplinary Proceedings (RGDP) provides:

> A lawyer who has been convicted or has tendered a plea of guilty or nolo contendere pursuant to a deferred sentence plea agreement in any jurisdiction of a crime which demonstrates such lawyer's unfitness to practice law, regardless of whether the conviction resulted from a plea of guilty or nolo contendere or from a verdict after trial, shall be subject to discipline as herein provided, regardless of the pendency of an appeal.

Rule 7, Rules Governing Disciplinary Proceedings, 5 O.S.2011, ch. 1, app. 1-A.

¶16 Not every criminal conviction facially demonstrates a lawyer's unfitness to practice law. *State ex rel. Okla. Bar Ass'n v. Armstrong,* 1990 OK 9, ¶ 8, 791 P.2d 815, 818. In fact, a lawyer should answer only for offenses that indicate lack of characteristics relevant to the practice of law. Rule 8.4, Cmt. 2, Oklahoma Rules of Professional Conduct (ORPC), 5 O.S.2011, ch.1, app. 3-A.[2] Answerable offenses typically involve violence, dishonesty, breach of trust, or serious interference with the administration of justice. *Id.*

¶17 Ezell's criminal conduct reflects adversely on her honesty and fitness to practice law in violation of ORPC Rule 8.4(b) and (c)[3] and RGDP Rule 1.3[4] and warrants discipline. Ezell sent emails to herself containing escalating threats and falsely reported the emails to OSDH, which launched an OSBI investigation that cost over $20,000. Ezell was not forthcoming with the truth when confronted with the information obtained by OSBI regarding the source of the threatening emails. Ezell's attempts to cover up her involvement in this scheme obstructed OSBI's investigation, and Ezell implicated a co-worker, a former high school acquaintance, and medical marijuana proponents as potential suspects. Ezell's actions resulted in the misuse and waste of state resources. Ezell admittedly had a motive and purpose to deceive her coworkers and law enforcement – even if the motive was for law enforcement to obtain evidence regarding potential fraud in the promulgation of the medical marijuana rules. *State ex. rel. Okla. Bar Ass'n v. Besly*, 2006 OK 18, ¶ 43, 136 P.3d 590, 605. Ezell pled guilty to the crimes of falsely reporting a crime – undoubtedly a crime involving dishonesty, fraud, and deceit – and the use of a computer to do so. Her conduct warrants discipline.

V. DISCIPLINE

¶18 This Court has not before addressed a disciplinary action that precisely mirrors the situation here, but we look to other examples for a baseline. In *State ex rel. Oklahoma Bar Association v. Pacenza*, 2006 OK 23, 136 P.3d 616, we made several observations that have equal force in this matter.

> [O]ffenses against common honesty should be clear, even to the youngest lawyers; and to distinguished practitioners, their grievousness should be even clearer. **Honesty and integrity are the cornerstones of the legal profession. Nothing reflects more negatively upon the profession than deceit.** There can be little doubt that the attorney has brought discredit upon the legal profession.

Id. ¶¶ 32-33, 136 P.3d at 629 (emphasis added). This Court commonly suspends attorneys for conduct involving dishonesty, fraud, deceit, or misrepresentation, with the length dependent on the surrounding circumstances and degree of harm to the client.[5]

¶19 The most relevant case regarding discipline for an attorney's misuse of state-owned resources is *State ex rel. Oklahoma Bar Association v. Olmstead,* 2012 OK 71, 285 P.3d 1110. In *Olmstead,* a former Oklahoma Associate District Judge pled no contest and a district court convicted him of the felony crime of violating the Oklahoma Computer Crimes Act after he used his state-issued computer to download explicit material for his personal use. Since Olmstead held a position of public trust, the media reported his misconduct. The misuse of state property resulted in Olmstead's resignation from office. *Id.* ¶ 5, 285 P.3d at 1112. The Court found Olmstead's conduct violated the rules governing an attorney's conduct, was egregious, an abuse of trust, and brought great

disrepute to the legal profession and the judiciary. *Id.* ¶ 7, 285 P.3d at 1113. The Court suspended Olmstead from the practice of law for one year. *Id.* ¶ 13, 285 P.3d at 1114.

¶20 Here, Ezell was a high-ranking public official with OSDH. Ezell's dishonest and deceitful acts of obtaining a fictitious email account, sending threatening emails to her official government email address, and falsely reporting these emails resulted in the misuse of state property and waste of law enforcement resources. Ezell's actions gained wide-spread media attention on both the local and national level. Ezell's conduct warrants discipline in line with *Olmstead*.

¶21 This Court does not agree that all the factors proposed by Ezell are mitigating. In *State ex rel. Oklahoma Bar Association v. Kinsey*, 2009 OK 31, 212 P.3d 1186, an attorney made thirteen false billing and travel claims to her law firm totaling over $15,000. When confronted, Kinsey admitted to these false submissions and resigned from her employment at the law firm. *Id.* ¶ 4, 212 P.3d at 1189. Kinsey took full responsibility for her improper actions but wanted to provide background information for a better understanding of her situation. Kinsey explained that she is a perfectionist with high expectations of herself and she encountered various stress-generating circumstances during the time she made the false billing and travel claims. Those stressful circumstances included her job as an associate attorney, her children, her family's need to move residences, her husband's unexpected loss of employment, and her need for personal time. *Id.* ¶ 6, 212 P.3d at 1190. Kinsey described her conduct as a "judgment in error" and asserted that the stresses in her life clouded her judgment. *Id.* ¶ 30, 212 P.3d at 1196.

¶22 The Court was not convinced that Kinsey comprehended the seriousness of her intentional and fundamentally dishonest conduct and did not accept Kinsey's explanation of her mental and emotional conditions as an excuse for her scheme of dishonesty and professional misconduct. *Id.* ¶ 31, 212 P.3d at 1196. This Court suspended Kinsey from the practice of law for one year. *Id.* ¶ 37, 212 P.3d at 1198.

¶23 Like in *Kinsey*, Ezell's mental and emotional conditions are not a justification for her scheme of dishonesty and professional misconduct. We acknowledge that Ezell sought counseling to address her mental and emotional conditions and continues to do so. Under the circumstances in this case, we think a one year suspension effective from the date of her interim suspension is sufficient to deter Ezell and other lawyers from similar misconduct in the future and to accomplish the goals of discipline.[6]

VI. CONCLUSION

¶24 Ezell's actions provide clear and convincing evidence of engaging in conduct that reflects adversely on the legal profession in violation of her professional duties pursuant to ORPC Rule 8.4 and RGDP Rule 1.3. The conduct serves as a basis for the imposition of discipline, which we must determine. We appreciate Ezell's remorse regarding her actions, and we are mindful of Ezell's mitigating circumstances, specifically her efforts to get counseling. This is the right course for her to take. Considering the *Olmstead* and *Kinsey* cases, we conclude the Trial Panel's recommendation is appropriate. This Court suspends Ezell from the practice of law for one year, effective from the date of her interim suspension.

¶25 The OBA filed an application to assess the costs of the disciplinary proceedings in the amount of $2,436.71. Ezell did not file an objection to this application. These costs include Trial Panel expenses and costs associated with the record, and each is permissible. See RGDP Rule 6.16. This Court orders Ezell to pay costs in the amount of $2,436.71 within ninety days of the effective date of this opinion.

THE RESPONDENT IS SUSPENDED FOR ONE YEAR EFFECTIVE FROM THE DATE OF INTERIM SUSPENSION AND ORDERED TO PAY COSTS.

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

Kauger (by separate writing), Kane, and Rowe, JJ., concur in part, dissent in part.

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

Kauger, J., with whom Kane, J. and Rowe, J. join, concurring in part, dissenting in part:

"I would impose discipline for a period of one year from the date of this opinion."

COMBS, J., dissenting:

¶1 While I agree with the majority's determination that Respondent's criminal conduct reflects adversely on her honesty and fitness to practice law, I disagree as to what constitutes

appropriate discipline under the circumstances. The Trial Panel recommended she be suspended for one year from November 4, 2019, the date of our interim suspension order. The majority opinion states the Respondent's conduct warrants discipline in line with *State ex rel. Oklahoma Bar Ass'n v. Olmstead*, 2012 OK 71, 285 P.3d 1110, yet it adopts the Trial Panel's recommendation. The opinion relies upon both *Olmstead* and *State ex rel. Oklahoma Bar Ass'n v. Kinsey*, 2009 OK 31, 212 P.3d 1186. In both cases the discipline of one-year suspension from the practice of law began from the effective date of the opinion, not the date of the interim suspension order. From the date this opinion will become effective, the Respondent will only be suspended for approximately five months. I do not believe this is an appropriate discipline to deter the Respondent and other lawyers from similar misconduct.

¶2 The Respondent's conduct is also not in line with either *Olmstead* or *Kinsey*. Her actions not only involved dishonesty but were the quintessential embodiment of "serious interference with the administration of justice"[1] and much more egregious than either of these two cases. The main similarities between the facts in the present case and *Olmstead* are that both concerned computer related crimes and the misuse of state resources; *Olmstead* concerned the misuse of a state computer to download inappropriate material and here the misuse of state resources concerns over $20,000 spent on a needless investigation. In *Kinsey*, a lawyer submitted false billing and travel expense reports on thirteen occasions totaling approximately $15,000. *Id.*, ¶5. When confronted, she confirmed what she had done. *Id.* On the other hand, the Respondent in the present matter continued her charade with law enforcement for several days before she was caught. Only when confronted with irrefutable evidence did she admit what she had done. But for the expeditious forensic examination of her phone, the criminal investigation could have been very lengthy and costly.

¶3 The main reason I find this case so egregious is the fact that prior to being caught the Respondent continued to falsely and knowingly implicate other individuals and groups for her crime. These included a co-worker, a high school acquaintance and the medical marijuana proponents. Had the investigation been protracted, it is not hard to see how those individuals' lives and the proponents' cause would have been negatively and possibly irreparably affected. The Respondent's actions were also the subject of intense state and national media coverage. In my dissent in *State ex rel. Oklahoma Bar Ass'n v. Hastings*, I disagreed with the majority's final discipline of a two-year suspension from the practice of law. 2017 OK 43, ¶1, 395 P.3d 552 (Combs J., dissenting). I found the nature of Hastings' conduct deserved a suspension of two years and one day which would place significant requirements on seeking reinstatement. *Id.* Part of my reasoning was based upon Hastings' conduct which was the subject of intense media coverage and "thoroughly embarrassed and undermined the legal profession as a whole."[2] *Id.*, ¶3. Like *Hastings*, the majority opinion notes that Respondent's actions "gained wide-spread media attention on both the local and national level." Her actions have brought disrepute and harmed the public image of the legal profession. *See also Olmstead*, 2012 OK 71, ¶7, 285 P.3d 1110.

¶4 The district court has deferred the Respondent's sentence until October 15, 2024; over four years into the future from the effective date of this opinion. One factor used by this Court to determine the appropriate period of professional suspension in a Rule 7 disciplinary matter, is the length of a lawyer's criminal sentence. *State ex rel. Oklahoma Bar Ass'n v. Demopolos*, 2015 OK 50, ¶19, 352 P.3d 1210; *State ex rel. Oklahoma Bar Ass'n v. Ijams*, 2014 OK 93, ¶8, 338 P.3d 639. In *Demopolos*, a lawyer received a two-year deferred sentence on three misdemeanor counts. *Demopolos*, 2015 OK 50, ¶¶1-2. His deferred sentence was set for review on January 6, 2017. *Id.*, ¶2. This Court entered an interim suspension order on February 2, 2015. *Id.*, ¶4. Our final discipline was to suspend him for one year from the date of his interim suspension with an additional one-year deferred suspension until February 3, 2017, which was a month after his deferred sentence would be reviewed. *Id.*, ¶42. In *Ijams*, a lawyer was sentenced on four misdemeanor counts, which included obstructing a police officer. *Ijams*, 2014 OK 93, ¶3, 338 P.3d 639. Sentencing was deferred until December 23, 2015. We held "the goals established by this Court would be met by suspending the Respondent from the practice of law until December 23, 2015, the end of the deferred sentences." *Id.*, ¶13. In *State ex rel. Oklahoma Bar Ass'n v. Cooley*, a lawyer pled guilty to felony offenses of making a false declaration of ownership of a firearm he pawned and falsely personating

another to create liability in order to avoid arrest on his outstanding felony warrant. 2013 OK 42, ¶¶6-7, 304 P.3d 453. On February 13, 2013, he received a deferred sentence on both counts for a period of five years until February 5, 2018. *Id.* We held his conduct involved dishonesty and serious interference with the administration of justice and suspended him from the practice of law for the duration of his deferred sentences. *Id.*, ¶15.

¶5 The Respondent's deferred sentence will last another four years. I have repeatedly expressed my concern on how this Court can protect the integrity of the legal profession if we allow a lawyer to practice law while on probation. *State ex rel. Oklahoma Bar Ass'n v. Bernhardt*, 2014 OK 20, ¶6, 323 P.3d 222 (Combs J., dissenting); *State ex rel. Oklahoma Bar Ass'n v. Brown*, 2013 OK 40, ¶3, 303 P.3d 895 (Combs J., dissenting). During this time a lawyer is subject to an accelerated judgment and sentence upon a violation of the terms and conditions of the order of deferred sentence. This is especially a problem where, as here, there is a lengthy deferred sentence. I believe a suspension from the practice of law for the duration of her deferred sentence is appropriate here. Upon successfully completing the terms of the deferred sentencing and when the criminal charges are dismissed, she could seek reinstatement of her license to practice law pursuant to Rule 11, RGDP. At the very least, I would suspend her for no less than two years and one day.

Winchester, J.

1. Rule 7, Rules Governing Disciplinary Proceedings, 5 O.S.2011, ch. 1, app. 1-A.

2. Comment 2, ORPC 8.4 provides:
Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

3. ORPC 8.4(b) and (c) provides in pertinent part:
It is professional misconduct for a lawyer to:
. . . .
(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . . .

4. RGDP 1.3 provides:
The commission by any lawyer of any act contrary to prescribed standards of conduct, whether in the course of his professional capacity, or otherwise, which act would reasonably be found to bring discredit upon the legal profession, shall be grounds for disciplinary action, whether or not the act is a felony or misdemeanor, or a crime at all. Conviction in a criminal proceeding is not a condition precedent to the imposition of discipline.

5. *See e.g., State ex rel. Okla. Bar Ass'n v. Moisant*, 2019 OK 55, 457 P.3d 1040 (suspending an attorney for one year and six months for engaging in the unauthorized practice of law and making dishonest statements to the court); *State ex rel. Okla. Bar Ass'n v. Kerr*, 2012 OK 108, 291 P.3d 198 (suspending an attorney for two years and one day for attempting to bribe a police officer); *State ex rel. Okla. Bar. Ass'n v. Johnston*, 1993 OK 91, 863 P.2d 1136 (suspending an attorney for four months for commingling and converting funds, making false statements to the court, professional incompetence, failure to act promptly and communicate with clients); *State ex rel. Okla. Bar Ass'n v. Stubblefield*, 1988 OK 141, 766 P.2d 979 (suspending an attorney for 30 days for misrepresentation in adoption and divorce proceedings); *State ex rel. Okla. Bar Ass'n v. Peveto*, 1980 OK 182, 620 P.2d 392 (suspending an attorney for one year for neglecting clients' affairs and knowingly making false statements to clients).

6. Ezell argues a suspension longer than six months is inappropriate and urges the appropriate discipline is a public censure. Ezell cites to several attorney discipline cases involving alcohol-related offenses or sexual misconduct cases. The majority of the cases cited by Ezell included conduct outside of the attorneys' employment and did not affect an attorney/client relationship. This Court notes that the entirety of Ezell's conduct at issue was acting as General Counsel of OSDH.

COMBS, J., dissenting:

1. Rule 8.4, Cmt. 2, Oklahoma Rules of Professional Conduct, 5 O.S. 2011, Ch. 1, App. 3-A.

2. Hastings threatened his ex-wife with a firearm and was involved in a police stand-off for several hours. *State ex rel. Oklahoma Bar Ass'n v. Hastings*, 2017 OK 43, ¶¶4-5, 395 P.3d 552. Eventually, he was removed from his home after the police used tear gas. *Id.*, ¶5.

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. June 23, 2020

APPEAL FROM DISTRICT COURT OF OKLAHOMA COUNTY

¶0 School Districts filed an action in District Court and alleged they received insufficient State Aid payments for the years 1992-2014. They sought writs of mandamus to compel defendants to demand and recoup excessive State Aid payments made to other school districts, and then pay the correct apportionments to plaintiffs. Plaintiffs sought summary judgment and intervenors, school districts in Tulsa County, sought summary judgment against plaintiffs. The Honorable Thomas Prince, District Judge, granted intervenors' motion for summary judgment and concluded the defendants did not have a duty to seek repayment of excessive State Aid payments made to other schools until an audit was performed by auditors approved by the State Auditor and Inspector. Plaintiffs appealed and the Supreme Court retained the appeal. **We hold**: The audit used by the State Board of Education when demanding repayment must be performed by auditors approved by the State Auditor and Inspector. A school district possesses a legal right to a proper apportionment of State Aid regardless of excessive payments made to other districts. A school district lacks a cognizable legal interest and standing in a claim to compel the State Board of Education to fund a lapsed appropriation. Plaintiffs' filings raise the issue of their standing to judicially compel legislative appropriations. Standing must be adjudicated on remand.

DISTRICT COURT JUDGMENT AFFIRMED IN PART AND REVERSED IN PART AND CAUSE REMANDED FOR FURTHER PROCEEDINGS

Joe E. Edwards, Clyde A. Muchmore, and Mary H. Tolbert, Crowe & Dunlevy, Oklahoma City, Oklahoma, for Plaintiffs/Appellants, Independent School District No. 52 of Oklahoma County (Midwest City-Del City), Independent School District No. 57 of Garfield County (Enid), Independent School District No. 71 of Kay County (Ponca City), and Independent School District No. 89 of Oklahoma County (Oklahoma City).

A. Scott McDaniel, Stacy L. Acord, McDaniel Acord, PLLC, Tulsa, Oklahoma, for Intervenor Defendants/Appellees, for 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.

Melissa Oxford, Tulsa, Oklahoma, for Intervenor Defendants/Appellees, for 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.

Mithun Mansinghani, Solicitor General, and Michael Velchik, Asst. Solicitor General, Office of the Oklahoma Attorney General, Oklahoma City, Oklahoma, for Defendants/Appellees.

William H. Hickman, Hickman Law Group, PLLC, Norman, Oklahoma, for Intervenor/ Appellee, Oklahoma Public Charter School Association.

EDMONDSON, J.

¶1 This case involves the procedure specified in 70 O.S. § 18-118. This statute is used when the State Board of Education requires a school district to return to the Board an excessive payment of State Aid funds. Plaintiffs are allegedly owed State Aid funds and they seek to compel the State Board of Education to audit other schools, demand return of funds, collect funds, and then pay some of these funds to plaintiffs. We read plaintiffs' petition as seeking to compel the State Board of Education to seek an audit from the State Auditor and Inspector. We agree with the trial court that 70 O.S. § 18-118

requires an audit by auditors approved by the State Auditor and Inspector when the Board demands a return of State Aid funds pursuant to the statute.

¶2 The parties raised the issue whether plaintiffs' claims were justiciable and barred by the political question doctrine, but they did not address the plaintiffs' standing to bring their claims. The State Board of Education has a statutory duty to make the correct apportionment to a particular school district regardless of excessive amounts paid to a different school district, and a school district's right to receive the proper apportionment is not necessarily contingent upon the Board's recovery of improper amounts paid to other school districts. A school district lacks a cognizable legal interest and standing in a claim to compel the State Board of Education to fund a lapsed appropriation.

¶3 A standing issue is presented on whether plaintiffs possess a cognizable legal interest in legislatively appropriated funds. The issue of plaintiffs' right to compel the State Board to seek a proper audit, or demand and collect funds from other school districts is premature and may not be adjudicated in this appeal.

I. Case Summary

¶4 School districts located in Midwest City/Del City, Enid, Ponca City, and Oklahoma City[1] commenced a legal proceeding in the District Court of Oklahoma County. They sought mandamus relief for several purposes including the payment of additional State Aid funds. The named defendants in the petition were: "Joy Hofmeister, Superintendent of Oklahoma State Department of Education," (OSDE); (2) "Oklahoma Tax Commission," and (3) "Ken Miller, Oklahoma State Treasurer." The schools alleged they had received less State Aid funds between 1992 and 2014 because the OSDE used an incorrect assessment rate in its calculations for State Aid. A fifth school district located in Oklahoma County, Western Heights,[2] filed a separate action in the District Court of Oklahoma County and against the OSDE and others.[3] This school district also sought mandamus relief and additional State Aid funds.[4] Defendants filed an unopposed motion to consolidate the two proceedings in District Court and the court granted the motion.

¶5 An unopposed motion to intervene was filed by seven school districts located in Tulsa County.[5] They intervened as defendants and filed an Answer to the petitions filed by the plaintiffs.[6] The Oklahoma Public Charter School Association (OPCSA) filed a motion to intervene and it was granted by the trial court.

¶6 Plaintiffs filed a motion for summary judgment. They argued the OSDE had agreed plaintiffs had received less than the proper amount of State Aid funds they were entitled to during the years 2004-2014. Plaintiffs argued the OSDE was required to recoup the State Aid funds overpaid to other school districts, and then apportion those funds to school districts such as plaintiffs. They argued their claim was not barred by laches or a three-year statute of limitations.

¶7 State entities argued the case "is about whether there is a clear duty [by mandamus] on SBE [State Board of Education] to take action to withhold payments from some schools and apply those payments to other schools." They argued the summary judgment requested by plaintiffs sought relief against the Oklahoma State Department of Education but not the Oklahoma Tax Commission, Treasurer for the State of Oklahoma, or the Oklahoma State Board of Education. They argued the State Board of Education had certain statutory duties and not the State Department of Education. They then argued the State Board of Education's statutory duty had not been "triggered" because an audit by auditors approved by the State Auditor and Inspector had not been performed. Defendants also asserted laches, and alleged plaintiffs knew for twenty years how the State Aid was supposed to be apportioned, and for at least ten years prior to commencing their legal action knew or suspected that State Aid was incorrectly calculated.

¶8 Intervenors (Tulsa County Schools) filed a motion for summary judgment against plaintiffs. They characterized plaintiffs' action as seeking to (1) correct alleged errors in calculating State Aid to every public school district in the State for a twenty-two year period, 1992-2014, and (2) recoup payments from hundreds of school districts by reducing their current State Aid payments and then transferring these funds to plaintiffs. The Tulsa County school districts argued the plaintiffs "had all the information at their disposal to discern they had been shorted State Aid by no later than 1993, and they did nothing" to correct the error. They asserted laches as a defense. They asserted plaintiffs' claims "present a non-justiciable political question." They also asserted all school

districts in the State which received overpayments of State Aid during 1992 - 2014 must be joined as necessary parties.

¶9 Plaintiffs responded to the motion for summary judgment filed by the intervenors. Plaintiffs objected to the assertion they possessed "actual knowledge" for many years of the "calculation errors" committed by the OSDE. Plaintiffs asserted they did not have the means to discover miscalculations in the State Aid formula. They objected to classifying the legal controversy as a non-justiciable political question.

¶10 Intervenors (Tulsa County) replied to plaintiffs' motion and plaintiffs replied to intervenors' motion for summary judgment. An intervening defendant, Oklahoma Public Charter School Association (OPCSA), filed an objection to plaintiffs' motion for summary judgment. The OPCSA argued State Aid "is the sole revenue source for educating children at a charter school." The Association sought "as an initial matter," a legal determination "if charter schools are school districts for purposes of funding to determine whether charter schools may be impacted by any relief that may be granted plaintiffs."[7] They argued the Oklahoma State Board of Education is "interpreting and implementing the school funding law to deny charter schools Local Revenue sources, including CAPP." They argued "a reduction of State Aid has a greater proportional impact on charter schools than other public schools."

¶11 The trial court concluded no duty existed for the OSDE to initiate a 70 O.S. § 18-118 authorized recoupment process from school districts such as those in Tulsa County. The trial court ruled section 18-118 required an audit by auditors approved by the State Auditor and Inspector, and such an audit had not been performed. The trial court concluded a writ of mandamus would not issue and granted the motion for summary judgment filed by intervenors (Tulsa County schools).

¶12 Plaintiffs filed a "motion for reconsideration" and argued their request for mandamus was sufficiently broad to include a request requiring the OSDE to seek an audit from the State Auditor and Inspector.[8] Defendants responded and argued plaintiffs had changed the nature of their mandamus request after issuance of the court's summary judgment. The motion for reconsideration was denied, plaintiffs appealed the judgment, and the appeal was retained for adjudication by this Court.

II. Summary of Issues on Appeal and Standard of Review

¶13 In summary, the issues on appeal are limited in scope to the issues before the trial court which were adjudicated on summary judgment and then preserved in plaintiffs' motion for new trial. Secondly, the issues addressed are limited to those necessary to the nature of the trial court's judgment as modified by this Court on appeal. The issues on appeal must include a jurisdictional issue raised on the face of plaintiffs' filings, and this Court will direct the District Court to make the necessary findings and conclusions on remand when necessary to adjudicate a jurisdictional issue.

¶14 A "motion to reconsider" does not technically exist within Oklahoma's statutory nomenclature, this Court looks to the content and substance of a motion rather than its title to determine how the motion is treated, and a motion to reconsider may be treated as a motion for a new trial pursuant to 12 O.S. § 651.[9] Plaintiffs' motion to reconsider argued the trial court's decision was contrary to law with alleged specific defects, a ground specified in 12 O.S.2011 § 651(6).[10] A party who files a motion for new trial must raise therein the issues the party seeks to use as assignment of error in a subsequent appeal.[11] The trial court adjudicated whether an audit by auditors approved by the State Auditor and Inspector was necessary before the State Board of Education has a duty to seek recoupment of excess State Aid funds paid to a school district. This issue construed 70 O.S.2011 § 18-118 and is before us on appeal.

¶15 Plaintiffs' right to compel both a statutorily-defined accounting pursuant to 70 O.S. § 18-118 and additional payment of State Aid funds was challenged as nothing more than a political question lacking justiciability. Standing is jurisdictional, and we explain herein a school district possesses a legal interest to compel payment of State Aid funds in certain circumstances, and in certain circumstances standing is absent and a political question is present. The scope of a school district's legal interest when seeking State-appropriated funds is limited by mandatory law which is created by either the Oklahoma Constitution or statutory enactment. We lack the appropriate record and arguments to adjudicate standing

as to plaintiffs, and the standing adjudication is left for a decision on remand based upon the principles we explain.

¶16 Plaintiffs' cite the mandamus statute, 12 O.S. § 1451,[12] invoking a special procedure not statutorily controlled by the Oklahoma Pleading Code.[13] Mandamus is a special proceeding invoking equity.[14] A standard of review applied in an appeal is based upon the nature of the decision made by the trial court, *e.g.*, a decision based on law, fact, mixed law and fact, as well as the nature of the action (law versus equity), and the procedural context of the decision, such as dismissal of an insufficient petition, a summary judgment, directed verdict, judgment on a jury verdict, motion for new trial, etc.[15]

¶17 Application of the appellate abuse-of-discretion standard for reviewing a motion for new trial uses a *de novo* review when examining the correctness of an alleged erroneous conclusion of law.[16] Mandamus is tried as in civil actions and the merits may be adjudicated using the District Court Rule 13 procedure for summary judgment or summary disposition.[17] Further, an issue of law is presented by questions concerning the application of a statute to an uncontested fact, and *de novo* appellate review is used by the Court.[18] This *de novo* standard is consistent with *de novo* review of an error of law in the context of a motion for new trial as well as our appellate review of a summary judgment which we have explained is a *de novo* and nondeferential review.[19]

¶18 The trial court relied on 70 O.S. § 18-118, and concluded one of the elements necessary to obtain mandamus was absent. The court stated the defendants did not have a plain legal duty. The absence of this plain legal duty was adjudicated in the context of plaintiffs' alleged statutory right to compel this duty by mandamus. The summary judgment herein construed 70 O.S. § 18-118 to determine the absence of a statutory duty. The trial court's decision is reviewed *de novo*.

III. Special Audit by State Auditor and Inspector on Appeal and Judicial Notice.

¶19 Plaintiffs filed a "Notice of Report by State Auditor and Inspector" as a "subsequent development relevant to the Court's review of this appeal." The Notice references an article published in a newspaper and has an attached photocopy of a "Special Audit Report" for Western Heights Public School District. This audit states it is authored by the Oklahoma State Auditor and Inspector.

¶20 Intervenors filed a motion to strike appellant's Notice of Report, etc. Appellees argued the newspaper article and Special Audit Report were not before the trial court. Appellees also argue the Special Audit Report states Western Heights Public Schools experienced a State Aid funds shortfall for fiscal years 2004 through 2014. However, Western Heights School District is not a party to this appeal, and the audit does not address State Aid funds for any other school district, including the plaintiffs in this appeal. Appellees argued the Special Audit Report was not proper for judicial cognizance by judicial notice.

¶21 Plaintiffs responded and stated the Court should take judicial notice of the report by the State Auditor and Inspector. Plaintiffs have filed a photocopy of the audit with the Court. The audit is found on the official website for the State Auditor and Inspector.[20]

¶ 22 In federal court, judicial notice of fact may occur when the fact is not subject to reasonable dispute and it "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."[21] The Oklahoma statute has similar language.[22] Some federal courts have stated a court may take judicial notice of an indisputably accurate fact[23] on the world wide web (or internet),[24] and public records and government documents available from reliable sources on the internet, such as websites run by governmental agencies may be used for the purpose of judicial notice.[25] Some federal courts have also concluded public agency actions, factfinding, and decisions may be appropriate for judicial notice.[26]

¶23 Plaintiffs argue the State Auditor's report on Western Heights School District "effectively approved the overall recalculation performed by the OSDE." Appellants argue Western Heights School District did not receive its proper funding and "this *necessarily* means that other districts were overpaid," because State Aid to one district must be offset by an equal reduction in State Aid to one or more districts."[27] The motion to strike is denied, we take judicial notice of the audit, and use it as cited herein.

IV. State Aid Controversy

¶24 State Aid funds are State funds appropriated by the Legislature[28] and distributed to school districts.[29] The initial calculation of State

Aid to be distributed to a school district is based on a formula which uses the number of students attending the school district and the grade they are enrolled in for that year, number of special education students and economically disadvantaged students, additional specified programs, transportation needs for certain districts, and a comparison of the current number of students with the number for the previous two years.[30] This initial calculation includes consideration of funds attributed to ad valorem tax revenues used to determine state-wide factors for State Aid (including statutorily specified school Foundation Aid and Salary Incentive Aid).[31] The amount of State Aid is reduced by an amount of public local revenues attributed to the school district. This local revenue is referred to as "chargeable revenue" or "chargeable valuations," and is revenue charged against or subtracted from a calculation of a school district's amount of State Aid.

¶25 The State Aid formula statutes were amended several times in the decade leading up to the 1991 decennial version of the statute, *i.e.*, 1982, 1983, 1984, 1986, 1989, and 1990. For example, during the 1980s 70 O.S. § 18-109.1 was designed to reflect the changes to assessment ratios in counties coming into compliance with guidelines for assessment ratios established by this Court, and to also provide for greater equalization of State Aid with respect to determining the chargeable valuation of taxable property.[32] The first appearance of an eleven percent rate used to compute a school district's chargeable valuations for computing State Aid appears in the 1989 version of the statute.[33] The rate remained in the 1990 amendment which applied it to the 1991-1992 school year, and then also to personal commercial and personal agricultural property. The statute came to state as follows, in part.

> The Legislature hereby declares, for the purpose of financial support to school districts through the State Aid Formula, that greater equalization of State Aid to school districts will be attained by the following procedure:
>
> 1. For the 1989-90 school year, the real property portion of the valuations for those school districts in counties having an assessment ratio in excess of twelve percent (12%) shall be computed at a twelve percent (12%) assessment ratio to determine chargeable valuations. Beginning with the 1990-91 school year, the real property portion of the valuations for those school districts in counties having an assessment ratio in excess of eleven percent (11%) shall be computed at an eleven percent (11%) assessment ratio to determine chargeable valuations. Beginning with the 1991-92 school year, the commercial personal and agricultural personal property portion of the valuations for those school districts in counties having an assessment ratio in excess of eleven percent (11%) shall be computed at an eleven percent (11%) assessment ratio to determine chargeable valuations. The Oklahoma Tax Commission shall supply to the State Department of Education the information necessary to carry out the provisions of this paragraph.
>
> 2. The real property portions of the valuations for those school districts in counties having an actual assessment ratio of less than twelve percent (12%) shall be computed at the actual assessment ratio in effect for the county as determined by the Oklahoma Tax Commission in order to determine chargeable valuations for calculating State Aid to such district if such ratio is at least nine percent (9%) and the county is certified by the Oklahoma Tax Commission to have a verifiable revaluation program using property identification cards for the applicable assessment year.
>
> 3. The real property portion of the valuations for those school districts in counties which have an actual assessment ratio of less than twelve percent (12%) and which are not certified by the Oklahoma Tax Commission to have a verifiable revaluation program using property identification cards shall be computed at a twelve percent (12%) assessment ratio to determine chargeable valuations. For each school year, the actual assessment ratio shall be the assessment ratio recommended by the Oklahoma Tax Commission and certified by the State Board of Equalization for the applicable assessment year.

70 O.S.1991 § 18-109.1 & 70 O.S.2011 § 18-109.1.

The 1990 statute was not amended and this version appeared unaltered in the 1991, 2001, and 2011 decennial versions of our statutes.[34] Beginning with the 1991-1992 school year, the commercial personal and agricultural personal property portion of the valuations for those school districts in counties having an assess-

ment ratio in excess of eleven percent shall be computed at an eleven percent assessment ratio to determine chargeable valuations to calculate State Aid.

¶ 26 Plaintiffs' petition states counties in Oklahoma have implemented different assessment rates for commercial personal and agricultural personal property. Plaintiffs allege they are located in counties with a rate in excess of an eleven percent rate, and because an eleven percent rate was not used during 1992-2014 an excessive amount of chargeable revenue was attributed to them causing an improper decrease in State Aid funds. Plaintiffs allege school districts in counties such as Tulsa County received too much State Aid during these years.

V. Summary Judgment and 70 O.S. § 18-118

¶27 We agree with plaintiffs that their action may be read as seeking mandamus to compel an audit of State Aid funds, to compel the OSDE to demand a return of funds from school districts in several counties for the years 1992-2014, to compel the OSDE to seek recoupment of funds not disgorged in response to these demands, and then to compel the OSDE to apportion State Aid funds to plaintiffs for the years 1992-2014. The trial court granted summary judgment to the intervenors (Tulsa County schools).

¶28 Summary judgment is an adjudication on the merits of the controversy.[35] Generally, an adjudication on the merits of a cause of action involves one or more elements of the cause of action as well as elements of a defense interposed against a cause of action.[36] A judgment determining the existence of a cause of action requires an adjudication concluding all elements of the action are present, but an adjudication that no cause of action exists may be based upon either (1) the absence of a single element of the action or (2) the presence of all elements of a defense to the action.[37]

¶29 The District Court *appears* to have adjudicated an element of plaintiffs' alleged cause of action. The District Court's order states the case "presents one (1) relatively straight forward question as a matter of statutory interpretation, whether the procedural mandates of 70 O.S.2011, § 18-118, have been satisfied in this case." The scope of the § 18-118 duty may be explained by a plain reading of its language and its necessarily implied meaning. However, the § 18-118 duty in the context of the jurisdictional and *publici juris* issue of standing raised by plaintiffs' assertion of a legally enforceable right was not expressly adjudicated, and plaintiffs' standing must be adjudicated on remand as we explain herein. We first address 70 O.S. § 18-118, and explain why we disagree, in part, with the trial court's description of the State Board of Education's duty pursuant to 70 O.S. § 18-118.

¶30 The trial court granted summary judgment to intervenors due to the lack of an audit required by 70 O.S. 2011 § 18-118 (A). The statute states as follows.

> A. The State Auditor and Inspector shall approve auditors who shall audit the funds of the public school districts and the use made of the monies thereof, and shall make such other audits as may be required by the State Auditor and Inspector.
>
> B. School districts and officers and employees thereof who divert any monies received by a district from the purpose for which the monies were apportioned to the district shall be jointly and severally liable for any such diversion.
>
> C. If audits disclose that state monies have been illegally apportioned to, or illegally disbursed or expended by, a school district or any of its officers or employees, the State Board of Education shall make demand that the monies be returned to the State Treasurer by such school district. If the monies are not returned, the State Board of Education shall withhold the unreturned amount from subsequent allocations of state funds otherwise due the district. The State Board of Education shall cause suit to be instituted to recover for the state any monies illegally disbursed or expended, if not otherwise recovered as provided herein.

70 O.S. 2011 § 18-118.

The opening paragraph states that the "State Auditor and Inspector shall approve auditors" who shall audit the funds of the public school districts. This language came into being in 2010 when the Legislature removed the authority of the State Board of Education to appoint auditors and gave the authority to the State Auditor and Inspector.[38] The previous version of 70 O.S. § 18-118 stated as follows.

A. The State Board of Education shall appoint auditors who shall audit the funds of the public school districts and the use made of the monies thereof, and shall make such other audits as may be required by the State Board of Education.

B. School districts and officers and employees thereof who divert any monies received by a district from the purpose for which the monies were apportioned to the district shall be jointly and severally liable for any such diversion.

C. If audits disclose that state monies have been illegally apportioned to, or illegally disbursed or expended by, a school district or any of its officers or employees, the State Board of Education shall make demand that said monies be returned to the State Treasurer by such school district. If said monies are not returned, the State Board shall withhold the unreturned amount from subsequent allocations of state funds otherwise due the district. The State Board of Education shall cause suit to be instituted to recover for the state any monies illegally disbursed or expended, if not otherwise recovered as provided herein.

70 O.S.2001 § 18-118.

¶31 The first paragraph of the 2001 version of 18-118 stated the "State Board of Education shall appoint auditors." This authority to appoint auditors appears in the same statute which also states the State Board of Education "shall make demand" that funds improperly overpaid to a school district based upon an "audit" of the school district be returned, and if the funds are not returned then they are withheld by the State Board of Education from subsequent allocations of state funds to the school district. 70 O.S. § 18-118(C) (both 2001 and 2011 versions). The plain language in § 18-118 paragraph "C", "if audits disclose" clearly refers to the "audits" described in § 18-118 paragraph "A" in both the 2001 and 2011 versions.[39]

¶32 Plaintiffs relied on *Independent School Dist. No. I-20 of Muskogee County v. Oklahoma State Dept. of Education*,[40] for the Department's duty to calculate the improper apportionments for 1992-2014 and seek the return of the improperly apportioned funds to the Department. In *Independent School Dist. No. I-20* we stated the following.

The State Department of Education, through the State Board of Education, is responsible for administration of the public school system in the state. The Board is responsible for apportioning and disbursing annual appropriations to school districts which meet qualifications to receive state aid. If the Board ascertains that any of the factors on which apportionment or allocations are based have changed so as to disqualify the district or reduce its aid, the Board has an affirmative duty to adjust the apportionment or collect an overpayment. Forfeiture of state aid and recovery of overpayments are governed by 70 O.S.2001 §§ 18 – 116 – 118.

Independent School Dist. No. I-20, 2003 OK 18, ¶ 15, 65 P.3d at 619, notes omitted.

In 2003 when we explained this statutory duty of the State Department of Education, through the State Board of Education, the version 2001 version of § 18-118 did not provide for auditors approved by the State Auditor and Inspector, but "auditors appointed by the State Board of Education." We clearly stated recoupment of State Aid overpayments "are governed by" the then current statues, 70 O.S.2001 § 18-116 - § 18-118. *Independent School Dist. No. I-20*, 2003 OK 18, at ¶ 15.

¶33 The version of 70 O.S. 18-118 in effect in 2016 when plaintiffs sought mandamus to compel an audit unequivocally states the involvement of the State Auditor and Inspector in the § 18-118 process. Plaintiffs' reliance on *Independent School Dist. No. I-20* for arguing the OSDE has responsibility for an audit to the exclusion of the State Auditor and Inspector, regardless how "audit" is defined, is simply misplaced. The Legislature clearly intended for the State Auditor and Inspector to be involved after the amendment of § 18-118 in 2010.[41] Plaintiffs did not name the State Auditor and Inspector as a party.

¶34 The State Department of Education argues it and the State Board have no statutory obligation to make a demand for improperly apportioned funds unless and until the State Auditor and Inspector performs an audit specifically examining the proper amount of State Aid for the particular school district. They argue this language limits the scope of the OSDE's and the State Board's duty to seek an audit.

¶35 In both the 2001 and 2011 versions, the State Board of Education "shall" make a demand upon a school district for the return of funds in excess of the amount the school district should have legally received. In 2003 we observed that the State Board "has an affirmative duty to adjust the apportionment or collect an overpayment" to a school district.[42] A long-standing rule of statutory construction is that "may" generally denotes permissive or discretional, while "shall" is ordinarily interpreted as a command or mandate; however directory construction rather than mandatory for the word "shall" may be made upon a finding of legislative intent for such construction.[43] In both the 2001 and 2011 verison of section 18-118 an express authority is given using mandatory language for instituting a legal action to recover improperly allocated State funds.[44] This language emphasizes that the State Board of Education has an affirmative duty to make a demand upon a school district for return of an excessive State Aid apportionment.

¶36 The same statute, 70 O.S. §18-118, which creates an affirmative duty on the State Board to make a demand for an overpayment of funds also states this demand is based upon the State Auditor and Inspector approving auditors who shall audit the funds of the public school district. The essence of plaintiffs' complaint is simply this: Defendants and the trial court make the audit by the State Inspector a *discretionary condition precedent to the exercise of a mandatory duty* by the Board and this makes the statutory language inconsistent. While we disagree with this reasoning, we do conclude a lack of an audit does not relieve the State Board from requesting an audit from the State Auditor and Inspector pursuant to § 18-118 when the Board has a reason to do so to fulfill its § 18-118 duty.[45] Of course, the existence of the Board's duty does not necessarily mean a school district has a right to enforce that duty.

¶37 The jurisprudence of obligations includes the idea an express obligation created by either contract or statute may also include an implied obligation. In the context of the authority and powers of a state officer or state entity, we recently quoted from an opinion from forty years ago and stated the following.

> . . . generally, an officer or agency has, by implication and in addition to the powers expressly given by statute, such powers as are necessary for the due and efficient exercise of the powers expressly granted, or such as may be fairly implied from the statute granting the express powers. However, an agency created by statute may only exercise the powers granted by statute and cannot expand those powers by its own authority.

Farmacy LLC v. Kirkpatrick, 2017 OK 37, ¶ 20, 394 P.3d 1256, 1261, quoting *Marley v. Cannon*, 1980 OK 147, 618 P.2d 401, 405 (citations omitted).

A statute creating an *express power* in the nature of an *express affirmative duty* normally creates an *implied power* necessary to fulfill that express affirmative duty. An implied *power* so created becomes an implied *duty,* unless some other provision of law or factual circumstance makes the implied duty either discretionary or unnecessary to fulfill.[46]

¶38 The OSDE is clearly correct that a statute may provide an official's mandatory duty will not arise until another official exercises a discretionary duty. In a general sense, there is nothing internally inconsistent with legislatively conditioning or predicating a mandatory duty upon the happening or condition of another event – the container of the law is filled to the brim with such conditions and events.[47] Section 18-118 would not be internally inconsistent if the Board's mandatory duty to demand repayment and seek recoupment was conditioned upon a discretionary duty of the State Auditor and Inspector to perform an audit. However, we reject the OSDE's reading for at least two reasons, (1) possession of information showing an incorrect apportionment may be known by several entities, including the State Board who is the entity charged with a duty to act on an audit, and (2) legislative authorization exists for a school district to request and pay for an audit which could be used for a § 18-118 demand and recoupment.

¶39 An implied duty of the State Board to request an audit is consistent with 74 O.S.2011 § 213 (C)(1) which states as follows.

> C. 1. The State Auditor and Inspector shall perform a special audit on elementary, independent, and technology center school districts upon receiving a written request to do so by any of the following: the Governor, Attorney General, President Pro Tempore of the Senate, Speaker of the House of Representatives, State Board of Education, or the elementary, independent,

or technology center school district board of education.

This statute authorizes both the State Board of Education and a school district board of education to request a special audit.

¶40 The State Auditor and Inspector is statutorily authorized to perform different types of audits, *e.g.*, financial audit, operational audit, performance audit, special or investigative audit, and "any other type of engagement conducted in accordance with Government Auditing Standards."[48] Plaintiffs argued an "audit" of a school district would not show the error in apportionment. We understand this statement to be referencing "the board of education of each school district in this state shall provide for and cause to be made an annual audit of such school district for each fiscal year."[49] Plaintiffs argue on appeal the "special audit" performed by the State Auditor and Inspector on the Western Heights School District affirmatively shows the apportionment error for fiscal years 2004-2014. The special audit states the apportionment error plaintiffs assert is not in an "audit" of a school district.

¶41 Title 74 O.S.2011 § 213 states who pays for a special audit: "The costs of any such audit shall be borne by the audited entity and may be defrayed, in whole or in part, by any federal funds available for that purpose."[50] Section 213 also limits the number of special audits when not specifically requested: "the State Auditor and Inspector shall, contingent upon the availability of funding, perform a special audit, without notice, on not more than four common school districts each year."[51] In some circumstances a 74 O.S. § 213 special audit is paid using the 70 O.S. § 18-118.1(C)(2) revolving fund.[52] The special audit performed by the State Auditor and Inspector requested by Western Heights School District, states it was issued in accordance with 74 O.S. § 227.8, a statute which requires an entity to pay for services requested from the State Auditor and Inspector.[53]

¶42 It is true that 70 O.S. § 18-118 does not *expressly state* a duty for the State Board to request an audit from the State Auditor and Inspector. However, statutes clearly authorize a school district, or the State Board of Education, or others, to request a special audit by the State Auditor and Inspector apart from § 18-118. State Aid apportionment amounts are provided to school districts each year and provide information which could be used as a basis for an audit request by different parties. For example, the State Board of Education notifies and certifies to the treasurer and district superintendent of the school district the allocation of State Aid to be included as probable income for the local board of education to use in its Estimate of Needs and Financial Statement to its county excise board.[54] This notification is nothing new and predates alleged improper allocations in this case.[55] Whether plaintiffs' are legally charged with a duty to make audit requests for their own school districts during the years 1992-2014, or 2004-2014, because of either actual or constructive notice of some fact is not before us in this proceeding.[56] The point here is simply this, the failure of § 18-118 to have express language making the State Board the entity requesting an audit provides for circumstances when other entities may request an audit and the State Board need not needlessly request duplicate audits.

¶43 Plaintiffs named the OSDE and the State Superintendent of Public Instruction as defendants for the purpose of compelling compliance with 70 O.S. § 18-118. Defendants objected and argued on summary judgment that the State Board of Education must be made a named party to compel the Board to audit and recoup funds pursuant to §18-118, and the State Department of Education is the wrong party. However, the State Board of Education was expressly named as a defendant in the Western Heights School District legal proceeding and the proceedings were consolidated prior to the trial court's judgment.

¶44 The supervision of instruction in public school schools is vested in a Board of Education with the State Superintendent of Public Instruction as the chief executive officer[57] or president of the Board.[58] Generally, the State Board takes official actions of the Board by a majority vote.[59] No authority is cited by plaintiffs for the Superintendent of Public Instruction or the Department of Education controlling the official actions of the State Board of Education when the Board makes a demand for the return of improperly apportioned State Aid funds.

¶45 The State Board of Education is the entity expressly stated as responsible for the State Aid recoupment in 70 O.S. § 18-118. Citation to this statute is the extent of defendants' argument on the issue that the wrong party was sued. Plaintiffs' argument relied on *Independent School Dist. No. I-20 of Muskogee County* as its

sole authority on the proper party to be sued. The parties' arguments on this point are not fully developed. For example, the parties do not address the legal consequences of the Superintendent as a named party in an official capacity, or the Board as a named as party in the proceeding brought by Western Heights School District, and the issue whether plaintiffs' proceeding shows a proper party as a defendant is not preserved for appellate review with a proper argument and authority.

¶46 Plaintiffs object to the trial court concluding the auditors approved by the State Auditor and Inspector who "verify" an improper apportionment must be licensed pursuant to the Oklahoma Accountancy Act, 59 O.S.2011 § 15.1 - § 15.38 (as amended). The statutory language states: "The State Auditor and Inspector shall approve auditors who shall audit the funds of the public school districts and the use made of the monies thereof, and shall make such other audits as may be required by the State Auditor and Inspector." 70 O.S.2011 § 18-118. Again, the 2011 version of § 18-118 refers to an "audit" and it must have been performed by "auditors" approved by the State Auditor and Inspector.

¶47 Plaintiffs rely on *Green-Boots Construction Co. v. State Highway Commission*,[60] but this opinion is contrary to the point they argue. In *Green-Boots* we noted the commission had failed to audit a claim against it "as the law provides,"[61] and we authorized mandamus to compel an audit. We explained the action of the commission "was in violation of the *statutory duty* of the highway commission to *audit* the claim,"[62] as set forth in legislation *for claims,* and the *Legislature had guarded* "the expenditure of highway funds [and] has provided that the highway commission *may not allow any claim* until same has been *audited by the commission.*"[63] The right to compel the audit was granted and defined by the Legislature. *Green-Boots Construction Co.* does not create a right to compel an audit apart from statutory authority requiring an audit procedure for certain claims. The right to compel an audit was *not* based upon the mere fact a party sought funds, but the legislatively-required procedure *for a claim* and an audit *as a necessary and required part of the claim procedure*. The procedure in 70 O.S.2011 § 18-118 has no language authorizing a claim by a school district for State Aid funds pursuant to § 18-118, or language stating a school district may compel an audit pursuant to § 18-118. The language in § 18-118 refers to process involving the State Board of Education. Whether a plaintiff school district possesses standing and a legal interest to compel the State Board to recoup funds from other school districts during the fiscal year of an appropriation or for nonfiscal year claims not yet lapsed presents a premature issue for adjudication at this time.

¶48 Plaintiffs argued an employee of the Department of Education who performed calculations for authorized State Aid funds was a sufficient authority to compel § 18-118 duties by mandamus. The OSDE employee herein was not licensed pursuant to the Oklahoma Accountancy Act. Section 18-118 clearly requires the State Auditor and Inspector shall "approve" the auditor. Plaintiffs did not (1) submit an evidentiary record showing the specific employee of the Department was expressly approved to perform "audits" by the State Auditor and Inspector, or (2) cite any statute expressly stating an employee of the OSDE was approved by the State Auditor and Inspector to conduct audits of State Aid funds. Whether the State Auditor and Inspector possesses authority to give someone authority to conduct audits of public funds when that person is neither an employee of the State Auditor and Inspector nor licensed by the Oklahoma Accountancy Act presents a hypothetical question on the factual record before us and this assignment of error presents no ground for reversal based upon our reading of the plain language in the statute.[64] Again, we agree with the trial court the statutorily described audit must be performed by auditors approved by the State Auditor and Inspector.

¶49 The State Board of Education has a 70 O.S.2011 § 18-118 duty to recoup improperly allocated State Aid funds. The State Board uses an audit from the State Auditor and Inspector relating to the school district which has been apportioned the incorrect excess of funds. We explain herein the *duty* of the State Board to apportion the correct amount of funds as required by the Legislature arises from sources such as the State Aid formula statutes and this duty is not based upon the Board's § 18-118 duties to recoup improper State Aid payments. We explain herein the *duty* of the State Board to apportion funds as required by the Legislature has a *corresponding legally cognizable right* possessed by a school district to be apportioned the correct amount of State Aid funds.[65]

¶ 50 As we explain, the cognizable interest a school district possesses has been recognized as identical with the amount it should receive based on the statutory formula as applied to that particular school district. A statutory duty of the State Board of Education to recoup State Aid in 70 O.S.2011 § 18-118 cannot translate into a corresponding right possessed by school districts to obtain those particular recouped funds. State Aid funds retain their identity as State funds when an incorrect and excessive amount is transferred to a school district and the Department demands a return of State funds. This concept may be observed by various methods. The nature of plaintiffs' requests for relief is based upon the State character of the funds requiring the Department to recoup because plaintiffs themselves have no legal right to particular excessive State Aid funds held by a particular school district. The concept is also observed in the context of a State appropriation for State Aid lapsing and unexpended funds being subject to further appropriation by the Legislature. Section 18-118 cannot overrule mandatory language in the Oklahoma Constitution or a legislative appropriations bill establishing when an appropriation lapses.

¶51 These issues raise the standing possessed by a school district for the *type* of controversy. Plaintiffs' filings raise the issue of standing possessed by a school district, and the record on appeal is not sufficient to determine if standing exists *as to plaintiffs*. The District Court must adjudicate the standing issue to determine whether plaintiffs possess standing in the context of the scope of their claims.

VI. Standing is Jurisdictional and Limited Scope of Review by the Court in this Appeal

¶52 The Oklahoma Supreme Court may reverse, vacate or modify judgments of the District Court for errors appearing on the record.[66] We require parties to preserve error with proper argument and authority, or the error is waived for the appeal.[67] One exception to this rule occurs when a jurisdictional issue appears on the face of the parties' filings because an appellate court must engage in a *sua sponte* determination of its jurisdiction as well as the jurisdiction of the trial court.[68] An Oklahoma District Court has a similar duty to inquire into whether it possesses jurisdiction over the subject matter of an action that has been brought before the court.[69] Although a complaint in federal court must affirmatively show on its face jurisdiction and standing,[70] specific and detailed allegations of each and every jurisdictional fact need not appear on the face of a petition invoking the unlimited general jurisdiction of an Oklahoma District Court.[71] However, when language in the parties' filings casts reasonable doubt on the extent of a court's exercise of jurisdiction, such as subject matter jurisdiction or a plaintiff's standing, then an exercise of sound and reasonable discretion by the trial court is invoked to determine the standing issue as to facts, law, or both facts and law, as necessary to decide the issue.[72] This Court will not make first instance determinations of disputed non-jurisdictional law issues or contested fact issues.[73]

¶53 A plaintiff's standing may be assessed at any point during the judicial process, and may be raised by this Court *sua sponte*.[74] Standing is a preliminary or threshold issue adjudicated prior to an examination of the merits of a cause of action.[75] U.S. Supreme Court decisions distinguish (1) constitutional standing which is decided as a threshhold issue, and (2) plaintiff's allegation of harm or an aggrieved status for the purpose of showing the existence of a cause of action under a statute.[76] In Oklahoma, it is possible for mandatory law to limit either the jurisdictional existence or jurisdictional scope of a cause of action, and thereby create a state-law jurisdictional boundary to the cause of action.[77] In summary, the existence or mandatory scope of a legally cognizable cause of action may present a jurisdictional issue.

¶54 When a court raises an issue *sua sponte* the parties must be given a reasonable opportunity to present facts and law on the issue *prior to the court's decision adjudicating the sua sponte issue*.[78] For example, when we *sua sponte* address a jurisdictional issue the usual appellate practice involves providing all parties an opportunity to file briefs on the issue.[79] *We do not depart from these principles because we do not now adjudicate standing as to plaintiffs in the controversy before us*. We have not requested briefs for several reasons which may be summarized.

¶55 First, our past opinions have clearly recognized a cognizable right possessed by a school district to obtain State Aid funds by mandamus in some circumstances. Secondly, our past opinions have clearly recognized a mandatory constitutional limit on this cognizable right. Thirdly, plaintiffs asserted a legally cognizable interest based upon an unusual statute which states on its face it will not take effect until the happening of an event; but the event did *not* occur and such is stated by both an his-

torical note to a different statute and a State of Oklahoma website. Fourthly, we have not previously addressed the issue when a statute conditions its effectiveness on an event which has not occurred. Fifthly, our explanation of standing is limited to a *type of controversy,* and plaintiffs must be given an opportunity to present facts or law in support of standing as recognized by current law, or argue for exceptions to current law herein we have not discussed, or champion a modification or alteration of existing law.

¶56 The controversy involves the alleged illegality of public funds being diverted to school districts not entitled to those funds, and the *publici juris* nature of the controversy weighs in favor of the Court addressing the right of a school district to judicially obtain a correct State Aid apportionment. We also note the U. S. Supreme Court has used a procedure to address and explain standing in a *type of controversy* then before the Court, and the Court remanded the controversy to adjudicate the plaintiffs' standing therein based upon the explanation of standing provided by the Court's opinion. A similar type of remand has occurred in our Court when we have remanded for an adjudication of a critical issue which is identified or explained by an appellate opinion.

¶57 When the scope of a trial court's adjudication does not include critical issues or findings necessary for the subject matter, the case must be remanded with directions that the court make the necessary examination and findings.[80] Further, the proceeding herein is an appeal from a petition seeking statutory mandamus governed by equitable considerations, and an equitable result requires antecedent equitable means giving a party an opportunity to litigate issues.[81]

¶58 A related issue is our explanation of standing and its scope being limited to *the type of controversy before us,* and not the plaintiffs' standing which should be adjudicated on remand. *Gill v. Whitford*,[82] a 2018 decision of the U.S. Supreme Court, explained why it was remanding the matter to give a party an opportunity to show standing. The Court explained the plaintiffs had failed to show standing as required in federal court and the Court's usual practice was to dismiss a plaintiff's claims when standing was not shown.[83] The Court then explained the matter before it was not the usual case because it included "an unsettled kind of claim this Court has not agreed upon, the contours and justiciability of which are unresolved."[84] The Court remanded the case to the District Court so the plaintiffs could have an opportunity to present facts which met the standards of standing the Court explained in its opinion.[85] *Gill* mentioned its unique issues which weighed in favor of remanding to the District Court.

¶59 Our case has unique issues relating to standing. One of these is plaintiffs' reliance on a statute to show their legal interest in the controversy when (1) the statute conditions its effectiveness on the existence of an event, (2) the statute is published for several years with an effective date, and (3) the required conditional event for effectiveness has not occurred. The *Gill* plaintiffs asserted a "state-wide" or group political interest insufficient for standing. Although they met an initial pleading burden for an individual aggrieved legal interest, they failed to follow with proof, and the matter was remanded to the District Court for them to have an opportunity to show standing as a federal-court requirement.[86] Similarly, the plaintiffs herein asserted an interest as members of a group classified by a statute as well as alleging individual aggrieved status from an individual loss of State Aid funds. The need to address the critical difference in this controversy exists as it did in *Gill*.

¶60 Plaintiffs' action involves alleged illegal public funding of school districts and alleged public duties of the Oklahoma State Department of Education, Oklahoma State Board of Education, Treasurer for the State of Oklahoma, Oklahoma Tax Commission, and the State of Oklahoma Auditor and Inspector. This matter may be classified as one type of *publici juris* controversy.[87] It presents for adjudication public law issues relating to the internal conduct of government or the proper functioning of the State[88] as such relates to proper accounting and expenditure of State funds.[89]

¶61 We have not previously analyzed standing and justiciability of a school district in a 70 O.S. § 18-118 equitable enforcement proceeding involving several fiscal years. In *Gill* a few of "the contours and justiciability" had been "unresolved" by prior precedents, and a similar situation herein combined with the *publici juris* nature of the controversy weigh in favor of the Court explaining the jurisdictional issue with a remand to the District Court to apply the jurisdictional standards we explain herein.[90] The parties did litigate a related standing issue on summary judgment when they ad-

dressed the distinct concepts of justiciability and the political question doctrine.[91] Plaintiffs asserted a right to seek mandamus and additional State Aid funds based upon *Independent School Dist. No. I-20 of Muskogee County v. Oklahoma State Dept. of Education*, and its discussion of a § 18-118 recoupment as fulfilling legislative intent.[92] Although the trial court did not adjudicate this issue as part of a standing analysis or otherwise in its judgment, the standing issue as a jurisdictional boundary to a *type of a cause of action* is fairly comprised within the issues raised by the parties in the trial court. Finally, mandatory constitutional and statutory law involving the structure and function of government may not be waived by parties in a judicial contest, and a party's failure to raise such an issue, or a party creating an express admission or stipulation, will not bind a court's adjudication of these public interests.[93]

VII. A School District's Reliance on 70 O.S. § 18-109.7.

¶62 Plaintiffs relied on 70 O.S. § 18-109.7 to show they possessed a cognizable legal right. We do not adjudicate plaintiffs' standing based upon this statute. We explain we will assume *for the purpose of this appeal* a type of standing present in the statutory language could also be present without this statute. However, because of the *publici juris* nature of this controversy, the unique circumstances of this statute in legal publications, and the possibility of other school districts attempting to rely on this statute, we must address its application presented by plaintiffs.

¶63 Plaintiffs asserted (1) a right to additional State Aid funds, and (2) possession of a legal interest sufficient to compel audits of all party and non-party school districts in the State because: (1) The Legislature appropriated a specified sum of State Aid money for each of the fiscal years at issue. (2) The OSDE placed this appropriated sum each year in a common fund. (3) A particular public school district's State Aid is calculated based upon a *mathematical relationship to all other school districts in the State* participating in a statutory common State Aid fund for the fiscal year at issue. In summary, plaintiffs argued if a school district received an improper increase of calculated State Aid funds during a fiscal year, then this event *necessarily* caused an improper decrease in apportioned State Aid funds to one or more other school districts receiving State Aid from a common fund for the fiscal year.

¶64 Plaintiffs cited 70 O.S. § 18-109.7 for a "common school fund" as established therein[94] in support of their argument relating to appropriated State Aid funds and possession of a legal interest sufficient to justify their mandamus requests. The State defendants also noted section 18-109.7 in their filings. The effectiveness of 70 O.S. § 18-109.7 for the purpose of establishing a school district's standing is an issue which arises from the face of the statute. Section 18-109.7 states on its face its effectiveness is based upon a successful referendum election amending Okla. Const. Art. 10 § 12a.

> The provisions of this section shall not have the force and effect of law unless and until the voters of the State of Oklahoma approve amendments to Section 12a of Article X of the Oklahoma Constitution contained in Enrolled House Joint Resolution No. 1005 of the 1st Extraordinary Session of the 42nd Oklahoma Legislature.

70 O.S.2011 § 18-109.7(D).

A vote of the People was held in a special election for this proposed amendment and it was defeated on June 26, 1990.[95] The "effective date" listed in certain current legal publications for § 18-109.7 is January 1, 1991. This date is not an effective date based upon a successful referendum election,[96] but the effective date stated in the original enactment by the Legislature when the statute was created apart from its required subsequent legislative referendum.[97] Language in § 18-109.7 referenced three other statutes when it was created, 47 O.S. §1104; 68 O.S. § 1004, and 68 O.S. § 1806. All three statutes were simultaneously amended when § 18-109.7 was created, and all three referenced the then proposed constitutional amendments. Two of the statutes have since been amended and language removed which applied conditions based upon the proposed amendments.

¶65 Section 18-109.7(C) references 68 O.S. § 1806, and the 2011 version of §1806 (b)(2) still appears to condition application as to one of its parts on an amendment to Section 12a of Article X of the Constitution by referencing the same legislative referendum as in 70 O.S. § 18-109.7.[98] The Thomson Reuters (West) publications note the election defeat of the proposed amendment on June 26, 1990, with reference to 68 O.S. § 1806, but not with reference to 70 O.S. § 18-109.7.[99] Oklahoma Constitution, Art. 10 § 12a, was adopted by an election in August

1913, and remains unamended.[100] We have stated Okla. Const. Art. 10 § 12a is not self-executing but requires statutory enactments for its execution.[101]

¶66 Section 18-109.7 was created in the First Extraordinary Session of the Forty-Second Legislature by House Bill No. 1017 (approved April 25, 1990).[102] It was created in 1990 as "new law" and not as an amendment to a then current statute. Section 18-109.7 references 68 O.S. § 1004, a gross production tax statute, with a new version of 68 O.S. 1004 enacted by House Bill No. 1017 in its section 95. This version of § 1004 also contained a provision for an amendment to the Oklahoma Constitution contained in Enrolled House Joint Resolution No. 1005 of the 1st Extraordinary Session of the 42nd Oklahoma Legislature.[103] The language in 68 O.S. 1991 § 1004 referencing the legislative referendum was removed in 1999.[104]

¶67 Section 18-109.7 also contains a reference to 47 O.S. § 1104, and with an amendment in H.B. 1017,[105] the then new § 1104 twice referenced Enrolled House Joint Resolution No. 1005 with a provision for money to be remitted to the State Treasurer for the Common Fund.[106] In 1995 the Legislature removed the first-appearing reference to the legislative referendum in 47 O.S.1991 § 1104(A)(1)(b).[107] The second-appearing reference to the referendum in section 1104(B) was removed by the Legislature two years later.[108] Additional changes in funding were created to support House Bill 1017 which we need not analyze for this appeal.[109]

¶68 Section 18-109.7 has continued to appear in legal publications of Oklahoma Statutes including decennial versions since 1991 although § 18-109.7 was never otherwise amended or approved by the Legislature,[110] and the statute continues to this day to state its effectiveness dependent upon approval by a vote of the People. No published appellate opinion with precedential or persuasive value in this State has relied on this statute to dispose of a legal controversy.

¶69 Nothing before us shows State officials used the language in § 18-1097.7 for a general revenue fund apportionment of State Aid to school districts. Its potential legal absence as a fund for accounting purposes would not strip an otherwise legally-supported and statutorily-required apportionment to school districts,[111] nor would an incorrect reference to a specific fund in the Treasury create a legal bar to a State Aid appropriation and apportionment. [112] This conclusion is based in part because everything authorized by law in a valid appropriation to be paid out of the State Treasury is payable out of the general revenue fund when not made payable out of a valid designated fund,[113] and appropriation legislation often has authorizations for the transfer of funds to the proper dispensing fund.[114]

¶70 Plaintiffs do not address their reliance on § 18-109.7 to show they have a legal interest in the legal correctness of State Aid apportionments to other school districts. They do not address authority for using a common financial account allocating State Aid funds pursuant to some other authority, such as customary accounting practice of the OSDE by virtue of a different statute,[115] or from the method the Legislature has used to appropriate State Aid funds such as the State Aid formula statute itself,[116] or if § 18-109.7 could be infused with legal vitality by some other means such as a good faith reliance on the part of public officials and confusion related to the public purse in the context of equity.[117] We need not decide those hypothetical issues.

¶71 For the sole purpose of our opinion and without adjudicating the issue for this proceeding or creating a legal effect on subsequent proceedings for any purpose including plaintiffs' standing, we may assume at this stage of this litigation plaintiffs' right to compel the State Board of Education to request an audit could be based, in part, on the existence of a single financial account which is apportioned among all school districts in the State. However, even *if* we assume standing based on this principle for the purpose of this controversy, there still remains whether such standing is consistent with a school district's legal interest in State funds because of how the Oklahoma Constitution creates and limits a party's legal right to State-appropriated funds.[118]

VIII. Standing and Violation of a Statute

¶72 Standing focuses on a plaintiff's legally cognizable interest in the outcome of the litigation.[119] This focus is not merely the general issue of whether mandamus may be used to compel enforcement of a public entity's statutory duty, but also if a school district possesses a cognizable legal interest for the specific statutory duty to be enforced by mandamus. For example, a governmental entity's duty to make a payment is not equal to, or the same standard

for, determining a plaintiff's right to judicially compel the performance of that duty to make a payment in all contexts.[120] Secondly, when statutes create obligations governing the conduct of persons or entities, then the statutes do not necessarily make those obligations such that any person has standing to commence a judicial enforcement proceeding.[121]

¶73 The mere allegation of an improper application of statutory law does not create a legally-enforceable injury for every person and entity in the State, and we have explained this in the context of a school district as a plaintiff. In *Murray Cnty. v. Homesales, Inc.*,[122] we noted the difference between: (1) an allegation of improper application of a statute due to it being allegedly unconstitutional and potentially causing an ultimate reduction of State Aid funds paid to a school district due to a legislative decision; and (2) an improper application of a statute causing an actual reduction of local revenue paid to the school district.[123] A school district's standing was not based merely on the allegation of improper application of a statute, but the nature of the legal interest the school district possessed in the controversy, an alleged actual loss of local funds. A school district must have standing to seek equitable relief, and it must allege an injury in fact to a cognizable legal interest[124] and the relief sought would remedy the injury.[125] The alleged injury to a school district must be an injury to a *cognizable legal interest* and this interest is one of the elements for proof necessary to obtain equitable relief *and also a standing requirement*.[126]

IX. Standing, State-Appropriated Funds, and Mandatory Language Defining a School District's Cognizable Right to Compel Payment by Mandamus

¶74 The Oklahoma Legislature has distinguished funds which are apportioned and disbursed annually by the State Board of Education from appropriations made by the Legislature from "funds derived from other sources provided by law" and the methods of apportionment and disbursements "shall remain in force until the same are amended or repealed by the Legislature."[127] A legislative appropriation is made each fiscal year "in lump sum" for State Aid apportioned to the public schools.[128] The Legislature also provides additional funding for common education by means of dedicated revenue sources.

¶75 Similarly, the OSDE distinguishes "state-dedicated revenue" from legislative "appropriations" for the purpose of describing individual fiscal-year appropriations for schools. They place in the former category school revenue derived from State-generated dedicated funds such as the Oklahoma gross production tax, State-imposed motor vehicle collections, the Oklahoma Rural Electrification Association tax, and State School Land earnings. In the latter category they place State appropriated funds which are not identified by an express statutory or constitutional dedication for revenue and expense.[129] For example, whether one uses OSDE published reports for 2009 or ten years later, 2018/2019, the Department indicates the principal sources of nondedicated *appropriated* revenues include Foundation and Salary Incentive Aid, and both annual reports appear to show a large amount of State general revenue fund money is allocated to public schools by a fiscal-year legislative appropriation.[130]

¶76 One issue is raised by the parties' filings but left unanswered: Whether any State Aid funds are derived from an appropriation to a revolving fund in a Bill which does not also use the standard language for lapsing the funding appropriation in the Bill. This is a standing issue because mandatory language in the State Constitution defines and limits the scope of a party's cognizable right to compel payment based on a general revenue fund appropriation, and an appropriation to a revolving fund not subject to this constitutional limit may nevertheless be subject to mandatory language for lapsing in the appropriations Bill created by the Legislature.

¶77 We first address the constitutional issue which pertains to a school district's standing.[131] The Oklahoma Constitution prevents State officials from making a payment of funds on a State general revenue appropriation older than two and one-half years (thirty months) prior to payment.

> No money shall ever be paid out of the treasury of this State, nor any of its funds, nor any of the funds under its management, except in pursuance of an appropriation by law, nor unless such payments be made within two and one-half years after the passage of such appropriation act, and every such law making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated and the object to which it is to

> be applied, and it shall not be sufficient for such law to refer to any other law to fix such sum.

Okla. Const. Art 5 § 55.

The expiration of the thirty-month period in Art. 5 § 55 creates a time-limit for payment and a lapse in an appropriation from the general revenue fund by *constitutional authority.* This two and one-half years time limit for payment does not usually apply to certain funds. For example we have explained the Art. 5 § 55 limit does not apply to a re-appropriation of funds prior to their lapsing from a previous appropriation.[132] We have explained several times that funds are not limited by Okla. Const. Art. 5 § 55 when the funds are derived from non-fiscal dedicated revenue which is tied to non-fiscal dedicated expenses, such as when a revolving fund is created by the Legislature without a period for lapsing appropriations to the fund. In *City of Sand Springs v. Department of Public Welfare*,[133] we relied on *State ex rel. Hawkins v. Okla. Tax Commission*,[134] and explained the constitutional requirement for payment of the appropriation within two and one-half years after passage of the appropriating legislation did not apply to special funds, *i.e.*, identified revenue devoted to "special purposes."[135]

¶78 We also addressed this issue in *Edwards v. Childers*,[136] where we noted the Legislature created a fund with a dedicated revenue source and a dedicated "imperative command" authorizing expenses from the fund for the purpose of constructing and maintaining state highways. The Court compared the legislation to that which created a "continuing special tax, the whole of which is dedicated to a single purpose."[137] The Court noted *no further appropriation legislation was necessary* "because the fund being set apart for the specified use must be so held and paid out in the manner prescribed, as long as the act which provides for its creation remains in force."[138] The Court then explained the nature of this special fund did not require application of the two and one-half year limitation on payment.

> It is sufficient to say that it is wholly unnecessary for a determination at this time as to whether or not the appropriation of the funds created by the acts under consideration elapse at the end of 2 1/2 years from the date of the passage of the act. The question is prematurely presented to the court.

Edwards v. Childers, 1924 OK 652, 228 P. at 477.

The Legislature does use revolving funds for the purpose of funding specific needs in common education,[139] but as we explain herein, a large share of State Aid funds has been funded by the State's general revenue fund.[140] The State Aid formula does anticipate a school district may have a carryover in the school district's general fund and imposes penalties in the reduction of State Aid,[141] but this is a fund of the school district and not the dispensing/disbursing account/fund used and controlled by either the State Treasurer, or the OSDE, or other State entity for receiving, apportioning, or transferring State Aid funds.

¶79 The constitutional thirty-month period also does not apply to an appropriation considered to come into being by the Constitution itself where the constitutional appropriation is self-executing.[142] The Oklahoma Constitution contains the following language.

> The Legislature shall, by appropriate legislation, raise and appropriate funds for the annual support of the common schools of the State to the extent of forty-two ($42.00) dollars per capita based on total state-wide enrollment for the preceding school year. Such moneys shall be allocated to the various school districts in the manner and by a distributing agency to be designated by the Legislature; provided that nothing herein shall be construed as limiting any particular school district to the per capita amount specified herein, but the amount of state funds to which any school district may be entitled shall be determined by the distributing agency upon terms and conditions specified by the Legislature, and provided further that such funds shall be in addition to apportionments from the permanent school fund created by Article XI, Section 2, hereof.

Okla. Const. Art. 13 § 1a.

The Constitution requires an appropriation for common education and it specifies a constitutional amount of forty-two ($42.00) dollars per capita based on total state-wide enrollment for the preceding school year. This same provision states the amount of state funds to which any school district may be entitled shall be determined by the distributing agency *upon terms and conditions specified by the Legislature*. Even if we assumed and considered the forty-two dollars as a constitutionally-specified minimum: (1) The clear language of Art. 13 § 1a

would leave amounts appropriated in excess of $42.00 within the Legislature's discretion.[143] (2) There is little doubt the Legislature appropriates more than $42.00 per capita based on total state-wide enrollment.[144] and (3) The usual rules of constitutional interpretation leave no doubt the fiscal-year appropriations in excess of $42.00 herein are legislative and not constitutional appropriations.[145] We must also note on this issue: Our Legislature generally may do, as to proper subjects of legislation, all but that which it is prohibited from doing, and under the Oklahoma Constitution fundamental rights are not necessarily determined by whether they are provided for within the document.[146] The language of Okla. Const. Art. 13 § 1a does not give school districts a constitutional-appropriation exemption from applying Okla. Const. Art. 5 § 55.

¶80 We recognized a school district has a legal interest in a State Aid appropriated and apportioned amount of funds in *State ex rel. Board of Education of Independent School District No. 1 of Grady County, et al. v. State Board of Education*.[147] In this case the standing of the school district was not based upon an interest in a common fund with incorrect apportionments having various effects upon all school districts in the State. In *Grady County* the school district brought mandamus proceedings against the State Board of Education and its Director of Finance to compel them to make a reapportionment and further disbursement of State Aid funds allegedly owed to the specific school district by a proper application of the State Aid formula. The defendants raised the thirty-month bar in Okla. Const. Art. 5 § 55 in response to the school district's claim. The Court's response to the argument invoking Art. 5 § 55 is instructive.

¶81 The Court noted the State Aid appropriation in that case was (1) "nonfiscal" and (2) "available for contractual purposes for thirty months from that date (the effective date of the enactment)."[148] The Court also noted the legal proceeding brought by the school district was commenced on a date within the Okla. Const. Art. 5 § 55 thirty-month period: "The present action was begun and alternative writs issued on November 16, 1953, within the thirty-month period following the date of the 1951 appropriation."[149] The Court noted the Legislature acted in 1953 and "continued and reappropriated" the 1951 appropriation minus sums previously expended. The Court noted the evidence in the case showed that on the date the school district commenced its action in District Court "there remained on hand some $2,359,400 of the 1951 appropriation for the fiscal year ending June 30, 1953." However, this account was reduced to a zero balance by defendants while plaintiff's action was pending in District Court.

¶82 The Court in *Grady County* noted a similar question had been examined in *Fortinberry Co. v. Blundell*,[150] where private parties sought mandamus to compel the State Treasurer to deliver a warrant on State funds to pay for what was due on a contract made between one of the plaintiffs, the Fortinberry Company, and the Oklahoma Tax Commission. The District Court rendered a judgment for the plaintiffs, finding the contract between the Tax Commission and the Fortinberry Company was a legal and valid contract, an assignment and pledge thereof to a bank was valid, and that such acts had been accepted and approved by the Tax Commission. This judgment was affirmed on appeal in a different proceeding.[151]

¶83 The original action in *Fortinberry* was filed in 1938 after the merchandise had been delivered to the Tax Commission and the action was based upon a contract dated May 18, 1937. Plaintiffs asserted the legislative authorization for the contract occurred in 1937, and the authorization could not be repealed in 1939 without a provision providing for payment of a valid contractual claim. The Court agreed.[152] The Court then noted the specific 1937 legislation "was in the nature of a revolving fund, which would still be in effect unless the law were repealed or amended," and "[i]t was not an appropriation for any fiscal year or years."[153] The Court characterized the action for delivery of a warrant as "clearly ancillary" to the original action.[154] The Court noted a stipulation concerning the availability of funds to pay the plaintiffs' claim: "It is stipulated that each month from July 1, 1939, to January 1, 1940, there was a surplus in the General Enforcement Fund in excess of the amount of plaintiffs' claim, after paying all other expenses of administration."[155]

¶84 The Court also noted the reason for the delay in paying the claim. The delay was caused by State officials refusing to approve and pay a timely valid claim and the delay was not chargeable to plaintiffs. The *Fortinberry* Court relied on *Carter v. Miley*,[156] in support of this point.[157] We explained the ruling with the following language.

> This ruling was upon the theory that when a State official wrongfully refuses to perform an act necessary to secure payment, such payment will be enforced by mandamus and will relate back to and be considered as made when it should have been made, and the fund provided for payment shall be considered as encumbered by the claim.

Fortinberry Co. v. Blundell, 242 P.2d at 434.

This language simply cannot be read as equating the act of an incorrect school district apportionment with an act of State officer which "wrongfully refuses to perform an act necessary to secure payment." Such a reading would prevent any general revenue fund appropriation from lapsing after thirty months when one government entity seeks judicial correction of payments the Legislature has specified are to be transferred from one government entity to another government entity. Such a reading would be inconsistent with other language in *Fortinberry* as well as our analysis in *Grady County*. We stated the following in *Fortinberry.*

> In *State ex rel. Telle v. Carter*, 170 Okl. 50, 39 P.2d 134, 140, it was said: It was clearly the intention of the framers of the Constitution that any party claiming any portion of an appropriation, setting apart for some purpose or uses a definite sum of money, must make claim for same within two and one-half years after the appropriation is made, and if claim is not so made, thereafter the Legislature is authorized to make whatever disposition of the balance of such appropriation as it may determine is for the best interests of the state.

Fortinberry Co. v. Blundell, 242 P.2d at 434, quoting *State ex rel. Telle v. Carter,* 1934 OK 702, 39 P.2d 134, 140.

In *State ex rel. Telle v. Carter,* the State Auditor rejected a claim filed on April 3, 1934, for payment of a salary for services performed during the months July 1933 to and including March 1934, and then a mandamus proceeding was brought in 1934. The language in *Fortinberry* refers to a State official refusing a claim by another. Our analysis in *Grady County* referenced the date the mandamus proceeding was commenced as a timely claim for purposes of Okla. Const. Art. 5 § 55.

¶85 *Fortinberry* also states *State ex rel. Telle v. Carter* indicates when appropriated funds are not spent as required in an appropriation, then they are subject to being continued or revived, or subject to a new appropriation after the lapse in the original appropriation.[158] A lapsed appropriation occurs when funds are not spent as authorized during the time legislatively specified. For example, we have explained when "appropriations were not used for the purposes for which they were made and were not transferred legally, they constituted unexpended appropriations which lapsed at the end of the fiscal year . . . no valid contracts having been entered into, those appropriations lapsed."[159] A court does not enforce a lapsed legislative appropriation unless granted authority from the legislative body which created the appropriation.[160]

¶86 A school district must allege and present evidence stating the amount of funds which were incorrectly apportioned to obtain mandamus relief for a new apportionment.[161] *Grady County, Fortinberry*, and *State ex rel. Telle* were decided when the Legislature met in a regular session every two years, prior to the 1966 amendment to Okla. Const. Art. 5 § 27 which changed the sessions to an annual regular legislative session. We explained a purpose of Okla. Const. Art. 5 § 55 in this context.

> One useful purpose was to enable the Legislature to ascertain at each biennial session the amount of Surplus revenues that would be available for appropriation during the next biennium. In order to do so it was necessary to establish a terminal date upon the effectiveness of prior appropriations. This was especially true as applied to general fund appropriations from which the three branches or departments of government are financed.

State ex rel. Hawkins v. Oklahoma Tax Commission, 1969 OK 118, 462 P.2d 536, 538.

Biennial sessions with an appropriation at the beginning of the session allowed the next session in the waning months of the thirty-month period to be able to assess the general funds to finance government.

¶ 87 Language in the Oklahoma Constitution may be mandatory and self-executing (or self-enforcing), and where mandatory State Constitutional provisions truly conflict with a state statute the constitutional provision is followed and the statute excluded from enforcement.[162] When mandatory law acts as a substantive limitation on a right to recover in a judicial proceeding, then the mandatory law is acting

similar to a statute of repose which marks the boundary of a substantive right.[163] Section 55 of Article 5 of our Constitution is mandatory and self-executing.[164]

¶88 In *Grady County* we noted the applicability of Okla. Const. Art. 5 § 55, and we observed the availability of funds to pay the appropriation to the school district on the date the action was commenced in District Court. This observation is consistent with this Court explaining a court's power to prevent an irreparable injury to a party's legal rights from a wrongful refusal of a government official to act while judicial relief is being sought.[165]

¶ 89 In our 1980 opinion in *City of Sand Springs v. Department of Public Welfare*,[166] we explained the purpose for Okla. Const. Art. 5 § 55 was to make the Will of the Legislature paramount to wasteful spending or prodigality by the Executive.[167] *City of Sand Springs* relied on our 1924 opinion in *Edwards v. Childers*,[168] and explained the character of being wasteful was based upon the mere fact the legislative Will for an appropriation was overruled by the Will of the Executive when diverting money appropriated for one purpose and using it for a different purpose.[169] Our opinions have historically determined prodigality by analyzing the degree of discretion possessed by the entity spending the appropriation and if spending outside of the Legislature's Will could occur.

¶90 For example, *City of Sand Springs* relied on *Edwards v. Childers* where we looked at statutory language stating the Legislature gave the state entity an imperative command that all the moneys in a specific fund shall be expended for purposes and in the manner therein provided. We addressed whether an appropriation had occurred with a specified purpose. We examined the statutory requirement that the funds "shall be expended for purposes and in the manner therein provided," and we discussed our opinion from 1910 in *Menefee v. Askew*.[170]

¶91 We applied *Menefee* in *Edwards* and examined whether an appropriation expressed an intent by the Legislature to give officials a discretion to use appropriated funds in a manner which could be inconsistent with the Legislature's intent.[171] We condemned one appropriation with "looseness and carelessness of the language used" which "left to the discretion of the fish and game department" to spend appropriated moneys outside the intent of the Legislature.[172] The Fish and Game Act appropriation "contemplated advisable and necessary small expense of the department in catching and shipping game is not limited by the language of the act, and yet the act does not appropriate the entire fish and game fund for the stated uses of the department." We also discussed funds consumed by the fish and game department would cause "other departments of the state and other general public interests be thereby made to suffer by the prodigality of the fish and game department."[173] However, we gave our approval to a different appropriation to the state highway department where the appropriation controlled the department by specifying it was required to use the money in accordance with the Legislature's intent. The highway department appropriation was worded so "the will of the lawmakers absolutely controls the amount of the fund to be expended by the highway department," and "the acts of the executive department are definitely controlled by the provisions of the bill."[174]

¶92 The fundamental concept in a school district's cause of action which we applied in *Grady County* was simply this: Executive officers exercised an arbitrary discretion when they failed to follow the Legislative Will, by failing to correctly follow the State Aid statutory formula, which resulted in an apportionment of a factually incorrect amount of State Aid funds. This exercise of an arbitrary discretion in payment of government funds was judicially cognizable in a mandamus proceeding.[175] In 1910 (*Menefee*), and in 1924 (*Edwards*), and again in 1980 (*City of Sand Springs*), the Court explained Okla. Const. Art. 5 § 55 prevents an Executive officer from altering the Legislature's Will expressed in an appropriation by the officer changing the recipient of the appropriation or its amount. The Court determined the timeliness of the mandamus proceeding brought by the school district for the purpose of Okla. Cost. Art. 5 § 55. There can be no doubt that Okla. Const. Art. 5 § 55 and its thirty-month period for an appropriation lapse applies to annual fiscal year State Aid appropriated amounts derived from the State's general revenue fund.

¶93 A cognizable legal right to payment from a legislative appropriation is also defined by any other mandatory language used by the Legislature creating that right. Generally, we have explained when the Legislature creates a legal interest and also creates the remedy for its enforcement, then the remedy is exclusive

when so stated by the Legislature.[176] We have examined whether a cognizable legal interest a party possesses and the remedy for its enforcement were created by common law or statute.[177] A statute may express a mandatory requirement in the absence of express language, and we examine both the nature of the legal right created by the statute and whether the mandatory language at issue attaches directly to the right created, such as a mandatory time limit for enforcement of the right.[178] For example, when a statute of repose acts as a limitation on the right and not the remedy, then it acts to create a time-related element to the cause of action.[179] A lapse by *statutory authority* will occur when an appropriation states it will lapse with a fiscal year, or by otherwise stating it will lapse by statutory language, and such lapsing will moot a mandamus request for payment of government funds derived from a lapsed appropriation.[180]

¶94 We use fiscal year 2014-2015 legislation as an example how this issue may appear in a school district's assertion of a right to State Aid apportioned funds. A large share of funding for common education comes from the general revenue fund, and we see this in two Bills funding common education for 2014-2015. Enrolled Senate Bill No. 2127 (54th Okla. Legis., 2nd Sess., eff. July 1, 2014), and the Enrolled House Bill No. 3513 created at the same time.[181] The first two provisions of the Senate Bill are as follows.

> SECTION 1. There is hereby appropriated to the State Board of Education *from any monies not otherwise appropriated from the General Revenue Fund* of the State Treasury for the fiscal year ending June 30, 2015, the sum of One Billion Fifty-five Million Two Hundred Ninety-four Thousand Five Hundred Forty-seven Dollars ($1,055,294,547.00) or so much thereof as may be necessary for the financial support of public schools.
>
> SECTION 2. There is hereby appropriated to the State Board of Education from any monies not otherwise appropriated from the Education Reform Revolving Fund created in Section 34.89 of Title 62 of the Oklahoma Statutes, the sum of Seven Hundred Thirty-eight Million Six Hundred Twenty-five Thousand Four Hundred Seventy-four Dollars ($738,625,474.00) or so much thereof as may be necessary for the financial support of public schools.

Enrolled S.B. No. 2127 § 1 (emphasis added).

Enrolled House Bill No. 3513 states in part as follows.

> 1. Funds appropriated and authorized by Sections 1 through 7 of Enrolled Senate Bill No. 2127 of the 2nd Session of the 54th Oklahoma Legislature: Local and State-supported Financial Support of Public Schools.....$1,877,570,777.00

Enrolled H.B. No. 3513 § 1.

These two Bills clearly show general fund revenue funding common education and facially appear to be subject to the thirty-month limit in Okla. Const. Art. 5 § 55. They also show several provisions relating to revolving funds.

¶95 House Bill No. 3513 also contains the following provision expressing Legislative Will for appropriations to lapse.

> SECTION 18. Appropriations made by Sections 1 through 14 of Enrolled Senate Bill No. 2720 of the 2nd Session of the 54th Oklahoma Legislature, not including appropriations made for capital outlay purposes, may be budgeted for the fiscal year ending June 30, 2015 (hereafter FY-15) or may be budgeted for the fiscal year ending June 30, 2016 (hereafter FY-16). Funds budgeted for FY-15 may be encumbered only through June 30, 2015, and must be expended by November 15, 2015. Any funds remaining after November 15, 2015, and not budgeted for FY-16, shall lapse to the credit of the proper fund for the then current fiscal year. Funds budgeted for FY-16 may be encumbered only through June 30, 2016. Any funds remaining after November 15, 2016, shall lapse to the credit of the proper fund for the then current fiscal year. These appropriations may not be budgeted in both fiscal years simultaneously. Funds budgeted in FY15, and not required to pay obligations for that fiscal year, may be budgeted for FY-16, after the agency to which the funds have been appropriated has prepared and submitted a budget work program revision removing these funds from the FY-15 budget work program and after such revision has been approved by the Office of Management and Enterprise Services.

Enrolled House Bill No. 3513 at § 18.

This language states, except for capital outlay purposes, appropriations in Sections 1 through 14 of Enrolled Senate Bill No. *2720* of the 2nd Session of the 54th Oklahoma Legislature may be budgeted for fiscal years ending June 30, 2015, and June 30, 2016. Section 18 also states some funds will lapse when remaining after November 15, 2015, and not budgeted for FY-16. The funds lapse on June 30, 2016.

¶96 Section 18 of H.B. No. 3513 references Enrolled S.B. 2720. There was no Enrolled Senate Bill with number "2720" in the second session of the 54th Legislature. The highest Enrolled Senate Bill for the Session is No. 2140, and this is the same number for the highest Engrossed version, except for Engrossed S.B. No. 9999. These two are also the highest sequential Introduced Senate Bill numbers. No S.B. Floor Version is numbered 2720. Enrolled House Bill Numbers appearing in sequence include: 2692, 2706, 2711, 2730, 2740, and 2765. No Enrolled House Resolutions of any kind are numbered "2720." An Engrossed House Bill No. 2720 exists for the Second Session of the 54th Legislature, but its subject is tax law and contains no appropriation.

¶97 Appropriations are made in sections 1-14 of Enrolled S.B. No. 2127, and they pertain to fiscal year appropriations for education.[182] In ascertaining and giving effect to the Legislature's Will, inept or incorrect choice of words in a statute will not be construed and applied in a manner which would destroy the real and obvious purpose of the statute.[183] While a scrivener's error is not used to change the law, it may be used to determine meaning to avoid an absurd consequence.[184] Section 18 of H.B. No. 3513 referring to non-existent "2720" refers to S.B. 2127, and language in Section 18 states: "Any funds remaining after November 15, 2015, and not budgeted for FY-16, *shall lapse* to the credit of the proper fund for the then current fiscal year." We construe this "shall lapse" as mandatory language.[185] The combination of Senate Bill No. 2127 and House Bill No. 3513 provides examples of the Legislature creating a statutory lapse in appropriations, and similar to a constitutional lapse pursuant to Okla. Const. Art. 5 § 55.

¶ 98 We need not analyze all education appropriation Bills between 1992 and 2014, or lapsing of appropriations. We need not analyze to what extent the general revenue fund was used in each year between 1992 and 2014. These matters are for the parties to examine on remand. We are not determining plaintiffs' standing pursuant to any appropriation. We have recognized mandamus may be used to compel public officials' compliance with mandatory constitutional and statutory law.[186] A school district must possess a legally cognizable right to bring a mandamus proceeding when seeking the payment of funds from a government entity.[187] A school district must also comply with mandatory law when it seeks to judicially compel the State Board of Education to pay State Aid funds to the school district. The legally cognizable interest must be based upon appropriations and funds which have not lapsed pursuant to either Okla. Const. Art. 5 § 55 or some other mandatory law.

X. Conclusion

¶99 We agree with plaintiffs their petition could be construed as a request to compel proper authorities to request an audit from the State Auditor and Inspector. The State Board of Education uses an audit prepared by auditors approved by the State Auditor and Inspector when using the audit for purposes of 70 O.S.2011 § 18-118.

¶100 Plaintiffs' petition may be construed as seeking payment for State Aid funds not correctly paid to the plaintiffs. A school district has a legally cognizable interest in funds correctly apportioned to that school district independent of the procedure in 70 O.S. § 18-118 used by the State Board of Education. Plaintiffs' standing is raised as an issue by their claims for payment of State Aid funds from State appropriations. A State appropriation to a revolving fund is subject to lapsing when the Legislature has stated it will lapse, and a general revenue appropriation is subject to lapsing pursuant to Okla. Const. Art. 5 § 55, provided these appropriations are not otherwise saved from lapsing by mandatory law. A school district lacks a cognizable legal interest and standing in a claim to compel the State Board of Education to fund a lapsed appropriation.

¶101 We expressly do not decide whether plaintiffs possess standing in whole or in part in relation to their claims for State Aid payments from the State Board of Education. Plaintiffs' standing must be adjudicated on remand as a preliminary jurisdictional issue in this controversy.

¶102 **Plaintiffs possess no cause of action to obtain legislatively appropriated funds when those funds have lapsed by application of**

either Okla. Const. Art. 5 § 55 or other mandatory language such as in an appropriations bill. On remand: (1) The plaintiffs must present facts and legal authority showing the State Aid funds they seek are based on appropriations of State Aid to their specific school districts which have not lapsed by application of either (a) the thirty-month period of Okla. Const. Art. 5 § 55, or (b) legislative language creating a lapse for the specific appropriation they seek to enforce. **(2)** General revenue fund appropriations for State Aid lapse thirty months (Okla. Const. Art. 5 § 55) from the date of the appropriation, and other appropriations lapse when the appropriation bill contains lapsing language for the appropriation, and additionally in some circumstances lapsing for a non-general revenue fund appropriation will occur by Okla. Const. Art. 5 § 55. **(3)** Plaintiffs must show their action was commenced in the District Court within thirty months of any general revenue fund appropriation authorizing the specific State Aid funds they seek. **(4)** In addition to showing the specific appropriation does not lapse by Okla. Const. Art. 5 § 55, plaintiffs must show the appropriations bill authorizing the appropriation for the funds they seek is a bill which does not contain lapsing language, or if it does contain such language that their District Court action was commenced before the date of lapsing in the appropriations bill. **(5)** After the plaintiffs show the nature of the lapsed or non-lapsed funds they seek, then the District Court shall make the proper findings of fact and dismiss any claims seeking funds based upon a lapsed appropriation. **(6)** If plaintiffs fail to show any non-lapsed appropriated funds, then their action shall be dismissed by the District Court because in such circumstance they have no legally cognizable aggrieved interest and they lack standing. **(7)** If plaintiffs are successful in showing they seek a specific legislative appropriation which has not lapsed after application of either the constitutional thirty-month period or legislative language, then the trial court may proceed to make findings of fact and conclusions of law addressing whether plaintiffs possess a right to compel by mandamus the State Board to fund a claim for specific State Aid funds. **(8)** If plaintiffs possess a legally cognizable claim to appropriated State Aid funds which have not lapsed, then that claim is subject to the ordinary jurisprudence of mandamus, including the manner, timing, and circumstances of compelling a State entity to pay State funds and whether such is appropriate by mandamus. **(9)** Mandamus to compel payment of a legally cognizable claim of a school district for payment of State Aid by the State Board must be based upon the State Board refusing to pay that claim made by that school district to the Board.

¶103 The judgment of the District Court is affirmed in part and reversed in part, and the controversy is remanded to the District Court for further proceedings consistent with this opinion.

¶104 CONCUR: WINCHESTER, EDMONDSON, COMBS, KANE, and ROWE, JJ.

¶105 CONCUR IN JUDGMENT: GURICH, C.J.

¶106 CONCUR IN PART AND DISSENT IN PART: KAUGER, J.

¶107 NOT PARTICIPATING: COLBERT, J.

¶108 NOT VOTING: DARBY, V.C.J.

EDMONDSON, J.

1. The four school districts are: (1) Independent School District No. 52 of Oklahoma County (Midwest City-Del City); (2) Independent School District No. 57 of Garfield County (Enid); (3) Independent School District No. 71 of Kay County (Ponca City); and (4) Independent School District No. 89 of Oklahoma County (Oklahoma City).

2. Western Heights Independent School District No. I-41 of Oklahoma County.

3. District Court of Oklahoma County, Cause No. CJ-2016-4826, "Western Heights Independent School District No. I-41 of Oklahoma County v. The State of Oklahoma, ex rel. Oklahoma State Department of Education, Oklahoma State Board of Education, Joy Hoffmeister [sic], State Superintendent of Public Instruction for the State of Oklahoma, Oklahoma Tax Commission, Ken Miller, Oklahoma State Treasurer."

4. The petition filed by Western Heights School District is not included in the record on appeal, and no lawyer has entered an appellate appearance for Western Heights School District.

5. The schools are: (1) Tulsa Public School District, I-1 of Tulsa County; (2) Sand Springs Public School District, I-2 of Tulsa County; (3) Broken Arrow Public School District, I-3 of Tulsa County; (4) Bixby Public School System, I-4 of Tulsa County; (5) Jenks Public School District, I-5 of Tulsa County; (6) Union Public School District, I-9 of Tulsa County; and (7) Owasso Public School District, I-11 of Tulsa County.

6. Plaintiff school districts are located in Enid and Ponca City, and the three Oklahoma County school districts, Oklahoma City, Mid-Del, and Western Heights.

7. Appellants' Record on Accelerated Appeal, Vol. II, Tab 16, Intervening Defendant, OPCSA, Response and Objection to Plaintiffs' Motion for Summary Judgment, etc., at pg. 8.

8. Appellants' Record on Accelerated Appeal, Vol. III, Tab 22, Plaintiffs' Motion for Reconsideration of the Judgment, at unnumbered pg. 1.

9. *Matter of K.S.*, 2017 OK 16, ¶ 7, 393 P.3d 715, 717.

10. 12 O.S.2011 § 651: "A new trial is a reexamination in the same court, of an issue of fact or of law or both, after a verdict by a jury, the approval of the report of a referee, or a decision by the court. The former verdict, report, or decision shall be vacated, and a new trial granted, on the application of the party aggrieved, for any of the following causes, affecting materially the substantial rights of the party: ... 6. That the verdict, report, or decision is not sustained by sufficient evidence, or is contrary to law...."

See also Slagell v. Slagell, 2000 OK 5, ¶¶ 5-9, 995 P.2d 1141, 1142 (a new trial motion is insufficient unless its allegations inform the trial court of the specific defects for which the aggrieved party seeks review) explaining *Horizons, Inc. v. Keo Leasing Co.*, 1984 OK 24, 681 P.2d 757 and 12 O.S. § 991.

11. *Andrew v. Depani-Sparkes,* 2017 OK 42, ¶ 19, 396 P.3d 210, 218 (pursuant to 12 O.S. § 991 if a party files a motion for new trial, then the assignments of error in a subsequent appeal are limited to those raised in the motion before the trial court); *City of Broken Arrow v. Bass Pro Outdoor World, L.L.C.*, 2011 OK 1, ¶ 11, 250 P.3d 305, 311 (assignments of error in a subsequent appeal are limited to those raised in the motion before the trial court, and rule applied to a motion to reconsider construed as a motion for new trial); *Slagell v. Slagell,* 2000 OK 5, 995 P.2d 1141 (rule applied to dismiss appeal); *Federal Corporation v. Indep. Sch. Dist. No. 13 of Pushmataha Co.*, 1978 OK CIV APP 55, 606 P.2d 1141, 1144 (approved for publication by the Supreme Court), (rule explained as "a continuation of a well-established principle of appellate practice).

12. 12 O.S.2011 § 1451: "The writ of mandamus may be issued by the Supreme Court or the district court, or any justice or judge thereof, during term, or at chambers, to any inferior tribunal, corporation, board or person, to compel the performance of any act which the law specially enjoins as a duty, resulting from an office, trust or station; but though it may require an inferior tribunal to exercise its judgment or proceed to the discharge of any of its functions, it cannot control judicial discretion."

13. *Gaines v. Maynard*, 1991 OK 27, 808 P.2d 672, 676 (statutory mandamus procedure is a "special statutory proceeding" not governed by the Oklahoma Pleading Code) citing, Committee Comment to 12 O.S.1985 Supp. § 2001.

14. *Osage Nation v. Bd. of Commissioners of Osage Cnty.*, 2017 OK 34, ¶ 46, 394 P.3d 1224, 1240 (An action seeking a mandatory injunction against a public official to compel the enforcement of law is usually considered to be in the nature of mandamus.); *Stonecipher v. Dist. Ct. of Pittsburg County*, 1998 OK 122, ¶ 9, 970 P.2d 182, 185 (mandamus is a special proceeding addressing itself to the equity powers and conscience of a court or judge).

15. *Christian v. Gray,* 2003 OK 10, ¶ ¶ 40-47, 65 P.3d 591, 608-610 (review of issues of law and fact); *I.T.K. v. Mounds Public Schools*, 2019 OK 59, n. 12, & ¶¶ 11-12, 451 P.3d 425, 431 (appellate standard of review is based upon the nature of the trial court's decision and the judicial discretion exercised); *Laubenstein v. Bode Tower, L.L.C.*, 2016 OK 118, ¶ 9, 392 P.3d 706, 709 (In a case of equitable cognizance, a judgment will be sustained on appeal unless it is found to be against the clear weight of the evidence or is contrary to law or established principles of equity.).

16. *Grisham v. City of Oklahoma City,* 2017 OK 69, ¶ 4, 404 P.3d 843, 846.

17. 12 O.S. Ch. 2, App., Rule 13 (a) provides in part: "A party may move for either summary judgment or summary disposition of any issue on the merits on the ground that the evidentiary material filed with the motion or subsequently filed with leave of court show that there is no substantial controversy as to any material fact."

Cf. Shamblin v. Beasley, 1998 OK 88, n. 25, 967 P.2d 1200, 1208 ("Other jurisdictions, much like Oklahoma, do not differentiate – for summary judgment purposes – between equity suits and actions at law."); *Board of County Com'rs of Marshall County v. Snellgrove*, 1967 OK 108, 428 P.2d 272 (mandamus is a special proceeding addressing itself to the equity powers and conscience of the court or judge, and a judgment of the trial court will be set aside if it is clearly against the weight of the evidence); *Chandler U.S.A., Inc. v. Tyree*, 2004 OK 16, ¶ 31, 87 P.3d 598 (discussing the Oklahoma Discovery Code and stating issues in a mandamus proceeding are tried as in a civil action).

18. *Braitsch v. City of Tulsa*, 2018 OK 100, ¶ 2, 436 P.3d 14,17. *See also Christian v. Christian*, 2018 OK 91, ¶ 5, 434 P.3d 941, 942 ("when this Court is faced with a question of statutory interpretation, we apply a *de novo* standard of review").

19. *Boyle v. ASAP Energy, Inc.*, 2017 OK 82, ¶ 7, 408 P.3d 183, 187-188; *Nelson v. Enid Medical Associates*, 2016 OK 69, 376 P.3d 212, 216.

20. For identification purposes plaintiffs' request for judicial notice includes a photocopy of the government document, or relevant portion thereof if voluminous, and the website address for the document's location. See Western Heights Public School District Special Audit Report FY 2019, December 12, 2019, website for the State Auditor and Inspector, https://www.sai.ok.gov/ and then located by website-enabled search feature, https://www.sai.ok.gov/Search%20Reports/database/WesternHeightsWebFinal.pdf.

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

22 12 O.S. 2011 § 2202:

A. This section governs only judicial notice of adjudicative facts.

B. A judicially noticed adjudicative fact shall not be subject to reasonable dispute in that it is either:

1. Generally known within the territorial jurisdiction of the trial court; or

2. Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

C. A court may take judicial notice, whether requested or not.

D. A court shall take judicial notice if requested by a party and supplied with the necessary information.

E. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

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

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

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

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

27. Appellants' response to appellees' motion to strike notice of auditor's report, pg. 4, emphasis in original.

28. Okla. Const. Art. 13 § 1a: provides in part: "The Legislature shall, by appropriate legislation, raise and appropriate funds for the annual support of the common schools of the State to the extent of forty-two ($42.00) dollars per capita based on total state-wide enrollment for the preceding school year. . . amount of state funds to which any school district may be entitled shall be determined by the distributing agency upon terms and conditions specified by the Legislature, and provided further that such funds shall be in addition to apportionments from the permanent school fund created by Article XI, Section 2, hereof." (Citing Okla. Const. Art.11 § 2 permanent school fund).

29. *See* the discussion of legislative appropriations herein at ¶¶ 85-90.

30. 70 O.S. 2011 § 18-109.1 (State Aid formula); 70 O.S.2011 § 18-200.1 (same).

31. *See, e.g.*, 70 O.S.2011 § 18-200.1 (C) ("On and after July 1, 1997, the amount of State Aid each district shall receive shall be the sum of the Foundation Aid, the Salary Incentive Aid and the Transportation Supplement, as adjusted pursuant to the provisions of subsection G of this section and Section 18-112.2"); 70 O.S. §18-200.1 (D)(1) ("Foundation Aid shall be determined by subtracting the amount of the Foundation Program Income from the cost of the Foundation Program"); 70 O.S. § 18-200.1 (D)(1)(b)(1) ("The Foundation Program Income shall be the sum of the following: (1) The adjusted assessed valuation of the current school year of the school district, minus the previous year protested ad valorem tax revenues held as prescribed in Section 2884 of Title 68 of the Oklahoma Statutes, multiplied by the mills levied pursuant to subsection (c) of Section 9 of Article X of the Oklahoma Constitution, if applicable, as adjusted in subsection (c) of Section 8A of Article X of the Oklahoma Constitution"). *See also* the Opinion of Okla. Atty. Gen. Edmondson, 1999 OK AG 36(July 20, 1999), ("The State Aid Program consists of two parts, foundation program aid and statutory incentive aid," where the former is a certain amount of money per pupil.).

We need not address 2020 amendments to 70 O.S.2011 § 18-200.1 to adjudicate the appeal. *See* 2020 Okla. Sess. Law Serv., c. 61, §§ 2 & 3 (S.B. 212) (West), (approved May 19, 2020) (amending 70 O.S.2011 § 18-200.1 and as amended by § 2 of c. 61); 2020 Okla. Sess. Law Serv., c. 128, § 1 (H.B. 3964) (West), (approved May 21, 2020) (amending 70 O.S.2011 § 18-200.1).

32. *Fair School Finance Council of Oklahoma, Inc. v. State,* 1987 OK 114, 746 P.2d 1135, 1142-1143, citing *State of Okla. ex rel. Poulos v. State Bd. of Equalization*, 1982 OK 68, 646 P.2d 1269 (Poulos III).

33. 70 O.S.Supp.1989 § 18-109.1(1) stated in part: "Beginning with the 1990-91 school year, the real property portion of the valuations for those school districts in counties having an assessment ratio in excess of eleven percent (11%) shall be computed at an eleven percent (11%) assessment ratio to determine chargeable valuations."

34. 70 O.S.1991 § 18-109.1; 70 O.S.2001 § 18-109.1, 70 O.S.2011 § 18-109.1.

35. *Oklahoma Public Employees Association v. Oklahoma Department of Central Services*, 2002 OK 71, ¶ 6, 55 P.3d 1072, 1076, citing *Union Oil Co. of California v. Board of Equalization of Beckham County*, 1996 OK 40, 913 P.2d 1330, 1333.

36. *Shamblin v. Beasley*, 1998 OK 88, ¶ 8, 967 P.2d 1200. *See also FDIC v. Tidwell*, 1991 OK 119, 820 P.2d 1338, 1341 (adjudication of a cause of action includes adjudication of a legally cognizable defense to the cause of action).

37. *McGee v. Alexander*, 2001 OK 78, ¶ 23, 37 P.3d 800, 806 (the absence of any one element used to define a cause of action is enough to defeat this action); *Akin v. Missouri Pacific Railroad Co.*, 1998 OK 102, ¶ 9, 977 P.2d 1040, 1044 (a defendant must show either the absence of at least one essential element to plaintiff's cause of action, or the presence of all elements necessary to an affirmative defense to the cause of action).

38. 2010 Okla. Sess. Law, ch. 477, § 1 (West).

39. *Video Gaming Technologies, Inc. v. Tulsa Cnty. Bd. of Tax Roll Corrections*, 2019 OK 84, ¶ 11, 455 P.3d 918, 921 (in the absence of ambiguity or conflict with another enactment, we simply apply the statute according to the plain meaning). *See also Broadway Clinic v. Liberty Mut. Ins. Co.*, 2006 OK 29, ¶ 6, 139 P.3d 873, 883 (part of an entire statute must be construed in light of the whole statute and its general purpose and objective).

40. 2003 OK 18, 65 P.3d 612.

41. *In re Initiative Petition No. 397, State Question No. 767*, 2014 OK 23, ¶ 9, 326 P.3d 496, 501 (The primary goal in reviewing a statute is to ascertain legislative intent, if possible, from a reading of the statutory language in its plain and ordinary meaning.).

42. *Independent School Dist. No. I-20 of Muskogee County v. Oklahoma State Dept. of Education*, 2003 OK 18, ¶ 15, 65 P.3d 612, 619.

43. *Grisham v. City of Oklahoma City*, 2017 OK 69, n. 8, 404 P.3d 843, 847 citing *Woods Development Co. v. Meurer Abstract*, 1985 OK 106, 712 P.2d 30, 33.

44. *Velasco v. Ruiz*, 2019 OK 46, ¶ 9, 457 P.3d 1014, 1017-1018 (our cases explain the Legislature's use of the word "shall" is considered to be creating a mandatory element).

45. *See also* 70 O.S.2011 § 18-117:

> All apportionments of State Aid to school districts shall be made by the State Board of Education through its Director of Finance, who shall not knowingly make any apportionment or disbursement of State Aid funds which is not authorized by law. Any State Aid funds illegally disbursed by the Director of Finance shall be returned to the State Treasurer by the school district receiving such funds, or legal action shall be instituted in the name of the state against such school district or on the bond of the Director of Finance.

46. *Farmacy*, 2017 OK 37, ¶ 20, 394 P.3d at 1261. *See also Okla. Dept. of Securities ex rel. Faught v. Blair*, 2010 OK 16, ¶ 9, 231 P.3d 645, 652 (public agency possesses those powers expressly granted by law and such powers as are necessary for the due and efficient exercise of the powers expressly granted, or such as may be fairly implied from law granting the powers) citing, *Oklahoma Public Employees Ass'n v. Oklahoma Dept. of Central Services*, 2002 OK 71, ¶¶ 25 – 27, 55 P.3d 1072, 1083 – 1084.

47. *See, e.g., American Bank of Commerce v. City of McAlester*, 1976 OK 126, 555 P.2d 581, 585 (statute established a duty upon an account debtor to make payments to the assignee after account debtor received proper notification of the assignment, and statutory duty was conditioned upon the happening of an event); *Comer v. Preferred Risk Mut. Ins. Co.*, 1999 OK 86, 991 P.2d 1006 (the Legislature created statutory duty for drivers and all occupants of vehicles to use seat belts, and the duty arises upon the happening, or fulfillment, of a condition, a person is an occupant).

48. 74 O.S.Supp.2014 §212 (B)(4) (a-e).

49. 70 O.S.2011 § 22-103(A). *See also* Oklahoma Administrative Code, 210:25-5-5 (as amended at 33 OK Reg 720, eff 8-25-16) (describing a school district audit).

50. 74 O.S.2011 § 213 (C)(1) & (C)(3):

> C. 1. The State Auditor and Inspector shall perform a special audit on elementary, independent, and technology center school districts upon receiving a written request to do so by any of the following: the Governor, Attorney General, President Pro Tempore of the Senate, Speaker of the House of Representatives, State Board of Education, or the elementary, independent, or technology center school district board of education. . . .
>
> 3. The special audit shall include, but not necessarily be limited to, a compliance audit. Such audits shall be designed to review items for management's compliance with statutes, rules, policies and internal control procedures or other items applicable to each entity. The costs of any such audit shall be borne by the audited entity and may be defrayed, in whole or in part, by any federal funds available for that purpose.

51. 74 O.S.2011 § 213 (D).

52. 70 O.S.Supp.2012 § 18-118.1:

> A. When a bond is forfeited due to illegal activity of a school district officer or employee and an audit performed by the Office of the State Auditor and Inspector reported the illegal activity, the school district shall forward ten percent (10%) of the amount of the forfeited bond to the State Board of Education for deposit to the School Investigative Audit Revolving Fund.
>
> B. 1. Every person convicted of the crime of theft, embezzlement, conversion, or misappropriation of school district funds shall be assessed an amount equivalent to ten percent (10%) of any court-ordered restitution costs.
>
> 2. The assessment shall be mandatory and in addition to and not in lieu of any fines, restitution costs, other assessments, or forfeitures authorized or required by law for the offense. The assessment required by this subsection shall not be subject to any order of suspension. The court shall order either a lump-sum payment or establish a payment schedule.
>
> 3. Willful failure of the offender to comply with the payment schedule shall be considered contempt of court.
>
> 4. For purposes of collection, the assessment order shall not expire until paid in full, nor shall the assessment order be limited by the term of imprisonment prescribed by law for the offense, nor by any term of imprisonment imposed against the offender, whether suspended or actually served.
>
> 5. The assessment provided for in this subsection shall be collected by the court clerk as provided for collection of fines and costs. When assessment payments are collected by the court clerk pursuant to court order, the funds shall be forwarded to the State Board of Education for deposit into the School Investigative Audit Revolving Fund created by this section.
>
> C. 1. There is hereby created in the State Treasury a revolving fund for the State Board of Education to be designated the "School Investigative Audit Revolving Fund". The fund shall be a continuing fund, not subject to fiscal year limitations, and shall consist of all monies paid to and received by the State Board of Education from school districts, officers, or employees for the performance of audits, for the forfeiture of bonds, or for assessments ordered in addition to court-ordered restitution costs, and monies appropriated or transferred to the fund by the Legislature.
>
> 2. All monies accruing to the credit of the fund are hereby appropriated and may be budgeted and expended by the State Board of Education to reimburse the Office of the State Auditor and Inspector for costs incurred in the performance of special audits conducted pursuant to the provisions of Section 213 of Title 74 of the Oklahoma Statutes.
>
> 3. Prior to approval of any payment from this fund, the State Board of Education shall determine that a school district that is liable for expenses incurred due to the performance of an audit is unable to pay such expenses. Payments from this fund shall only be made to the extent that monies are available in the fund. Expenditures from the fund shall be made upon warrants issued by the State Treasurer against claims filed as prescribed by law with the Director of the Office of Management and Enterprise Services for approval and payment.

53. 74 O.S.2011 § 227.8:

> Notwithstanding the provisions of any other law, any state agency, board, commission, city or town, common school, technology center school, county, institution of higher education, public trust or political subdivision of the state may enter into agreements with the State Auditor and Inspector to perform audits, investigative or consultant services and the entity shall pay the State Auditor and Inspector for the services. Payments made by such entity shall be deposited in the State Treasury to the credit of the State Auditor and Inspector Revolving Fund created by Section 227.9 of this title. Expenses incurred in auditing such books and accounts, including compensation of necessary personnel, including consultants, or causing the books and accounts to be audited, shall be paid by the entity in the same manner as now provided by law for other disbursements.

54. 70 O.S.2011 § 18-104; 70 O.S.2011 § 5-135.

55. 70 O.S.2011 § 18-104 (70 O.S.1991 § 18-104); 70 O.S.2011 § 5-135(L) (70 O.S.1991 § 5-135(L).

56. For example, when officials of an entity possess actual notice of circumstances sufficient to put the officials upon inquiry as to a particular fact within their sphere of official authority, and they omit to make such inquiry with reasonable diligence, they are deemed to have constructive notice of the fact itself. *Manokoune v. State Farm Mut. Auto.*

Ins. Co., 2006 OK 74, ¶ 18, 145 P.3d 1081, 1085-1086 (notice of a fact may be sufficient to put a person upon inquiry as to a particular fact, and when failing to make such inquiry is deemed to have constructive notice of the fact; and constructive notice in some circumstances is imputed as an issue of law based upon a dependent issue of fact); *Tiger v. Verdigris Valley Elec. Coop.*, 2016 OK 74, ¶ 16, 410 P.3d 1007, 1012 (knowledge or notice possessed by an agent while acting within the scope of authority is knowledge or notice attributed to the principal).

57. 70 O.S.2011 § 1-105(C); 70 O.S.2011 § 3-107.1. Cf. 70 O.S.2011 § 23-104 (3) (for purposes of Article 23 of Title 70 State Superintendent of Public Instruction is the executive officer of the State Board of Education).

58. Okla. Const. Art. 13 § 5: (the supervision of instruction in the public schools shall be vested in a Board of Education, and the Superintendent of Public Instruction shall be President of the Board); 70 O.S.2011 § 1-105(B) ("The State Board of Education is that agency in the State Department of Education which shall be the governing board of the public school system of the state.").

59. 70 O.S.2011 § 3-103 ("A quorum of the State Board of Education shall consist of four members. No business may be transacted at any meeting unless a quorum is present and every act of said Board shall be approved by a majority of the membership of said Board.").

60. 1933 OK 521, 25 P.2d 783.

61. 1933 OK 521, 25 P.2d at 787.

62. 1933 OK 521, 25 P.2d at 787 (emphasis added).

63. 1933 OK 521, 25 P.2d at 785 (emphasis added).

64. *Gaasch, Estate of Gaasch v. St. Paul Fire and Marine Insurance Company,* 2018 OK 12, n. 23, 412 P.3d 1151 (Court does not address hypothetical issues in an appeal).

65. A legal duty giving rise to liability corresponds to a correlative legal right secured by a legal remedy. *Hensley v. State Farm Fire and Casualty Company,* 2017 OK 57, n. 17, 398 P.3d 11, citing *Silver v. Slusher,* 1988 OK 53, n. 28, 770 P.2d 878, 884; W. Hohfeld, *Fundamental Legal Conceptions,* 78 (1923) (explaining a right may have a correlative negative or positive legal duty based upon the right at issue), and Leake, *Law of Property in Land*, 1-2 (1st ed., 1874).

66. 12 O.S.2011 § 952 (a):

> (a) The Supreme Court may reverse, vacate or modify judgments of the district court for errors appearing on the record, and in the reversal of such judgment may reverse, vacate or modify any intermediate order involving the merits of the action, or any portion thereof.

67. *Osage Nation v. Bd. of County Commissioners of Osage Cnty.,* 2017 OK 34, n. 20, 394 P.3d 1224, citing *Worsham v. Nix*, 2006 OK 67, ¶ 28, 145 P.3d 1055, 1064 (failure to brief an issue with authority is a waiver of an assignment of error relating to that issue). *See also Matter of Estate of Vose*, 2017 OK 3, n.1, 390 P.3d 238, 242 (argument without supporting authority will not be considered).

68. *Stites v. DUIT Const. Co., Inc.*, 1995 OK 69, n. 10, 903 P.2d 293, 297 ("It is this court's duty to inquire *sua sponte* not only into its own jurisdiction but also into the cognizance of the court whence the case came by appeal or on certiorari.") (collecting cases).

69. *Fehr v. Black Petroleum Corporation*, 1924 OK 903, 229 P. 1048, 1050 (when discussing a claim defendant used the incorrect procedure to challenge the jurisdiction of the trial court, the Supreme Court explained "the question can be raised at any stage of the proceedings, either by motion, or the court may, of its own motion, or whenever its attention is called to the fact, refuse to proceed further and dismiss the case"), citing *Model Clothing Co. v. First National Bank of Cushing,* 1916 OK 852, 160 P. 450. *Cf. Dutton v. City of Midwest City,* 2015 OK 51, ¶ 15, 353 P.3d 532, 538 ("A court has a duty to inquire into whether it possesses jurisdiction over the subject matter of an action that has been brought before the court."); *Sheffer v. Buffalo Run Casino, PTE, Inc.,* 2013 OK 77, 315 P.3d 359 (District Court's *sua sponte* dismissal of action against Peoria Tribe for lack of jurisdiction affirmed on appeal by Court).

70. *FW/PBS v. City of Dallas*, 493 U.S. 215, 231, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990); *United States ex rel. Gen. Rock & Sand Corp. v. Chuska Dev. Corp.*, 55 F.3d 1491, 1495 (10th Cir. 1995). *See also Metallgesellschaft AG v. Sumitomo Corp. of Am.,* 325 F.3d 836, 842 (7th Cir.2003) (a district court may dismiss a case *sua sponte* for lack of Article III standing); *Cf. Kilgore v. Attorney General of Colorado,* 519 F.3d 1084, 1089 (10th Cir. 2008) (federal district court may dismiss a habeas corpus petition *sua sponte* when the face of the petition shows untimeliness in filing).

71. *Powers v. District Court of Tulsa County,* 2009 OK 91, ¶ 16, 227 P.3d 1060, 1072-1073.

72. *Christian v. Gray,* 2003 OK 10, ¶ 45, 65 P.3d 591, 609 (a trial court's exercise of judicial discretion is based upon fixed principles).

73. *Oklahoma Schools Risk Management Trust v. McAlester Public Schools*, 2019 OK 3, ¶ 13, 457 P.3d 997, 1000; *In re Guardianship of Stanfield,* 2012 OK 8, ¶ 27, 276 P.3d 989, 1001.

74. *Hall v. Galmor,* 2018 OK 59, n. 49, 427 P.3d 1052, 1062, citing *J.P. Morgan Chase Bank Nat'l Ass'n v. Eldridge*, 2012 OK 24, ¶ 7, 273 P.3d 62, 65 (quoting *Hendrick v. Walters*, 1993 OK 162, ¶ 4, 865 P.2d 1232, 1234; *In re Estate of Doan*, 1986 OK 15, ¶ 7, 727 P.2d 574, 576).

75. *Hunsucker v. Fallin*, 2017 OK 100, ¶3, 408 P.3d 599, 602.

76. *See, e.g., Lexmark Intern., Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014) (discussing difference between Article III standing and principles including a (1) prohibition on a litigant raising another person's legal rights, (2) the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and (3) the requirement that a plaintiff's complaint fall within the zone of interests protected by the statute invoked); *Horne v. Flores,* 557 U.S. 433, 445, 129 S.Ct. 2579, 174 L.Ed.2d 406 (2009) (standing is a threshold issue and "an essential and unchanging part of the case-or-controversy requirement of Article III").

77. *See, e.g., Hampton v. Clendinning*, 1966 OK 51, 416 P.2d 617 (plaintiff's cause of action at the time it was filed did not exist in Oklahoma due to doctrine of intrafamily immunity and prohibition issued to prevent further exercise of jurisdiction against the defendant); *Bd. of Cnty. Comr's of Cleveland Cnty. v. City of Norman*,1970 OK 126, 472 P.2d 910 (District Court lacked jurisdiction that was proper before Corporation Commission); *Perry v. Snyder,* 1919 OK 140, 181 P. 147 (proceeding for ejectment lacked a required element when the proceeding was based upon a void tax deed issued at a time when not authorized by statute); *Fehr v. Black Petroleum Corporation*, 1924 OK 903, 229 P. 1048, 1051 (a jurisdictional issue was presented when an Oklahoma constitutional provision was not self-executing and a statute was created providing a penalty to be recovered at the suit of the State for a violation of this section of the constitution, and the statutory remedy was available only in a suit brought by the State through its proper officers, and suit was not available to the individual).

78. *Andrew v. Depani-Sparks,* 2017 OK 42, ¶¶ 35-38, 396 P.3d 210, 223-224.

79. *Conterez v. O'Donnell*, 2002 OK 67, n. 5, 58 P.3d 759, 761 (collecting authority, and noting the adequate opportunity which occurred in the Supreme Court to challenge the *sua sponte* actions by a different court).

80. *Salazar v. City of Oklahoma City,* 1999 OK 20, n. 17, 976 P.2d 1056, 1062 (collecting cases). *See also Nelson v. Pollay,* 1996 OK 142, n. 35, 916 P.2d 1369, 1376.

81. *Hedges v. Hedges*, 2002 OK 92, ¶ 22, 66 P.3d 364, 372-373 (in an equitable proceeding the circumstances called for an equitable result which required giving a party a fair opportunity to litigate a time-bar issue raised by filings in the trial court).

82. 585 U.S. ___, 138 S.Ct. 1916, 201 L.Ed.2d 313 (2018).

83. *Gill*, 585 U.S. ___, 138 S.Ct.1916, 1933-1934.

84. *Gill*, 585 U.S. ___, 138 S.Ct.1916, 1934.

85. *Gill*, 585 U.S. ___, 138 S.Ct.1916, 1934.

86. *Gill*, 138 S.Ct. 1916, 1933 ("the fundamental problem with the plaintiffs' case as presented on this record. It is a case about group political interests, not individual legal rights.").

87. *State ex rel. Howard v. Oklahoma Corp. Commission*, 1980 OK 96, n. 8, 614 P.2d 45, 51 (one type of *publici juris* controversy adjudicates a "public right").

88. Diller, Paul A., *The City and the Private Right of Action*, 64 Stan. L. Rev. 1109, 1116 (2012). *See also* Barnett, Randy E., *Foreward: Four Senses of the Public Law-Private Law Distinction*, 9 Harv. J.L. & Pub. Pol'y 267, 267-268 (1986) (different approaches to public law discussed); Nicholas, Barry, *An Introduction to Roman Law* (Oxford: Clarendon Press, 1962) 208 (historical approach discussing public-law controversies in Roman law).

89. *Draper v. State*, 1980 OK 117, 621 P.2d 1142, (a legal challenge to legislation containing appropriations to the State Board of Education for the funding of common schools was *publici juris*).

90. *See also Frank v. Gaos*, ___ U.S. ___, 139 S.Ct. 1041, 1043-1044, 203 L.Ed.2d 404 (2019) ("Because there remain substantial questions about whether any of the named plaintiffs has standing to sue in light of our decision in *Spokeo, Inc. v. Robins*, 578 U. S. ___, 136 S.Ct. 1540, 194 L. Ed.2d 635 (2016), we vacate the judgment of the Ninth Circuit and remand for further proceedings.").

91. Dean Edwin Chemerinsky divides justiciability into the four distinct doctrines of standing, ripeness, mootness, and political question; and he notes the first three are constitutional while the fourth is prudential. *See* Edwin Chemerinsky, *A Unified Approach to Justiciability*, 22 Conn. L. Rev. 677, 677-78, 683 (1990).

92. Appellants' Record on Accelerated Appeal, Vol II, Tab 12, Plaintiffs' Response in Opposition to Intervenors' Motion for Summary Judgment, p. 13, citing *Independent School Dist. No. I-20 of Muskogee County v. Oklahoma State Dept. of Education*, 2003 OK 18, ¶ 17, 65 P.3d 612.

93. *State ex rel. State Ins. Fund v. JOA, Inc.*, 2003 OK 82, ¶¶ 6 – 7, 78 P.3d 534, 536 – 537. *See also State ex rel. Oklahoma Bar Ass'n v. Knight,* 2015 OK 59, n. 22, 359 P.3d 1122, 1129.

94. Plaintiffs' Motion for Summary Judgment, pgs. 6-7.

70 O.S.2011 § 18-109.7:

A. Pursuant to Section 12a of Article X of the Oklahoma Constitution, there is hereby created in the State Treasury a fund to be designated as the "Common School Fund". Monies from this fund shall be apportioned by the State Treasurer for distribution as provided for by the Legislature through the State Aid Formula for the benefit of the common schools of this state.

B. Beginning January 1, 1991, taxes collected on public service corporation property for the benefit of the common schools pursuant to paragraph 2 of subsection B of Section 12a of Article X of the Oklahoma Constitution, except that portion of such taxes collected for the benefit of school districts in this state pursuant to Section 26 of Article X of the Oklahoma Constitution and that portion of such taxes collected for purposes of raising money for a building fund for a school district pursuant to Section 9 of Article X of the Oklahoma Constitution, and taxes collected on locally assessed commercial/industrial real and personal property for the benefit of the common schools pursuant to paragraph 2 of subsection C of Section 12a of Article X of the Oklahoma Constitution, except that portion of such taxes collected for the benefit of school districts in this state pursuant to Section 26 of Article X of the Oklahoma Constitution and that portion of such taxes collected for purposes of raising money for a building fund for a school district pursuant to Section 9 of Article X of the Oklahoma Constitution, together with any revenues accruing to it pursuant to law and any money appropriated to it by the Legislature shall be paid to the State Treasurer to be placed in the Common School Fund.

C. Beginning July 1, 1991, gross production taxes collected on oil and gas which are apportioned for common school purposes pursuant to the provisions of Section 1004 of Title 68 of the Oklahoma Statutes, motor vehicle taxes and fees collected pursuant to the Oklahoma Vehicle License and Registration Act which are apportioned for common school purposes pursuant to the provisions of Section 1104 of Title 47 of the Oklahoma Statutes and taxes levied upon rural electric cooperative corporations which are apportioned for common school purposes pursuant to the provisions of Section 1806 of Title 68 of the Oklahoma Statutes together with any revenues accruing to it pursuant to law and any money appropriated to it by the Legislature shall be paid to the State Treasurer to be placed in the Common School Fund.

D. The provisions of this section shall not have the force and effect of law unless and until the voters of the State of Oklahoma approve amendments to Section 12a of Article X of the Oklahoma Constitution contained in Enrolled House Joint Resolution No. 1005 of the 1st Extraordinary Session of the 42nd Oklahoma Legislature.

95. Election was held on June 26, 1990, State Question No. 634, Legislative Referendum No. 282, proposed amending Okla. Const. Art 10 §§ 9, 10, & 12a, and the proposed amendments were rejected by the people with a vote: Yes-110,669; No-132,907. The June 26th election also had on the ballot Legislative Referendum No. 281 (proposed amendment to Okla. Const. Art. 13 § 5, rejected), Legislative Referendum No. 283 (proposed amendment to Okla. Const. Art. 11 § 3, rejected), and Legislative Referendum No. 283 (proposed amendment to Okla. Const. Art. 13 § 4, rejected). *See* Oklahoma State Election Board, https://www.ok.gov/elections/documents/1990_RESULTS.pdf.

96. After the defeat in the election held June 26, 1990, and prior to the "effective date" of January 1, 1991, listed in legal publications for § 18-109.7, additional statewide elections held during the 1990 calendar year were held on: 1. August 28, 1990 (a primary election which included Legislative Referendum No. 277 (amending Okla. Const. Art 2 § 19), Legislative Referendum No. 278 (amending Okla. Const. Art. 2§ 24), Legislative Referendum No. 279 (amending Okla. Const. Art. 10 § 35), and Legislative Referendum No. 280 (amending Okla. Const. Art. 10 § 27B); 2. September 18, 1990 (runoff primary election which included Initiative Petition No. 340 (creating Okla. Const. Art. 29), Initiative Petition No. 346 (adding Okla. Const. Art. 5 § 17A), Legislative Referendum No. 286 (amending Okla. Const. Art. 28 § 8); 3. November 6, 1990 (general election which included Legislative Referendum No. 285 (defeating proposed amendment to Okla. Const. Art. 28 § 6), and Legislative Referendum No. 287 (creating Okla. Const. Art. 10 § 6c). *See* Oklahoma State Election Board website for results of 1990 elections cited in note 95 supra. No statewide election in 1990 after the June 26th election proposed constitutional amendments as those proposed on June 26, 1990.

97. House Bill No. 1017 states § 93 would become effective on January 1, 1991. Oklahoma Sess. Laws Supp., Laws 1989, 1st Extra. Sess. C. 2, § 129.

The current Thomson Reuters (West) publications show an effective date of "Jan. 1, 1991" for 70 O.S. §18-109.7. *See* (1) Oklahoma Statutes 2011, Vol. 7, Titles 70-85, at pg. 295, § 18-109.7, and (2) Oklahoma Statues Annotated, (bound volume), Title 70 Schools, Ch. 1, Articles VII to End, Chs. 2-8, February 8, 2018, pgs. 226-227, § 18-109.7.

98. 68 O.S.2011 § 1806 (b)(2):

Beginning July 1, 1991, if the amendment to Section 12a of Article X of the Constitution of the State of Oklahoma contained in Enrolled House Joint Resolution No. 1005 of the 1st Extraordinary Session of the 42nd Oklahoma Legislature is approved by the people, the remaining ninety-five percent (95%) of all monies collected under this act shall be remitted to the State Treasurer to be deposited in the Common School Fund.

99. *See* (1) Oklahoma Statutes 2011, Vol. 6, Titles 63-69, pg. 1106, 68 O.S. 1806, editorial note no. 2, and (2) Oklahoma Statues Annotated, (bound volume), Title 68 Revenue and Taxation, §§ 1001 to 2357.403, pg. 523, 68 O.S. § 1806, editorial note no. 2.

100. Okla. Const. Art. 10 § 12a: "All taxes collected for the maintenance of the common schools of this State, and which are levied upon the property of any railroad company, pipe line company, telegraph company, or upon the property of any public service corporation which operates in more than one county in this State, shall be paid into the Common School Fund and distributed as are other Common School Funds of this State."

101. *Linthicum v. School Dist. No. 4 of Choctaw Cnty.*, 1915 OK 594, 149 P. 898, ("This latter contention, it seems to us, is well taken . . . it is impossible to conclude that the people in adopting said section 12a intended it to go into effect without the aid of additional legislation.").

102. Okla. Sess. Laws 1989, 1st Extra. Sess. c. 2, § 93.

103. 68 O.S.1991 § 1004(4)(b) (providing if the proposed amendment to Okla. Const. Art. 10, § 12a according to the enrolled House Joint Resolution No. 1005 was approved by the People, then a certain share of sum collected from the gross production tax described would be remitted to the State Treasurer for the common school fund).

104. Okla. Sess. Laws 1999, 1st Extra. Sess. c. 1, § 3.

105. Okla. Sess. Laws 1989, 1st Extra. Sess. c. 2, § 94.

106. 47 O.S.1991 § 1104(A)(1)(b) & § 1104(B).

107. 47 O.S.1991 § 1104(A)(1)(b) was amended by Okla. Sess. Laws 1995, c.305, § 1, by removing the reference to the legislative referendum and its stated percentage to be remitted to the State Treasurer for the Common Fund, and added stated percentages apportioned to school districts in 47 O.S. § 1104(A)(1)(a).

108. Okla. Sess. Laws 1997, c.294, § 1.

109. For example, the Education Reform Revolving Fund was created with dedicated revenues to be expended for the purposes stated in H.B. No. 1017. See 62 O.S.Supp.2011 §§ 34.88, 34.89, 18-400.

110. Inclusion of an enacted statute in a subsequent decennial codification is a type of amendment pursuant to Okla. Const. Art. 5 § 43, and this new codification will relate back to the statute's creation and cure a procedural defect in the original enactment, such as the original legislation's title. *Allen v. Retirement System for Justices & Judges*, 1988 OK 99, 769 P.2d 1302, 1305; *Southwestern Bell Telephone Co. v. Oklahoma Corp. Commission*, 1994 Ok 142, 897 P.2d 1116, n. 13 & 1123-1124 (Opala, J., concurring). When a statutory right is created which did not exist at the common law and the same statute fixes the conditions upon which the right may be asserted, the conditions are an integral part of the right thus granted and are substantive conditions. *Hughes Drilling Company v. Morgan*, 1982 OK 77, 648 P.2d 32, 35. Provisions in 70 O.S. § 18-109.7 did not exist at common law, the condition on § 18-109.7 taking effect is a substantive condition for the purpose of applying *Allen,* and the new codification with each decennial publication could not make the § 18-109.7 legally effective in the face of its substantive condition limiting effectiveness.

111. 70 O.S.2011 § 18-103, states in part: "There shall be apportioned and disbursed annually by the State Board of Education, from appropriations made by the Legislature for this purpose . . . such sums of money as each school district may be qualified to receive under the provisions of this article."

70 O.S.2011 § 18-105, states in part: "The State Board of Education shall furnish the Director of the Office of Management and Enterprise Services with a copy of the apportionments made from the funds appropriated for each fiscal year to each of the several school districts of the state, and warrants shall be drawn by the State Treasurer against appropriations for each fiscal year in accordance with such apportionments."

112. *Reynolds v. Fallin,* 2016 OK 38, ¶ 15, 374 P.3d 799 (the expressed legislative intent of the Legislature to spend public moneys for an identified purpose allowed by law is sufficient to conclude an appro-

priation was made); *Calvey v. Daxon*, 2000 OK 17, ¶¶ 22-23, 997 P.2d 164 (Legislature has authority to transfer existing revenues and unappropriated money from one fund to another); *Coffee v. Henry*, 2010 OK 4, ¶ 14, 240 P.3d 1056, 1061 (Kauger, J., concurring) ("this state is committed to the rule that no particular words need be used in making an appropriation, and that an appropriation may be implied where the language used reasonably leads to the conclusion that such was the intention of employment of those words.") quoting *Riley v. Carter*, 1933 OK 448, 25 P.2d 666, 672.

113. *Miller v. Childers*, 1924 OK 675, 238 P. 204, 208 ("it would seem that everything authorized by law to be paid out of the state treasury is payable out of the general fund, if not specially made payable out of some specific fund") quoting with approval *Proll v. Dunn*, 80 Cal. 220, 22 P. 143 (1889).

114. *See, e.g.*, Enrolled House Bill No. 3513, § 16 (54th Okla. Legis., 2nd Sess., eff. July 1, 2014) ("The State Board of Education is authorized to request the Office of Management and Enterprise Services to transfer appropriated funds to the appropriate dispensing fund.").

115. *Oklahoma Tax Commission v. Liberty National Bank & Trust Co.*, 1955 OK 208, 289 P.2d 388, 392-393 (taxpayer's long-used accounting practice not expressly prohibited by statute and acquiesced in by Tax Commission could be used for interpreting statutes).

The long-held construction placed on a statute by officers in the discharge of their duties is a rule of judicial interpretation based upon an existing valid statute the officials are construing or interpreting. *Murray County v. Homesales, Inc.*, 2014 OK 52, 330 P.3d 519 (The long-held construction placed on a statute by officers in the discharge of their duties is a rule of judicial interpretation for a statute).

116. 70 O.S.2011 § 200.1. Paragraph "B" of this statute states: "The State Department of Education shall retain not less than one and one-half percent (1 1/2%) of the total funds appropriated for financial support of schools, to be used to make midyear adjustments in State Aid and which shall be reflected in the final allocations."

117. *Southwestern Bell Telephone Co. v. Oklahoma County Excise Bd.*, 1980 OK 97, 618 P.2d 915, 921 (good faith reliance on a statute may be considered when determining prospective invalidity); *Campbell v. White*, 1993 OK 89, 856 P.2d 255, 262 (we have made our rulings prospective in effect when the statute involved may change an appropriated budget); *State ex rel. Nesbitt v. Ford*, 1967 OK 186, 434 P.2d 934, 940 (Court will withhold a writ of mandamus when confusion to the public purse would result from its issuance).

118. We have not given the parties an opportunity to comment on the Court taking judicial notice of the website of the State of Oklahoma Election Board. The lack of an opportunity for comment by the parties is of no legal consequence since we assume for the purpose of this controversy an interest similar to that expressed in the statute. *See, e.g., Matter of M.A.H.*, 1993 OK 92, 855 P.2d 1066 (discussed party's opportunity to challenge judicial notice) citing, *Callison v. Callison*, 1984 OK 7, 687 P.2d 106, 112.

119. *Knight ex rel. Ellis v. Miller*, 2008 OK 81, ¶ 11, 195 P.3d 372, 375, citing *Democratic Party of Oklahoma v. Estep*, 1982 OK 106, 652 P.2d 271, 274.

120. *See, e.g., Murray County v. Homesales, Inc.*, 2014 OK 52, ¶¶ 9-15, ¶¶ 16-20, 330 P.3d 519, 524-527, 527-529 (statutes did not grant a county clerk the authority to sue to collect unpaid documentary stamp taxes, the Legislature did not intend for a county to have direct enforcement authority to collect these unpaid taxes, but a county had standing to seek declaratory relief to adjudicate local taxes are due).

121. *Holbert v. Echeverria*,1987 OK 99, 744 P.2d 960, 963 (explaining a statutory regulatory scheme does not necessarily create a judicially enforceable right of action, and adopting three prongs of the four-prong test in *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), wherein one of the prongs is whether the statute provides some intent, explicit or implicit, that the legislative body intended the party to possess a judicial remedy to enforce a statute). *See also Murray County v. Homesales, Inc.*, 2014 OK 52, at ¶¶ 9-15, 330 P.3d at 524-527 (county lacked direct enforcement authority to enforce statute). *See also Fehr v. Black Petroleum Corporation, supra* at notes 69 and 77.

122. 2014 OK 52, 330 P.3d 519.

123. *Murray Cnty.*, 2014 OK 52, at ¶ 18, 330 P.3d at 528, explaining *Independent School District No. 9 v. Glass*, 1982 OK 2, 639 P.2d 1233 (school district possessed standing), and *Indep. Sch. Dist. No. 5 of Tulsa County v. Spry*, 2012 OK 98, 292 P.3d 19 (school districts did not possess standing).

124. *See, e.g., State ex rel. Ind. School Dist. No. 1 Okla. Cnty. v. Barnes*, 1988 OK 70, 762 P.2d 921, 923 (a school district has a direct and pecuniary interest in protecting the revenues used to support it so as to have standing to bring an action for mandamus to compel compliance with a statutory rule requiring distribution of unprotested ad valorem tax revenue), explaining *State ex rel. Tulsa Classroom Teacher's Association, Inc. v. Board of Equalization, Tulsa County*, 1979 OK 129, 600 P.2d 861.

125. *Independent School Dist. No. 9 of Tulsa Cnty. v. Glass*,1982 OK 2, 639 P.2d 1233, 1237.

126. *Glass*, 639 P.2d 1233, 1237.

127. 70 O.S.2011 § 18-103:

> There shall be apportioned and disbursed annually by the State Board of Education, from appropriations made by the Legislature for this purpose and from funds derived from other sources provided by law for this purpose, to the several school districts of the state, such sums of money as each school district may be qualified to receive under the provisions of this article. The methods of apportionment and disbursements contained herein shall remain in force until the same are amended or repealed by the Legislature. The State Board of Education will furnish the Legislature each year the recommended use of any new educational funds, listing priorities and percentage of new funds recommended for each priority item listed.

128. 70 O.S.Supp. 2013 § 3-104 (3)(a) states in part: "Appropriations therefor shall be made in lump-sum form for each major item in the budget as follows: a. State Aid to schools." *See also Southern Corrections Systems, Inc. v. Union Public Schools*, 2002 OK 93, ¶ 16, 64 P.3d 1083, 1089 ("Funding for public education through State aid is appropriated by the Legislature and administered by the State Board of Education.").

129. We have not provided the parties with an opportunity to comment on our use of a State of Oklahoma website to show the nature of State Aid as an appropriation of State funds. This lack of opportunity for comment has no legal consequences because the website is the official website for the OSDE, a party to the litigation, and the nature of State Aid funds as a State appropriation is recognized by all parties in their filings.

130. OSDE, Oklahoma School Finance Document: Technical Assistance Document, Sources of Revenue State Formula Penalties/Adjustments, Financial Services Division, State Aid Section, Revised December 2018, pg. 9; OSDE, School Finance: Technical Assistance Document, Sources of Revenue, State Aid Formula, Penalties/Adjustments, Policies/Procedures, Financial Services Division, Revised July 2009, pg. 11.

The 2018 report states it is issued by the OSDE as authorized by 70 O.S. § 3-104, and available through the agency website, at https://sde.ok.gov/sites/default/files/documents/files/FY%202019%20TAD%2012.11.18%20mp_1.pdf. The 2009 report is issued by the OSDE and available through the agency website at sde.ok.gov/sde/sites/ok.gov.sde/files/TechAsstDoc.pdf.

131. *Battles v. State ex rel. Oklahoma Commission for Crippled Children*, 1951 OK 313, 244 P.2d 320, 322 (a constitutional issue not expressly raised by the parties but a necessary part of the pled controversy and involving public revenue and taxation should be addressed by the Court).

132. *Reynolds v. Fallin*, 2016 OK 38, ¶¶ 26-27, 374 P.3d 799, 811-812.

133. 1980 OK 36, 608 P.2d 1139.

134. 1968 OK 118, 462 P.2d 536.

135. *City of Sand Springs*, 608 P.2d at 1150.

> We have noted the phrase "special fund" may be used to describe different types of funds which must be analyzed to determine their legal attributes. We need not catalogue the different types of "special funds" to adjudicate this appeal. *See, e.g., Boswell v. State*, 1937 OK 727, 74 P.2d 940, 950 (discussing different uses for the phrase "special fund" and noting the difference between (1) a special fund created by a levy of a specific tax for a specific purpose and distinguished from a general revenue fund as used in *Edwards v. Childers*, 1924 OK 652, 228 P. 472, and (2) in *Baker v. Carter*, 1933 OK 484, 25 P.2d 747 where the phrase refers to a special fund generated by income to pay for a self-liquidating project).

136. 1924 OK 652, 228 P. 472.

137. *Edwards v. Childers*, 1924 OK 652, 228 P. 472, 477.

138. *Edwards v. Childers*, 1924 OK 652, 228 P. at 477, quoting with approval *Commonwealth ex rel. Bell v. Powell*, 249 Pa. 144, 94 A. 746, 750 (1915).

139. *See, e.g.*, Oklahoma Education Lottery Revolving Fund (3A O.S.Supp.2019 § 713); Education Reform Revolving Fund (62 O.S.Supp.2017 § 34.89); Common Education Technology Revolving Fund (62 O.S.Supp.2012 § 34.90); Public School Classroom Support Revolving Fund (70 O.S.Supp.2012 § 1-123); School Lunch Workshop Revolving Fund, and the Statistical Services Revolving Fund (70 O.S.Supp.2013 § 3-104); Curriculum Materials Revolving Fund (70 O.S.Supp.2012 § 3-109); Oklahoma Teacher Recruitment Revolving Fund (70 O.S.Supp.2017 § 6-132); Teachers' Competency Examination Revolving Fund (70 O.S.Supp.2012 § 6-191); Education Leadership Oklahoma Revolving Fund (70 O.S.Supp.2012 § 6-204.3); Oklahoma National Board Certification Revolving Fund (70 O.S.Supp.2012 § 6-204.4); Professional Development Institutes Revolving Fund (70 O.S.Supp.2012 § 6-204.5); Oklahoma School Psychologist, Speech-

Language Pathologist, and Audiologist National Certification Revolving Fund (70 O.S.Supp.2012 § 6-206.1); Cameras for School Bus Stops Revolving Fund (70 O.S.Supp.2019 § 9-119); Personal Financial Literacy Education Revolving Fund (70 O.S.Supp.2017 § 11-103.6h); Oklahoma Special Education Assistance Fund (70 O.S.Supp.2012 § 13-114.1); Oklahoma Early Intervention Revolving Fund (70 O.S.Supp.2013 § 13-124.1); Adult Education Revolving Fund (70 O.S.Supp.2015 § 14-133); and the Education Reform Revolving Fund (70 O.S.Supp.2012 § 18-400).

140. We also address the possibility of funding State Aid from a source other than the general revenue fund, but nevertheless lapsing due to language in an appropriations Bill at ¶¶ 93-98 herein.

141. We need not analyze hypothetical issues related to a corrected apportionment of State Aid or if a retroactive deemed carryover in a general fund for a former fiscal year is created thereby, or if a corrected apportionment could be used for retroactively reducing State Aid calculations in former years, or the potential effect, if any, on former Estimates of Needs and Financial Statements, or the effect of recent legislation such as the Legislature's 2020 amendment in House Bill 3964 and relating to a carryover penalty. *See, e.g.*, 70 O.S. 2011 §5-157, eff. July 1, 1996, (deficit budget prohibited); 70 O.S.2011 § 18-200.1 (G) (school district State Aid reduced from carryover in school district's general fund); 70 O.S.2011 § 18-104 (Estimate of Needs and Financial Statement procedure); 2020 Okla.Sess.Law Serv., c. 128, § 1 (H.B. 3964) (West), (approved May 21, 2020). The audit of Western Heights School District submitted by plaintiffs on appeal does not indicate whether the State Auditor and Inspector considered such issues.

142. *Riley v. Carter,* 1933 OK 448, 25 P.2d 666, 675-676.

143. *Liddell v. Heavner,* 2008 OK 6, ¶ 16, 180 P.3d 1191, 1199 (absent ambiguity the plain language of the Constitution is applied as an expression of intent from the Framers proposing it and the People adopting it); *Oklahoma Electric Cooperative, Inc. v. Oklahoma Gas & Electric Co.,* 1999 OK 35, ¶ 7, 982 P.2d 512, 514 (same).

144. *See, e.g.*, Oklahoma State Department of Education, 2013-2014 Annual Report: Statistical Report on Oklahoma Schools and the State Department of Education (April 2015), at p. 3, stating State-Appropriated 2013-2014 Revenue (non-dedicated) ($2,299,245,013.00), and State-Dedicated Revenue 2013-2014 ($474,946,865); Actual 2013-2014 Average Daily Attendance (ADA) (639,376.27); Actual 2013-2014 Average Daily Membership (ADM) (675,534.35); Actual 2013-2014 Weighted ADM (1,076,940.88); and Weighted ADM used for State Aid (1,088,587.43); Oklahoma State Department of Education, 2012-2013 Annual Report: Statistical Report on Oklahoma Schools and the State Department of Education (April 2014), at p. 3, stating the appropriation amounts as well as ADAs and ADMs. See https://sde.ok.gov/sites/ok.gov.sde/files/documents/files/2013-14%20Annual%20Report%20Final.pdf and https://sde.ok.gov/sites/ok.gov.sde/files/documents/files/Corrected%202012-13%20Annual%20Report.pdf.

145. There is a presumption legislation is constitutional. *Wilson v. Fallin*, 2011 OK 76, ¶ 16, 262 P.3d 741, 746. An assumed constitutional $42.00 would be deemed to have been paid first in any apportionment to a school district. *City of Del City v. Fraternal Order of Police, Lodge No. 114,* 1993 OK 169, 869 P.2d 309, 315 (a constitutionally-imposed funding obligation must be satisfied prior to a legislatively-imposed funding obligation), discussing *In Protest of Kansas City So. Ry. Co.,* 1932 OK 328, 11 P.2d 500, 509 (1932). Further, the Legislature determines fiscal policy, and a specific grant of grant of authority in the Constitution, upon any subject whatsoever, such as a $42.00 specified amount, shall not work a restriction, limitation, or exclusion of such authority upon the same or any other subject or subjects whatsoever. *Naifeh v. State ex rel. Oklahoma Tax Commission*, 2017 OK 63, ¶ 11, 400 P.3d 759, 763; Okla. Const. Art. 5 § 36.

146. *Fair School Finance Council of Oklahoma, Inc. v. State*, 1987 OK 114, 746 P.2d 1135, 1149.

147. 1955 OK 229, 287 P.2d 704.

148. 1955 OK 229, 287 P.2d at 707 (explanatory phrase added).

149. 1955 OK 229, 287 P.2d at 707.

150. 1952 OK 80, 242 P.2d 427.

151. *Fortinberry Co. v. Blundell,* 242 P.2d at 431, citing *Oklahoma Tax Commission v. Fortinberry Company, Inc*., 1949 OK 75, 207 P.2d 301.

152. *Fortinberry Co. v. Blundell*, 242 P.2d at 433 (the 1937 Act became a part of plaintiffs' contract, and could not be repealed or amended without making adequate provision to meet the existing obligation of plaintiffs' contract).

153. *Fortinberry Co. v. Blundell*, 242 P.2d at 434.

154. *Fortinberry Co. v. Blundell*, 242 P.2d at 431.

155. *Fortinberry Co. v. Blundell*, 242 P.2d at 433.

156. 1940 OK 326, 103 P.2d 933.

157. *Fortinberry,* 242 P.2d at 434, citing *Carter v. Miley,* 1940 OK 326, 103 P.2d 933.

158. *State ex rel. Telle v. Carter,* 1934 OK 702, 39 P.2d 134, 140.

159. *Protest of Trimble,* 1931 OK 347, 300 P. 406, 409, 410.

160. Separation of powers, case or controversy, appropriations clause, and other constitutional concepts which would prevent a court from enforcing a lapsed appropriation are not novel applications of law. *See, e.g., Office of Personnel Management v. Richmond*, 496 U.S. 414, 424-425, 110 S.Ct. 2465, 2471, 110 L.Ed.2d 387 (1990) (Appropriations Clause application and noting "Any exercise of a power granted by the Constitution to one of the other branches of Government is limited by a valid reservation of congressional control over funds in the Treasury."); *City of Houston, Tex. v. Dep't of Hous. & Urban Dev*., 306 U.S. App.D.C. 313, 24 F.3d 1421, 1424 (D.C. Cir. 1994) ("It is a well-settled matter of constitutional law that when an appropriation has lapsed or has been fully obligated, federal courts cannot order the expenditure of funds that were covered by that appropriation."); *National Ass'n of Regional Councils v. Costle,* 184 U.S.App.D.C. 98, 564 F.2d 583, 589-590 (D.C.Cir. 1977) (unless specifically granted the power, a court "simply lacks the power to order the obligation of public funds, regardless of how appropriate a remedy that order would be"); 31 U.S.C.A. § 1552 (a) ("On September 30th of the 5th fiscal year after the period of availability for obligation of a fixed appropriation account ends, the account shall be closed and any remaining balance (whether obligated or unobligated) in the account shall be canceled and thereafter shall not be available for obligation or expenditure for any purpose.).

161. *State ex rel. Board of Ed. of Independent School Dist. No 17, etc., v. State Bd. of Education*, 1955 OK 305, 295 P.2d 279, 280 ("We are unable to issue a writ of mandamus requiring a reapportionment of State Equalization Aid without facts which would enable us to include in the order the amounts that should be reappropriated to the respective school districts.").

162. *Movants to Quash Grand Jury Subpoenas v. Powers*, 1992 OK 142, 839 P.2d 655, 656; *Ex Parte McNaught,* 1909 OK 37, 1909 OK CR 3, 100 P.27, 31.

163. *Consolidated Grain & Barge Co. v. Structural Systems, Inc.,* 2009 OK 14, ¶¶ 10-11, 212 P.3d 1168, 1171-1172 (statute of repose marks the boundary of a substantive right); *Neer v. State ex rel. Oklahoma Tax Commission*, 1991 OK 41, ¶ 2, 982 P.2d 1071 (legislatively created mandatory time barrier used to deny taxpayer's refund was similar to a statute of repose).

164. *Betts v. Commissioners of Land Office*, 1910 OK 51, 110 P. 766, 770.

165. *Southwestern Bell Telephone Co. v. Oklahoma Corp. Commission*, 1994 OK 142, 897 P.2d 1116, 11120, quoting *Scripps-Howard Radio, Inc. v. Federal Communications Commission*, 316 U.S. 4, 62 S.Ct. 875, 86 L.Ed. 1229 (1942) (explaining importance of a judicial stay in an administrative appeal).

166. 1980 OK 36, 608 P.2d 1139.

167. *City of Sand Springs,* 608 P.2d at 1149.

168. 1924 OK 652, 228 P. 472.

169. *City of Sand Springs,* 1980 OK 36, 608 P.2d at 1149, discussing *Edwards v. Childers,* 608 P.2d at 1149.

170. 1910 OK 47, 107 P. 159.

171. *Edwards*, 228 P. at 475-476.

172. *Edwards,* 228 P. at 475.

173. *Edwards,* 228 P. at 475.

174. *Edwards,* 228 P. at 476.

175. *Clay v. Independent School Dist. No. 1 of Tulsa Cnty*, 1997 OK 13, 935 P.2d 294, 304 ("A writ [of mandamus] will issue to compel a board to make appropriations required by constitutional or statutory provisions."); *State Highway Commission v. Green – Boots Const. Co.*, 1947 OK 221, 187 P.2d 209, 214 (The rule is well established that a writ of mandamus may not lawfully issue to control a decision of an officer vested with discretion, but mandamus will lie to correct a gross abuse of discretion by an official acting wholly through fraud, caprice, or by purely arbitrary decision and without reason.).

176. *In re De-Annexation of Certain Real Property from City of Seminole*, 2007 OK 95, ¶ 13, 177 P.3d 551, 555, relying on *R. R. Tway, Inc. v. Oklahoma Tax Commission*, 1995 OK 129, 910 P.2d 972; *Tate v. Browning – Ferris, Inc.*, 1992 OK 72, n. 36, 833 P.2d 1218, 1226; and *Stallings v. Oklahoma Tax Commission*, 1994 OK 99, 880 P.2d 912, 917 – 918.

177. *Young v. Station 27, Inc.*, 2017 OK 68, ¶ 23, 404 P.3d 829, 841-842 (concluding a plaintiff's claim in District Court was governed by a statute and not common-law public policy tort, in part because of the rule where the common law provides a remedy and another remedy is provided by statute, the statutory remedy is merely cumulative unless the statutory remedy declares itself to be exclusive).

178. *In re Initiative Petition No. 397, State Question No. 767*, 2014 OK 23, ¶25, 326 P.3d 496, 507.

179. *St. Paul Fire & Marine Ins. Co. v. Getty Oil*, 1989 OK 139, 782 P.2d 915, 920 (by defining the perimeters of the substantive right a statute of repose "in effect adds an additional element to tort claims enumerated thereunder"); *Neer v. State ex rel. Oklahoma Tax Commission,*

1999 OK 41, ¶ 19, 982 P.2d 1071, 1078-1079 (defining a statute of repose).

180. *Clay v. Independent School Dist. No. 1 of Tulsa Cnty*, 1997 OK 13, n. 22, 935 P.2d 294, 305.

181. Enrolled Senate Bill No. 2127 (54th Okla. Legis., 2nd Sess., eff. July 1, 2014); Enrolled House Bill No. 3513 (54th Okla. Legis., 2nd Sess., eff. July 1, 2014).

182. S.B. No. 2127 appropriations §§ 1-14: § 1 (general revenue fund for public schools); § 2 (Education Reform Revolving Fund created in 62 O.S. § 34.89) § 3 (Common Education Technology Revolving Fund); § 4 (Mineral Leasing Fund appropriated to State Board of Education); § 5 (Mineral Leasing Fund appropriated to State Board of Education); § 6 (Oklahoma Education Lottery Trust Fund); § 7 (Oklahoma Education Lottery Trust Fund); § 8 (general revenue fund for public schools); § 9 (general revenue fund for the purchase of textbooks and instructional materials); § 10 (general revenue fund for public schools); § 11 (Oklahoma Education Lottery Trust Fund transfer of specific funds to the School Consolidation Assistance Fund); § 12 (Oklahoma Education Lottery Trust Fund transfer of specific funds to the School Consolidation Assistance Fund); § 13 (Oklahoma Education Lottery Trust Fund transfer of specific funds to the Teachers' Retirement System Dedicated Revenue Revolving Fund); and § 14 (Oklahoma Education Lottery Trust Fund transfer of specific funds to the Teachers' Retirement System Dedicated Revenue Revolving Fund).

183. *Maule v. Indep. Sch. Dist. No. 9,* 1985 OK 110, 714 P.2d 198, 203 (notes omitted).

184. *Mariani v. State ex rel. Okla. State Univ.*, 2015 OK 13, n.7, 348 P.3d 194, 200.

185. *See Grisham v. City of Oklahoma City*, and *Woods Development Co. v. Meurer Abstract, supra* at note 43, and *Velasco v. Ruiz, supra,* at note 44.

186. *Hunsucker v. Fallin*, 2017 OK 100, ¶ 7, 408 P.3d 599, 603; *Morton v. Adair County Excise Bd.*, 1989 OK 174, 780 P.2d 707, 709.

187. *Independent School District No. 9 v. Glass*, 1982 OK 2, 639 P.2d 1233.

2020 OK 57

IN RE: STATE QUESTION No. 807, INITIATIVE PETITION No. 423 PAUL TAY, Petitioner, v. RYAN KIESEL and MICHELLE TILLEY, Respondents.

No. 118,582. June 23, 2020

ORIGINAL PROCEEDING TO DETERMINE THE CONSTITUTIONAL VALIDITY OF STATE QUESTION NO. 807, INITIATIVE PETITION NO. 423

¶0 This is an original proceeding to determine the legal sufficiency of State Question No. 807, Initiative Petition No. 423. The petition seeks to create a new article to the Oklahoma Constitution, Article 31, for the purpose of legalizing, regulating, and taxing the use of marijuana by Oklahoma adults. Petitioner Paul Tay filed this protest alleging the petition is unconstitutional because it violates the federal supremacy provisions of Article VI, clause 2 of the United States Constitution and Article 1, Section 1 of the Oklahoma Constitution. Petitioner alleges the proposed measure is preempted by existing federal statutes including the Controlled Substances Act, 21 U.S.C. §§ 801-904, the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968, and Section 280E of the Internal Revenue Code, 26 U.S.C. § 280E. Because the United States Supreme Court has not addressed this question, the Supremacy Clause permits us to perform our own analysis of federal law. Upon our review, we hold Petitioner has not met his burden to show clear or manifest facial constitutional infirmities because he has not shown State Question No. 807 is preempted by federal law. On the grounds alleged, the petition is legally sufficient for submission to the people of Oklahoma.

STATE QUESTION NO. 807, INITIATIVE PETITION NO. 423 IS LEGALLY SUFFICIENT FOR SUBMISSION TO THE PEOPLE OF OKLAHOMA

Paul Tay, Tulsa, Oklahoma, *pro se* Petitioner.

D. Kent Meyers and Melanie Wilson Rughani, Crowe & Dunlevy, Oklahoma City, Oklahoma, for Respondents.

PER CURIAM:

I.

FACTS AND PROCEDURAL HISTORY

¶1 On December 27, 2019, Respondents Ryan Kiesel and Michelle Tilley (Respondents) filed State Question No. 807, Initiative Petition No. 423 (SQ 807) with the Secretary of State of Oklahoma. SQ 807 proposes for submission to the voters the creation of a new constitutional article, Article 31, which would legalize, regulate, and tax the use of marijuana by adults under Oklahoma law. Notice of the filing was published on January 3, 4, & 8, 2020. Within ten business days, Petitioner Paul Tay (Petitioner) brought this original proceeding pursuant to the provisions of 34 O.S. Supp. 2015 § 8(b),[1] challenging the constitutionality of SQ 807. Petitioner alleges the proposed amendment by article is unconstitutional because it violates the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2, as well as Okla. Const., art. 1, § 1, which provides that the United States Constitution is the supreme law of the land. Specifically, Petitioner contends SQ 807 is preempted by the Controlled Substances Act (CSA), 21 U.S.C. §§ 801-904, the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968, and Section 280E of the Internal Revenue Code, 26 U.S.C. § 280E (2018).

II.

THE PROPOSED MEASURE

¶2 The proposed Article 31 contains seventeen (17) sections. Section 1 provides for defini-

tions used throughout Article 31. Section 2 contains limitations, noting Article 31 does not affect or limit laws that govern use by minors under twenty-one (21) years of age or use in certain circumstances or locations. Section 3 provides Article 31 will not limit the rights and privileges of medical marijuana patients, or the rights of employers and governments except in the ways provided.

¶3 Section 4 legalizes the personal use of marijuana. Section 4 declares the possession and use of certain amounts of marijuana to be not unlawful and not an offense under state law. It also provides similar status to personal cultivation of marijuana plants. In addition, Section 4 provides certain protections for personal use in such areas as parental rights, parole, privacy, eligibility in public assistance, and possession of firearms. Section 5 creates civil fines and penalties for violations of the possession and use restrictions found in Article 31, primarily in Section 4.

¶4 Section 6 renames the Oklahoma Medical Marijuana Authority to the Oklahoma Marijuana Authority (Authority) and gives it power over licensing for the commercial cultivation and sale of marijuana. Section 7 requires the Authority to promulgate rules and regulations for implementation and enforcement of Article 31. Section 7 also sets out comprehensive areas that must be addressed by those regulations, including labelling, security, inspection, and testing procedures.

¶5 Section 8 provides protections for licensees, declaring conduct authorized by Article 31 as not unlawful under Oklahoma law. Section 8 further notes that contracts will not be unenforceable on the basis marijuana is prohibited by federal law, and professionals will not be subject to discipline in Oklahoma for providing advice to licensees based on federal law prohibitions. Section 9 provides for various restrictions on licensees, concerning areas such as location, security, and the need to comply with Authority inspection.

¶6 Section 10 allows local governments, subject to the provisions of Section 4 and 8, to regulate the time, place, and manner of business licensed under Article 31. However, Section 10 also prevents local governments from prohibiting licensees in their jurisdictions after the next election, from prohibiting transportation of marijuana, and from adopting unduly burdensome regulations or ordinances.

¶7 Section 11 imposes an excise tax of fifteen percent (15%) on the gross receipt of sales of marijuana by licensees to consumers. Section 11 also permits the Legislature to alter the excise tax rate after November 3, 2024, and requires the Oklahoma Tax Commission (OTC) to both collect the tax and establish rules and procedures for collection. Section 12 creates the Oklahoma Marijuana Revenue Trust Fund (Fund) to receive the proceeds from the excise tax. Section 12 also provides for percentage-based distribution of that revenue after costs for running the Authority are deducted. Revenue from the Fund will be distributed in the following manner: 1) four percent (4%) to the political subdivisions where the retail sales occurred; 2) forty-eight percent (48%) to grants for public schools; and 3) forty-eight percent (48%) to provide grants to agencies and non-profit organizations to increase access to drug addiction treatment services. Section 12 also contains provisions to prevent legislative undercutting of funding in those areas due to the new revenue from the Fund.

¶8 Section 13 provides for judicial review of rules and regulations adopted by the Authority pursuant to the Oklahoma Administrative Procedures Act (APA). Section 14 requires the Authority to publish an annual report concerning licensees, any actions taken against them, revenues and expenses of the Authority, and revenue collected by the OTC.

¶9 Section 15 provides for retroactive application of Article 31. Section 15 allows those convicted of once-criminal conduct made lawful by Article 31 to petition for resentencing, reversal of conviction and dismissal, or modification of their judgment and sentence. Section 15 also creates a procedure for the State to oppose such a petition, including based on an unreasonable risk of danger to an identifiable individual's safety. Section 16 is a severability clause, and Section 17 notes Article 31's effective date will be ninety (90) days after it is approved by the people of Oklahoma.

III.

STANDARD OF REVIEW

¶10 "The first power reserved by the people is the initiative," which includes "the right to propose amendments to the Constitution by petition...." Okla. Const. art. 5, § 2; *In re: Initiative Petition No. 420, State Question No. 804,* 2020 OK 9, ¶12, ___ P.2d ___; *In re Initiative Petition No. 409, State Question No. 785*, 2016 OK 51, ¶2,

376 P.3d 250. This Court has repeatedly noted that the right of initiative is precious, and one which the Court must zealously preserve to the fullest measure of the spirit and letter of the law. *In re: Initiative Petition No. 420*, 2020 OK 9 at ¶12; *Okla. Oil & Gas Ass'n v. Thompson*, 2018 OK 26, ¶4, 414 P.3d 345; *In re Initiative Petition No. 382, State Question No. 729*, 2006 OK 45, ¶3, 142 P.3d 400.

¶11 However, while the right of initiative is zealously protected by the Court, it is not absolute. *In re: Initiative Petition No. 420*, 2020 OK 9 at ¶13; *Okla. Oil & Gas Ass'n*, 2018 OK 26 at ¶5. Any citizen of Oklahoma may protest the sufficiency and legality of an initiative petition. *In re: Initiative Petition No. 420*, 2020 OK 9 at ¶13; *In re Initiative Petition No. 409*, 2016 OK 51 at ¶2; *In re Initiative Petition No. 384, State Question No. 731*, 2007 OK 48, ¶2, 164 P.3d 125. Upon such a protest, it is the duty of this Court to review the petition to ensure that it complies with the rights and restrictions established by the Oklahoma Constitution, legislative enactments, and this Court's jurisprudence. *In re: Initiative Petition No. 420*, 2020 OK 9 at ¶13; *In re: Initiative Petition No. 384*, 2007 OK 48 at ¶2.

¶12 Pre-election review of an initiative petition under 34 O.S. Supp. 2015 § 8 is confined to determining whether there are "clear or manifest facial constitutional infirmities" in the proposed measure. *In re: Initiative Petition No. 420*, 2020 OK 9 at ¶13 (quoting *In re: Initiative Petition No. 358, State Question No. 658*, 1994 OK 27, ¶7, 870 P.2d 782). Further, because the right of the initiative is so precious, the Court has held that "all doubt as to the construction of pertinent provisions is resolved in favor of the initiative. The initiative power should not be crippled, avoided, or denied by technical construction by the courts." *In re: Initiative Petition No. 420*, 2020 OK 9 at ¶12; *In re Initiative Petition No. 403, State Question No. 779*, 2016 OK 1, ¶3, 367 P.3d 472. Thus, a protestant bears the heavy burden of demonstrating the required clear or manifest constitutional infirmity. *In re: Initiative Petition No. 420*, 2020 OK 9 at ¶14; *In re Initiative Petition No. 362, State Question No. 669*, 1995 OK 77, ¶12, 899 P.2d 1145.

IV.

ANALYSIS

A. Principles of Federal Preemption and the Anticommandeering Doctrine

¶13 Petitioner's argument rests on the interpretation and application of the federal supremacy provisions of the United States Constitution[2] and the Oklahoma Constitution.[3] Petitioner asserts SQ 807 is preempted because it conflicts with existing federal legislation concerning controlled substances such as marijuana. The federal government, acting through Congress, has the power to preempt state law pursuant to the Supremacy Clause. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992); *Craft v. Graebel-Oklahoma Movers, Inc.*, 2007 OK 79, ¶11, 178 P.3d 170. State law and state constitutional provisions must also yield to the United States Constitution. *See Okla. Coalition for Reproductive Justice v. Cline*, 2012 OK 102, ¶2, 292 P.3d 27; *In re Initiative Petition No. 349, State Question No. 642*, 1992 OK 122, ¶12-13, 838 P.2d 1.

¶14 With respect to both the United States Constitution and federal statutes enacted by Congress, this Court is governed by the decisions of the United States Supreme Court and must pronounce rules of law that conform to extant Supreme Court jurisprudence. *Hollaway v. UNUM Life Ins. Co. of America*, 2003 OK 90, ¶15, 89 P.3d 1022; *Bogart v. CapRock Communications Corp.*, 2003 OK 38, ¶13, 69 P.3d 266; *Cline*, 2012 OK 102 at ¶12 ("Because the United States Supreme Court has spoken, this Court is not free to impose its own view of the law...").

¶15 However, subject to decisions of the United States Supreme Court, we are free to promulgate judicial decisions grounded in our own interpretation of federal law. *Hollaway*, 2003 OK 90 at ¶15; *Bogart*, 2003 OK 38 at ¶13. The Supreme Court of the United States has yet to directly address federal law preemption of state marijuana regulation. Because the United States Supreme Court has not considered this question we are free to make our own determination on preemption and indeed have a duty to do so since the question has been placed before us. That is a freedom we do not have where the United States Supreme Court has pronounced clear rules on federal questions, such as an individual's right to abortion protected by the United States Constitution. *See, e.g., In re Initiative Petition No. 395, State Question No. 761*, 2012 OK 42, 286 P.3d 637; I*n re Initiative Petition No. 349, State Question No. 642*, 1992 OK 122, 838 P.2d 1. An individual's constitutional right to an abortion is hardly the only area in which this Court has determined it is bound by United States Supreme Court prece-

dent on federal questions. For example, in *Lewis v. Sac and Fox Tribe of Okla. Housing Auth.*, 1994 OK 20, ¶5, 896 P.2d 503, the Court noted its jurisdiction to adjudicate certain civil actions concerning Indian matters was limited by opinions of the United States Supreme Court addressed to the question. In *Cities Service Gas Co. v. Okla. Tax Com'n*, 1989 OK 69, ¶7, 774 P.2d 468, the Court noted it was obligated to apply the United States Supreme Court's four pronged test to decide whether state taxes on interstate commerce were permissible under the commerce clause. In *Bailess v. Paukune,* 1953 OK 349, 254 P.2d 349, the Court overruled a prior decision concerning interpretation of the General Allotment Act of February 8, 1887, on remand from an appeal to the United States Supreme Court, because that Court's interpretation was binding.

¶16 Petitioner asserts SQ 807 is constitutionally infirm because it conflicts with federal legislation. When it comes to the preemptive effect of federal legislation, the purpose of Congress is the ultimate touchstone. *Altria Group, Inc. v. Good,* 555 U.S. 70, 76, 129 S.Ct. 538, 172 L.ed.2d 398 (2008). Consideration of any issues arising under the Supremacy Clause starts with the assumption that the historic police powers of the States are not preempted by federal action unless that is the clear and manifest purpose of Congress. *Altria Group, Inc.,* 555 U.S. at 78; *Cipollone*, 505 U.S. at 516; *Rice v. Santa Fe Elevator Corp.*, 331 U.S 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947). The preemption doctrine is thus not an independent grant of legislative power to the Congress but rather a rule of decision applied in the case of an apparent conflict between federal and state law. *Murphy v. Natl. Collegiate Athletic Ass'n,* ___ U.S. ___, 138 S.Ct. 1461, 1479 (2018). *See Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 324-25, 135 S.Ct. 1378, 191 L.Ed.2s 471 (2015).

¶17 There are three varieties of preemption that may arise from federal action: express preemption, field preemption, and conflict preemption. *Murphy,* 138 S.Ct. at 1480. S*ee English v. General Elec. Co.*, 496 U.S. 72, 78-79, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990). Express preemption occurs when a federal statute includes a provision stating that it displaces state law and defining the extent to which state law is preempted. *See Dan's City Used Cars, Inc. v. Pelkey,* 569 U.S. 251, 256, 133 S.Ct. 1769, 185 L.Ed.2d 909. Field preemption occurs when Congress expresses an intent to occupy an entire field, such that even complementary state regulation in the same area is foreclosed. *Arizona v. U.S.*, 567 U.S. 387, 401, 132 S.Ct. 2492, 183 L.Ed.2d 351 (2012). Finally, conflict preemption occurs when there is an actual conflict between state and federal law. *See Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 120 S.Ct. 1913, 146 L.Ed.2d 914. Despite nuances in how they arise, these forms of preemption all function in essentially the same way:

> Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers rights or imposes restrictions that conflict with the federal law; and therefore the federal law takes precedence and the state law is preempted.

Murphy, 138 S.Ct. at 1480.

¶18 While the Supremacy Clause and the preemption doctrine may effectively prevent States from regulating areas controlled by federal law, "even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." *Murphy* at 1477. Known as the anticommandeering doctrine, this principle means that even a particularly strong federal interest does not enable Congress to command a state government to enact state regulation or enable it to compel a state to enact and enforce a federal regulatory scheme. *See id.* at 1466-77; *New York v. United States,* 505 U.S. 144, 161 & 178, 112 S.Ct. 2408, 120 L.ed.2d 120 (1992).

B. SQ 807 is not preempted by the Controlled Substances Act, 21 U.S.C. §§ 801 – 904.

¶19 Petitioner argues several federal provisions effectively preempt SQ 807. First, Petitioner argues SQ 807 is unconstitutional because it is preempted by the provisions of the Controlled Substances Act (CSA), 21 U.S.C. §§ 801 – 904. The CSA governs the use and trafficking of controlled substances, including marijuana. Marijuana is a Schedule I controlled substance pursuant to the CSA, and thus it is illegal under federal law for any person to manufacture, distribute, or dispense, marijuana, and also illegal under federal law for any person to possess marijuana with intent to manufacture, distribute, or dispense it. *See* 21 U.S.C. §§ 841(a)(1) & 844(a) (2018). Petitioner asserts this prohibition renders SQ 807 facially unconstitutional.

¶20 The CSA contains an explicit preemption provision. Title 21 U.S.C. § 903 (2018) provides:

> No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.

Section 903 states that the CSA's provisions do not expressly preempt state law and are not intended to exclusively occupy any field to the exclusion of state law. Thus, of the three types of preemption only conflict preemption is relevant.

¶21 Federal courts have interpreted the "positive conflict" language used in Section 903 to mean that state laws are preempted only in cases of actual conflict with federal law such that compliance with both federal and state law is a physical impossibility, *see Hillsborough County, Fla. v. Auto. Medical Laboratories, Inc.*, 471 U.S. 707, 713, 105 S.Ct. 2371, 85 L.Ed.2d 714, or where state law stands as an obstacle to the accomplishment and execution of Congress' full purposes and objectives. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995).

¶22 Petitioner first argues SQ 807 explicitly states an intention to usurp the supremacy of the CSA. This is incorrect. SQ 807 does not mention the CSA, nor does it state any intent to comprehensively regulate all controlled substances to the exclusion of the CSA. However, Petitioner correctly notes that SQ 807 effectively provides limited immunity from prosecution under state law for possession and distribution of marijuana. The decision to exercise that immunity, by either possessing and using marijuana as a consumer or taking advantage of the licensing scheme for production and distribution, could subject individuals to federal prosecution under the CSA. Petitioner argues this makes compliance with both federal and state law impossible.

¶23 The physical impossibility standard is a high burden. Federal precedent suggests that anything short of explicitly conflicting commands to act one way and also act the opposite way is insufficient to satisfy that burden. *See Wyeth v. Levine*, 555 U.S. 555, 571-73, 581, 129 S.Ct. 1187, 173 L.Ed.2d 51 (2009); *Barnett Bank, N.A. v. Nelson*, 517 U.S. 25, 31, 116 S.Ct. 1103, 134 L.Ed.2d 237 (1996). Respondents assert that SQ 807 does not create a situation where compliance with both federal and state law is impossible. SQ 807 contains no affirmative mandate that individuals use marijuana or that they grow it for commercial distribution. Oklahomans, Respondents argue, "can elect to refrain from using cannabis and, thus, be fully compliant with both federal and state law."[4]

¶24 In *Wyeth*, the Supreme Court determined physical impossibility was a "demanding defense" that did not apply where a state law required a drug manufacturer to change its warning labels after they had been approved by the FDA because there was no evidence to suggest the FDA would object to the amended warning label. 555 U.S. 555 at 571-73. In a more factually relevant scenario, in *Barnett Bank, N.A.*, the Court did not find physical impossibility in a scenario where a federal statute authorized the sale of insurance and a state statute forbade the same sale of insurance. 517 U.S. 25 at 31. The Court noted the "two statutes do not impose directly conflicting duties on national banks – as they would, for example, if the federal law said, 'you must sell insurance,' while the state law said, 'you may not.'" *Id.* In the present matter, the proposed Article 31 contains no mandate that requires Oklahomans to violate any provision of the CSA. Thus, it is not facially physically impossible to comply with both state law and the CSA, were SQ 807 to be adopted.

¶25 Petitioner additionally contends SQ 807 stands as an obstacle to the accomplishment and execution of Congresses' purposes in enacting the CSA. That is also a high threshold to meet. *See Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 607, 131 S.Ct. 1968, 563 U.S. 582 (2011). "What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Id.* at 373.

¶26 The manifest purpose of the CSA was "to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances." *Gonzales v. Raich*, 545 U.S. 1, 12, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005). SQ 807 does not purport to limit or prevent federal authorities from enforcing federal law. SQ 807 instead would alter how Oklahoma regulates marijuana and would provide a form of limited immunity under state law for users and producers

that satisfy the measure's requirements. Further, the federal government lacks the power to compel Oklahoma, or any other state, to enforce the provisions of the CSA or to criminalize possession and use of marijuana under state law. *See Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S.Ct. 1461, 1475-79, 200 L.Ed.2d 854 (2018) (discussing and applying the anticommandeering doctrine).

¶27 Petitioner argues one of the purposes of the CSA was to bring the United States into compliance with various treaty obligations, including the Vienna Convention on Psychotropic Substances. *See* 21 U.S.C. § 801a (2018). In support of his argument, Petitioner cites old decisions of the United States Supreme Court that struck down state laws inconsistent with U.S. treaty obligations and established the supremacy of the federal government. *See Ware v. Hylton,* 3 U.S. 199, 1 L.Ed. 568 (1796) (holding treaty provisions are binding as U.S. domestic law and take precedence over state law); *M'Culloch v. Maryland*, 17 U.S. 316, 4 L.Ed. 579 (1819) (holding state action may not impede valid constitutional exercises by the federal government). However, beyond conclusory statements Petitioner makes no argument as to how exactly SQ 807 prevents the U.S. from complying with its treaty obligations as reinforced in the CSA.

¶28 "'The case for federal preemption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them.'" *Wyeth,* 555 U.S. at 575 (quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166-67, 109 S.Ct. 971, 103 L.Ed.2d 118 (1989). Respondents argue the CSA was never intended to coerce the states to follow or adopt its specific regulatory scheme, and the states are free to engage in their own complementary regulation of controlled substances, even if that regulation differs in scope and standards.

¶29 Respondents' argument is supported by the anticommandeering doctrine and the recent decision of the Supreme Court of the United States in *Murphy.* In that case, the Court invalidated a federal law that prohibited states from authorizing sports gambling schemes. Specifically, the challenged provision of the Professional Amateur Sports Protection Act (PASPA) made it unlawful for a state to sponsor, operate, advertise, promote, license, or authorize by law or compact gambling and betting on competitive sporting events. *Murphy,* 138 S.Ct. at 1470. The Court concluded that a state repealing an existing ban on sports gambling constituted "authorization" of that activity, but that the PASPA provision at issue was an unconstitutional violation of the anticommandeering doctrine because it unequivocally dictated what a state legislature could and could not do. *Id.* at ¶1478. However, the *Murphy* Court noted that the anticommandeering doctrine and preemption require separate analysis. Notably, because the challenged PASPA provision did not impose any restrictions on private actors, the Court determined federal preemption was not implicated. *Id.* at 1481.

¶30 The posture of this case is distinct from *Murphy.* Clearly Congress lacks the power to enact a law ordering a state legislature to refrain from enacting a law licensing the growing and use of marijuana for individual consumption. See *id.* at 1482. That is not what the CSA does. Rather, unlike the challenged provisions of PASPA, the CSA's restrictions are directed at private individuals. Still, *Murphy* is useful by analogy to reinforce the limits of the CSA's intended scope and the limits of its preemption. In enacting the CSA, Congress specifically chose to leave room for state regulation of controlled substances, likely in part because its ability to compel the states is limited (per *Murphy*) but also because it relied on the states to voluntarily shoulder the burden of policing and regulating controlled substances. *See* 21 U.S.C. § 903 (2018). The fact that Oklahoma might choose to do so in a far less restrictive way than the CSA does not mean doing so inherently frustrate the CSA's overarching purposes.

¶31 The reasoning of the Supreme Court of Arizona concerning its medical marijuana statute is instructive on that point:

> The state-law immunity AMMA provides does not frustrate the CSA's goals of conquering drug abuse or controlling drug traffic. Like the people of Michigan, the people of Arizona 'chose to part ways with Congress only regarding the scope of acceptable medical use of marijuana.' *Ter Beek*, 846 N.W.2d at 539.

Reed-Kaliher v. Hoggatt, 237 Ariz. 119, ¶23, 347 P.3d 136 (2015). By adopting SQ 807, the people of Oklahoma would be going farther than the people of Arizona, but they would still simply be parting ways with Congress on the scope of

acceptable marijuana use and how unacceptable use is to be penalized. Use by those under 21, in public, and under other conditions, would remain prohibited. Further, SQ 807 also makes no attempt to impede federal enforcement of the CSA where marijuana is concerned.[5]

¶32 Not all states are in agreement. The Supreme Court of Oregon relied on *Michigan Canners and Freezers Ass'n, Inc. v. Agricultural Marketing and Bargaining Bd.*, 467 U.S. 461, 104 S.Ct. 2518, 81 L.Ed.2d 399 (1984) in finding Oregon's medical marijuana statute was preempted by federal law in *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries,* 230 P.3d 518 (Oregon 2010).[6] At a glance, *Michigan Canners and Freezers Ass'n*, might appear to be controlling. In that case the Supreme Court concluded Michigan's Agricultural Marketing and Bargaining Act was preempted by the federal Agricultural Fair Practices Act because the former stood as an obstacle to the accomplishment of the latter's purpose.

¶33 Michigan's law gave food producer's associations the option to obtain from the state the right to act as the exclusive bargaining agent for all producers of a particular commodity. *Id.* at 466. Doing so would interfere with producers' freedom to bring their products to market individually or through an association, as guaranteed by the Agricultural Fair Practices Act. *See id.* at 464-65. The Court concluded that "because the Michigan Act authorizes producers' associations to engage in conduct that the federal Act forbids, it 'stands as an obstacle to the – accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* at 478 (quoting *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1984)).

¶34 However, we find *Michigan Canners* was properly distinguished by the Supreme Court of Michigan in *Ter Beek v. City of Wyoming*, 846 N.W.2d 531 (Mich. 2014). There, the court explained:

> The United States Supreme Court concluded that the Michigan Act was preempted by the AFPA because the Michigan Act, by compelling individual producers to effectively join and be bound by the actions of accredited associations, "empowers producers' associations to do precisely what the federal Act forbids them to do" and "imposes on the producer the same incidents of association membership with which Congress was concerned in enacting" the AFPA. *Id.* at 478, 104 S.Ct. 2518. **In other words, the AFPA guaranteed individual producers the freedom to choose whether to join associations; the Michigan Act, however, denied them that right.**
>
> Such circumstances are not present here. Section 4(a) simply provides that, under state law, certain individuals may engage in certain medical marijuana use without risk of penalty. As previously discussed, while such use is prohibited under federal law, § 4(a) does not deny the federal government the ability to enforce that prohibition, nor does it purport to require, authorize, or excuse its violation. Granting Ter Beek his requested relief does not limit his potential exposure to federal enforcement of the CSA against him, but only recognizes that he is immune under state law for MMMA-compliant conduct, as provided in § 4(a). Unlike in *Michigan Canners,* the state law here does not frustrate or impede the federal mandate.

Id. at 539-40 (emphasis added).

¶35 Based on the above analysis and the lack of a bright line rule concerning conflict preemption in this area, we find Petitioner has not demonstrated that SQ 807 is clearly or manifestly unconstitutional due to its alleged preemption by the CSA. Like the people of Michigan and Arizona, the voters of Oklahoma, should they adopt SQ 807, would be parting ways with Congress only regarding the scope of acceptable use of marijuana. *See Reed-Kaliher v. Hoggatt*, 237 Ariz. 119, ¶¶22-23, 347 P.3d 136 (2015); *Ter Beek,* 846 N.W.2d at 536-41.[7]

C. SQ 807 unlikely to result in State violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 – 1968.

¶36 Petitioner also asserts SQ 807 is unconstitutional because it would create a state-sponsored agency specifically to engage in criminal money laundering by levying and collecting an excise tax on cannabis and creating a fund to funnel that money to other agencies and nonprofit entities. Petitioner thus asserts SQ 807 necessitates violation of The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961 – 1968.

¶37 RICO prohibits persons from receiving income derived from a pattern of racketeering

activity, which includes "the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in Section 102 of the Controlled Substance Act) punishable under any law of the United States." 18 U.S.C. § 1961(1)(D) (2018). RICO is to be read broadly. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985). RICO also created a new civil cause of action for any person injured in their business or property by reason of a violation of its prohibitions. *RJR Nabisco, Inc. v. European Cmty.*, ___ U.S. ___, 136 S.Ct. 2090, 2096, 195 L.Ed.2d 476 (2016). *See* 18 U.S.C. § 1964 (2018). Petitioner, however, is not alleging a private RICO claim.[8] Rather, he is asserting SQ 807, if adopted, would result in an inevitable violation of RICO's provisions. Though petitioner does not specifically invoke the preemption doctrine, his framing of this tension implies a form of conflict preemption.

¶38 Respondents acknowledge that, like the CSA, RICO remains a potential ongoing threat to any individuals engaged in the cannabis business. However, Respondents also correctly note that Petitioner is not asserting SQ 807 is unconstitutional because of RICO's potential application to individual private citizens. Rather, Petitioner argues SQ 807 is unconstitutional because it will force the State of Oklahoma and its officials to engage in RICO violations through the excise tax provisions.[9] Petitioner's argument is flawed for several reasons. First, government entities are not subject to the criminal law provisions of RICO because they cannot form the necessary malicious intent for the predicate acts. *See Lancaster Community Hosp. v. Antelope Valley Hosp. Dist*., 940 F.2d 397 (9th Cir. 1991).[10] Further, state and local officials are granted immunity from the majority of the provisions of the CSA that create the predicate acts for a RICO violation.[11]

¶39 Petitioner's RICO argument is focused on the excise tax provisions of SQ 807 that would result in the state handling tax revenue from the marijuana industry and appropriating it for use.[12] In addition to the specific limitations of RICO itself when applied to a sovereign entity, Petitioner's argument is flawed because illegality of a given activity is not a bar to its lawful taxation. Petitioner attempts to paint the excise tax provisions of SQ 807 as a form of racketeering. Sections 11 and 12 of SQ 807 create an excise tax and revenue framework very similar to the state's other existing excise taxes. The United States Supreme Court has upheld the taxation of federally-unlawful activities on multiple occasions. *See Department of Revenue of Montana v. Kurth Ranch,* 511 U.S. 767, 778, 114 S.Ct. 1937, 128 L.Ed.2d 767; *U.S. v. Sullivan,* 274 U.S. 259, 263, 47 S.Ct. 607, 71 L.Ed. 1037 (1927). *Kurth Ranch* concerned the punitive nature of a tax on marijuana specifically, and the Court explained:

> As a general matter, the unlawfulness of an activity does not prevent its taxation. **Montana no doubt could collect its tax on the possession of marijuana**, for example, if it had not previously punished the taxpayer for the same offense, or, indeed, if it had assessed the tax in the same proceeding that resulted in his conviction.

511 U.S. at 778 (internal citations omitted) (emphasis added). Multiple states have taxed marijuana in various ways despite criminal prohibitions. *See State v. Gulledge*, 896 P.2d 378 (Kan. 1995); *State v. Garza,* 496 N.W.2d 448 (Neb.1993); *Sisson v. Triplett*, 428 N.W.2d. 565 (Minn. 1988).

¶40 The U.S. Government itself already collects taxes on marijuana businesses that are illegal under federal law. *See* IRS, *Taxpayers Trafficking in a Schedule I or II Controlled Substance,* Dec. 10, 2014, https://www.irs.gov/pub/irs-wd/201504011.pdf. Title 26 U.S.C. § 280E (2018), which Petitioner cites in support of his argument, actually supports the legal taxation of marijuana. Section 280E forbids marijuana businesses from deducting business expenses from their gross income when calculating their federal income taxes.[13] Implicit in the provision is the acknowledgement that marijuana businesses are otherwise paying taxes on illegal activity. Further, it is axiomatic that if the states and federal government are permitted to tax illegal activity, they are permitted to use the resulting revenue. Based on the above analysis, Petitioner has not shown that SQ 807 is clearly and manifestly unconstitutional because it would force the state and state officials to engage in unlawful conduct that violates RICO by taxing marijuana in Oklahoma.[14]

V.

CONCLUSION

¶41 In considering federal law questions, the Supremacy Clause requires this Court adhere to decisions of the United States Supreme

Court. We have previously declared unconstitutional various initiative petitions and state laws that infringed upon rights the United States Supreme Court has expressly determined are guaranteed by the United States Constitution. We have also followed United States Supreme Court precedent on federal questions in diverse areas such as Indian law and application of the Commerce Clause. However, the United States Supreme Court has never addressed preemption of state marijuana laws under federal statutes such as the CSA.

¶42 Petitioner argues that this uncertainty concerning federal preemption of state marijuana regulations compels this Court to declare SQ 807 unconstitutional. The opposite is true. The burden is on a protestant to demonstrate that a proposed initiative is clearly and manifestly unconstitutional on its face. *In re: Initiative Petition No. 420*, 2020 OK 9 at ¶14.

¶43 This Court acknowledges the lack of controlling federal precedent has created uncertainty concerning the interplay between state regulatory schemes permitting marijuana use and existing federal law. The people of Oklahoma have spoken once on this interplay between state regulations and existing federal law in the approval and implementation of SQ 788, Oklahoma's legalization of medical marijuana. We have confronted that uncertainty, and considered the question in depth by examining the parameters of SQ 807, the language of federal statutes such as the CSA, and principles of preemption under the Supremacy Clause. Based on the above analysis, Petitioner has failed to meet his burden of demonstrating that SQ 807 is clearly or manifestly unconstitutional. We hold therefore that State Question No. 807, Initiative Petition No. 423, is legally sufficient for submission to the people of Oklahoma.

STATE QUESTION NO. 807, INITIATIVE PETITION NO. 423 IS LEGALLY SUFFICIENT FOR SUBMISSION TO THE PEOPLE OF OKLAHOMA

¶44 Gurich, C.J., Kauger, Winchester, Edmondson and Combs, JJ., concur;

¶45 Darby, V.C.J., Kane **(by separate writing)** and Rowe (**by separate writing**), JJ., dissent;

¶46 Colbert, J., not participating.

Kane, J., with whom Darby, J. joins, dissenting:

¶1 A growing number of states wish to differ with the federal government as to the regulation of marijuana. Before us is an attempt to have Oklahoma join these states. The majority finds the petition is legally sufficient for submission to the people, but I find the proposed measure stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress and is, therefore, preempted by the Controlled Substances Act (CSA).[1] I also part with the majority's reliance on the anticommandeering doctrine in support of their conclusion that the proposed measure is not preempted by the CSA. I therefore dissent.

¶2 Our preemption analysis begins with the assumption that the historic police powers of the states are not superseded by federal law unless that is the clear and manifest purpose of Congress. *See Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008). Section 903 of the CSA sets forth Congress's clear and manifest purpose to preempt state law, specifically when "there is a positive conflict between [a provision of the CSA and a state law] so that the two cannot consistently stand together." 21 U.S.C.A. § 903 (current through P.L. 116-142). Such "positive conflict" exists either when it is physically impossible to comply with both state and federal law or when state law "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). The United States Supreme Court has previously found when state law authorizes conduct that federal law forbids, it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *See Mich. Canners & Freezers Ass'n v. Agric. Mktg. and Bargaining Bd.*, 467 U.S. 461, 478 (1984) (citing *Hines*, 312 U.S. at 67).

¶3 We next look to the purposes and objectives of Congress in the CSA. The United States Supreme Court has determined:

> The main objectives of the CSA were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances. Congress was particularly concerned with the need to prevent the diversion of drugs from legitimate to illicit channels.
>
> To effectuate these goals, Congress devised a closed regulatory system making it

> unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA. The CSA categorizes all controlled substances into five schedules. The drugs are grouped together based on their accepted medical uses, the potential for abuse, and their psychological and physical effects on the body.

Gonzales v. Raich, 545 U.S. 1, 12-13 (2005) (footnotes and citations omitted). Congress has continued to classify marijuana as a Schedule I drug despite extensive efforts to have it unclassified or reclassified. *See* 21 U.S.C.A. § 812(c)(10) (current through P.L. 116-142). Marijuana is classified as a Schedule I drug based on Congress's belief that marijuana has high potential for abuse, there is no accepted medical use, and there is a lack of accepted safety for use under medical supervision. *See id.* § 812(b)(1)(A)-(C). Federal law prohibits ***all*** production, sale, and use of marijuana.[2] State Question 807 authorizes the widespread production, sale, and use of marijuana. The proposed measure affirmatively authorizes conduct the CSA expressly forbids. This clearly presents an obstacle to the accomplishment and execution of the full purposes and objectives of Congress and is preempted.

¶4 The majority leans on this notion that state law immunity would not frustrate the CSA's goals of conquering drug abuse or controlling drug traffic because, if SQ 807 is approved, Oklahoma would "simply be parting ways with Congress on the scope of acceptable marijuana use." This notion of "scope of acceptable use" comes from decisions on the legalization of medical marijuana, not recreational marijuana. *See Reed-Kaliher v. Hoggatt,* 347 P.3d 136, 141-142 (Ariz. 2015); *Ter Beek v. City of Wyoming*, 846 N.W.2d 531, 539 (Mich. 2014). Congress is clear that there is no acceptable use of marijuana. The proposed measure makes the scope of acceptable use extremely broad, permitting use by anyone 21 years of age or older. This "parting of ways" leaves a gaping hole between Congress's scope of acceptable use (none) and Oklahoma's (anyone 21 or older). If that is not "a positive conflict" between the CSA and Oklahoma law "so that the two cannot consistently stand together," then what is? The majority's decision makes the already narrow preemption provision in 21 U.S.C.A. § 903 a complete nullity.

¶5 Some clarification as to preemption and the anticommandeering doctrine is warranted. The analysis employed by the majority blends consideration of obstacle preemption with the anticommandeering doctrine and *Murphy v. National Collegiate Athletic Association*, __ U.S. __, 138 S. Ct. 1461 (2018), to bolster its holding. Preemption is based on the Supremacy Clause and means that when federal and state law conflict, federal law prevails and state law is preempted. See *id.* at 1476. "***[E]very form of preemption is based on a federal law that regulates the conduct of private actors, not the States.***" *Murphy,* 138 S. Ct. at 1481 (emphasis added). The anticommandeering doctrine is based on the Tenth Amendment and is a limit to Congress's legislative powers. *See id.* at 1476. Congress does not have the power to issue direct orders to the governments of the states. *Id.* In *Murphy,* the United States Supreme Court found there was ***no federal preemption provision in PASPA because PASPA regulates states, not private actors.*** *Id.* at 1481. The *Murphy* Court then found "there is simply no way to understand the provision prohibiting state authorization as anything other than a ***direct command to the States.*** And that is exactly what the anticommandeering rule does not allow." *Murphy,* 138 S. Ct. at 1481 (emphasis added).

¶6 In sum, preemption is implicated when federal law regulates private actors; the anticommandeering doctrine is implicated when federal law regulates the states. In *Murphy,* the Supreme Court found preemption was not implicated. Rather, the PASPA provision regulated the states and violated the anticommandeering doctrine. The Supreme Court did ***not*** find the PASPA provision regulated private conduct and that the state law did not stand as an obstacle to the purposes of PASPA and, therefore, was not preempted. That is an important distinction. Because the United States Supreme Court found preemption was not implicated in *Murphy*, they did not undergo an obstacle preemption analysis. As a result, *Murphy* cannot support the majority's holding that SQ 807 does not stand as an obstacle to the purposes of the CSA and, therefore, is not preempted. Here, there is no question the CSA regulates the conduct of private actors and that § 903 of the CSA is a preemption provision. Therefore, the only inquiry is whether the proposed state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the CSA (not whether the CSA violates the anticommandeering statute).[3]

¶7 Furthermore, any suggestion that this Court should find SQ 807 is not preempted because the federal government is aware of the widespread state legalization of medical and/or recreational marijuana but has declined to enforce the CSA is irrelevant. Congress creates federal laws. The executive branch is responsible for enforcing those laws. This branch is charged with interpreting the laws in a way that gives effect to the intent of Congress. Congressional intent is clear: the production, sale, and use of marijuana for any purpose is prohibited, and any state law that permits such acts is preempted. Despite a shift in public opinion and many states legalizing medical and/or recreational marijuana, Congress has continued to classify marijuana as a Schedule I drug and prohibit ***all*** production, sale, and use of it. In *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries*, 230 P.3d 518, 533 (Or. 2010), the Supreme Court of Oregon aptly noted "whatever the wisdom of Congress's policy choice to categorize marijuana as a Schedule I drug, the Supremacy Clause requires that we respect that choice when, as in this case, state law stands as an obstacle to the accomplishment of the full purposes of the federal law."

¶8 I respectfully dissent.

Rowe, J., with whom Darby, VCJ., joins, dissenting:

¶1 I dissent from the Court's opinion holding that State Question No. 807, Initiative Petition No. 423 ("SQ 807") is not preempted by federal law and legally sufficient for submission to the people of Oklahoma.

¶2 The Controlled Substances Act ("CSA"), 21 U.S.C. §§ 801-904, which governs the use and trafficking of controlled substances, explicitly addresses the issue of federal preemption of state law:

> No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.

21 U.S.C. § 903. As the Court notes in its opinion, a "positive conflict" arises either when it is impossible to comply with both federal and state law, or where state law stands as an obstacle to the accomplishment and execution of Congress's full purposes and objectives. *See Hillsborough City, Fla. v. Automated Med Labs, Inc.*, 471 U.S. 707, 713 (1985).

¶3 The Court correctly concludes that the proposed constitutional amendments in SQ 807 contain no mandate that would require Oklahomans to violate the provisions of the CSA. However, passage of SQ 807 would clearly present an obstacle to the accomplishment and execution of Congress's full purposes and objections, expressed in the CSA. The purpose of the CSA was "to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances." *Gonzalez v. Raich*, 545 U.S. 1, 12 (2005). Marijuana is considered a Schedule I controlled substance under the CSA. 21 C.F.R. § 1308.11(d)(23). It is illegal for any person to manufacture, distribute, or dispense marijuana and also illegal for any person to possess marijuana with the intent to manufacture, distribute, or dispense it. 21 U.S.C. §§ 841(a)(1), 844(a).

¶4 If SQ 807's proposed amendments become law, there will unquestionably be a proliferation in the cultivation, manufacture, distribution, dispensation, and recreational use of marijuana in Oklahoma. These outcomes are hardly hypothetical. In a world where these activities are sanctioned and licensed by the State of Oklahoma, it will become virtually impossible for federal law enforcement, operating with limited resources, to accomplish Congress's objective in the CSA to control the production, sale, and use of controlled substances.

¶5 Contrary to the Court's analysis, reading the CSA as preempting state laws which legalize and regulate trafficking in marijuana would not run afoul of the anti-commandeering doctrine. The anti-commandeering doctrine operates as a limit on federal preemption. "We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power to directly compel the States to require or prohibit those acts." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1477 (2018) (quotation omitted). The CSA contains no direct mandate for the states to adopt drug enforcement regulations which mirror its provisions; the CSA merely prohibits certain

conduct on behalf of individuals. Congress anticipated that states would adopt regulatory schemes that are generally complementary to federal law, even if not perfectly consistent with the CSA. Sanctioning activity that is proscribed by federal law, however, is in no sense complementary.

¶6 The Court likens the question before us to that addressed by the United States Supreme Court in *Murphy v. National Collegiate Athletic Association*, where the Court invalidated a federal law, the Professional Amateur Sports Protection Act (PASPA), that prohibited states from authorizing or licensing gambling on sporting events. *Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. at 1470. The Court found that PASPA violated the anti-commandeering doctrine because it "unequivocally dictate[d] what a state legislature may and may not do." *Id.* at 1478. PASPA, however, is distinguishable from the CSA in a number of important ways. First, PASPA did not make sports gambling a federal crime. *Id.* at 1471. This meant that the burden of enforcing its provisions would fall exclusively on state government, thus conscripting state law enforcement for federal purposes. *Id.* Second, and most importantly, the CSA does not contain any provisions unequivocally dictating what a state legislature may and may not do.

¶7 SQ 807's proposed constitutional amendments clearly present a substantial obstacle to Congress's objectives expressed in the CSA to control the production, sale, and use of controlled substances. Therefore, SQ 807 is preempted by federal law.

¶8 Accordingly, I respectfully dissent.

PER CURIAM:

1. Title 34 O.S. Supp. 2015 § 8(b) provides:
   It shall be the duty of the Secretary of State to cause to be published, in at least one newspaper of general circulation in the state, a notice of such filing and the apparent sufficiency or insufficiency of the petition, and shall include notice that any citizen or citizens of the state may file a protest as to the constitutionality of the petition, by a written notice to the Supreme Court and to the proponent or Respondents filing the petition. Any such protest must be filed within ten (10) business days after publication. A copy of the protest shall be filed with the Secretary of State.
2. U.S. Const. art. VI, cl. 2 provides:
   This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.
3. Okla. Const., art. 1, § 1 reinforces the federal Supremacy Clause, and provides: "The State of Oklahoma is an inseparable part of the Federal Union, and the Constitution of the United States is the supreme law of the land."
4. Respondents/Proponents Ryan Kiesel and Michelle Tilley's Brief in Response to Protest Challenging Constitutionality of Initiative Petition No. 423, February 18, 2020, p. 5.
5. While the potential for such enforcement remains, the reality is that the Justice Department has shown little interest of late in using federal resources to enforce federal marijuana prohibitions in the states that have legalized its use. At his confirmation hearing, Attorney General William Bar noted: "[t]o the extent that people are complying with state laws on distribution and production, we're not going to go after that." Brian Tashman, *What We Learned from William Barr's Confirmation Hearing*, ACLU, Jan. 16, 2019, https://www.aclu.org/blog/civil-liberties/executive-branch/what-we-learned-william-barrs-confirmation-hearing. In each budget cycle since FY 2014, Congress has passed an appropriate rider preventing the Department of Justice from using taxpayer funds to prevent the states from "implementing their own laws that authorize the use, distribution, possession, or cultivation of marijuana. See Pub. L. No. 116-6, div. C, Section 537, 133 Stat. 138 (2019); *United States v. McIntosh*, 833 F.3d 1163, 1178 (9th Cir. 2016).
6. Also, in *People v. Crouse*, 2017 CO 5, 388 P.3d 39, the Supreme Court of Colorado determined a specific provision of Colorado's medical marijuana scheme requiring law enforcement officers to return medical marijuana seized from an individual later acquitted of a state drug charge was preempted by the CSA because it would require state police officers to violate federal law. *People* concerns a distinct factual scenario not directly implicated by Petitioner's challenge to SQ 807.
7. It should also be noted that one of the specific purposes of the CSA is to conquer drug abuse. *See Gonzales*, 545 U.S. at 12. Much of the excise tax revenue that would be collected if SQ 807 is adopted would be directed to programs specifically designed to combat drug abuse. That collection and funding effort would serve to aid one of the primary purposes of the CSA, not thwart it.
8. Respondent's challenge Petitioner's standing to make such a claim, noting he has alleged no injury to his own interests. However, we need not consider that issue because Petitioner's challenge is to the legal sufficiency of SQ 807 and he is not seeking to invoke the private right of action created by 18 U.S.C. § 1964.

   Thus far, many attempts by private citizens to assert RICO violations by marijuana businesses have failed. *See Ainsworth v. Owenby*, 326 F.Supp.3d 1111 (D. Oregon 2018); *Bokaie v. Green Earth Coffee LLC*, 2018 WL 6813212 (N.D. Cali. 2018). *But see Safe Streets Alliance v. Hickenlooper*, 859 F.3d 865 (10th Cir. 2017). Of note, the Tenth Circuit in *Safe Streets Alliance* also concluded that the plaintiff organizations had failed to allege any viable substantive right to enforce the preemptive provisions of the CSA, thus implying that individuals may not possesses the option of challenging state marijuana laws in federal court as preempted by the CSA. *See* 859 F.3d at 901-04.
9. As Petitioner notes in his response:
   9. All elements of probable cause to bring criminal felony charges against state officials who promulgate IP 423, if it becomes article 31, Oklahoma Constitution, exist under [RICO].

   Petitioner/Protestant's Brief in Response to Respondents/Respondents Ryan Kiesel and Michelle Tilley's Response, ¶9.
10. The Second Circuit Court of Appeals has indicated it is possible to seek prospective injunctive relief against a sovereign entity in a civil action pursuant to RICO. *See Gingras v. Think Finance, Inc.*, 922 F.3d 112, 124-25 (2nd Cir. 2019). However, Petitioner is not seeking injunctive relief. He is arguing SQ 807 is facially unconstitutional because it would require the State to engage in criminal RICO violations. *Gingras* is thus not directly applicable.
11. Title 21 U.S.C. § 885(d) (2018) provides:
    Except as provided in sections 2234 and 2235 of Title 18, no civil or criminal liability shall be imposed by virtue of this subchapter upon any duly authorized Federal officer lawfully engaged in the enforcement of this subchapter, or upon any duly authorized officer of any State, territory, political subdivision thereof, the District of Columbia, or any possession of the United States, who shall be lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances.

    In *Smith v. Superior Ct.*, 239 Cal.Rptr.3d. 256, 260 (Cal. App. Dep't Super. Ct. 2018), a California appellate court applied Section 885(d) and concluded the San Francisco Police Department was immune from federal prosecution under the CSA when complying with California law for the return of marijuana lawfully possessed under California law. *But see People v. Crouse*, 2017 CO 5, ¶8, 388 P.3d 39 (holding state law return provision to be preempted by the CSA because an officer could not be "lawfully engaged" in enforcement activities under state law if state law required violation of federal law).
12. Petitioner states:
    State Question 807 would create a state-sponsored agency specifically to engage in criminal felony RICO money laundering,

by excise sales taxing cannabis purchases and creating a trust fund to funnel excise sales tax receipts to other agencies and private non-profit entities.

Protest to Challenge the Constitutionality of State Question 907, Petitioner Number 423, ¶9.

13. Specifically, 26 U.S.C. § 280E (2018) provides:

> No deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business if such trade or business (or the activities which comprise such trade or business) consists of trafficking in controlled substances (within the meaning of schedule I and II of the Controlled Substances Act) which is prohibited by Federal law or the law of any State in which such trade or business is conducted.

14. Though Respondents discuss the potential application of other federal statutes, such as 18 U.S.C. §§ 1956 & 1957 (2018) (money laundering) and 18 U.S.C. § 1960 (2018) (prohibition of unlicensed money transmitting business), those statutes are not discussed by Petitioner in his filings.

Kane, J., with whom Darby, J. joins, dissenting:

1. I have no issue with the majority's conclusion that compliance with both federal and state law is not physically impossible.

2. The sole exception is using marijuana as part of a Food and Drug Administration preapproved research study. *See Gonzales v. Raich,* 545 U.S. 1, 14 (2005) (citing 21 U.S.C. § 823(f)).

3. In fact, the CSA does not violate the anticommandeering doctrine. The CSA regulates the conduct of private actors, not the States. Therefore, the CSA does not implicate the anticommandeering doctrine.

2020 OK 58

IN RE INITIATIVE PETITION NO. 425, STATE QUESTION NO. 809 OKLAHOMA SECOND AMENDMENT ASSOCIATION, Petitioner/Protestant, v. THE HONORABLE JASON LOWE, JENNIFER BIRCH, and JOSHUA HARRIS-TILL, Respondents/ Proponents.

No. 118,665. June 23, 2020

ORIGINAL PROCEEDING TO DETERMINE THE LEGAL SUFFICIENCY OF INITIATIVE PETITION NO. 425, STATE QUESTION NO. 809

¶0 This is an original proceeding to determine the legal sufficiency of the gist of Initiative Petition No. 425, State Question No. 809. The initiative petition seeks to amend the Oklahoma Statutes for the purpose of making it unlawful to carry a concealed or unconcealed handgun without a license. The Petitioner filed this protest alleging the gist of the initiative petition is legally insufficient. We hold the gist does not accurately explain the proposal's effect on existing law and is misleading.

INITIATIVE PETITION NO. 425, STATE QUESTION NO. 809 IS DECLARED INVALID AND ORDERED STRICKEN FROM THE BALLOT

Kevin Calvey and Robert Robles, Oklahoma City, Oklahoma, for Petitioner/Protestant.

Brian Ted Jones, Oklahoma City, Oklahoma, for Respondents/Proponents.

Randall J. Yates, Assistant Solicitor General, Office of the Attorney General, for the State of Oklahoma.

KANE, J.:

I. FACTS AND PROCEDURAL HISTORY

¶1 During the 2019 Legislative Session, the Oklahoma Legislature passed HB 2597. Prior to the passage of HB 2597, the Oklahoma criminal code provided it was unlawful to carry a concealed or unconcealed handgun without a license. See 21 O.S.Supp.2018 § 1272; 21 O.S. Supp.2012 § 1290.4. HB 2597 instituted what is known as "permitless carry" or "constitutional carry." This was accomplished by amending the Oklahoma criminal code to create a new exception to the law generally prohibiting the carrying of firearms at 21 O.S. § 1272(A)(6):

> A. Notwithstanding any other provision of law, it shall be unlawful for any person to carry upon or about his or her person, or in a purse or other container belonging to the person, any pistol, revolver, shotgun or rifle whether loaded or unloaded or any blackjack, loaded cane, hand chain, metal knuckles, or any other offensive weapon, whether such weapon be concealed or unconcealed, except this section shall not prohibit:
>
> . . .
>
> 6. The carrying of a firearm, concealed or unconcealed, loaded or unloaded, by a person who is twenty-one (21) years of age or older or by a person who is eighteen (18) years of age but not yet twenty-one (21) years of age and the person is a member or veteran of the United States Armed Forces, Reserves or National Guard or was discharged under honorable conditions from the United States Armed Forces, Reserves or National Guard, and the person is otherwise not disqualified from the possession or purchase of a firearm under state or federal law and is not carrying the firearm in furtherance of a crime.

21 O.S.Supp.2019 § 1272(A) (Laws 2019, HB 2597, c. 1, § 1, eff. Nov. 1, 2019). The statutory scheme provides that carrying a concealed or unconcealed firearm is unlawful, but then provides six exceptions. The permitless carry exception applies to most people. Prior to HB

2597, obtaining a handgun permit was the broadest, generally available exception. HB 2597 also amended other statutes to implement the policy on permitless carry and to clean up language as the result of changing from a licensed carry system to permitless carry.

¶2 Respondents/Proponents The Honorable Jason Lowe, Jennifer Birch, and Joshua Harris-Till (Respondents) first filed Referendum Petition No. 26, State Question No. 803, to stop HB 2597 from going into effect. However, Respondents did not collect a sufficient number of signatures to get on the ballot, and Referendum Petition No. 26 was dismissed by this Court for numerical insufficiency on October 7, 2019.[1] Respondents then challenged the constitutionality of HB 2597 and sought a temporary injunction preventing the law from going into effect. Their application for a temporary injunction was denied by the district court and their application for an emergency stay and temporary injunction was denied by this Court on October 31, 2019.[2]

¶3 Respondents now seek to reinstate the licensing requirement by initiative petition. Respondents filed Initiative Petition No. 425 for State Question No. 809 with the Oklahoma Secretary of State on February 3, 2020. Initiative Petition No. 425 seeks to amend the Oklahoma Statutes by repealing permitless carry and returning to a licensed carry system. It also seeks to reverse some of the other firearms regulations amended by HB 2597 and clean up language as the result of changing from permitless carry to a licensed carry system. The Secretary of State published notice of Initiative Petition No. 425 on February 7, 2020. Petitioner/Protestant Oklahoma Second Amendment Association (Petitioner) filed a timely application to assume original jurisdiction to review the legal sufficiency of Initiative Petition No. 425, brief in support, and motion for oral argument on February 21, 2020.[3] On March 10, 2020, the Office of the Attorney General of the State of Oklahoma filed an entry of appearance and notice of intent to express the views of the Attorney General. This Court authorized the Attorney General to file a brief on or before March 20, 2020 and the parties were given the opportunity to file response briefs. Briefing was completed May 11, 2020. Oral presentation was made before the Referee on June 9, 2020.

II. STANDARD OF REVIEW

¶4 Article V, § 1 of the Oklahoma Constitution provides:

> The Legislative authority of the State shall be vested in a Legislature, consisting of a Senate and a House of Representatives; but the people reserve to themselves the power to propose laws and amendments to the Constitution and to enact or reject the same at the polls independent of the Legislature, and also reserve power at their own option to approve or reject at the polls any act of the Legislature.

Okla. Const. art. V, § 1. "The first power reserved by the people is the initiative" and "[t]he second power is the referendum." Okla. Const. art. V, § 2. "The right of the initiative is precious, and it is one which this Court is zealous to preserve to the fullest measure of the spirit and the letter of the law." *In re Initiative Petition No. 382, State Question No. 729*, 2006 OK 45, ¶ 3, 142 P.3d 400. Therefore, "all doubt as to the construction of pertinent provisions is resolved in favor of the initiative." *Id.* This Court has a duty to protect these rights as a function of the people's right to govern themselves:

> The people reserved to themselves the power to propose laws and amendments to the Constitution. . . . This power so reserved to the people should not be crippled, avoided, or denied by technical construction by the courts. It is the duty of the courts to construe and preserve this right as intended by the people in adopting the Constitution, and thereby reserve unto the people this power. Ours is a government which rests upon the will of the governed. The initiative and referendum is the machinery whereby self-governing people may express their opinion in concrete form upon matters of public concern. If the people are to be self-governed, it is essential that they shall have a right to vote upon questions of public interest and register the public will.

In re Referendum Petition No. 348, State Question No. 640, 1991 OK 110, ¶ 6, 820 P.2d 772, 775-776 (quoting *Ruth v. Peshek*, 1931 OK 674, 5 P.2d 108).

¶5 However, the right of initiative and the right of referendum are not absolute. These rights are subject to limitations established by the Constitution, legislative enactments, and this Court's jurisprudence. *See In re Initiative*

Petition No. 384, State Question No. 371, 2007 OK 48, ¶ 2, 164 P.3d 125 (citing *In re Initiative Petition No. 379, State Question No. 726*, 2006 OK 89, ¶¶ 16-17, 155 P.3d 32). Any citizen can protest the legal sufficiency of an initiative petition pursuant to 34 O.S.Supp.2015 § 8.

III. DISCUSSION

¶6 Petitioner contends Initiative Petition No. 425 is actually an untimely repeal referendum petition disguised as an initiative petition and challenges the legal sufficiency of the gist statement.

A. Untimely Repeal Referendum Petition

¶7 Petitioner argues Initiative Petition No. 425 is an out-of-time repeal referendum petition filed more than 90 days after the end of the legislative session in which HB 2597 was enacted. Petitioner contends Respondents' original repeal referendum failed and they should not get a second bite at the apple with this referendum petition disguised as an initiative petition.

¶8 We hold Initiative Petition No. 425 is not a referendum petition; it is an initiative petition. Referendum petitions ask for voters to approve or reject a bill of the legislature. *See* 34 O.S.Supp.2015 § 1. Initiative petitions ask voters to approve or reject a proposed law. *See* 34 O.S.Supp.2015 § 2. An initiative petition may amend existing law by repealing parts of recent legislation along with proposing new laws. *See In re Initiative Petition No. 347, State Question No. 639*, 1991 OK 55, ¶ 6, 813 P.2d 1019, 1022-23. Article V, § 3 of the Oklahoma Constitution does not impose a 90-day deadline on initiative petitions. Initiative Petition No. 425 is not time barred.

B. Sufficiency of the Gist

¶9 The gist of an initiative petition is required by 34 O.S.2011 § 3, which provides, in pertinent part: "[a] simple statement of the gist of the proposition shall be printed on the top margin of each signature sheet." This Court has explained:

> [The] purpose of the gist, along with the ballot title, is to prevent *fraud, deceit, or corruption* in the initiative process. The gist should be sufficient that the signatories are at least put on notice of the changes being made, and the gist must explain the proposal's effect. The explanation of the effect on existing law does not extend to describing policy arguments for or against the proposal. The gist need only convey the practical, not the theoretical, effect of the proposed legislation, and it is not required to contain every regulatory detail so long as its outline is not incorrect. We will approve the text of a challenged gist if it is free from the taint of misleading terms or deceitful language.

In re Initiative Petition No. 409, State Question No. 785, 2016 OK 51, ¶ 3, 376 P.3d 250 (footnotes and internal quotations omitted) (emphasis original). Each signature sheet is attached to a copy of the initiative petition. *See* 34 O.S. § 3. The two form what is called the "pamphlet"[4] and is circulated to potential signatories. *Id.* The gist at the top of each signature sheet is a shorthand explanation of the proposal's effect. *See Initiative Petition No. 409*, 2016 OK 51, ¶ 4.

¶10 This Court recently summarized how omissions of information from the gist should be evaluated in *In re Initiative Petition No. 420, State Question No. 804*, 2020 OK 10, ¶ 4, 458 P.3d 1080. "Because the purpose of the gist is to prevent fraud, deceit or corruption in the initiative process, any alleged flaw created by an omission of details in the gist must be reviewed to determine whether such omission is critical to protecting the initiative process." *Id.* (citing *In re Initiative Petition No. 363, State Question No. 672*, 1996 OK 122, ¶¶ 18-20, 927 P.2d 558, 567). The sole question for this Court is whether the absence of a more detailed gist statement, without more, perpetrates a fraud on the signatories. *See Initiative Petition No. 420*, 2020 OK 10, ¶ 4; *Initiative Petition No. 363*, 1996 OK 122, ¶ 19.

¶11 The gist of Initiative Petition No. 425 is as follows:

> This measure would generally restore the handgun permitting requirements and certain other firearms-related provisions that were in place prior to the Legislature's enactment of HB 2597, the so-called "permitless carry" bill, in 2019. It removes the provision generally authorizing the concealed or unconcealed carrying of firearms without a permit by any person not otherwise disqualified by law from possession of a firearm who is 21 years of age or older, or 18 years of age or older if a military member or veteran. It prohibits any person, including handgun licensees, from possessing handguns or certain offensive weapons on college, university, or technology center property. It generally restores certain requirements regarding the unli-

censed transportation of firearms in vehicles, as well as regarding the unlicensed carrying of firearms on private property; while going to or from places for recognized firearm activities like hunting, target-shooting, or trading firearms, and while in such places; and generally prohibits confiscation of firearms during traffic stops when any person in the vehicle holds a valid handgun license. It restores the prior, narrower state preemption of local firearms laws, restores the prior, narrower scope of State immunity from civil liability regarding actions or misconduct by handgun licensees, restores the prior, broader obligation on handgun licensees to notify police of a handgun during an arrest, detention, or traffic stop, narrows protections for handgun licensees who refuse to leave a place where firearms are prohibited, and provides an effective date.

¶12 First, Petitioner argues Initiative Petition No. 425 is so broad and impacts so many different provisions of law that it is impossible to craft a gist that would be anything other than incomplete and misleading. We reject Petitioner's argument it is impossible to craft a legally sufficient gist for the proposed measure.

¶13 More specifically, Petitioner argues seven provisions in the gist are false, inaccurate, misleading, deceitful, and inflammatory. Petitioner challenges the first sentence of the gist: "This measure would generally restore the handgun permitting requirements and certain other firearms-related provisions that were in place prior to the Legislature's enactment of HB 2597, the so-called "permitless carry" bill, in 2019." Petitioner argues the gist does not communicate that SQ 809 is a repealer of HB 2597 and, therefore, it is misleading. Petitioner also argues that the law is generally known as "constitutional carry" and using "permitless carry" is misleading.

¶14 The second provision challenged is: "It removes the provision generally authorizing the concealed or unconcealed carrying of firearms without a permit by any person not otherwise disqualified by law from possession of a firearm who is . . . 18 years of age or older if a military member or veteran." Petitioner claims the gist omits that, if approved, SQ 809 would take away trained military personnel and honorably discharged veterans' right to carry a concealed or unconcealed firearm, and that omission is misleading.

¶15 The third provision challenged is that addressing handguns on college campuses: "It prohibits any person, including handgun licensees, from possessing handguns or certain offensive weapons on college, university, or technology center property." Petitioner claims the gist does not describe the law as it currently exists and effectively states that HB 2597 allows the carrying of firearms on a college, university, or technology center property, which is false and misleading. The Attorney General argues this language is misleading, because it may induce a signature from someone who believes SQ 809 will establish a college campus ban when such ban already exists. Petitioner also argues the gist fails to mention that HB 2597 added a prohibition to carrying machete knives on campuses, and that omission is misleading.

¶16 The fourth provision challenged by Petitioner is: "It generally restores certain requirements regarding the unlicensed transportation of firearms in vehicles, as well as regarding the unlicensed carrying of firearms on private property . . . ." Petitioner argues this is misleading because people are already allowed to carry unlicensed weapons on private property and the immunity is fully addressed by the current law. The Attorney General adds that this clause is vague and misleading because it suggests a change to the current law, when there is none. Additionally, the Attorney General argues that the gist suggests a change to existing law for transporting weapons for certain activities, including hunting, target shooting, and trading firearms, but such protections already exist.

¶17 The fifth provision challenged addresses the confiscation of firearms: "[It] generally prohibits confiscation of firearms during traffic stops when any person in the vehicle holds a valid handgun license." Petitioner asserts that HB 2597 did not change the law on confiscating firearms during traffic stops. Therefore, this statement is misleading. The Attorney General adds that this language makes it sound like SQ 809 will make it harder for police to confiscate firearms, but it actually makes it easier.

¶18 The sixth provision challenged is: "[It] restores the prior, broader obligation on handgun licensees to notify police of a handgun during an arrest, detention, or traffic stop . . . ." Petitioner argues this is misleading because a person is still required under current law to inform an officer when requested.

¶19 The seventh provision challenged by Petitioner is: "[It] narrows protections for handgun licensees who refuse to leave a place where firearms are prohibited . . . ." Petitioner asserts that the gist omits, if approved, a person faces a misdemeanor for refusing to leave private property.

¶20 The Attorney General raises five additional challenges to the gist, which were adopted and incorporated by Petitioner. First, the Attorney General argues the primary effect of SQ 809 is to amend the criminal code to make the currently lawful carrying of firearms without a license a crime, and the gist is insufficient because it fails to explicitly discuss the creation of this new crime or the punishment for failing to comply with the law. Second, the gist fails to discuss the new licensing process. Third, the use of "generally restores" is vague, and the gist is not clear what parts of the current law are and are not being restored. Fourth, the sentence "It restores the prior, narrower state preemption of local firearms laws . . . ." is misleading as it suggests SQ 809 allows greater protection of local control of firearm regulation, but it does not. Fifth, the sentence "[It] restores the prior, narrower scope of State immunity from civil liability regarding actions or misconduct by handgun licensees . . . ." is inaccurate, because the proposed measure would not change the scope of civil immunity.

¶21 We hold that two of the challenged provisions do not accurately explain the proposal's effect on existing law and are misleading. The gist does not put signatories on notice of the changes being proposed, because it suggests changes that are not actually proposed by the measure. As a result, the gist is legally insufficient.

¶22 Currently, the law prohibits handguns on college, university, or technology center campuses:

> No person in possession of a valid handgun license issued pursuant to the provisions of the Oklahoma Self-Defense Act or who is carrying or in possession of a firearm as otherwise permitted by law or who is carrying or in possession of a machete, blackjack, loaded cane, hand chain or metal knuckles shall be authorized to carry the firearm, machete, blackjack, loaded cane, hand chain or metal knuckles into or upon any college, university or technology center school property, except as provided in this subsection.

21 O.S.Supp.2019 § 1277(G). Even with the passage of HB 2597 and permitless carry, carrying firearms and other offensive weapons on these campuses is prohibited. Section 2 of SQ 809 amends 21 O.S. § 1277(G). Section 2 deletes the phrase "or who is carrying or in possession of a firearm as otherwise permitted by law" and changes "firearm" to "handgun." Respondents assert that these changes to the law reconcile the removal of the permitless carry exception in 21 O.S. § 1272 with the existing campus ban in 21 O.S. § 1277(G), which is true. The proposed measure removes the reference to permitless carry but retains the campus prohibition as it applies to handgun licensees. The gist provides, in part: "[The proposed measure] prohibits any person, including handgun licensees, from possessing handguns or certain offensive weapons on college, university, or technology center property."

¶23 Our inquiry is into the sufficiency of the gist statement and what it communicates to potential signatories. Respondents assert that a signor can read this sentence and easily understand what the law would be if the measure were to pass. We agree with Respondents that this sentence states what the law will be – handgun licensees will be prohibited from possessing handguns and other weapons on campus property. We are not, however, persuaded that the gist is legally sufficient. The gist must put signatories on notice of the changes being made and explain the proposal's effect on existing law. *See In re Initiative Petition No. 409, State Question No. 785*, 2016 OK 51, ¶ 3, 376 P.3d 250. SQ 809 does not make substantive changes to 21 O.S. § 1277(G). The challenged provision does not mention it is retaining the campus ban that currently exists or that the campus ban that currently exists would continue to apply to handgun licensees. Approval of SQ 809 will not change the current prohibition against handguns and other offensive weapons on these campuses. Today, handgun licensees are prohibited from carrying on campus. If SQ 809 is approved, handgun licensees will be prohibited from carrying on campus. The proposed measure merely brings the statutory language in line with the other changes requiring a license to carry a handgun. Such technical changes to reconcile § 1272 with § 1277(G) are not significant changes to the law. We agree with Petitioner and the Attorney General's arguments this language gives the false impression that,

currently, the law does not prohibit handguns and other offensive weapons on these campuses and that approval of SQ 809 would change to law to establish, create, or reinstate such a ban. Handguns are already prohibited on the campuses, and that will continue whether or not SQ 809 is approved. Furthermore, this language may induce the signature of someone who erroneously believes SQ 809 will establish a campus ban. We hold the language does not accurately explain the proposal's effect on existing law and is misleading.

¶24 The other problematic provision is that addressing the confiscation of firearms. The gist provides that the measure "generally prohibits confiscation of firearms during traffic stops when any person in the vehicle holds a valid handgun license." Petitioner asserts that HB 2597 did not change the law on confiscating firearms during traffic stops and this sentence is misleading. The Attorney General adds that this provision sounds like the proposed measure would make it harder for law enforcement to confiscate firearms, but it actually makes it easier.

¶25 The law currently provides, in pertinent part:

> Any firearm lawfully carried or transported as permitted pursuant to state law shall not be confiscated, unless:
>
> 1. The person is arrested for violating another provision of law other than a violation of subsection A of this section; provided, however, if the person is never charged with an offense pursuant to this paragraph or if the charges are dismissed or the person is acquitted, the weapon shall be returned to the person; or
>
> 2. The officer has probable cause to believe the weapon is:
>
> a. contraband, or
>
> b. a firearm used in the commission of a crime other than a violation of subsection A of this section.

21 O.S.Supp.2019 § 1289.13A(B). With permitless carry making it lawful to carry a firearm without a license, most firearms are being lawfully carried or transported and not subject to confiscation, unless there is a separate legal basis for confiscation. Section 7 of SQ 809 amends 21 O.S. § 1289.13A. The proposed measure prohibits the confiscation of firearms during a traffic stop only when the arresting officer determines that someone in the vehicle has a valid handgun license.

¶26 The proposed measure would change the law from a general prohibition against the confiscation of firearms to a specific prohibition against confiscating firearms when someone in the vehicle has a handgun license. Today, confiscation is prohibited without regard to whether someone in the vehicle has a handgun license. SQ 809, if approved, would prohibit the confiscation of firearms only if someone in the vehicle has a handgun license. We hold the language does not accurately explain the proposal's effect on existing law and is misleading.

¶27 We are also troubled by the use of "restores" in the gist statement. This requires potential signatories to know what the law was prior to HB 2597. Stating that the measure "generally restores" or "restores" prior law is both confusing and misleading. The proposed measure seeks to change the current law. It does that by repealing some of the current law, which was enacted by HB 2597, and proposing new law. However, the proposed measure also retains several aspects of HB 2597. The proposed measure does not seek to repeal every law enacted by HB 2597 and reinstate the prior law. As discussed above, the gist does not make it clear what changes to *existing* law are being proposed.

IV. CONCLUSION

¶28 The gist suggests a change to the law that is not being proposed, does not accurately explain the proposal's effect on existing law, and is misleading.

INITIATIVE PETITION NO. 425, STATE QUESTION NO. 809 IS DECLARED INVALID AND ORDERED STRICKEN FROM THE BALLOT

CONCUR: Gurich, C.J., Darby, V.C.J., Kauger, Winchester, Combs, Kane, JJ., and Reif, S.J.

CONCUR IN PART, DISSENT IN PART: Rowe (by separate writing), J.

RECUSED: Edmondson, Colbert, JJ.

ROWE, J. concurring in part and dissenting in part:

¶1 I concur in the Court's judgment that the gist of State Question No. 809, Initiative Petition No. 425 ("SQ 809") is legally insufficient. Specifically, the gist's third sentence regarding

the prohibition of handguns and other offensive weapons on educational campuses fails to accurately explain the measure's effect on existing law and, more importantly, is misleading. I write separately, however, because I disagree with the court's holding that the provision in the gist addressing confiscation of firearms during traffic stops is similarly misleading.

¶2 The relevant provision states that SQ 809 "generally prohibits confiscation of firearms during traffic stops when any person in the vehicle holds a valid handgun license." The majority points out that the law currently provides a general prohibition on confiscation of lawfully carried firearms. 21 O.S. § 1289.13A(B). Under the current system of permitless carry, most firearms are lawfully carried or transported, and thus, few are subject to confiscation. In keeping with its broader purposes of eliminating permitless carry and reinstating a licensing regime, SQ 809 would amend 21 O.S. § 1289.13A(B) to prohibit confiscation only when someone in the vehicle has a valid handgun license.

¶3 The majority states that this provision in the gist fails to communicate the true effect of SQ 809 on existing law, which is a transition from a general prohibition on confiscation to a much narrower prohibition on confiscation when someone in the vehicle has a handgun license. While the provision may not be the most artful explanation of SQ 809's effect on confiscation, it is adequate to put signatories on notice of the changes being made by the measure. *In re Petition No. 409, State Question No. 785*, 2016 OK 51, ¶ 3, 376 P.3d 250, 252. The provision communicates to signatories that a change to the confiscation rules would be made and that if the measure were adopted, confiscation would be prohibited if someone in the vehicle has a handgun license.

¶4 Moreover, this provision is not misleading in the same way as the one addressing possession of weapons on educational campuses, which ascribes credit to SQ 809 for a law that currently exists, and which is so misleading that it cannot pass the test for fraud. *Id.* (citing *In re Initiative Petition No. 409*, 1996 OK 122, ¶ 18, 927 P.2d 558, 567).

KANE, J.:

1. *In re Referendum Petition No. 26, State Question No. 803*, No. 118,238.

2. *Lowe v. Stitt*, CJ-2019-5628; *Lowe v. Stitt*, No. 118,371.

3. This Court granted Petitioner's motion for oral argument on March 2, 2020. Oral argument was scheduled for March 31, 2020. However, due to COVID-19, on March 23, 2020, this Court cancelled oral argument and stayed the proceedings, with the exception of additional briefing, until further notice. The stay was lifted May 11, 2020.

4. As of April 28, 2015, the more detailed ballot title is no longer part of the pamphlet circulated to potential signatories. *See* 34 O.S.Supp.2015 §§ 2, 8(A). As a result, [t]he gist alone must now work to prevent fraud, corruption, and deceit in the initiative process." *In re Initiative Petition No. 409, State Question No. 785*, 2016 OK 51, ¶ 4, 376 P.3d 250.

2020 OK 59

GREENWOOD CENTRE, LTD., an Oklahoma limited partnership; JOHN HOPE FRANKLIN CENTER FOR RECONCILIATION, INC., a non-profit corporation; SHANNON MARTIN, an individual; and BIM STEPHEN BRUNER, an individual, Petitioners, v. REBECCA BRETT NIGHTINGALE, Judge of the District Court in and for Tulsa County, Respondent.

No. 118,860. June 23, 2020

CORRECTED ORDER

Petitioners Greenwood Centre Ltd., John Hope Franklin Center for Reconciliation, Inc., Shannon Martin, and Bim Stephen Bruner's application to assume original jurisdiction is denied. Okla. Const. art. VII, § 4. Petitioners cannot establish the necessary elements for a writ of mandamus, specifically that Petitioners possess a clear legal right to the relief they seek. *Chandler U.S.A., Inc. v. Tyree,* 2004 OK 16, ¶¶ 24-25, 87 P.3d 598, 604-05.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 19th DAY OF JUNE, 2020.

/s/ Noma D. Gurich
CHIEF JUSTICE

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

COMBS, J., with whom, Kauger, J., joins, concurring

¶1 I concur in this order for the following reasons. Oklahoma Governor Stitt's executive order no. 2020-20, filed June 12, 2020, paragraph 15 provides:

> All businesses **should adhere** to the statewide Open Up and Recover Safely **(OURS) Plan** as provided on the Oklahoma Department of Commerce website. (emphasis added)

The OURS Plan on the Oklahoma Department of Commerce's website has a specific

provision for entertainment venues.[1] It notes, entertainment venues, such as the BOK Center, reopened on May 1, 2020. It also provides the following social distancing guidelines:

> **Social Distancing Guidelines**
>
> It is at the **discretion** of **business owners** or **local officials** to determine when and if social distancing measures should be applied.
>
> Business owners and event organizers should **use their best judgment** taking into account factors such as location and size of venue when determining the appropriate levels of social distancing and group size. (emphasis added).

The Petitioners included in their appendix the Tulsa Mayor's executive order no. 2020-10, signed June 8, 2020. This executive order provides:

> 2. Special Event Permits may be issued to organizers following **CDC and OURS Plan guidelines for social distancing** and sanitation guidelines effective June 1, 2020.
>
> 3. **All businesses within the City of Tulsa,** including bars, **shall follow the** guidance in the Governor of the State of Oklahoma's **OURS Plan**. (emphasis added).

There is no indication that the BOK Center needed to apply or applied for a special event permit for the subject event. There is no other local official executive order presented to this Court which provides restrictions on social distancing. Therefore, the only social distancing requirement is to follow the OURS Plan. In the context of an entertainment venue, the OURS Plan only requires a business owner to use discretion and its best judgment. The OURS Plan is permissive, suggestive and discretionary. Therefore, for a lack of any mandatory language in the OURS Plan, we are compelled to deny the relief requested.

Rowe, J. concurring:

¶1 Petitioners ask this Court to enjoin Real Parties in Interest, SMG and ASM Global Parent, Inc., which manage the BOK Center, from permitting President Trump's campaign to host a rally at the venue in Tulsa, Oklahoma, on June 20, 2020, unless the campaign institutes social distancing protocols. Nearly three weeks ago, on June 1, 2020, Oklahoma entered into Phase 3 of the Open Up and Recover Safely (OURS) Plan. In Phase 3 of the plan, business owners or local officials became vested with the discretion to determine when and if social distancing measures should be applied. Thus, social distancing measures as of the date of the President's rally are not mandatory in Oklahoma as Petitioners claim.

¶2 Governor Stitt and Mayor Bynum have indicated that the proposed presidential rally will be operated consistent with the guidance contained in the OURS plan. Neither the governor nor the mayor have sought to reinstate, by executive order, social distancing measures in anticipation of the President's rally.

¶3 It is not the duty of this Court to fashion rules or regulations where none exist, simply to achieve a desired outcome. Okla. Const. art. 4, § 1 ("[T]he Legislative, Executive, and Judicial departments shall be separate and distinct, and neither shall exercise the powers properly belonging to either of the others."); *State ex rel. York v. Turpen*, 1984 OK 26, ¶4, 681 P.2d 763, 766-67. Rather, it is our duty to apply the law as written. *Zeier v. Zimmer, Inc*., 2006 OK 98, ¶ 12, 152 P.3d 861, 866-67 ("[J]ust as it is the responsibility of the Legislature to make law and the Executive to carry those laws into effect, it is for the judiciary to interpret the same ...").

¶4 Based on the foregoing, Petitioners have not shown a likelihood of success on the merits, which is the first of four requirements in order for a temporary injunction to issue. 12 O.S. § 1382. As such, we need not address the three remaining criteria.

¶5 Accordingly, I concur in the Court's decision to deny the Petition for Writ of Mandamus and to allow the President's rally to proceed as planned.

COMBS, J., with whom, Kauger, J., joins, concurring

1. This information can be found at https://www.okcommerce.gov/wp-content/uploads/Entertainment-and-Sporting-Venue-Guidance.pdf.

2020 OK 60

IN RE: OKLAHOMA BAR ASSOCIATION ALTERNATIVE METHOD TO CONDUCT 2020 ANNUAL MEETING

SCBD 6938. June 29, 2020

ORDER ALLOWING ALTERNATIVE METHOD TO CONDUCT THE 2020 OKLAHOMA BAR ASSOCIATION ANNUAL MEETING

This matter comes on before this Court upon an Application for an Order Allowing Alternative Method to Conduct the 2020 Oklahoma Bar Association Annual Meeting. This Court finds that it has jurisdiction over this matter and makes the following order.

That in the interest of the safety and health of its members, if the Oklahoma Bar Association deems it is unable to conduct the elections and other House of Delegate business pursuant to its Bylaws, the Oklahoma Bar Association is authorized to use alternative means to conduct the business of the House of Delegates including allowing delegates to vote by mail.

DONE BY THE SUPREME COURT IN CONFERENCE this 29TH day of JUNE, 2020.

/s/ Noma D. Gurich
CHIEF JUSTICE

ALL JUSTICES CONCUR

2020 OK 61

Re: CREATION OF THE UNIFORM REPRESENTATION OF CHILDREN AND PARENTS IN CASES INVOLVING ABUSE AND NEGLECT OVERSIGHT COMMITTEE

SCAD-2020-56. June 29, 2020

ORDER

¶1 This Order amends paragraph 3 of SCAD 2019-65 entered on July 22, 2019. In all other respects, SCAD 2019-65 remains in effect.

¶2 The Task Force submitted an interim report on February 1, 2020, which included a recommendation to create pilot programs in order to improve the representation of children and parents in both urban and rural areas. The Task Force also unanimously voted to create a Parent Representation Program to implement attributes of high quality legal representation across the state.

¶3 In order to provide oversight to the Parent Representation Program and any pilot programs which may be created, as well as monitor the ongoing representation of children and parents paid by the district court fund budget, the Task Force will be renamed The Uniform Representation of Children and Parents in Cases Involving Abuse and Neglect Oversight Committee.

¶3 The Uniform Representation Oversight Committee shall submit an annual report to the Supreme Court regarding the status of uniform representation of children and parents in cases involving abuse and neglect not later than February 1st of each year.

¶4 Members will continue to serve without a specified term. The Chief Justice shall fill any vacancies as they occur.

¶5 DONE BY ORDER OF THIS COURT THIS 29TH DAY OF JUNE, 2020.

/s/ Noma D. Gurich
CHIEF JUSTICE

ALL JUSTICES CONCUR

2020 OK 62

STATE OF OKLAHOMA *ex rel.* OKLAHOMA BAR ASSOCIATION, Complainant, v. BRENT EARL MAYES, Respondent.

SCBD 6934. June 30, 2020

ORDER APPROVING RESIGNATION FROM OKLAHOMA BAR ASSOCIATION PENDING DISCIPLINARY PROCEEDINGS

¶1 Before this Court is (1) the affidavit of Respondent Brent Earl Mayes filed pursuant to Rule 8.1 of the Rules Governing Disciplinary Proceedings (RGDP), 5 O.S.2011, ch. 1, app. 1-A, requesting that he be allowed to resign his membership in the Oklahoma Bar Association (OBA) and relinquish his right to practice law, and (2) the OBA's Application for Order Approving Resignation.

¶2 THE COURT FINDS AND HOLDS:

¶3 On September 22, 2015, the OBA admitted Mayes to membership. On June 16, 2020, the OBA filed with this Court Mayes's affidavit of resignation pending disciplinary proceedings. Mayes executed his affidavit on June 2, 2020, and submitted it to the OBA on June 11, 2020.

¶4 Mayes's affidavit of resignation reflects that (a) it was freely and voluntarily rendered; (b) he was not subject to coercion or duress; and (c) he was fully aware of the consequences of submitting his resignation.

¶5 Mayes's affidavit of resignation states that on March 18, 2020, the Supreme Court of Kansas issued its Order of Disbarment in the Matter of Brent E. Mayes, Bar Docket No. 27058, which resulted from Mayes's improper handling and misconduct in four personal injury cases while employed with the DeVaughn

James law firm in Wichita, Kansas. The misconduct involved dishonesty, conversion, incompetency, and conflict of interest. The facts of these cases are as follows:

a. The Young and Guffey Matters involved the conversion of funds belonging to one client (Guffey) to pay off a vehicle loan balance of $2,433.05 for another client (Young). Mayes intentionally misrepresented to Guffey in her settlement statement that the funds at issue were paid to a "Medical Physician" to have Guffey approve the release of funds. The law firm repaid Guffey the funds that belonged to her, and Mayes reimbursed the law firm.

b. The Rodriguez Matter involved miscalculating the repayment of eight medical bills totaling $1,375.00 for a client after the settlement of a personal injury claim. Mayes misled the client to believe she could obtain additional money damages from the other driver's insurance policy to pay the outstanding medical bills when the driver had already executed a release and that Mayes had sent a demand letter to the driver when he had not.

c. Cumpston Matter involved misrepresenting to a client that Mayes had filed suit against an insurer for failure to pay a claim when he had not. After making these misrepresentations, Mayes conducted research and determined that such a suit was not viable under Oklahoma law.

¶6 Mayes is aware that these allegations would constitute violations of Rules 1.15, 8.4(a), 8.4(c), and 8.4(d) of the Oklahoma Rules of Professional Conduct (ORPC), 5 O.S. 2011, ch. 1, app. 3-A, and Rule 1.3 of the RGDP, as well as his oath as an attorney.

¶7 Mayes's affidavit of resignation further states:

a. He understands that the surrender of his law license in Kansas is sufficient for the OBA to initiate reciprocal discipline proceedings against him pursuant to Rule 7 of the RGDP, but he has requested to voluntarily resign his membership in Oklahoma;

b. He is aware that the OBA has the burden of proving the allegations against him, but he waives any and all rights to contest the allegations;

c. He is aware that approval of his resignation is discretionary with this Court;

d. He is familiar with and agrees to comply with Rule 9.1 of the RGDP, agrees to comply with Rule 11 of the RGDP as a prerequisite to reinstatement, and agrees to make no application for reinstatement prior to the expiration of five (5) years from the effective date of his resignation;

e. He acknowledges that the Client Security Fund may receive claims from his former clients and agrees to reimburse the Fund for the principal amounts and statutory interest for claims which it approves and pays as a prerequisite to his reinstatement to the practice of law;

f. He acknowledges and agrees to cooperate with the Office of General Counsel in the task of identifying any active client cases wherein documents and files need to be returned or forwarded to new counsel, and in any client cases where fees or refunds are owed by Mayes;

g. He acknowledges that the OBA has incurred no costs in the investigation of this matter; and,

h. He has surrendered his OBA membership card to the Office of the General Counsel.

¶8 We determine the effective date of resignation to be the date Mayes submitted his resignation to the OBA, June 11, 2020.[1]

¶9 This Court finds Mayes's resignation pending disciplinary proceedings is in compliance with all the requirements set forth in Rule 8.1 of the RGDP and should be accepted,

¶10 Mayes's OBA number is 32458, and his official roster address, as shown by OBA records, is Brent Earl Mayes, 918 Winding Lane, Derby, Kansas 67037.

¶11 **IT IS THEREFORE ORDERED** that the OBA's Application for Order Approving Resignation is approved, and Mayes's resignation is deemed effective on the date Mayes submitted his resignation to the OBA, June 11, 2020.

¶12 **IT IS FURTHER ORDERED** that Mayes's name be stricken from the Roll of Attorneys and that he make no application for

reinstatement to membership in the OBA prior to the expiration of five (5) years from the effective date of his resignation. *See* RGDP Rules 8.2 and 11.1.

¶13 **IT IS FURTHER ORDERED** that Mayes comply with Rule 9.1 of the RGDP and return all client files and refund unearned fees. As a condition of reinstatement, Mayes shall reimburse the Client Security Fund for any monies expended because of his malfeasance or nonfeasance. *See* RGDP Rule 11.1(b).

¶14 DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this day 29th of June, 2020.

/s/ Noma D. Gurich
CHIEF JUSTICE

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

1. Mayes states his intent that his resignation be effective from the date and time of its execution and that he will conduct his affairs accordingly. The OBA requests the Court make the resignation effective retroactive to the date of its execution by Respondent. We note Mayes executed the resignation on June 2, 2020, and submitted the resignation to the OBA on June 11, 2020. The OBA filed Mayes's resignation with this Court on June 16, 2020. The ten business days between June 2nd and June 16th is not sufficiently contemporaneous for treating the resignation as effective from the date of execution. However, the three business days between June 11th and June 16th is sufficiently contemporaneous. *See State ex rel. Okla. Bar Ass'n v. Claborn*, 2019 OK 14, ¶ 10, 440 P.3d 660, 663 (holding the Court may determine an effective date for the resignation to be the date it was submitted to the OBA when the resignation is contemporaneously filed with this Court and finding two days to be sufficiently contemporaneous).

2020 OK 63

IN THE MATTER OF L.M.A., K.M.A., and P.A., Adjudicated Deprived Children, CHRISTOPHER F. ALFRED, Appellant, v. THE STATE OF OKLAHOMA, Appellee.

No. 118,136. June 30, 2020

APPEAL FROM DISTRICT COURT OF OKLAHOMA COUNTY

¶0 Three minor children were removed from their home. Their mother voluntarily terminated her parental rights. A jury trial was held before the Honorable Lydia Y. Green, Special Judge for the District Court of Oklahoma County, the children were adjudicated deprived by the court and the jury's verdict found two reasons for terminating father's parental rights. Father appealed the judgment and the Oklahoma Supreme Court retained the appeal. We hold: the evidence was sufficient for the adjudication of deprived status and termination of father's parental rights.

DISTRICT COURT JUDGMENT AFFIRMED

Kacey L. Huckabee, Oklahoma City, Oklahoma, for Appellant.[1]

Rebecca Bauer, Assistant District Attorney, Oklahoma County, Oklahoma City, Oklahoma, for the State of Oklahoma.[2]

EDMONDSON, J.

¶1 This case involves three children and a trial in the District Court which determined the children were deprived and father's parental rights should be terminated.

Father appealed to this Court and argues the evidence was insufficient. We hold the evidence was sufficient.

¶2 Three children were taken into emergency custody pursuant to an order of the District Court in September 2016. The ages of the three children were approximately 3 years, 2 years, and 10 months. Their mother was temporarily incarcerated at this time in a county jail. An emergency custody show cause hearing was held with both parents present and both waived a show cause hearing. The State filed a petition and alleged the home of mother and father was inadequate, dangerous, and unfit, and that the children were deprived. The petition alleged inadequate caregivers were provided, and the children suffered certain conditions of neglect. Allegations relating to the children included, but were not limited to, child developmental delays, lack of medical care, lack of hygiene, and lack of food in the home. Several other allegations were made including the unfitness of mother and father. The petition sought to terminate father's parental rights based upon 10A O.S.Supp.2015 § 1-4-904 (A) & (B) (8) (b) and father's previous conviction for two counts of rape in the first degree in a 2005 Oklahoma County case.[3] The petition also referenced father's previous conviction in Alaska for assault with intent to commit a felony (sexual assault).

¶3 Mother was released from a county jail shortly after the children were taken into DHS custody. Father was arrested in January 2017 for violating the conditions of his probation, released temporarily, and again arrested and taken into custody after his domestic abuse assault and battery upon the mother of these

children. Father has been incarcerated since January 2017.

¶4 The Department of Human Services (DHS), mother, and certain organizations worked for several months to achieve a reunification of mother and children as a family. Father was incarcerated during this time. After efforts for family reunification were unsuccessful, DHS recommended termination of the parental rights of mother in May 2018. Mother personally appeared in the trial court and gave her voluntary consent for termination of her parental rights. The trial court considered exhibits admitted into evidence at the hearing. The children were adjudicated deprived as to mother. The court terminated mother's parental rights, dismissed her as a party in further proceedings, and allowed her counsel to withdraw. The trial court noted at this same hearing one child had been placed with the child's maternal relative, and potential placement of a second and third child with this same relative was discussed.

¶ 5 Father remained incarcerated after mother's voluntary termination of her parental rights in May 2018, and the State filed an amended petition in August 2018 to terminate his parental rights. This petition alleged the children were deprived as to father, repeated the request to terminate his parental rights pursuant to 10A O.S.Supp.2015 § 1-4-904 (A) & (B) (8)(b) and added the additional claim his parental rights should be terminated pursuant to 10A O.S.Supp.2015 § 1-4-904 (A) & (B) (12) because he was incarcerated.[4]

¶6 The State requested a jury trial to terminate father's parental rights. A jury trial was held and a journal entry was entered on the verdict. The journal entry states the children were adjudicated deprived by the court.[5] The journal entry states the father failed to provide the proper care and guardianship necessary for the children's physical and mental well-being, the home of the father was unfit due to domestic violence, the home of the father was unfit due to not providing a stable home, home of the father was unfit due to mental health, the home of the father was unfit due to threat of harm. The jury found father's parental rights should be terminated as to each of the three children. The jury relied on father's incarceration and father's conviction of first degree rape. The jury found termination of the parental rights was in the bests interests of the children. The court ruled father had a duty to support his children unless or until an adoption of the children is completed. The court ordered the children to remain wards of the court.

¶7 Father appealed and this Court retained the appeal. His four assignments of error in his appellate brief[6] are: (1) The evidence was insufficient to show the children were deprived. (2) The evidence was insufficient to terminate father's parental rights due to incarceration because the State did not show father's parental rights would cause harm to the children. (3) The evidence was insufficient to show the children would be neglected or abused in the father's custody. (4) Trial court committed an abuse of discretion by allowing prejudicial evidence presented to the jury.

I. The Trial

¶8 The first witness was a Child Welfare Specialist and foster care worker, formerly in Child Protective Services and having investigated allegations relating to safety of children. His employment required a bachelor's degree and specialized training. He testified that in father's case a joint response occurred with the Oklahoma City police department and the "overnight unit" and he reviewed the reports the next day. This same day two child safety meetings were held for the purpose of determining whether a plan could be put in place without taking the children into custody. He stated he was concerned due to the lack of food for the children and father leaving the children with inappropriate caregivers while father was at work.

¶9 He stated some of his concerns such as the two oldest children not being able to walk in shoes and the middle child's lack of speaking. He testified concerning father's conviction, registration as a sex offender, probation status, and prior referrals for the family. A record of immunizations for the children could not be determined. He recommended the children be placed in DHS custody because they were not adequately supervised, the living conditions in the home, and because they were not receiving medical attention.

¶10 On cross examination the witness stated he had not been personally present in the home to observe the lack of food or an inappropriate caregiver. He also testified the father told him the children were left by father with "prostitutes and junkies" to care for the children while the father was at work. He explained the father gave this information at one of the two child

safety meetings in response to a question by a facilitator at the meeting asking why a concern was raised about the babysitters.

¶11 The child welfare specialist testified when the children were taken into custody the father provided clothing for the children which "did not fit," "smelled of urine," and was "unclean." He was asked how he personally knew the clothes did not fit and smelled of urine. He testified he knew about the clothing because "the clothes in the bag were so pungent that we had to move them to a different spot because they were overpowering, the smell of urine was overpowering." He testified clothes for the children from their home were brought to the meeting in two bags, one by father and one by the initial case worker, and both smelled of urine.

¶12 The second witness was a DHS employee who testified that the oldest child, a three-year-old, would not speak and would make sounds but no words. This child communicated by using hands for pointing. During DHS custody she received, and was continuing to receive, therapy she needed. By the time of father's trial this child was speaking and attending kindergarten, although using fewer words than typical for her age. The witness testified the middle child had self-harming, talking, and other issues. She testified on the individual needs of the children and "the amount of therapy that they receive is extensive." Testimony and the record on appeal show counseling, therapy, and participation in different programs for the children was started shortly after being taken into custody and continued in various forms. The children had family counseling with their mother before she relinquished her parental rights. At the time of trial the youngest child was exhibiting normal behavior for the child's age.

¶13 Counsel for father questioned whether testing had been performed on both mother and father. The witness said the evaluation of mother had been requested but not completed prior to her relinquishment of her parental rights, and "Dad wouldn't attend . . . for us to find out if there was anything we needed to do, if there was any other issues." Counsel then pressed: "Now, let's be realistic. You all were never going to do an FFA because you were going to terminate. So if you were not going to allow him to do any services, you were never going to do an FFA." The witness testified: "There were some scheduled that he never showed up for." The witness also explained: "We have service plans on individuals who are on a termination case plan goal." The witness was questioned whether the children have ever had an evaluation to determine the reason why they are having behavioral issues and whether such is a result of being in the home or in DHS custody. The witness replied "yes," but then explained that the evaluations were based upon the services and therapy the children needed at that time and not to determine a first or ultimate cause of a behavioral issue.

¶14 Counsel for father questioned whether children needing therapy was the result of being in DHS custody. The witness testified a self-harm issue with one of the children was not caused by being in DHS custody. She answered counsel's question explaining she knew this because the child had the issue "since the opening of the case," and the child's mother told her the child had the same behavior at home prior to being taken into custody. Counsel for father again pressed the witness on whether the child's behavior was the result of a lack of stability caused by being in DHS custody with different placements. The witness testified a cause for the child's behavior could not be placed on the doorstep of "DHS exclusively."

¶ 15 The youngest child, approximately ten-months-old when taken into custody, had the fewest behavioral issues for DHS to address, and the witness opined this was due to the child's age and less amount of time in the family home prior to DHS custody. She was asked whether her opinion was based on "scientific support" or "scientific evidence," or "scientifically," or "scientifically of proving." She admitted her conclusion was her "personal opinion." The witness also admitted that she could not say whether the cause of one child's developmental issues was from genetics or exposure to different environments. The witness said she was attributing cause based upon the lack of issues with the youngest child combined with experience she personally had with other children "born into custody" who do not have certain issues, or to the same extent, which may occur in children taken into custody from a home environment. The witness admitted when questioned there was "no way scientifically of proving that anything these children are dealing with is the result of being with their father versus being in DHS custody." The transcript is not clear on what counsel and the witness meant by phrases such as "scientific

method" and "scientifically proving" when applied to causes for behavior exhibited by the children.[7] Since the witness stated a scientific opinion was not being given, no negative inference of a scientific nature against the father was created.

¶16 On cross examination she admitted she did not contact father to determine if he needed services from DHS because of his status as a parent of children in DHS custody. She testified she wrote to father a few times. She testified one of the reasons she did not make the effort while he was in prison was a previous DHS case worker had documented three attempts where father did not "show up" for DHS meetings prior to father being placed into custody in January 2017. Father testified at trial he did not see his kids for "a couple of months" after they were taken into custody because "I had a warrant out for my arrest and I was advised if I came up here I would be arrested." Father also testified this time was December 8, 2016, until his arrest in January 2017. Father appears to be referencing meetings at the county courthouse or county office building for meetings with his children and his desire to avoid arrest if he appeared. Father testified his only contact with this DHS witness resulted from "a court order by the judge for me to write my children." Father then wrote several letters to his children. He also testified the DHS witness responded to father and wrote a lengthy letter to father describing the children, and three photographs were included.

¶17 The DHS witness testified DHS had been focused on providing services for the mother of the children while the father was incarcerated. She stated regular court hearings, reviews, and reports had occurred with ongoing discussions relating to mother's efforts to care for the children, and these proceedings did not include the incarcerated father. She testified she had irregular contact with father's prison caseworker and no contact with father. She stated one of the reasons for these circumstances was that mother had initially been meeting the requirements of her service plan and its goal of reunifying mother and children; and for a period of time "mom had actually moved into a window of having unsupervised visits." Mother later voluntarily terminated her parental rights, and then "the reports [to the court] focused on the father" concerning his sentence and time for incarceration.

¶18 The next witness was the father of the children. He stated he left his children with two women while he went to his place of employment. He stated he did not discover until after his children were taken into custody that one of the women had previously had her parental rights terminated. He stated the second woman was not an appropriate caregiver "according to DHS records," but he thought she was proper as a caregiver when he left his children with her. He testified they were proper caregivers because when he went home he would park at the hotel in a location he could observe them outside, and he would walk to a location outside his room where he could "gauge their interaction with my children to make sure there was no type of abuse or anything that was out of order."

¶19 He testified the allegations against him in the petition to terminate concerning his children were false. He stated the allegations concerning his convictions were true. Father testified their mother took the children for their immunizations to the local public health department. He testified he and the children were living in a room with a kitchenette at an extended-stay hotel. He explained the family had been living in this hotel for "six or seven months" and "I was awaiting my disability check so we could get an apartment." He testified the children slept in the queen or king-sized bed, and he and the mother of the children slept on an air mattress placed on the floor. On a subsequent day of testimony he said he remembered the youngest had a bassinet. He stated the children received a bath every night and their clothes were washed. He stated he did not allow cleaning staff in his room because he had previously had items stolen from the room, and the staff left clean linen at his door.

¶20 He denied saying to officials on the day the children were taken into custody that he had run out of food that day. He was at his work when he received a telephone call from a police officer stating he needed to come home. He stated he was going to buy groceries after work on the day the children were taken into custody. He stated he liked to buy fresh food for the children and he had planned on bringing home cooked and prepared chicken for the children to eat. He testified the government assistance programs for children provided him with what he needed to feed his children.

¶21 He testified on the child developmental delays DHS was trying to correct. He explained

when he was a child he had "a lot of developmental delays," and had "the same speech impediment" as the three-year-old child, the oldest of the three. He also stated he knew about the developmental delays of his three-year-old child prior to the child being taken into custody. He commented "we talked about putting her into speech classes." Father was also asked by his counsel why the middle child, the two-year-old, would not speak to anyone, including any of the DHS workers, "and all the other people around at the time." Father explained she doesn't talk to strangers. He also testified the middle child was struggling with issues while in DHS custody because the father has been denied access to the child. He testified the mother of the children had developmental delays.

¶22 Father testified that when he and his family had been residing in a former location the DHS offered to assist him and mother with placing the children in a daycare, and he and mother declined the offer. He subsequently testified he had not placed his children in daycare because they were not "the proper age to be in daycare." He also stated he declined an earlier offer by DHS to put the children in daycare because he thought it wasn't necessary.

¶23 Father testified he did not learn to talk until the age of six or seven. He testified he has split personalities and was taking two medications for this diagnosis, medication for his anxiety, and additional medication he could not remember. He testified concerning his schizophrenia, bipolar disorder, agoraphobia, depression, and post-traumatic stress disorder. He stated he received disability checks for a mental health disability. He testified his mental health issues "had nothing to do with me rearing my children." He testified his status as a "lifetime registered sex offender" "has no bearing on whether I can raise my children. My children are not my victims." He testified his registration as a sex offender would not prevent him from raising his children or participating in their school activities and being a good father for them. The "special conditions" of his probation included a prohibition on his presence at a school for children, and father argued this did not apply to him because he had agreed to this before his children were born. He later testified he could, when necessary, petition a District Court to modify these special provisions. He testified he was fifty years old and had five additional children, ages 34, 30, 28, 23, and 16, four living in Alaska and one in Australia.

¶24 Father testified on providing financial support for his family. When he was released from prison in 2010 he attended school and started his own paralegal service typing motions and doing legal research for attorneys, and working for a labor service. He testified he could work as paralegal typing briefs when the children were asleep.

¶25 He explained his business he described as a "legal broker." This involved people telephoning him for legal advice. People "would have questions for me regarding counsel, are they receiving effective representation . . . [a]nd I'd point to the statute...[a]lso I would point them to certain case law that would enable them to determine whether counsel was effectively representing them when people would call me." He also explained he would assist them in doing legal research by showing them how to use WestLaw. He stated he would go to the courthouse and "pass out my flyers and stuff and I would meet with people and I would talk to them." Father testified he would refer cases to a certain lawyer, and he had an agreement with this lawyer which provided father could do the "paralegal work" the cases required. He enjoyed being at the Oklahoma County courthouse from eight in the morning until five in the afternoon "talking to people about their cases and trying to help them and things like that . . . [and] doing scout work" for a certain lawyer. He explained he was working primarily as a laborer when the children were taken into custody because he had not found a lawyer to employ him to work on a full-time basis.

¶26 Father testified the day of trial was the first time he had heard any complaint from anyone about his children being dirty, unkempt, or given inappropriate care. He also testified that when the joint response of police and DHS appeared at his hotel residence one of their concerns was an allegation he kept his children in car seats for extended periods of time. He stated he would not allow his children to be strapped into car seats for an extended period of time. He also stated his children would not have tolerated being strapped into car seats for an extended period of time. He testified he would never again use the two women caregivers he previously used. Father also testified that during the child safety meeting he was told by DHS it had concern for the children

due to inappropriate caregivers, and a dirty and unkempt home.

¶27 He testified it was inappropriate for him to bathe his two-year-old and three-year-old daughters, and bathing his daughters was a duty of the two women he requested to be caregivers for his children. Father's relationship with these two women and if they possessed an employment status or received payment from father for providing child care was not specified in the testimony. On cross examination he testified he telephoned every day for one of the women to come to his room to bathe his daughters during the time their mother was in the county jail. He testified he planned to have his two sisters to bathe his daughters when he is released from incarceration in 2021.

¶28 Father testified a statement by a DHS worker was a lie. Father stated he never said the women caregivers were "prostitutes and junkies." When asked how DHS obtained that information, father replied: "Man I have – I have extensive experience in the courtroom with DHS, and I – I think he was coached into saying that, my honest opinion." Father also explained that DHS "haven't met their burden of proof to take my children. So the only thing they have is to focus on my character, and to assassinate my character." Father denied he brought soiled clothing for the children to the child safety meeting. He testified he never brought clothes to the child safety meeting. He testified he telephoned a third party and requested she go to Walmart and buy new clothing for the children, and those clothes were brought to the meeting. He stated he had an opportunity to bring clothes from home for the children.

¶29 He denied the children had missed necessary immunizations. He stated mother kept the immunization cards in her purse, and he did not go with the family for the immunizations because he did not like needles or to observe the children upset. Father stated he intended to have the youngest child "caught up" with required immunizations before the child entered daycare. Father testified none of the children were in daycare. Father recalled the DHS witness and agreed DHS stated it couldn't locate any immunization records for his children. Father's response on this issue was essentially he did not know why the DHS witness made this statement.

¶30 Counsel for the children questioned father on his trouble remembering the birthdays of two of the three children, and father's good memory on the details of his former military service in the U. S. Navy several years ago, his memory of the three hotels and mobile home park he and the children used as residences prior to his incarceration, and legal cases father uses and cites from memory as a paralegal. Father testified the DHS custody of the children had "destabilized" his children. Father stated he thought the children had "issues" caused by the DHS custody. He also stated he wanted his children to remain in custody until his expected release in 2021.

¶31 Father testified his probation was revoked because of his non-compliance with the conditions of his probation which included offender treatment classes and taking a polygraph. He testified his probation originated from a criminal conviction on a no contest plea to rape in the first degree. The plea occurred in February 2008, and he had since commenced a habeas corpus proceeding in a U.S. District Court challenging that plea and conviction. The federal proceeding had not been completed at the time of his testimony. He testified he was waiting on a disability check to pay for the polygraph and classes. He also testified one probation officer had provided him with additional time to take the polygraph and classes.

¶32 Father testified on his plans for the future. He expects to be released from prison in 2021, and he plans to continue his paralegal education and raise his children. He plans to provide housing for his children: "I'm going to apply for my disability, and I have housing that would be set up for me upon my release, once my disability gets – well its already approved, but once I get reinstated, I have a couple – a couple of places that I have in place for housing." He expected to receive assistance in obtaining a place to live with his family which satisfied limitations imposed by his registration as a sex offender. He also explained he was "going for my disability for the military." He is on a waiting list for parenting classes while in prison. He will be on probation for five years upon his expected release in 2021.

¶33 He stated he has a relative who was then twenty-three years old and she would stay with the family when he is released from prison and she would be a caregiver for his children. He said he had an older daughter living in Alaska and she would move to Oklahoma

and help care for the children. He stated his relatives did not help him care for his children prior to being taken into custody because at that time he had a vehicle, food, and everything needed for the children, and so he did not need any help. He then explained his criminal convictions should have nothing to do with whether he cares for his children. None of his relatives he identified for helping him in the future testified at his trial.

¶34 He stated he had a support group in prison and he was on his medication with positive effects. He said he would not need a support group when he is released, and he would not be in the presence of people encouraging his bad behavior. He identified the mother of his children as a person encouraging his bad behavior before he was incarcerated. Father was asked if he now understands "how the nature of your conviction and the terms of your probation and the reasons why there was a joint response at your home relate in any way whatsoever to your ability to care for your children in the future?" Father responded "No, I don't – I don't see how – I don't understand how that would relate to me to care for my – I've cared for them before."

¶35 The petition to terminate alleged domestic violence. Father testified no domestic violence occurred involving mother. Later in the trial he was questioned concerning his misdemeanor conviction for domestic violence, assault and battery, against the mother. He response was: "I can't recall this incident because this incident never happened. It was a misdemeanor. And I as I told the investigator that I did not – I did not do this. This is what was alleged, but I did not do this, this act." Father agreed he had been convicted and had signed a plea for pleading guilty to the domestic violence. He explained his prior testimony as being correct because there had been no domestic violence at the time of the petition to terminate, and the conviction related to events in January 2017. He stated he pled guilty "to roll everything with my probation because I wanted to go to prison" and not "stay in the county jail and fight these charges."

¶36 Father testified his hitting the biological mother of the children did not impact his ability to safely care for the children in the future. He testified his restrictions on living near a school or park would impact his children concerning walking to a school or park, but another family member could take them to the park, and "they have a bus route, they can catch a bus to school." He then stated the special supervision conditions of his probation are the general provisions every sex offender must sign, but "most of these conditions aren't applicable to me."

II. Appeal and Review

¶37 A court shall not terminate the rights of a parent to a child unless the child has been adjudicated to be deprived either prior to or concurrently with a proceeding to terminate parental rights; and termination of parental rights must be in the best interests of the child.[8] If the court finds that the factual allegations in a petition filed by the state alleging that a child is deprived are supported by a preponderance of the evidence, and the allegations are sufficient to support a finding that the child is deprived, and it is in the best interests of the child that the child be declared to be a deprived child and made a ward of the court; then the court shall sustain the petition, and shall make an order of adjudication finding the child to be deprived and shall adjudge the child as a ward of the court.[9]

¶38 On appeal from an order declaring a child deprived, the Supreme Court will affirm the trial court's findings if they are supported by competent evidence.[10] When the State terminates parental rights the State must support its allegations for termination with clear-and-convincing evidence.[11] This Court does not re-weigh the evidence, but determines if the evidence for termination "is such that a fact finder could reasonably form a firm belief or conviction that the grounds for termination were proven."[12] Father's first assignment of error challenges the sufficiency of the evidence to adjudicate his children as deprived, and we review using the competent-evidence standard.

¶39 Father denied making any statement characterizing his choice of caregivers as prostitutes and junkies, and he accused the DHS worker of lying at trial. This issue did not first arise from testimony at trial. The affidavit in support of emergency removal filed in 2016 states it was reported father had been leaving the children with drug users and prostitutes.

¶40 Father attempted to ameliorate a negative legal result of a jury choosing to believe the statement by the DHS witness concerning his parental choice of caregivers. He stated he had known one of the women for two years with no negative issues, he did not have the

resources or authority to perform background checks on the women, he surreptitiously watched them care for his children to make sure they were proper caregivers, and he would never again use these same caregivers. Further, that he would use available family members as caregivers in the future. Mother was in the county jail, father was working during the day, and father was making the decisions on who would provide care to his children while he worked away from the home. He testified he had family members residing locally but he did not ask for their assistance. He testified the DHS had previously offered daycare assistance but he did not ask for daycare assistance.

¶41 There is little doubt an adult providing simultaneous child care to a three-year-old child, a two-year-old child, and ten-month-old child would cause, or contribute to, an increased risk of harm to the children if the adult uses and abuses an illicit drug. One of the women had previously had her parental rights terminated. The jury could have believed the testimony of the DHS witness concerning the father's reported character assessment of his selected caregivers, and concluded the father could have made a different decision and utilized adult family members or the DHS assistance for childcare without creating this risk of harm. The trial court's finding the home was unfit due to inappropriate caregivers is supported in the evidence.

¶42 Father testified the two oldest children had their immunizations from the local public health department, and the youngest child needed to be "caught up" on his immunizations. The DHS employee stated he could not find any records for immunizations given the children. Father testified he knew his oldest child needed speech therapy before they were taken into custody, but he was waiting until a later date to obtain therapy for her. The DHS had provided therapy for this child for over two years by the time of trial, and she was successfully attending kindergarten but still needed additional therapy. Father testified his middle child talked to him, but not strangers and this was her normal, and her behavioral issues were the fault of DHS. He also testified he had similar issues as a child but he overcame the issues as he grew older. He implied the issues relating to his two oldest children were like him (*i.e.*, with a genetic cause) and the issues would be overcome with the children growing older.

¶43 A parent's failure to provide immunizations and medical care for a serious condition may be used to show medical neglect.[13] The same may be said of a parent's conscious decision to not provide age-appropriate speech therapy care necessary for a child to communicate with others. The trial court's finding father's home was unfit for a failure to provide for the children's physical and mental well-being is supported by the evidence.

¶44 Father testified he provided a stable home for his children and residing in four locations in three years was not destabilizing for his children. He also testified he did not see any connection between fulfilling conditions of his probation and caring for his children in a stable home. He stated mother did not work, and he was the primary caregiver for the children as well as providing finances for them by his employment. He also stated he did not work all of the time during the day and could watch the children during the day as well. He also explained his "disabilities kind of flared up once in awhile and I couldn't work as consistent as I wanted to." He testified he needed to help watch the children at home because their mother needed help. His children needed him to fulfill his conditions of probation so he would not be sent back to prison. They needed him to be employed for their financial assistance and they needed his physical presence to provide necessary parental care young children need.

¶45 Father argued there was no domestic abuse prior to the children being taken into DHS custody, and the assault did not occur in the presence of the children. The petitions filed by the State alleged domestic abuse. The evidence of abuse the State used was father's conviction for an assault which occurred in January 2017. This assault was was not used a ground to terminate his parental rights, but as a ground to show deprived status of the children, *i.e.*, their status of being in a family where their father physically assaulted their mother. This domestic abuse assault was committed by father against mother during the time she was trying to follow court orders and obtain custody of her children.

¶46 When a petition is filed and alleges children are deprived due to domestic violence between their mother and father, it is not error for the trial court to consider one of the parent's criminal conviction for domestic abuse assault against the other parent when that

assault occurs during the pendency of the deprived proceeding.

¶47 The trial court found the home of the father was unfit due to his mental health. Father testified when his disabilities flare up "once in awhile" he cannot work as much as he desires. This finding is the least supported from reading a written record. Testimony did not link his mental health to an unfit home except in one limited circumstance. Father testified he could not perform as the caregiver he would like to be when he was waiting on his disability check. He testified he was waiting on a disability check "so I could provide a stable residency" and rent an apartment. The family did not live in an apartment. He stated his parole revocation occurred because he was waiting on a disability check to pay for a polygraph and treatment classes. His parole was revoked for not taking the required classes and polygraph.

¶48 The trial court also determined the father's home was unfit due to a threat of harm. The court did not tie this finding to a specific threat of harm. Adults know that children are by nature, as well by law, incapable of caring for themselves and making those decisions which are vital to their well-being and survival.[14] Parents are given the responsibility to make decisions which provide proper and necessary care for their children.[15] Parental decisions in the form of either an act or an omission to act may be used by the State to show the decisions caused or contributed to a deprived status.[16] The State must step in and become involved in the parent-child relationship when a parental decision causes, or contributes to, a risk of harm to a child which is legally cognizable.[17] The risk of harm assessment may include several factors, including but not limited to, the nature of parental care, supervision, cleanliness of the child and the home, and the nourishment and medical attention provided to the child.[18]

¶49 We affirm the trial court's determination the father's home was unfit and the children deprived.

¶50 Father objects to termination of his parental rights. He argues the State failed to show his incarceration would harm the children. Father references 10 A O.S.Supp.2015 § 1-904(B)(12), which allows termination of a parent's rights when the parent is incarcerated and continuation of the parental relationship would result in harm based upon the following nonexclusive factors.

> a. the duration of incarceration and its detrimental effect on the parent/child relationship,
>
> b. any previous convictions resulting in involuntary confinement in a secure facility,
>
> c. the parent's history of criminal behavior, including crimes against children,
>
> d. the age of the child,
>
> e. any evidence of abuse or neglect or failure to protect from abuse or neglect of the child or siblings of the child by the parent,
>
> f. the current relationship between the parent and the child, and
>
> g. the manner in which the parent has exercised parental rights and duties in the past.

10 A O.S.Supp.2015 § 1-904(B)(12).

¶51 Counsel argued the father had not been successful on probation in the past and upon his release he would again be on probation for five years. Father avoided visiting the children when a warrant had been issued for his arrest. The testimony and record show father commenced writing letters to his children on a regular basis after being directed to do so by the court in October 2018, two months after the amended petition to terminate had been filed and three months before his trial. Father had been incarcerated one year and nine months at the time he commenced writing letters. He testified no one at the DHS told him to write letters to his children or provided him an address for contacting the children. He also testified at trial he had experience in working with the DHS.

¶52 The ages of the children in 2021 will be eight-years-old, seven-years-old, and six-years-old. The six-year-old has not lived with his father since the child was ten-months-old. The oldest child was at one time temporarily placed with a maternal relative, although we lack information on a current placement there is no indication of placement of the children with father's relatives.

¶53 We have noted some incarcerated parents are able to make suitable arrangements, financial and otherwise, for the care and custody of their children while the parent is incarcerated, and often this includes members of the

parent's extended family with a continuation of family ties during incarceration.[19] Some courts have stated impecuniousness should not be the basis for taking a child from a parent.[20] We agree.

¶54 Father desires the children to be in the custody of DHS until he is released from prison. He is counting on assistance for obtaining a place to live, government financial support for himself and his children, and relatives he hopes will help him with daily tasks necessary for raising the children. He testified he does not currently have the assistance he described, the relatives he indicated would help him are not taking care of the children while he is incarcerated, and one of the relatives he identified as helping him resides in Alaska. Father wants his children when he is released from custody. Father testified he has learned from his mistakes and his care of his children will be different when released from prison. On the other hand, opposing counsel argued father had testified he did not do anything wrong, and father's testimony on what life will be like for the children upon his release is merely a continuation of deprived status and residing in an unfit home.

¶55 We agree evidence of harm was shown sufficient for the jury to terminate father's parental rights while incarcerated.

¶56 Parental rights may be terminated as to adjudicated deprived children when in the bests interests of the children and the parent has been convicted of rape.[21] The jury determined this ground was present and sufficient for termination of father's parental rights. Father's appellate brief does not challenge this ground directly, but indirectly by arguing (1) the evidence on the best interests of the children did not support termination, and (2) the trial court allowed prejudicial evidence relating to Father's prior criminal convictions in addition to the mere fact of the convictions. We have repeated much of the evidence herein and its nature is sufficiently clear and convincing for the determination made by the jury.

¶57 Father's trial counsel filed a motion *in limine.* The motion involved three categories, (1) his criminal history, (2) juvenile adjudications and municipal citations, and (3) hearsay issues. On the category of past criminal convictions, the State argued the father's past criminal convictions were relevant to the ground of termination due to incarceration and the best interests of the children. *The trial court sustained father's motion as to prior convictions which were not listed in the State's petition to terminate.* The trial court stated it would allow evidence concerning two convictions, rape in the first degree and a conviction in the State of Alaska because they were listed in the petition to terminate. The trial court ruled the other convictions could be used *for impeachment purposes.* When the issue came up on the last day of trial the Court stopped one of the lawyers from speaking and bringing up additional criminal convictions: "The Court has already ruled on the motion *in limine* prepared by the defense regarding the criminal history of the father and that we're going to stick specifically to what's alleged in the petition unless father impeaches himself or there's an issue of credibility …[And the State may not backdoor this issue] … So at this point in time the Court is not going to allow the State to present – or put criminal history into the record, will not be presented as evidence to the jury."

¶58 Father's brief argues the trial court improperly allowed admission of exhibits and cites a portion of the transcript at the end of the trial when counsel for father made objections to exhibits previously admitted. Counsel objected to Exhibit Nos. 3-9 inclusive. Exhibit Nos. 3-7 relate to father's rape conviction.[22] Exhibit Nos. 8 and 9 relate to father's misdemeanor conviction for domestic abuse. Counsel agreed to redact social security numbers. The trial court also agreed with father's counsel and stated specific case numbers referring to other criminal convictions would be redacted.

¶59 Father's counsel objected to the number of instruments and their multiple pages from the rape case. Father testified he was challenging his conviction in federal court and it did not count because it was coerced. Opposing counsel used pages other than those showing the mere fact of conviction when questioning father relating to his signature and certain responses and findings relating to a free and voluntary plea. We need not reach the issue pressed by father, that a single page from a document showing a conviction is all which should be allowed for the jury to see. Father testified his plea of no contest to two counts of rape in the first degree was invalid because of a coerced plea, and he opened up the issue of the circumstances of his plea. The last two exhibits, nos. 8 and 9, related to his domestic abuse conviction, and they were not admitted

until after father testified he did not commit domestic abuse.

III. Conclusion

¶60 The District Court's judgment adjudicated the children deprived as to father. The evidence is sufficient to support the trial court's adjudication. The jury determined father's parental rights should be terminated as to each of the individual three children. The District Court's judgment terminated father's parental rights. No assigned error is a ground for reversing the judgment, and the evidence is sufficient for the judgment of the trial court. District Court's judgment is affirmed.

¶61 ALL JUSTICES CONCUR.

EDMONDSON, J.

1. Father was represented by a different lawyer in the District Court.

2. The attorney for the children, Jana Harris, Oklahoma City, Oklahoma, joined the brief filed by the State of Oklahoma.

3. 10A O.S.Supp.2015 § 1-4-904 (A) & (B) (8) (b):

A. A court shall not terminate the rights of a parent to a child unless:

1. The child has been adjudicated to be deprived either prior to or concurrently with a proceeding to terminate parental rights; and

2. Termination of parental rights is in the best interests of the child.

B. The court may terminate the rights of a parent to a child based upon the following legal grounds: . . .

8. A finding that the parent has been convicted in a court of competent jurisdiction in any state of any of the following acts:...b. rape, or rape by instrumentation....

4. 10A O.S.Supp.2015 § 1-4-904 (A) & (B) (12):

A. A court shall not terminate the rights of a parent to a child unless:

1. The child has been adjudicated to be deprived either prior to or concurrently with a proceeding to terminate parental rights; and

2. Termination of parental rights is in the best interests of the child.

B. The court may terminate the rights of a parent to a child based upon the following legal grounds: . . .

12. A finding that the parent whose rights are sought to be terminated is incarcerated, and the continuation of parental rights would result in harm to the child based on consideration of the following factors, among others:

a. the duration of incarceration and its detrimental effect on the parent/child relationship,

b. any previous convictions resulting in involuntary confinement in a secure facility,

c. the parent's history of criminal behavior, including crimes against children,

d. the age of the child,

e. any evidence of abuse or neglect or failure to protect from abuse or neglect of the child or siblings of the child by the parent,

f. the current relationship between the parent and the child, and

g. the manner in which the parent has exercised parental rights and duties in the past.

Provided, that the incarceration of a parent shall not in and of itself be sufficient to deprive a parent of parental rights;

5. 10A O.S.2011 § 1-4-603:

A. If the court finds that:

1. The factual allegations in a petition filed by the state alleging that a child is deprived are supported by a preponderance of the evidence;

2. Such allegations are sufficient to support a finding that the child is deprived; and

3. It is in the best interests of the child that the child be declared to be a deprived child and made a ward of the court, then the court shall sustain the petition, and shall make an order of adjudication finding the child to be deprived and shall adjudge the child as a ward of the court.

B. The order of adjudication shall include a statement that advises the parent that failure to appear at any subsequent hearing or comply with any requirements of the court may result in the termination of parental rights to the child.

C. When a child has been adjudicated deprived, the court shall enter a dispositional order pursuant to the provisions of Section 1-4-707 of this title.

D. When a child has been adjudicated deprived, the parent or other legal custodian shall register with the court clerk within two (2) days of the adjudication and provide a valid, current address or other place where the parent or other legal custodian may be served with a summons. In the event that the address or place where the parent or legal custodian may be served a summons changes during the course of the litigation, the parent or other legal custodian shall have the obligation of filing a change of address form with the clerk. In the event that an amended petition or motion is filed, the address listed on the form of the court clerk shall constitute the last-known address of the parent or other legal custodian unless the state has actual knowledge of the parent or other legal custodian's location.

6. An appellate brief may amend assignments of error raised in a petition in error provided they were preserved in the trial court. *Lay v. Ellis*, 2018 OK 83, n. 3, 432 P.3d 1035 (petition in error will be deemed amended to include errors set forth in the propositions in the brief-in-chief, provided that in no event may the appeal be broader in scope than allowed by [Okla.Sup.Ct.] Rule 1.26(a)); *In re Adoption of M.J.S.*, 2007 OK 44, n. 12, 162 P.3d 211 ("Assignments of error not argued or supported in the brief with citations of authority are treated as waived.").

7. The transcript is not clear when counsel and witness addressed concepts of scientific method and scientific proof in the context of causation and human behavior if they were attempting to address general causation versus specific causation, or the application of *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), in the context of an opinion in a social science and whether any inherent methodological limitations are, or should be, judicially recognized as applicable for the particular circumstance of human behavior discussed. *See, e.g., U. S. v. LaVictor*, 848 F.3d 428, 443-444 (6th Cir. 2017) citing *U. S. v. Simmons*, 470 F.3d 1115, 1122 (5th Cir. 2006), and *Beauchamp v. City of Noblesvile*, 320 F.3d 733, 745 (7th Cir. 2003) (discussion of expert testimony allowed when concerning human behavior not supported by exhaustive statistical evidence but by the expert's general research and history of personal interactions with people possessing the behavior); *Christian v. Gray*, 2003 OK 10, ¶ 21, 65 P.3d 591, 602 (general causation versus specific causation discussed); The Federal Judicial Center, *Reference Manual on Scientific Evidence*, 229-276, 231 (2d ed. 2000) (discussing surveys "used to describe or enumerate objects or their beliefs, attitudes, or behavior of persons or other social units").

8. *See* 10A O.S.Supp.2015 § 1-4-904 (A), *supra*, at note 4.

9. *See* 10A O.S.2011 § 1-4-603, *supra*, at note 5.

10. *In re J.D.H.*, 2006 OK 5, ¶ 4, 130 P.3d 245, 257.

11. *In re S.B.C.*, 2002 OK 83, ¶ 5, 64 P.3d 1080, 1082.

12. *Matter of B. K.*, 2017 OK 58, ¶ 35, 398 P.3d 323, 330.

13. *In re K.M.*, 164 A.3d 945, n.4, 948 (D.C.2017) (one type of medical neglect is shown when a parent failed to have proper immunizations for a child and failed to treat a serious respiratory condition).

14. *Matter of Daniel*, 1979 OK 33, 591 P.2d 1175, 1178.

15. *Matter of A.D.B.*, 1991 OK 96, 818 P.2d 483, 487 (discussing the sufficiency of the termination petition, Matter of Daniel, *supra*, at note 14, and sufficiency of a petition for a dependency adjudication where one of the allegations was parents had been unable to provide proper and necessary care).

16. *In re A.L.F.*, 2010 OK 59, ¶ 4, 237 P.3d 217, 219 (trial court order was affirmed on appeal and it found children's deprived status was caused by or contributed to by the acts or omissions of a parent).

17. *Matter of Daniel*, 1979 OK 33, 591 P.2d at 1177.

18. *In re Moore*, 1976 OK 191, 558 P.2d 371, 374–375.

19. *In Matter of Christina T.*, 1979 OK 9, 590 P.2d 189, 192.

20. *New Jersey Div. of Youth and Family Services v. P.W.R.*, 205 N.J. 17, 11 A.3d 844 (2011).

21. *See* 10A O.S.Supp.2015 § 1-4-904 (A) & (B) (8) (b), *supra*, at note 3.

22. Exhibit No. 3, (plea of no contest summary of facts to the first degree rape charge); Exhibit No. 4, (plea of no contest, sentence on plea); Exhibit No. 5, (sex offender conditions on probation); Exhibit No. 6, (judgment and sentence on rape conviction); Exhibit No. 7 (revocation of probation).

2020 Legislative Recap

By Miles Pringle

The 2020 Legislative Session is over and, while fewer bills passed due to the pandemic, it was nevertheless a very eventful session. First, the state budget was not in great shape heading into the session, with the energy market slowing. COVID-19 dragged the economy in general and the energy market in particular to a standstill (literally), resulting in a large decline in tax collections for the state. The Oklahoma Board of Equalization declared a revenue failure for fiscal year 2020 amounting to more than $416 million, and severe losses are anticipated for fiscal year 2021 and, potentially, 2022.

Prior to the board's declaration, there was a fight between the Legislature and the governor over the state's fiscal response, in which leadership in both the House and Senate asked the Oklahoma Supreme Court to intervene. Gov. Stitt attempted to stall a meeting of the Board of Equalization, after he believed the Legislature reneged on a funding deal that included the digital transformation fund. After filing the petition with the Supreme Court, the governor did call a meeting of the board.

In order to avoid large budget cuts and blunt the impact of a projected $1.36 billion decline in revenues, lawmakers pulled amounts from several one-time sources for the fiscal year 2021 budget. The governor vetoed the budget, which was immediately overridden by the Legislature. The governor defended his veto, stating that "They overrode it. The Legislature owns that budget." In all, the governor vetoed 19 bills, 10 of which were overridden.

Another bone of contention has been the tribal gaming compacts. The year started with a stare down between the governor and many tribes over whether the compacts automatically renewed in 2020. While in the midst of litigation, the governor made a deal with two tribes that drew heavy criticism from the Legislature. Oklahoma Senate President Pro Tempore and the Speaker of the House petitioned the Oklahoma Supreme Court to step in and adjudicate the dispute, which is still pending review.

LEGISLATIVE DEBRIEF

Join the Legislative Monitoring Committee online on Tuesday, July 21, from 2-4:30 p.m. when we host our 2020 Legislative Debrief.

It's free and offers 2.5 credits (.5 may be applied toward ethics). We will be addressing the bills that did pass this year, as well as hearing from lawyer legislators on their views of the session. Here's the agenda, and it's easy to register online. You'll find the link at www.okbar.org/legdb

Miles Pringle is general counsel for The Bankers Bank and serves as the Legislative Monitoring Committee chairperson.

July 21 Agenda

2 p.m. - Welcome
OBA President Susan Shields

Native American Law
Carolyn Romberg, Retired Deputy General Counsel / Director Chickasaw Nation
15 Minutes – Tribal Gaming Issues; *McGirt v. Oklahoma*

Health Law
Steve Buck, President & CEO of Care Providers Oklahoma
15 Minutes – Coronavirus Issues

Employment Law
Rachel Bussett & Patricia Podolec, Bussett Legal Group, PLLC
15 Minutes – COVID-19-Related Employment Issues

General Bills
Camal Pennington, University of Oklahoma College of Law
15 Minutes – Highlight Non-Coronavirus-Related Bills

Ethics
Richard Stevens, OBA Ethics Counsel
30 Minutes – Maintaining Attorney Ethics During Pandemic

Legislators
Rep. Chris Kannady, Sen. Kay Floyd, and Sen. Brent Howard
Moderator Miles Pringle
30 Minutes – Views From the Session

2020 OK CR 10

STATE OF OKLAHOMA, Appellant, v. DELTA LOUISE SILAS, Appellee

Case No. S-2019-577. June 18, 2020

SUMMARY OPINION

LUMPKIN, JUDGE:

¶1 Appellee was charged with first-degree misdemeanor manslaughter, 21 O.S.2011, § 711(1), in Pottawatomie County District Court Case No. CF-2019-09. The underlying misdemeanor alleged was driving under the influence of alcohol, 47 O.S.Supp.2018, § 11-902.

¶2 The evidence presented by the State at preliminary hearing indicated that Silas and her husband, Ronnie Sheppard, spent the late afternoon hours of October 18, 2018, at their rural Pottawatomie County home drinking alcohol. They were later joined by their friend, Samuel Champlin. Champlin spent the evening drinking with the couple. Shortly after he returned home, Champlin received a phone call from Silas. Champlin testified that Silas told him, "I hit Ron and killed him. I've run over Ron. I'm going to spend the rest of my life in jail." At Champlin's urging, Silas called 9-1-1. Responding deputies confirmed that Sheppard was deceased and testified that Silas appeared intoxicated. A test of her blood indicated an alcohol concentration of .15.

¶3 Silas demurred. She argued that because the incident happened on her driveway she could not be convicted of the underlying misdemeanor offense of driving under the influence of alcohol, and therefore could not be guilty of first-degree (misdemeanor) manslaughter.

¶4 The argument was based on what was not included in the language of Section 11-902. Under this Section, it is unlawful for any person who is under the influence of alcohol to:

> drive, operate, or be in actual physical control of a motor vehicle within this state, whether upon public roads, highways, streets, turnpikes, other public places or upon any private road, street, alley or lane which provides access to one or more single or multi-family dwellings . . . .

47 O.S.Supp.2018, § 11-902(A).

¶5 Because in 47 O.S.2011, § 11-404 the Legislature referenced both "private road" and "driveway," Silas contended the absence of "driveway" in Section 11-902(A) evidenced the intent of the Legislature to exclude driveways from the legislation governing driving under the influence.[1] Special Judge David Cawthon granted the demurrer and the decision was upheld by Associate District Judge Sheila G. Kirk. The State's appeal of the decision was automatically placed on the accelerated docket of this Court pursuant to Rule 11.2(A)(4), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2020). The issues were presented to this Court in oral argument on March 5, 2020, pursuant to Rule 11.2(E). At the conclusion of the argument, this Court voted to reverse the decision of the district court.

¶6 Because the issue involves statutory interpretation, it is reviewed *de novo. Smith v. State*, 2007 OK CR 16, ¶ 40, 157 P.3d 1155, 1169. A fundamental principle of statutory construction is to ascertain and give effect to the intention of the Legislature. *Gerhart v. State*, 2015 OK CR 12, ¶ 14, 360 P.3d 1194, 1198. Legislative intent is first determined by the plain and ordinary language of the statute. *Newlun v. State*, 2015 OK CR 7, ¶ 8, 348 P.3d 209, 211. "A statute should be given a construction according to the fair import of its words taken in their usual sense, in connection with the context, and with reference to the purpose of the provision." *Jordan v. State*, 1988 OK CR 227, ¶ 4, 763 P.2d 130, 131.

¶7 We find nothing in the plain language of Section 11-902(A) suggesting an intent on the part of the Legislature to exclude "driveways" from the statute's reach. *See State v. Farthing*, 2014 OK CR 4, ¶ 7, 328 P.3d 1208, 1210-11 (where there is no ambiguity in the language of the statute, "[u]se of canons of construction to fabricate a different result is improper").

¶8 If the plain language of the statute were not enough, we note that in 47 O.S.2011, § 1-148 the Legislature chose to define "private road" and "driveway" synonymously.[2] "[T]his Court is bound by the language the Legislature has placed in our statutes defining crimes." *Arganbright v. State*, 2014 OK CR 5, ¶ 15, 328 P.3d 1212, 1216.

¶9 Appellee's reliance on *State v. Haws*, 1994 OK CR 11, 869 P.2d 849 does not support a different result. Haws, who was discovered asleep in someone else's driveway, was charged with actual physical control (APC). The APC statute (47 O.S. § 11-902) was governed by another statute (47 O.S. § 11-101), which limited the reach of such prosecutions to highways, turnpikes and public parking lots. *Houston v. State*, 1980 OK CR 63, ¶¶ 3-4, 615 P.2d 305, 306. The issue in *Haws* was whether the private driveway was a "public parking lot" for purposes of APC prosecution. We found it was not and therefore affirmed the lower court's decision dismissing Haws' prosecution. *Haws*, 1994 OK CR 11, ¶ 14, 869 P.2d at 852.

¶10 The same result was reached almost ten years later in *Fenimore v. State*, 2003 OK CR 20, 78 P.3d 549 where we dismissed a conviction for driving under the influence because the prosecution failed to prove the conduct occurred on a highway, turnpike or public parking lot. *Fenimore*, 2003 OK CR 20, ¶ 3, 78 P.3d at 550. We noted the narrow scope of the statute, and invited the Legislature to make a change: "If the language of Oklahoma's driving under the influence statute needs to be amended – whether by broadening the language or by making it an all inclusive statute to prohibit driving under the influence anywhere in the State, it must be done by the Oklahoma Legislature." *Fenimore*, 2003 OK CR. 20, ¶ 7, 78 P.3d at 551.

¶11 The Legislature responded. It amended Section 11-902(A) in 2004 by adding language expanding the scope of the statute and making it clear that private property was included within that scope. Specifically, the Legislature added: "whether upon public roads, highways, streets, turnpikes, other public places or upon any private road, street, alley or lane which provides access to one or more single or multi-family dwellings." 2004 SB 1407, c. 548, § 1 emerg. eff. June 9, 2004. Because this language did not exist at the time *Haws* was decided, it cannot be said, as Appellee suggests, that the case continues to stand for the proposition that the reach of Section 11-902 does not extend to private driveways. *See Luna-Gonzales v. State*, 2019 OK CR 11, ¶ 9, 442 P.2d 171, 174 (recognizing subsequent statutory amendments "im-pliedly" overrule case law with conflicting interpretations).

¶12 If anything, *Haws*, which dismissed the prosecution of someone found on a private driveway, cuts against Appellee's position. "[W]e must presume that the Legislature was aware of our decisions and contemplated them in amending the statute." *State v. Iven*, 2014 OK CR 8, ¶ 14, 335 P.3d 264, 269. After *Haws* and *Fenimore*, the Legislature expanded the reach of the statute and by doing so made clear that private property was not off limits. What the Legislature did implicitly through statutory amendment, we now do explicitly and overrule *Haws* and *Fenimore* to the extent those cases are inconsistent with this opinion.

¶13 Based on the testimony of first responders, here we are faced with a pathway – whether it is referred to as a private road or a driveway – extending from a highway to a single-family residence. Under these circumstances, we have little difficulty finding Section 11-902(A) plainly applies.

DECISION

¶14 The decision granting Appellee's demurrer is REVERSED and this matter is REMANDED to the district court for proceedings not inconsistent with this opinion.

AN APPEAL FROM THE DISTRICT COURT OF POTTAWATOMIE COUNTY THE HONORABLE SHEILA KIRK, ASSOCIATE DISTRICT JUDGE

APPEARANCES AT TRIAL

Robert A. Butler, Attorney at Law, 320 N. Broadway, Shawnee, OK 74801, Counsel for Defendant

Curtis Bussett, Asst. District Attorney, 331 N. Broadway, Shawnee, OK 74801, Counsel for State

APPEARANCES ON APPEAL

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Robert A. Butler, Attorney at Law, 320 N. Broadway, Shawnee, OK 74801, Counsel for Appellee

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

1. Section 11-404 provides, "The driver of a vehicle about to enter or cross a highway from a private road or driveway shall yield the right-of-way to all vehicles approaching on said highway."

2. Section 1-148 is entitled "Private Road or Driveway" and provides, "Every way or place in private ownership and used for vehicular travel

by the owner and those having express or implied permission from the owner, but not by other persons."

LEWIS, PRESIDING JUDGE, DISSENTING:

¶1 I would affirm the court below. Statutory interpretation drives my view. The foundation of statutory construction is that when the language is plain and unambiguous and its meaning clear, the enactment will be accorded the meaning as expressed by the language employed. *Smith v. State*, 1994 OK CR 46, ¶ 5, 878 P.2d 375, (citing *Oklahoma Journal Publishing Company v. City of Oklahoma City,* 1979 OK CIV APP 42, ¶ 7, 620 P.2d 452, 454).

¶2 The plain language clearly indicates that the legislature intended that persons not drive under the influence on public or private roadways. Nowhere in section 11-902(A) is driveway listed as one of the identified areas covered by the statute. Had the legislature intended driveways to be included in this statute they would have done so.

¶3 The majority's reach to include driveway in this statute fails the common rules of statutory construction. As much as I believe that driving under the influence is detestable, my belief must be bound by the legislature's power to enact laws, and the limits of the Court to interpret those laws. The Court's Opinion expanding the statute to include a common driveway is misplaced, therefore, I dissent.

HUDSON, J., SPECIALLY CONCURS

¶1 Title 47 O.S.Supp.2018, § 11-902(A) classifies roads into two basic categories: public and private. The plain language of the statute makes it unlawful for any person to drive, operate or have actual physical control of a motor vehicle whether upon public roads (or in other public places) or "upon any private road . . . which provides access to one or more single or multi-family dwellings[.]" Period. The inclusion of specific examples – i.e., highways, streets, turnpikes, alleys, lanes – in the statutory language represents inclusive (not exclusive) language that reinforces the categorical demarcation line for each broad category contained within the statute's plain language. To read the plain language of § 11-902(A) any other way would lead to absurd consequences, something forbidden under the rules of statutory construction we apply. *See State ex rel. Mashburn v. Stice,* 2012 OK CR 14, ¶ 11, 288 P.3d 247, 250. A driveway leading to a single-family home on a rural homestead clearly falls under the statute. I therefore specially concur in today's decision. I am authorized to state that Vice-Presiding Judge Kuehn joins in this writing.

2020 OK CR 13

MICHAEL JOHN BEVER, Appellant, v. STATE OF OKLAHOMA Appellee

Case No. F-2018-870. June 25, 2020

OPINION

LUMPKIN, JUDGE:

¶1 Appellant Michael John Bever was tried by jury and found guilty of five (5) counts of First Degree Murder (Counts I-V) (21 O.S. Supp.2012, § 701.7(A)) and one count of Assault and Battery with Intent to Kill (Count VI) (21 O.S.2011, § 652(C)) in the District Court of Tulsa County, Case No. CF-2015-3983. The jury recommended as punishment life in prison in each of Counts I-V, and twenty-eight (28) years in prison in Count VI. The trial court sentenced accordingly, ordering the sentences to be served consecutively.[1] It is from this judgment and sentence that Appellant appeals.

¶2 On July 22, 2015, in Broken Arrow, Oklahoma, 16-year-old Appellant and his 18-year-old brother, Robert Bever, murdered their mother, father, younger sister and two brothers, and severely wounded another sister. The youngest sister, who was almost two (2) years old, survived unharmed.

¶3 Robert Bever pled guilty to five (5) counts of first degree murder and one count of assault and battery with intent to kill. He was sentenced to life in prison without the possibility of parole for each of the five (5) murders and a life sentence for the assault with intent to kill. The sentences were ordered to run consecutively. Robert Bever testified for the defense at Appellant's trial. He testified that he did not see Appellant kill anyone and took credit for killing all of his family members. His testimony was frequently at odds with the State's evidence. In particular, while he claimed he did not see Appellant kill anyone, Appellant told police he had killed three (3) of his family members.

¶4 The story of what happened the night of July 22 is drawn largely from the testimony of C.B., Appellant's thirteen-year-old sister; Robert Bever; and Appellant's pre-trial statements to police. Prior to the day of the murders, Appellant and Robert Bever, also referred to as the brothers, had collected body armor and

knives to be used in the murder of their family. Those killings were to be a prelude to a cross-country killing spree. The brothers sought to emulate certain serial killers and intended to exceed the body count of recent well-known mass shootings. The brothers had ordered guns that were to be delivered to a local gun shop. They had yet to be picked up, as the brothers needed someone over 21 to actually pick up the guns. The ammunition, over 2,000 rounds, was to be delivered to their home on July 23.

¶5 Late in the evening on July 22, all the family members were in bed except for Appellant, his brother Robert, C.B., and their mother, April Bever. C.B. testified at trial that around 11:30 p.m., her mother told her to tell her brothers to do the dishes. When she went to their bedroom, she found them putting on body armor. She also noticed they had set several knives out on the bed. C.B. had seen them put on the body armor previously and knew about their extensive collection of knives.

¶6 When she arrived in their room, Appellant asked, "should we do it right now?" Robert replied, "yes." Appellant told C.B. to look at something on his computer. When she did, Robert came up behind her and slit her throat. Robert Bever testified that the plan was for C.B. to die quickly and then they would drag her body to the closet. However, C.B. did not die quickly and fought back as Robert repeatedly stabbed her. C.B. ran screaming from the bedroom and headed toward the front door. As she ran, she heard her mother scream. C.B. ran outside but was dragged back inside the house.

¶7 C.B. suffered multiple stab wounds, including some that appeared to be defensive wounds. Several of the wounds were so severe that her internal organs protruded out of her abdomen. When first responders arrived on the scene, she was thought to be near death. However, despite the severity of the wounds and the massive blood loss, she survived.

¶8 Robert then stabbed his mother, April Bever. She fought back aggressively but ultimately succumbed to the approximately 48 stab wounds to her arms, neck, face, chest, and abdomen.

¶9 Robert then asked Appellant where the others were and Appellant replied that they were hiding. A younger brother, ten-year-old C.P.B., and five-year-old sister, V.B., had heard the commotion and run to a bathroom where they locked themselves in. Appellant knocked on the door and said, "let me in. He's gonna kill me". One of the children opened the door, at which time Appellant entered and stabbed both of them to death. C.P.B. had approximately 21 stab wounds to his back, chest, head and neck. V.B. suffered approximately 23 stab wounds to her neck, back, chest, face and abdomen. Both victims had defensive wounds. (At trial, Robert took credit for killing C.P.B. and V.B. However, in pre-trial statements, Appellant admitted to stabbing them).

¶10 Appellant then went to his father's home office where his twelve-year-old brother, D.B., had locked himself inside. Appellant used the same ruse as before, telling D.B. to open the door, that Robert was going to kill him (Appellant). When D.B. opened the door, Appellant said to Robert, "he's all yours". D.B.'s pleas to be spared were ignored. Robert grabbed D.B. and stabbed him in the stomach. Ultimately, D.B. suffered 21 stab wounds to his stomach, chest, head, neck and back.

¶11 At some point, the brothers' father, David Bever, came out of his room and Robert stabbed him repeatedly. David Bever ultimately suffered 28 stab wounds to his back, chest, neck and abdomen.

¶12 During the murder spree, Appellant had disabled the home alarm system. Prior to his death, D.B. used Appellant's phone to call 911. Appellant admitted he took the phone from D.B. and smashed it to the floor.

¶13 With the murders concluded, the brothers ran to a creek behind their house to hide. Officers arrived on the scene at approximately 11:30 p.m. In their subsequent search of the house, they discovered 23-month-old A.B. asleep in an upstairs bedroom, untouched by the murderous rampage which had occurred on the floor below. Robert Bever testified that they had intended to kill A.B. by cutting off her head. However, it appeared the brothers had forgotten about her in the melee.

¶14 The brothers were ultimately located by police and search dogs near the creek. One of the dogs had bitten Appellant in attempt to subdue him. Appellant was covered in dirt and blood. The blood was later determined to be from his mother.

¶15 Forensic testing later showed Appellant's blood was found on a knife handle, and the blade of that knife had a mixture of blood

from which his father, C.P.B. and D.B. could not be excluded. For his part in the murder spree, Appellant was convicted of five (5) counts of first degree murder and one count of assault and battery with intent to kill. He was sentenced to life in prison with the possibility of parole for each of the five (5) murders and 28 years imprisonment for the assault with intent to kill. The sentences were ordered to run consecutively.

¶16 In his first three propositions of error, Appellant challenges his sentence. Specifically, in Proposition I he argues that the trial court's order for his sentences to be served consecutively violates the Sixth and Eighth Amendments to the United States Constitution and Oklahoma and Federal case law because the jury's verdict was that he was "not irreparably corrupt and permanently incorrigible." In Proposition II, Appellant argues his consecutive sentences violate the Eighth Amendment to the United States Constitution and Oklahoma and Federal case law because they do not provide him a meaningful opportunity for release. And finally in Proposition III, Appellant contends his sentence is excessive in violation of the Eighth Amendment to the United States Constitution and Oklahoma and Federal case law. To a certain extent, Appellant's propositions overlap. However, we attempt to address them separately.

¶17 The record on which Appellant's arguments are based shows that at the close of the sentencing stage of trial, the jury was instructed as follows:

> Should you unanimously find that Michael Bever is irreparably corrupt and permanently incorrigible, you are authorized to consider imposing a sentence of life without the possibility of parole.
>
> If you do not unanimously find beyond a reasonable doubt that Michael Bever is irreparably corrupt and permanently incorrigible, you are prohibited from considering the penalty of life without the possibility of parole. In that event, the sentence must be imprisonment for life with the possibility of parole.

(Instruction No. 54).

¶18 The jury was also instructed, in part, "no person who committed a crime as a juvenile may be sentenced to life without the possibility of parole unless you find beyond a reasonable doubt that the defendant is irreparably corrupt and permanently incorrigible." (Instruction No. 57).

¶19 As to each murder conviction, the jury found the "Defendant is not irreparably corrupt and permanently incorrigible and sentence the Defendant to life with the possibility of parole." At the sentencing hearing, the judge ordered the five (5) life sentences as well as the 28 years imposed for the assault and battery with intent to kill conviction to be served consecutively.

¶20 The majority of the arguments presented by both sides in the appellate briefs were presented to the trial court in sentencing memoranda from the defense and the prosecution. To the extent Appellant challenges the court's ability to run the sentences consecutively, our review is for abuse of discretion as the state statute leaves that decision in the hands of the trial court. 22 O.S.2011, § 976. However, whether the trial court's ruling is consistent with the current state of the law is an issue this Court reviews *de novo. King v. State*, 2008 OK CR 13, ¶ 4, 182 P.3d 842, 843.

¶21 In Proposition I, both the State and Appellant set forth the legal background of the evolving principles of law in the area of juvenile sentencing, focusing primarily on *Graham v. Florida*, 560 U.S. 48 (2010), *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 577 U.S. ___, 136 S.Ct. 718 (2016). The basic premise of Appellant's argument on appeal is that his Sixth and Eighth Amendment rights were violated by the trial court's ordering of his sentences to run consecutively despite the fact the jury found he was not irreparably corrupt and permanently incorrigible.

¶22 Relying primarily on *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002) Appellant argues that the finding of "irreparably corrupt and permanently incorrigible" is equivalent to an aggravator in a death penalty case. He asserts that as the jury in his case acquitted him of the alleged aggravator, this acquittal prohibited the jury from imposing a sentence that would deny him a meaningful opportunity for release. He contends that his right to jury sentencing prohibited the judge from imposing a *de facto* sentence of life without parole. Appellant contends that under *Ring*, he may not be exposed to a penalty exceeding the maximum he would have received if punished according to the facts reflected in the

jury's verdict. He contends that his five (5) consecutive life sentences did just that in violation of his rights under the Sixth, Eighth, and Fourteenth Amendments.

¶23 It is not necessary for us to determine whether the finding of "irreparably corrupt and permanently incorrigible" is akin to the finding of an aggravating circumstance. The claim on appeal is whether running the sentences consecutively violated federal and state law.

¶24 Initially, none of the authorities cited by either side involves cases of juvenile homicide offenders sentenced to multiple life sentences. Further, none of the authorities cited by Appellant support a conclusion that the trial court's ruling violated federal or state law.

¶25 No cases have been cited or found where the Supreme Court or this Court have held that a defendant is constitutionally entitled to jury sentencing. The Sixth Amendment requires that the trial necessary to impose life without parole on a juvenile homicide offender must be a trial by jury, unless a jury is affirmatively waived. *Stevens v. State,* 2018 OK CR 11, ¶ 34, 422 P.3d 741, 750 (citing *Apprendi,* 530 U.S. at 490). However, neither the Supreme Court nor this Court have found a Sixth Amendment right to jury sentencing. In fact, both *Miller* and *Montgomery* recognized that it is appropriate for a judge to make sentencing decisions. In *Oregon v. Ice*, 555 U.S. 160, 168 (2009), the Supreme Court said that Apprendi does not apply to a trial court's decision to run sentences consecutively, even if the court must make findings of fact beyond those made by the jury before imposing consecutive sentences. Judges have long had the discretion to run sentences concurrently or consecutively. *Setser v. United States,* 566 U.S. 231, 236 (2012).

¶26 Under state law, criminal defendants have a statutory right to have a jury help determine the sentence. 22 O.S.2011, § 926.1. Further, sentences for multiple offenses are to run consecutively unless otherwise ordered by the trial court. 22 O.S.2011, § 976.

¶27 A majority of this Court recently found no Eighth Amendment violation in ordering multiple sentences for juvenile homicide offenders to be served consecutively. In *Martinez v. State,* 2019 OK CR 7, 442 P.3d 154 the defendant was sentenced to life in prison for one count of first degree murder and fifteen years in each of two counts of shooting with intent to kill with the sentences ordered to run consecutively. Martinez argued, much as Appellant does, that his consecutive sentences constituted a *de facto* sentence of life without parole for a crime committed as a juvenile and thus, his sentences violated the United States and Oklahoma Constitutions' ban on cruel and unusual punishment pursuant to *Miller* and *Montgomery.* This Court disagreed and explained:

> . . . even after *Graham, Miller,* and *Montgomery*, defendants convicted of multiple offenses are not entitled to a volume discount on their aggregate sentence. Thus, we hold that where multiple sentences have been imposed, each sentence should be analyzed separately to determine whether it comports with the Eighth Amendment under the Graham/Miller/Montgomery trilogy of cases, rather than considering the cumulative effect of all sentences imposed upon a given defendant.

2019 OK CR 7, ¶ 6, 442 P.3d at 156. (internal citation omitted).

¶28 Relying on *Graham* and *Miller,* this Court found that a State is not required to guarantee eventual freedom to a juvenile offender. *Id.*, at ¶ 8, 442 P.3d at 157 (citing *Graham*, 560 U.S. at 74; *Miller,* 567 U.S. at 479). This Court concluded by finding, "[b]ased upon the length of [Martinez's] sentences and the current status of the law, we find that [Martinez] has some meaningful opportunity to obtain release on parole during his lifetime." *Id.*

¶29 This finding was upheld in *Detwiler v. State,* 2019 OK CR 20, 449 P.3d 873, where a majority of this Court said, "[w]e thus find, as we did in *Martinez,* that the Eighth Amendment analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence for multiple crimes. To do otherwise would effectively give crimes away." *Id.*, 2019 OK CR 20, ¶ 6, 449 P.3d at 875. While the juvenile defendant in *Detwiler* was convicted and sentenced for non-homicide offenses, this Court found "[t]he Supreme Court has not explicitly held that stacked sentences imposed in a juvenile case – whether homicide or non-homicide – should be reviewed in the aggregate when conducting an Eighth Amendment analysis." *Id.* This Court rejected the contention that the defendant's sentences viewed in the aggregate as though they were one constituted a *de facto* sentence of life without parole for crimes he committed as a juvenile. "Based

upon the length of each of [the defendant's] sentences, viewed individually, and the current status of the law, we find that [the defendant] has some meaningful opportunity to obtain release on parole during his lifetime." *Id.*, 2019 OK CR 20, ¶ 8, 449 P.3d at 875-876.

¶30 The fact that the jury found Appellant was not irreparably corrupt and permanently incorrigible and sentenced him to life in prison for the offense of murder is immaterial to the trial court's discretion to order multiple sentences to be served consecutively. Based upon our review of the current state of both federal and state law, the trial court's order for Appellant's five (5) life sentences to be served consecutively does not violate his constitutional rights despite the jury's finding that Appellant was not irreparably corrupt and permanently incorrigible. Proposition I is therefore denied.

¶31 Much of Appellant's Proposition II is a repeat of the argument in Proposition I. However, his main focus in Proposition II is that the consecutive sentences violate the Eighth Amendment and federal and state case law because the sentence does not provide him a meaningful opportunity for release.

¶32 As addressed in Proposition I, a majority of this Court held in Martinez that the State is not required to guarantee eventual freedom to a juvenile offender and that consecutive life sentences do not deny a juvenile homicide offender a meaningful opportunity for release on parole during his lifetime.

¶33 Appellant now asserts, as this Court noted in *Martinez,* that both state and federal courts are divided over whether the Eighth Amendment requires individual sentences to be analyzed separately or whether the cumulative effect of multiple sentences is the benchmark for compliance. Appellant's assertion that our rationale in *Martinez* is "nothing more than the expression of resistance to the clear intent expressed in recent Supreme Court jurisprudence" misses the mark.

¶34 This Court fully recognizes and faithfully discharges its "independent duty and authority to interpret decisions of the United States Supreme Court." *Martinez,* 2019 OK CR 7, ¶ 5, 442 P.3d at 156. As the State asserts, "there is no reason to believe that this Court, and the many other courts which agree with this Court, are willfully disregarding the Constitution."

¶35 While the Supreme Court has not specifically addressed the issue raised in Appellant's case, the Court's precedent regarding the history and propriety of consecutive sentencing strongly supports this Court's decision in *Martinez.* A defendant, even a juvenile, who murders five people (and who plans to murder many more) is simply and fundamentally different than a defendant who murders one person. Appellant's arguments have not shown that our decision in *Martinez* is contrary to established law.

¶36 In a second portion of this proposition, Appellant asserts that the parole system in Oklahoma does not provide the meaningful opportunity for release required by the Eighth and Fourteenth Amendments. This is an entirely separate argument from that challenging the consecutive nature of his sentences as ordered by the trial court. As such, we find it is waived pursuant to Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2020), which requires each proposition of error to be set out separately in the appellate brief. *See Baird v. State,* 2017 OK CR 16, ¶ 28, 400 P.3d 875, 883.[2]

¶37 In Proposition III, Appellant claims his sentence is excessive. He does not challenge any of the sentences individually, but argues that his sentences, when considered in the aggregate are excessive and violate the Eighth Amendment. To this extent, his argument is merely a reprise of his first two propositions.

¶38 We typically review claims of excessive sentence under the principle that "this Court will not disturb a sentence within statutory limits unless, under the facts and circumstances of the case, it shocks the conscience of the Court." *Kelley v. State,* 2019 OK CR 25, ¶ 18, 451 P.3d 566, 572. Here, Appellant received the minimum punishment of life in prison with the possibility of parole for each count of first degree murder. These sentences were within statutory range. 21 O.S.2011, § 701.9(A).

¶39 There is no absolute constitutional or statutory right to receive concurrent sentences. 22 O.S.2011, § 976. It is within the trial court's discretion whether sentences are run concurrently or consecutively. *Id.* An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue. *Neloms v. State,* 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170.

¶40 The record indicates the trial court reached its decision to run the sentences consecutively after much research and deliberation. During the sentencing stage of trial, the State reincorporated all of its first stage evidence. This included evidence that Appellant not only helped plan the massacre of his family but also fully participated in the killings.

¶41 The defense presented three (3) witnesses, Dr. Ana Mazur-Mosiewicz, a licensed clinical psychologist; Assistant Public Defender Adam Barnett; and Sherri Knight, a teacher at the Tulsa County Jail. Dr. Mazur-Mosiewicz testified that she conducted a neuropsychological evaluation of Appellant in May 2016 (two (2) years before trial) at the Tulsa County Jail. She testified that Appellant had an I.Q. of 85, which according to the doctor was in the low range of average intelligence. She testified that his intellectual dysfunction could be the result of traumatic brain injury or a birth defect. Dr. Mazur-Mosiewicz admitted that she did not test Appellant at the time of the crimes. However, it was her opinion that as Appellant was 16 years old at the time of the crimes, and given that his brain had not fully matured by that time, in a high stress environment such as the murder scene, it was very likely Appellant would have frozen in place and not known what to do.

¶42 Mr. Barnett testified that he interacted with Appellant in 2015 when Appellant was in the Tulsa County Jail. Mr. Barnett's impression of Appellant was that he was either "absolutely clueless and naïve as to what was going on or he was institutionalized before he ever came in the door," and that Appellant seemed remorseful.

¶43 Ms. Knight testified that she interacted with Appellant when he was enrolled as a student for the 2015-2016 school year. She said that she provided Appellant with school materials and books to read. It was her opinion that Appellant was respectful and seemed interested in improving himself.

¶44 Additionally, sentencing memorandum prepared by the parties were considered by the judge. Also considered were the wishes of some jurors who had written the judge a letter expressing their desire for the sentences to be run concurrent, as well as a victim impact statement from C.B.'s adoptive mother detailing C.B.'s fear that Appellant would be released from prison and kill her in order to finish what he started.

¶45 Under the facts of the case and the current state of the law, including this Court's holding in *Martinez*, the trial court did not abuse its discretion in running the sentences consecutively. This proposition is denied.

¶46 In Proposition IV, Appellant contends he was denied due process by numerous instances of prosecutorial misconduct. It is well established that "[w]e evaluate alleged prosecutorial misconduct within the context of the entire trial, considering not only the propriety of the prosecutor's actions, but also the strength of the evidence against the defendant and the corresponding arguments of defense counsel." *Sanders v. State,* 2015 OK CR 11, ¶ 21, 358 P.3d 280, 286. In a claim of prosecutorial misconduct, "[r]elief is only granted where the prosecutor's flagrant misconduct so infected the defendant's trial that it was rendered fundamentally unfair." *Tafolla v. State,* 2019 OK CR 15, ¶ 28, 446 P.3d 1248, 1260.

¶47 Appellant initially argues the State failed to preserve relevant evidence. Two items are at issue. The first is a computer hard drive, identified as Item 18, seized from the Bever home and provided to the Oklahoma State Bureau of Investigation (OSBI) for analysis. The OSBI was unable to analyze the hard drive because it would not "initialize." The hard drive was subsequently retrieved, along with other items of evidence, from the OSBI. However, the prosecution was not able to subsequently locate the hard drive for trial purposes.

¶48 The other item is a journal allegedly kept by C.B. which family members had turned over, along with other property from the Bever home, to an auction house once the police had concluded their investigation. An employee of the auction house informed police that she had read a journal that she thought was written by C.B. and which was thought to contain references to child abuse. The journal, or one resembling it, was recovered by the police approximately one year after the murders. There were pages torn out of the journal. The employee who had read the journal could not tell if that was the actual journal she had read. No references to child abuse were found in the journal. No one could identify who tore out the missing pages. The journal became part of the property collected by the Broken Arrow Police Department and was available for inspection by the defense.

¶49 Appellant acknowledges that his challenges to the items were raised before the trial court and that his objections were denied. However, he argues this Court is free to grant relief on the grounds of misconduct "especially when the prosecutorial misconduct in this case is weighed in its totality."

¶50 While Appellant's argument on appeal is prosecutorial misconduct for the failure to preserve evidence, his cited authority is *Brady v. Maryland*, 373 U.S. 83 (1963) which concerns the prosecution's suppression of evidence. Appellant does not claim that the State actually suppressed evidence after it had been requested by the defense, that the evidence was favorable to his defense, or that the evidence was material either to his guilt or punishment, arguments typical of a *Brady* claim.

¶51 If Appellant's claim is that of prosecutorial misconduct due to a loss of evidence, there are two (2) lines of Supreme Court cases dealing with a loss of evidence. One line of cases states that a defendant is entitled to relief if he can show that police destroyed evidence which had apparent exculpatory value and he is unable to reasonably obtain comparable evidence. *See California v. Trombetta,* 467 U.S. 479, 484 (1984). The other line of cases provides a defendant with relief if he can show the police, acting in bad faith, destroyed potentially useful evidence. *See Arizona v. Youngblood,* 488 U.S. 51, 57 (1988). This Court has recognized and applied both cases. *See Martinez v. State,* 2016 OK CR 3, ¶¶ 19-29, 37 P.3d 1100, 1108-1110. No relief is warranted in the present case under either *Trombetta* or *Youngblood.* Appellant has not argued that either item of evidence was exculpatory. At most, he insinuates the items might have been useful to the defense.

¶52 Regarding the journal, the defense was able to obtain either the actual journal itself or a comparable one. If Appellant's claim is true that the torn out pages referenced abuse, the defense was able to put on evidence of alleged physical abuse from C.B., Robert Bever, and Dr. Manzer-Mosiewicz. Further, the defense did not ask C.B. whether she kept a journal or whether she documented any incidents of abuse.

¶53 As for the computer hard drive, all the evidence showed that it was unreadable. Appellant has made no argument of its materiality.

¶54 Any argument that the loss of the computer hard drive or journal was done in bad faith is not supported by the record. Neither Appellant's cited authorities nor the authorities relevant to a claim of lost evidence nor the record support Appellant's claim of prosecutorial misconduct regarding the handling of the computer hard drive or journal.

¶55 Even assuming Appellant has made any showing of error, this error is harmless beyond a reasonable doubt. Although it does not appear that this Court has considered whether *Trombetta* and *Youngblood* errors can be harmless, there appears to be no reason why such errors could not be harmless. In fact, "most constitutional errors can be harmless." *Duclos v. State,* 2017 OK CR 8, ¶ 11, 400 P.3d 781, 784 (citing *Arizona v. Fulminate,* 499 U.S. 279, 306 (1991)). Evidence of Appellant's guilt was overwhelming. He received the minimum punishment. Any failure to preserve evidence, which has not been found or even claimed to be material or exculpatory, is harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 24 (1967). Accordingly, this claim of prosecutorial misconduct is denied.

¶56 Appellant further finds prosecutorial misconduct in two comments prosecutors made to the media approximately three (3) months before trial. Defense counsel brought the comments to the attention of the trial court as a violation of the Rules of Professional Responsibility. Now on appeal, his only cited authority are the Rules of Professional Responsibility and attorney discipline cases.

¶57 In *Harvell v. State,* 1987 OK CR 177, ¶ 10, 742 P.2d 1138, 1140, this Court said, "disciplinary rules merely establish standards which, if violated, subject an attorney to discipline. They do not establish the parameters of the constitutional right to a fair trial." This Court determined that "[w]hat is important is the effect which may ensue and whether the comment and the attendant adverse pretrial publicity had a prejudicial effect on prospective jurors." *Id.*

¶58 Appellant does not make a claim of prejudicial pre-trial publicity. The record reflects jurors were thoroughly screened for media exposure and for pre-determined opinions as to Appellant's guilt. Appellant has made no attempt to show that the jurors who sat on his case were prejudiced by the media or any pre-trial statements made by prosecutors. Any misconduct in the prosecutor's comments did not deny Appellant a fair trial.

¶59 Appellant next claims the State directed psychologist Dr. Shawn Roberson to evaluate him for a possible insanity defense without notice to defense counsel. Defense counsel raised this claim many times throughout the trial proceedings. The State consistently maintained that it had the consent of Appellant's prior attorney for Roberson to interview Appellant. In fact, at two (2) of the pre-trial hearings where the issue was raised, defense counsel actually seemed unsure about a lack of notice, stating more than once that he "could be wrong about the [alleged lack of notice/consent]" and that Dr. Roberson met with the defendant "without, I think, proper notice to our office."

¶60 If, in fact, the State did not have approval for any interview, Appellant has failed to show any prejudice. An insanity defense was not pursued and Dr. Roberson did not testify at trial. The defense ultimately provided their expert's raw data to Dr. Roberson. Appellant fails to show how his trial would have been impacted if it had been established that the State had not given the defense notice of Dr. Roberson's interview with Appellant.

¶61 Finally, Appellant complains about two (2) comments made during the State's opening statement, and numerous statements made during the State's closing arguments. We have thoroughly reviewed all of the alleged misconduct. Certain comments were met with contemporaneous objections. In those instances where the objections were sustained, any error was cured. *Young v. State,* 2000 OK CR 17, ¶ 50, 12 P.3d 20, 37-38. Other objections were overruled by the trial court, and our review is therefore for an abuse of discretion. Certain other comments were not met with any objection. In those instances our review is for plain error. *Malone v. State*, 2013 OK CR 1, ¶ 40, 293 P.3d 198, 211. Under the plain error test set forth in *Simpson v. State,* 1994 OK CR 40, 876 P.2d 690, we determine whether Appellant has shown an actual error, which is plain or obvious, and which affects his substantial rights. *See Duclos,* 2017 OK CR 8, ¶ 5, 400 P.3d at 783. This Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice. *Id.*

¶62 The challenged comments made in opening statement were well within the scope of opening statement. *See Howell v. State*, 2006 OK CR 28, ¶ 7, 138 P.3d 549, 556 ("[t]he purpose of opening statement is to tell the jury of the evidence the attorneys expect to present during trial. Its scope is determined at the discretion of the trial court.").

¶63 Regarding closing argument, this Court has long allowed counsel for the parties a wide range of discussion and illustration. *Sanders v. State,* 2015 OK CR 11, ¶ 21, 358 P.3d 280, 286. Counsel enjoy a right to discuss fully from their standpoint the evidence and the inferences and deductions arising from it. *Id.* We will reverse the judgment or modify the sentence only where grossly improper and unwarranted argument affects a defendant's rights. *Id.* It is the rare instance when a prosecutor's misconduct during closing argument will be found so egregiously detrimental to a defendant's right to a fair trial that reversal is required. *Tafolla*, 2019 OK CR 15, ¶ 28, 446 P.3d at 1260.

¶64 Reviewing the challenged comments made in closing argument for plain error and otherwise, we find the prosecutor's conduct was not so improper or prejudicial so as to have infected the trial so that it was rendered fundamentally unfair. While some comments were objectionable, the trial court's rulings helped to ensure the prosecutor's conduct did not determine the outcome of the trial. *See Pack v. State,* 1991 OK CR 109, ¶ 17, 819 P.2d 280, 284 (citing 20 O.S. § 3001.1.) No relief is warranted and this proposition is denied.

¶65 In Proposition V, Appellant contends his due process rights were violated by the trial court sustaining the State's objection to the first stage testimony of Dr. Mazur-Mosiewicz on the grounds that the doctor's testimony was not relevant. Appellant asserts the trial court's ruling denied him the fundamental right to present a complete defense as the doctor's testimony was relevant to the voluntariness of his statement to police, his state of mind during the crime, his intellectual functioning as it related to malice aforethought, and to rebut the State's theory that he was responsible for some of the stabbings. On appeal, we review decisions on the admission of evidence for an abuse of discretion. *Pullen v. State,* 2016 OK CR 18, ¶ 4, 387 P.3d 922, 925. An abuse of discretion is a conclusion or judgment that is clearly against the logic and effect of the facts presented. *Id.*

¶66 The record indicates that in a bench conference, defense counsel explained that he want-

ed the doctor to describe her testing, the results of her testing, and her conclusions as an expert in neuropsychology. Defense counsel argued that the doctor would testify that Appellant, "suffers from very specific cognitive limitations" and those limitations should be considered by the jury in the context of whether Appellant's decisions "were fully formed, intentional decisions or whether they were done through the filter of limited cognitive ability."

¶67 The prosecutor responded that in the doctor's report, which had been provided to the court, the doctor never rendered an opinion regarding whether or not Appellant was able to form the necessary intent to kill or whether his confession was voluntary. Defense counsel did not rebut this statement but insisted he just wanted "to present the tests that she ran, the results of those tests, her conclusions as a result of those tests, and then leave it for argument."

¶68 After reviewing the doctor's report, the judge noted that she was concerned by one of the last sentences in the report which read, "[t]he lack of medical records related to Mr. Bever's full medical and developmental history make it difficult to delineate whether his neurocognitive and motor deficits are congenital in nature, represent a decline in function as a result of the reported abuse, or both." Defense counsel did not disagree with the judge but added, "all we know is that he has deficits" and that the jury should be allowed to hear that. The judge reiterated her position that the doctor's explanations did not show that because of these deficits, Appellant committed the charged crimes. The judge ultimately decided that the doctor's testimony was not relevant first stage testimony, as it would not assist the jury in determining guilt or innocence. However, the testimony was found relevant for the punishment stage.

¶69 The defense did not raise a defense based on insanity, mental retardation/intellectual disability, or intoxication. Defense counsel did not make an offer of proof regarding the doctor's testimony. Based on defense counsel's failure to rebut, and his actual acquiescence in the prosecutor's argument that the doctor never rendered an opinion regarding whether or not Appellant was able to form the necessary intent to kill or whether his confession was voluntary, the trial court properly excluded the doctor's testimony in the first stage as it was not relevant to a determination of guilt or innocence. In the absence of any conclusion or testimony that because of any "deficits", mental or otherwise, Appellant either committed or did not commit the charged crimes, merely putting the doctor's tests and results before the jury was not relevant evidence.

¶70 Excluding the doctor's testimony in the first stage did not deny Appellant the opportunity to present a complete defense. In *Rojem v. State*, 2009 OK CR 15, ¶ 9, 207 P.3d 385, 390 (citing *Holmes v. South Carolina*, 547 U.S. 319 (2006)), this Court acknowledged that every criminal defendant has a Sixth Amendment right to present a defense. "[T]he Constitution permits judges 'to exclude evidence that is 'repetitive ..., only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues.'" *Holmes*, 547 U.S. at 326-327.

¶71 No assertions were made before the trial court that the doctor could testify to any reasonable degree of medical certainty that Appellant would not have been able to form the intent of malice aforethought. Defense counsel's attempts to have the doctor testify in first stage to general deficiencies Appellant may have had and then argue that there was no proof that he either killed or had the requisite malice to kill was properly thwarted by the trial court. Excluding the doctor's testimony from the first stage did not deny Appellant the ability to present a complete defense.

¶72 Having thoroughly reviewed Appellant's arguments, we find the trial court did not abuse its discretion in excluding the doctor's first stage testimony and the court's ruling did not deny Appellant his Sixth Amendment rights to present a complete defense. This proposition is denied.

¶73 In Proposition VI, Appellant contends he was denied a fair trial by the admission of "needlessly cumulative" photographs. Specifically, he complains about three (3) sets of photos. Appellant raised contemporaneous objections in each instance and those objections were overruled by the trial court. Therefore, our review on appeal is for an abuse of discretion. *Bench v. State*, 2018 OK CR 31, ¶ 59, 431 P.3d 929, 952. Unless a clear abuse of discretion is shown, reversal will not be warranted. *Id.*

¶74 Photographs are admissible if their content is relevant and their probative value is not substantially outweighed by their prejudicial effect. *Id.* at ¶ 61, 431 P.3d at 952. Relevant evidence is defined as "evidence having any tendency to make the existence of a fact that is of

consequence to the determination of the action more probable or less probable than it would be without the evidence." 12 O.S.2011, § 2401. When measuring the relevancy of evidence against its prejudicial effect, the court should give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value. *Bench*, 2018 OK CR 31, ¶ 62, 431 P.3d at 952. Where there is duplication in images, the Appellant has the burden to show that the repetition in images was needless or inflammatory. *Id.*

¶75 We have thoroughly reviewed the challenged photographs, State's Exhibits 120(A) and 128, 68 and 189, and 157, 158 and 174. Each of the photographs is relevant in showing a different aspect of the crime scene. *See Hogan v. State*, 2006 OK CR 19, ¶ 31, 139 P.3d 907, 921. Any duplication in the photographs is minor and not sufficient to qualify as "needless repetition" which can inflame the jury and result in error. *See President v. State*, 1979 OK CR 114, ¶¶ 9-17, 602 P.2d 222, 225-226. The trial court did not abuse its discretion in admitting the challenged photographs. This proposition is denied.

¶76 In his final proposition of error, Appellant contends the trial court abused its discretion in denying his requested instruction on duress. The trial court's decision regarding jury instructions is reviewed for an abuse of discretion. *Soriano v. State*, 2011 OK CR 9, ¶ 10, 248 P.3d 381, 387.

¶77 In denying the requested instruction, the trial court relied on *Long v. State*, 2003 OK CR 14, 74 P.3d 105. *Long* states that "duress is not a defense to the intentional taking of an innocent life by a threatened person." 2003 OK CR 14, ¶ 12, 74 P.3d at 108. Appellant now seeks to distinguish Long from his case and argues that *Long* misinterpreted 21 O.S. § 156, regarding the defense of duress, and improperly placed limits on the defense.

¶78 Appellant's case offers no reason to reconsider *Long*. Appellant has failed to offer any evidence that would have supported a jury instruction on duress. Even assuming arguendo, Appellant was acting under duress, he had ample opportunity to extricate himself from the scene prior to actually killing anyone. "[A] person who fails to avail himself of an opportunity to escape a situation of duress is not entitled to claim the defense." *Hawkins v. State*, 2002 OK CR 12, ¶ 30, 46 P.3d 139, 146. Further, Appellant offers no authority for his argument that juveniles should be treated differently than adults regarding the assertion of a defense of duress. Based upon the foregoing, the trial court did not abuse its discretion in denying the requested instruction. This proposition is denied.

¶79 Accordingly, this appeal is denied.

DECISION

¶80 The **JUDGMENT** and **SENTENCE** is **AFFIRMED.** Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2020), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT
OF TULSA COUNTY
THE HONORABLE SHARON HOLMES,
DISTRICT JUDGE

APPEARANCES AT TRIAL

Corbin Brewster, Marny Hill, Tulsa County Public Defender's Office, 423 S. Boulder Ave., Ste. 300, Tulsa, OK 74103, Counsel for the Defense

Stephen Kunzweiler, District Attorney, Julie Doss, Sarah McAmis, Asst. District Attorneys, 500 S. Denver, Tulsa, OK 74103, Counsel for the State

APPEARANCES ON APPEAL

Corbin Brewster, Tulsa County Public Defender's Office, 423 S. Boulder Ave., Ste. 300, Tulsa, OK 74103, Counsel for Appellant

Mike Hunter, Attorney General of Oklahoma, Jennifer L. Crabb, Asst. Attorney General, 313 N.E. 21st St., Oklahoma City, OK 73105, Counsel for the State

OPINION BY: LIMPKIN, J.
LEWIS, P.J..: CONCUR IN PART/
DISSENT IN PART
KUEHN, V.P.J.: CONCUR IN PART/
DISSENT IN PART
HUDSON, J.: SPECIALLY CONCURRING
ROWLAND, J.: CONCUR

LEWIS, PRESIDING JUDGE, CONCURRING IN PART AND DISSENTING IN PART:

¶1 I concur in affirming Appellant's convictions but would modify his sentences to comply with *Miller v. Alabama*, 567 U.S. 460 (2012). The Supreme Court in *Miller* did not prohibit a

state court or jury from *ever* imposing life without parole on a juvenile homicide offender, but it did hold that a lifetime in prison is disproportionate for all but the rarest juveniles, whose crimes show their permanent incorrigibility or irreparable corruption. *See Montgomery v. Louisiana,* 136 S.Ct. 718, 734 (2018). Appellant's jury unanimously concluded that he is neither permanently incorrigible nor irreparably corrupt, and sentenced him to five terms of life imprisonment rather than life without parole.

¶2 The trial court's subsequent order that those terms, as well as the sentence of twenty-eight years for assault and battery with intent to kill, be served consecutively effectively "mandated that [this] juvenile die in prison" even if the jury "thought that his youth and its attendant characteristics, along with the nature of his crime," made a punishment with some possibility of eventual release more appropriate. *Miller,* 567 U.S. at 465. This is the same situation that confronted the Supreme Court in *Miller,* and the same rule applies. Bever's mandatory punishment[1] of life imprisonment without parole violates the Eighth Amendment.

¶3 The majority avoids the constitutional tension between the jury's *Miller* findings and the trial court's life-without-parole order with its crime-specific, "no volume discount" theory of punishment,[2] according to which *Miller, Graham v. Florida*,[3] and logically even *Roper v. Simmons*,[4] can only limit the State's penalty options when sentencing a juvenile for a single crime. I read those decisions as *punishment*-specific: Regardless of the crime(s) of conviction, the State may not ordinarily inflict certain penalties on juveniles – the death penalty in *Roper,* perpetual imprisonment in *Graham* and *Miller* – because their lesser culpability, incomplete psychosocial development, and greater capacity for change than adults render those punishments cruel and unusual.

¶4 Appellant must serve thirty-eight years, three months of his *first* life sentence before he is even eligible to seek parole onto the next one, and so on. 21 O.S.Supp.2015, § 13.1(1); *Anderson v. State,* 2006 OK CR 6, ¶ 24, 130 P.3d 273, 282-83 (reckoning that a life sentence is equivalent to forty-five years for parole eligibility under the 85% Rule). He thus faces over 215 years in prison without any meaningful opportunity for release. I would either modify the judgment to concurrent sentences, or grant Bever a parole hearing to promptly consider his release from confinement after thirty-eight years, three months from the date of sentencing, and every three years thereafter. *See* 57 O.S.Supp.2018, § 332.7(E)(1) (granting reconsideration at three year intervals).

¶5 I am authorized to state that Vice Presiding Judge Kuehn joins in this separate writing.

KUEHN, V.P.J., CONCURRING IN PART/ DISSENTING IN PART:

¶1 This is an unusually disturbing case involving extreme violence and juvenile appellants. The judgment of the trial court is correct and Appellant's conviction must stand, but I dissent to this Court's affirmation of Appellant's consecutive sentences. Imposing five consecutive sentences on a homicide offender without the requisite finding required to sentence a juvenile to life without parole is error.

¶2 Appellant received five life sentences and one sentence of twenty-eight years, which the trial court ordered to run consecutively. I believe that consecutive sentences imposed on a juvenile defendant functionally serves as a sentence of life without parole. *Martinez v. State,* 2019 OK CR 7 ¶ 3, 442 P.3d 154, 157 (Lewis, P.J., dissenting). The Pardon and Parole Board measures a life sentence at forty-five years. Because Appellant's sentences are 85% crimes, he would be required to serve 215.05 years before he can be considered for parole. These consecutive sentences guarantee he has no reasonable opportunity for parole and amount to a sentence of life without parole. *See Budder v. Addison*, 851 F.3d 1047, 1055–56 (10th Cir. 2017) (explaining that "a sentencing court need not use that specific [life without parole] label" for a sentence to fit within that classification); *see also Graham v. Florida*, 560 U.S. 48, 57, 70 (2010) (explaining that Graham's life sentence would functionally serve life without parole).

¶3 Appellant's jury specifically found that he was not irreparably corrupt or permanently incorrigible. In homicide cases, a juvenile may be sentenced to life without parole ***only if*** a jury finds them "irreparably corrupt and permanently incorrigible." *Stevens v. State*, 2018 OK CR 11, ¶¶ 34-35, 37, 422 P.3d 741, 750; *Miller v. Alabama*, 567 U.S. 460, 477-78 (2012). Therefore, Appellant lacks the requisite findings to be sentenced to life without parole.

¶4 I would affirm the sentences of the lower court, but modify the terms to be served concurrently. This modification would, as required by the jury's finding, do nothing more than

assure Appellant a reasonable opportunity to come before the Pardon and Parole Board after serving 85% of a life sentence. Neither I nor my dissenting colleague forgive the horrid actions of the Appellant, nor would our reasoning guarantee his release during his lifetime. Appellant's jury specifically did not find the only condition which, as they were instructed, could justify life without parole. Considering a 215 year sentence as not equating to life without parole while ignoring the jury's collective decision and juror affidavits for concurrent sentences during sentencing is, as the special concurrence wants to call it, the only "ridiculous" result here.

¶5 If there were any evidence that the jurors desired consecutive sentencing, I am confident the Majority would point it out as justification for denying relief. But since the jury's legal findings and sentiments go against the result the Majority wants to reach, it simply ignores them. I dissent because the result today is contrary to the jury's wishes.

¶6 I am authorized to state Presiding Judge Lewis joins in this separate writing.

HUDSON, J., SPECIALLY CONCUR

¶1 I concur in today's decision. I write separately to address the views expressed in both dissents. Contrary to my colleagues' assertions, "the Eighth Amendment analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence for multiple crimes." *Detwiler v. State*, 2019 OK CR 20, ¶ 6, 449 P.3d 873, 875; *see also Martinez v. State*, 2019 OK CR 7, ¶ 6, 442 P.3d 154, 156. Interpreting the decisions in *Miller v. Alabama*, *Graham v. Florida* and *Roper v. Simmons* using the "punishment-specific" approach championed by the dissent yields the ridiculous consequence of enabling a juvenile offender to in essence circumvent punishment for a crime by committing multiple crimes. *See Martinez*, 2019 OK CR 7, ¶ 1, 442 P.3d at 157 (Hudson, J., Specially Concur). Oklahoma "is not required to guarantee eventual freedom to a juvenile offender." *Id.*, 2019 OK CR 7, ¶ 8, 442 P.3d at 157 (citing *Graham*, 560 U.S. at 74). That Bever has subjected himself to a severe penalty "is simply because he committed a great many [ ] offenses." *O'Neil v. Vermont*, 144 U.S. 323, 331 (1892). This case wholly exemplifies the soundness of this Court's analysis and reasoning in *Martinez* and *Detwiller.*

LUMPKIN, JUDGE:

1. Appellant must serve 85% of his sentence in each count before becoming eligible for consideration for parole. 21 O.S.Supp.2014, § 13.1.

2. However, we take this opportunity to note that under 57 O.S.Supp.2018, § 332.7, referred to as the "Forgotten Man Act", the Legislature has enacted procedures to ensure that inmates, other than those serving a life sentence without parole, shall be eligible for consideration for parole.

LEWIS, PRESIDING JUDGE, CONCURRING IN PART AND DISSENTING IN PART:

1. Though Appellant's jury rejected the *option* of "life without parole" sentences, the trial court's order that all of these sentences be served consecutively produces a mandatory administrative effect rendering Appellant ineligible for release from prison on parole for his natural lifetime, and then some.

2. *See also Martinez v. State*, 2019 OK CR 7, ¶ 6, 442 P.3d 154, 156 (holding "each [consecutive] sentence should be analyzed separately to determine whether it comports with the Eighth Amendment"); *Detwiler v. State*, 2019 OK CR 20, ¶ 6, 449 P.3d 873, 875 (holding Eighth Amendment analysis under *Graham* and *Miller* "focuses on the [consecutive] sentence imposed for each specific crime"), and my dissenting opinions in these cases.

2. 560 U.S. 48 (2010).

3. 543 U.S. 551 (2005).

HUDSON, J., SPECIALLY CONCUR

1. 567 U.S. 460 (2012).

2. 560 U.S. 48 (2010).

3. 543 U.S. 551 (2005).

In Memoriam

Wilfred L. Barber of Lindsay died Mar. 6, 2016. He was born Apr. 6, 1929, in Blackwell. **He served in the U.S. Army Quartermaster Corps from 1952 to 1954**. Mr. Barber received his J.D. from the OU College of Law in 1959. After graduating, he practiced law in Lindsay until retiring in 1992. He was also president of the Lindsay Chamber of Commerce, established the Lindsey Hospital Foundation and served as the attorney for the Rural Electric Cooperative.

Jack J. Burke of New Braunfels, TX died Nov. 21, 2018. He was born Apr. 19, 1938, in San Antonio, TX. Mr. Burke earned a B.A. in mechanical engineering from Rice Institute, a B.S. in mechanical engineering from Rice University and an M.S. in mechanical engineering from Southern Methodist University. **Upon graduating from Rice University, he served as a commissioned officer in the U.S. Army Corps of Engineers.** He then received a J.D. from the TU College of Law in 1984 and worked as an aviation lawyer with a focus on FAA and NTSB hearings, product liability, and aviation accident investigation, reconstruction and litigation.

Robbie Emery Burke of Tulsa died May 22. She was born Mar. 23, 1952, in Duncan. After working in journalism, Ms. Burke received her J.D. from the TU College of Law in 1982. She worked at Sneed Lang before going into private practice and focusing on elder law. Memorial contributions may be made to the First Presbyterian Church of Tulsa Children's Ministry or Tulsa Lawyers for Children.

Judge Kenneth W. Dickerson of Piedmont died May 30. He was born Jan. 21, 1939 and raised on a farm north of Piedmont. **He joined the U.S. Navy in 1959 and acted as an advisor to the Korean Navy in Seoul, Korea. After being honorably discharged, he went on active duty for an additional 18 months. During that time, he was promoted to petty officer.** After receiving his J.D. from the OCU College of Law in 1972, Judge Dickerson served Oklahomans for over 30 years. He worked as an attorney, a special judge for Canadian County, an associate district judge and a volunteer appellate judge for the Oklahoma Court of Criminal Appeals. He also helped establish the Canadian County Family Drug Court and served as city attorney, city councilman, vice-mayor and mayor of Piedmont.

Judge Arlene (Joplin) Johnson of Nichols Hills died May 12. She was born Sept. 1, 1940, in Ramsey, MN. Judge Johnson received her J.D. from the OU College of Law in 1971 and was the first woman to graduate first in her class. Upon graduating, she worked as an Oklahoma County assistant district attorney, an assistant attorney general and an assistant U.S. attorney. She was also chief of the criminal division at the U.S. attorney's office in Oklahoma City from 1995 to 2004. During that time, she played a pivotal role in the early stages of the Oklahoma City bombing case and received the John Marshall Award for Outstanding Legal Achievement for her work. In 2005, she was appointed to the Oklahoma Court of Criminal Appeals where she served as a judge until retiring in 2017.

Danny G. Lohmann of Alva died Mar. 28. He was born Sept. 20, 1954, in Alva. He received a J.D. from the OCU College of Law in 1992. Mr. Lohmann worked for the Oklahoma Indigent Defender System for over 15 years and was a prosecutor for nearly five years. He began his private practice in 2012. Memorial contributions may be made to Zion Lutheran Church Evangelism Fund, the Lutheran Hour Ministries or the American Cancer Society in Oklahoma.

Richard L. McLennan of Lawton died Apr. 19. He was born May 15, 1931, in Oklahoma City. **He served in the U.S. Army and retired as a lieutenant colonel in 1975 after 22 years of service.** Upon retiring, Mr. McLennan received a J.D. from the OU College of Law in 1979. He then established a private law practice in Marlow where he also served as a city judge.

Robert E. Price of Claremore died May 15. He was born Mar. 19, 1948, in Oklahoma City. After receiving his J.D. from the OU College of Law in 1973, he practiced as a private attorney for 47 years. Mr. Price also held judicial posts in Leflore County, Atoka County and Rogers County and was awarded the Tri-County CASA Attorney of the Year Award in 1998.

Bar News

OBA Member Resignations

The following members of the Oklahoma Bar Association have resigned as members of the association and notice is hereby given of such resignation:

Vineeth Shanker Hemavathi
OBA No. 33315
2901 N. Classen Blvd., Ste. 112
Oklahoma City, OK 73106

Joshua Stephen Donaldson
OBA No. 32607
6120 Charlotte Street
Kansas City, KS 64110

Nik Jones
OBA No. 4790
5105 E. 29th St.
Tulsa, OK 74114

Ruth Ellen Lando Hamilton
OBA No. 32792
Assoc. Legal Director
Criminal Defense Practice
Bronx Defenders
360 E. 161st Street
Bronx, NY 10451

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

2020 OK CIV APP 14

CHARLES SANDERS HOMES, INC., Plaintiff/Appellee, vs. COOK & ASSOCIATES ENGINEERING, INC. and JUSTIN COOK, Defendants/Appellants.

Case No. 115,458. May 14, 2020

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

HONORABLE DANA KUEHN, TRIAL JUDGE

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS

Scott R. Eudey, Melinda A. Aycock, ROSS & EUDEY, PLLP, Broken Arrow, Oklahoma, for Plaintiff/Appellee

Lawrence D. Taylor, Tulsa, Oklahoma, for Defendants/Appellants

JANE P. WISEMAN, PRESIDING JUDGE:

¶1 Cook & Associates Engineering, Inc., and Justin Cook appeal the denial of their motions to vacate certain deficiency orders in this mortgage foreclosure action.[1] The Cooks filed their motions pursuant to 12 O.S.2011 § 1031(3), arguing that the trial court's failure to use the property's appraised value, rather than the price paid at the sheriff's sale, for determining the fair market value of the property and the amount of their deficiency is an "irregularity" justifying vacation of the deficiency orders. We hold that using the price paid at the sheriff's sale as the property's fair market value to determine the amount of the Cooks' deficiency was improper, requiring us to vacate the orders and remand for further proceedings.

BACKGROUND

¶2 Charles Sanders Homes, Inc. (Homes) sold commercial property to Cook & Associates in 2006. In partial satisfaction of the purchase price, Cook & Associates and Justin Cook signed a promissory note secured by a real estate mortgage on the property. When the note was in default, Homes sued to collect the balance due and to foreclose its mortgage on February 12, 2012. Both Cook & Associates and Justin Cook were served with the petition on March 9, 2012, but chose not to defend the action. Believing that their equity in the property was in excess of $30,000, neither defendant appeared, "desiring instead for the case to proceed to judgment and sheriff's sale quickly and without unnecessary expense."

¶3 On May 17, 2012, Homes was granted a default judgment against both defendants in the amount of $279,769.78. Neither defendant appealed, and that judgment is final. *See Funk v. Payne*, 1938 OK 270, ¶ 2, 82 P.2d 976 (in order to assert errors in a judgment of foreclosure, it is necessary to appeal from that judgment); *see also First Nat'l Bank of Tulsa v. Colonial Trust Co.*, 1917 OK 360, ¶ 3, 167 P. 985 (a judgment of foreclosure is final if not appealed). The facts of Cook & Associates' and Justin Cook's liability to Homes and the amount of that liability, subject to credit for the fair market value of the property, have been determined and are not challenged in this appeal.

¶4 After entry of the May 2012 judgment, the property was ordered sold at sheriff's sale. Three appraisers, appointed as required by law, appraised the value of the property at $279,000. The Cooks did not appear at the sheriff's sale or submit a bid. The property was sold to Homes, the only bidder at the sheriff's sale, for $186,000, an amount equal to exactly two-thirds of the appraised value. The trial court's order confirming the sheriff's sale was filed on August 28, 2012, and not appealed. The Cooks have not challenged the order confirming the sheriff's sale in this appeal.

¶5 Pursuant to a motion for deficiency, the case was then set for hearing to determine the amount, if any, of the deficiency for which the Cooks would be liable. Neither defendant appeared at the hearing, and a default deficiency order against Cook & Associates was filed on October 30, 2012, in the amount of $93,769.78, the difference between the $186,000 sale price and the amount of Homes' judgment. A default deficiency order against Justin Cook for the same amount was filed on February 6, 2013. This appeal concerns the trial court's denial of subsequent motions filed by Cook & Associates and Justin Cook to vacate those deficiency orders.

STANDARD OF REVIEW

¶6 A motion to vacate a judgment "is addressed to the sound legal discretion of the trial court and the order made thereon will not be disturbed on appeal unless it clearly appears that the trial court has abused its discretion." *Hassell v. Texaco, Inc.*, 1962 OK 136, ¶ 14, 372 P.2d 233. An abuse of discretion standard of review includes examination of both fact and law issues and an "abuse occurs when the ruling being reviewed is based on an erroneous legal conclusion or there is no rational basis in the evidence for the decision." *Tibbetts v. Sight 'n Sound Appliance Ctrs., Inc.*, 2003 OK 72, ¶ 3, 77 P.3d 1042.

ANALYSIS

¶7 This is the Cooks' second appeal challenging the deficiency orders. In the first appeal, we addressed a motion to vacate the October 30, 2012 deficiency order that Cook & Associates filed on June 18, 2013. In its motion, filed pursuant to 12 O.S.2011 § 1031(3), Cook & Associates claimed there had been an "irregularity in obtaining a judgment or order." It argued that the irregularity resulted from the trial court's use of the $186,000 sheriff's sale price rather than the $279,000 appraised value in determining the amount of the deficiency Cook & Associates would be liable for after the sale. It asserted that the only evidence from which the trial court could have determined the "fair and reasonable market value" of the property, as required by 12 O.S.2011 § 686, was the appraised value reflected on the return filed by the appraisers. The trial court denied Cook & Associates' motion in a "minute order" filed on July 26, 2013. We dismissed Cook & Associates' appeal of that ruling for lack of a final appealable order. *Charles Sanders Homes, Inc. v. Cook and Assocs. Eng'g, Inc.*, 2016 OK CIV APP 45, ¶ 12, 376 P.3d 945.

¶8 On September 23, 2016, the trial court entered a "Journal Entry of Final Order" denying Cook & Associates' June 18, 2013 motion to vacate the October 30, 2012 deficiency order. Cook & Associates' petition in error in this appeal was timely filed to obtain appellate review of the September 2016 order.

¶9 On February 3, 2016, Justin Cook filed a motion to vacate the February 6, 2013 deficiency order. The trial court denied that motion in a "Journal Entry of Final Judgment" filed on September 23, 2016. Justin Cook's petition in error in this appeal was timely filed to obtain appellate review of that order.

¶10 In the first appeal involving these parties and their challenge to the deficiency orders, we also reviewed a motion to vacate filed by Cook & Associates and Justin Cook on September 11, 2013. That motion was directed at both the October 30, 2012 deficiency order against Cook & Associates and the February 6, 2013 deficiency order against Justin Cook. They cited 12 O.S.2011 § 1038 in their motion and claimed the deficiency orders were facially void because the notice of the deficiency hearings was constitutionally defective in that it did not state that a number other than the appraised value could be used as the fair market value of the property to determine the amount of their deficiency liability. The trial court denied that motion in a "Journal Entry of Final Order" filed on January 22, 2014. We held that the notice was not defective and affirmed the denial of the motion to vacate. "The district court's January 22, 2014 Final Order denying the Cooks' September 11, 2013 motion to vacate is affirmed." *Charles Sanders Homes,* 2016 OK CIV APP 45, ¶ 19.

¶11 In this second appeal, we address two different motions to vacate, Cook & Associates' June 18, 2013 motion to vacate the October 30, 2012 deficiency order and Justin Cook's February 3, 2016 motion to vacate the February 6, 2013 deficiency order. Both motions cite 12 O.S.2011 § 1031(3) as authority. Section 1031(3) provides that a judgment or final order may be vacated: "For mistake, neglect, or omission of the clerk or irregularity in obtaining a judgment or order." The Cooks assert that the "irregularity" in obtaining the judgment resulted from basing the amount of the deficiency on the price for which the property sold at the sheriff's sale rather than the appraised value of the property. In the first appeal, we did "not address the argument that the district court erred in using the sheriff's sale price rather than the appraised value of the property when determining the Cooks' deficiency liability." *Charles Sanders Homes,* 2016 OK CIV APP 45, ¶ 23. As a result, the current appeal is not barred by the settled-law-of-the-case doctrine. *See Panama Processes, S.A. v. Cities Serv. Co.*, 1990 OK 66, n. 27, 796 P.2d 276 (explaining that the "'settled-law-of-the-case' doctrine operates to bar relitigation of issues that have been settled by an earlier appellate opinion in that case").

¶12 As distinguished from the claim preclusion doctrine, which bars relitigation of all claims that were or could have been raised, the settled-law-of-the-case doctrine "operates to bar relitigation of only those issues that have been settled by an appellate opinion." *Mobbs v. City of Lehigh*, 1982 OK 149, n. 5, 655 P.2d 547. "To properly apply the law of the case doctrine the appellate court in the second appeal must decide exactly what the first appellate decision determined expressly or impliedly." *Tibbetts v. Sight 'n Sound Appliance Ctrs., Inc*., 2003 OK 72, ¶ 10, 77 P.3d 1042 (citing *Shoemaker v. Estate of Freeman*, 1998 OK 17, ¶ 15, 967 P.2d 871). As a result, successive motions to vacate would not be prohibited if they are filed within the time permitted by 12 O.S.2011 § 1038 and raise issues not previously decided by an appellate opinion. *See Joe Walsh Adver., Inc. v. Phillips Tire & Supply Co.*, 1972 OK 90, 498 P.2d 1391 (holding that a petition to vacate default judgment, relying on the same grounds as a previous motion to vacate, was barred by the doctrine of res judicata as ruling on prior motion was not timely appealed and became final adjudication of the issue); *cf. Salyer v. Nat'l Trailer Convoy, Inc.*, 1986 OK 70, 727 P.2d 1361 (regarding successive motions to vacate) and *Yery v. Yery,* 1981 OK 46, 629 P.2d 357 (regarding a motion to vacate).

¶13 The motions to vacate at issue in this appeal are based on a separate ground which the previous appeal did not decide. Both motions were filed within the three-year span set by 12 O.S.2011 § 1038: "Proceedings for the causes mentioned in paragraphs 3 and 6 of Section 1031 of this title, shall be within three (3) years."

¶14 We are therefore confronted with the question of whether any irregularity occurred in the manner in which the amount of the Cooks' deficiency was determined which would subject the deficiency orders to the trial court's exercise of discretion in deciding whether to vacate them.

> The term "irregularity in obtaining a judgment" has no fixed legal meaning. In every instance the question is one of fact, dependent upon the circumstances of each case. It logically follows that the application of this provision of the statute is addressed to the sound legal discretion of the court, to be exercised in furtherance of justice, on the particular facts of the case. It will be observed that we use the expression "sound legal discretion," which negatives arbitrary action or unsound exercise of discretion. In other words, it is an abuse of discretion or reversible error to vacate a judgment where the moving party shows no recognized legal ground therefor.
>
> "On the other hand, if he shows himself plainly and justly entitled to the relief demanded, the court must grant the application, and has no discretion to refuse it."

Nation v. Savely, 1927 OK 350, ¶ 9, 260 P. 32 (citations omitted).

¶15 To show a § 1031(3) irregularity, the Cooks must show that the trial court failed to follow the procedure applicable to deficiency orders in foreclosure cases and the refusal to correct this failure, being based on an erroneous legal conclusion or without rational basis in the evidence, was an abuse of discretion. The Cooks argue that Oklahoma's anti-deficiency statute, 12 O.S.2011 § 686, requires the trial court to use the fair market value of the property on the date of sale in determining the amount of the deficiency, if any, when it addresses a motion for deficiency order pursuant to this section. The Cooks take issue with the trial court's use of the sale price – $186,000 which represents exactly two-thirds of the fair market value set by the three sheriff's appraisers – in determining the amount of the deficiency. The only evidence of fair market value before the court, according to the Cooks, was the appraised value of $279,000 submitted by the appraisers.[2]

¶16 The question presented generates a closer examination of the applicable part of 12 O.S.2011 § 686, the anti-deficiency statute:

> Upon such [deficiency] motion **the court,** whether or not the respondent appears, **shall determine,** upon affidavit or otherwise as it shall direct, **the fair and reasonable market value of the mortgaged premises as of the date of sale** or such nearest earlier date as there shall have been any market value thereof and shall enter a post-judgment deficiency order. **Such post-judgment deficiency order shall be for an amount equal to the sum of the amount owing** by the party liable as determined by the order with interest, plus costs and disbursements of the action plus the amount owing on all prior liens and encumbrances with interest, **less the market value as determined by the court or the sale price**

of the property whichever shall be the higher.

(Emphasis added.) The statute draws a clear distinction between "market value" and "sale price." They are not synonymous, or there would be no need to dictate a statutory rule of choice between them in ascertaining whether a deficiency exists. In the absence of the rare occasion when the market value and the sale price coincide, the statute directs using the *higher* of the two in judicially determining the deficiency question arising from a mortgage foreclosure.

¶17 "By fair market value is meant the amount of money which a purchaser willing but not obliged to buy the property would pay to an owner willing but not obliged to sell it …." *City of Tulsa v. Creekmore*, 1934 OK 57, ¶ 0, 29 P.2d 101 (syl. no. 2 by the Court). Although the sheriff conducts the sale of the mortgaged premises, he is not the owner of the property. It is, in fact, the Cooks who own the property, and they cannot be said to be under no obligation to sell. A forced sale price should not be taken as the conclusive measure of fair market value as it lacks the black-letter requirements of a willing seller and a free decision whether and when to sell. And one could rationally argue that a sheriff's sale is not an open market sale, occurring as it does pursuant only to court order outside normal domestic real estate sales.

¶18 This is a forced sale pursuant to a decree of foreclosure, and the Cooks are entitled to the full protection of § 686. Although not impossible, it is a rare occurrence when a sheriff's sale brings the fair market value of a property. As noted in *Founders Bank and Trust Co. v. Upsher,* 1992 OK 35, n. 23, 830 P.2d 1355, "a forced sale seldom brings a property's fair market value." *See also Eufaula Bank & Trust Co. v. Wheatley,* 1983 OK CIV APP 21, 663 P.2d 393.[3] This makes adherence to § 686 all the more imperative because the statute draws a marked distinction between a forced sales price and fair market value. According to § 686, the deficiency is determined by subtracting "the market value as determined by the court or the sale price of the property whichever shall be the higher" from the amount owed according to the judgment.

¶19 As mandated by § 686, the trial court, whether the owner appears or not, must ascertain, "upon affidavit or otherwise as it shall direct, the fair and reasonable market value of the mortgaged premises as of the date of sale" in determining the question of any deficiency.[4] The Cooks are not required to present evidence of fair market value – the trial court shoulders the statutory duty to determine that value and may direct the party seeking the deficiency to present such evidence, not just the sale price, particularly in situations like this where the appraisers' determination of the property's "real value"[5] closely approximates the judgment amount in the foreclosure decree and the only actual evidence of fair market value is not the sale price, but the appraisal amount of $279,000.

¶20 At the time of the deficiency hearing, the trial court had no evidence of fair market value as of the time of sale other than the appraisal of $279,000. The price realized at sheriff's sale resulting from Homes' bid was strictly according to 12 O.S.2011 § 762: "[N]o [] property shall be sold for less than two-thirds (2/3) of the value returned in the [appraisement] . . . ." *Id.*[6] Without any other evidence on which to base fair market value, the statutory minimum bid – to meet confirmation standards – of 2/3 of the property's market value, as legally declared by the court, cannot with the stroke of a judicial pen then become the *actual* market value.

¶21 Lenders are not unaware of the legislative intent behind § 686. The Supreme Court in *Founders Bank and Trust Co. v. Upsher,* 1992 OK 35, n. 23, 830 P.2d 1355, has noted:

> Lenders frequently confront potential losses upon application of the anti-deficiency statute. This is so because a forced sale seldom brings a property's fair market value. The predictable built-in loss is the difference between the fair market value of the property and the foreclosure sale proceeds. For this reason, lenders often are compelled to protect a loan's soundness by obtaining a guaranty for at least that portion of the indebtedness which would be lost by application of the anti-deficiency proceedings.

¶22 Another division of this Court provided guidance in *Little Bear Resources, LLC v. Nemaha Services, Inc.*, 2011 OK CIV APP 18, 249 P.3d 957, with facts indistinguishable from those in this case. In *Little Bear,* the Court reversed the trial court's application of the $107,000 purchase price at the sheriff's sale (the required minimum 2/3 bid) as credit against Little Bear's judgment amount, and following the mandate of § 686, directed the application of

the full appraised value of the property ($160,000) as credit against the judgment in determining the deficiency. As the Court reasoned, the equitable principles of § 686 should "allow a debtor to receive full credit for the value actually received by the creditor – the fair market value of the property (or the sales price if it is higher)." *Id.* ¶ 11. The *Little Bear* Court succinctly stated:

> Where there has been a sheriff's sale of property and the creditor (here, Little Bear) purchases the property at the sale, the value accruing to creditor is not merely the amount of its bid. Little Bear received property of a certain value (here, $160,000), which is well in excess of its successful bid of $107,000. The value received by Little Bear exceeds the amount credited to its judgment against Nemaha, yielding an inequitable result. In order to adequately protect both Little Bear and Nemaha, the full appraised value of the property ($160,000) should have been credited against Little Bear's judgment.

Id. ¶ 13.

¶23 We should do no less in this case. The trial court here failed to follow § 686's mandated procedure for deficiency orders and therefore should have vacated them.

CONCLUSION

¶24 The trial court's orders denying the Cooks' motions to vacate are reversed, the deficiency orders are vacated, and the case is remanded for a hearing to determine the fair market value pursuant to § 686 in accordance with this Opinion before determining whether any deficiency is owed.

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

THORNBRUGH, C.J., concurs, and FISCHER, J., dissents.

FISCHER, J., dissenting:

¶1 Because of the issues decided in a previous appeal and because Cook and Associates and Justin Cook (the Cooks) failed to preserve other issues for appellate review, the only issue in this appeal is whether the district court's use of the price paid at the sheriff's sale to determine the fair market value of the property, rather than the property's estimated value, is an "irregularity" justifying vacation of the deficiency orders pursuant to 12 O.S.2011 § 1031(3).[1] In my view, that was not an "irregularity" as that term is defined in section 1031(3). I would affirm the orders appealed and, therefore, respectfully dissent.

¶2 The procedural history of this litigation is set out in the Majority Opinion and shows that this appeal concerns the denial of a motion to vacate. The Cooks did not appeal the foreclosure judgment or any of the final orders in this mortgage foreclosure case. Most importantly, they did not appear at or introduce any evidence during the hearing on the motion to determine their deficiency nor did they appeal the amount owed set out in the deficiency orders. They cannot do so now.

> This Court has previously held that under [section 1031(3)], the correctness of an amount of a judgment under the evidence before the court is contestable as a direct appeal from the judgment, but that issue is not presented on the occasion of a motion to vacate the judgment, nor an appeal therefrom.

Yery v. Yery, 1981 OK 46, ¶ 14, 629 P.2d 357. Errors regarding findings of fact necessary to a judgment "do not constitute irregularities, and are not grounds for vacation of a judgment under 12 O.S.[2011] § 1031." *Cunningham v. Cunningham*, 1977 OK 203, ¶ 21, 571 P.2d 839. "In appeals lodged from an adverse order entered in a postjudgment vacation proceeding, errors which may be reviewed are confined to those in granting or denying relief sought upon the grounds advanced and the evidence presented." *Stites v. Duit Constr. Co., Inc.*, 1995 OK 69, ¶ 25, 903 P.2d 293 (original emphasis and footnote omitted).

¶3 Consequently, the Cooks are limited in this appeal to showing the kind of "irregularity" with which section 1031(3) is concerned, that is, some irregularity in the denial of their motions to vacate the deficiency orders.

> The term "irregularity in obtaining a judgment" has no fixed legal meaning. In every instance the question is one of fact, dependent upon the circumstances of each case. It logically follows that the application of this provision of the statute is addressed to the sound legal discretion of the court, to be exercised in furtherance of justice, on the particular facts of the case.

Edge v. Sec. Bldg. & Loan Ass'n, 1935 OK 385, ¶ 7, 45 P.2d 1108 (quoting *Nation v. Savely*, 1927 OK 350, ¶ 9, 260 P. 32). "'In a plain case, this discretion has no office to perform, and its exercise is limited to doubtful cases, where an impartial mind hesitates.'" *Nation v. Savely*, 1927 OK 350, ¶ 10 (quoting with approval *Bailey v. Taaffe*, 29 Cal. 422 (1866)). This is not a "doubtful" case.

¶4 To show the type of irregularity with which section 1031(3) is concerned, the Cooks must show that the district court failed to follow "the established rules or mode of procedure" applicable to deficiency proceedings conducted pursuant to section 686. *Knell v. Burnes*, 1982 OK 35, ¶ 5, 645 P.2d 471.[2] Those rules and procedures are derived from several statutes scattered through chapters 12 and 13 of Title 12. Before the sheriff can sell the property, he must appoint three disinterested and impartial individuals who actually view the property and then file a signed affidavit of their "estimate of the real value of the property." 12 O.S.2011 § 759(B). The sheriff must then give notice of the sale. 12 O.S.2011 § 764. At the sale, the sheriff can sell the property for two-thirds of the appraisers' estimated value or any higher amount. 12 O.S.2011 § 762. Only after the property is sold can the district court determine the amount of any deficiency owed by the defendant. 12 O.S.2011 § 686; *Neil Acquisition, L.L.C. v. Wingrod Inv. Corp.*, 1996 OK 125, ¶ 8, 932 P.2d 1100.

¶5 The Cooks argue that section 686, Oklahoma's "anti-deficiency statute,"[3] requires the district court to use the three appraisers' estimated value of the property reported during the sheriff's sale, which the Cooks refer to as the "appraised value," when the court determines the amount of their deficiency. In my view, there is no such requirement in section 686.

> Upon such motion the court, whether or not the respondent appears, shall determine, upon affidavit or otherwise as it shall direct, **the fair and reasonable market value** of the mortgaged premises as of the date of sale . . . and shall enter a post-judgment deficiency order … for an amount equal to the sum of the amount owing by the party liable … **less the market value as determined by the court** or the sale price of the property whichever shall be the higher.

12 O.S.2011 § 686 (emphasis added). To determine the meaning of "market value" we first look to the "plain and ordinary meaning" of the term. *Lumber 2, Inc. v. Illinois Tool Works, Inc.*, 2011 OK 74, ¶ 8, 261 P.3d 1143. According to the plain language of the statute, the district court is required to determine and then use the higher of the sales price or "**the fair and reasonable market value**."[4]

¶6 If the Cooks were correct, the Legislature could have simply provided that the deficiency would be determined by the difference between the amount owed and the appraisers' estimated value reported during the sheriff's sale. It did not. The term "appraised value" is not mentioned in section 686. And, there is no reference to the appraisers' "estimate of the real value" in the statute. Legislative omission is evidence that a statute was not intended to reach the matter omitted. *McSorley v. Hertz Corp.*, 1994 OK 120, ¶ 19, 885 P.2d 1343. And, it is presumed that the Legislature intends what it expresses. *Oklahoma Ass'n for Equitable Taxation v. City of Oklahoma City*, 1995 OK 62, ¶ 5, 901 P.2d 800. Finally, "the general rule is that nothing may be read into a statute which was not within the manifest intention of the legislature as gathered from the language of the act." *Stemmons, Inc. v. Universal C.I.T. Credit Corp.*, 1956 OK 221, ¶ 19, 301 P.2d 212. Based on traditional rules of statutory construction, the district court is not required to use the appraisers' estimated value when determining the property's market value.

¶7 Further, section 686 deals with a proceeding that is separate from and has a different purpose than the sheriff's sale. "A foreclosure decree authorizes merely the sale of the specific land that is mortgaged." *Neil Acquisition, L.L.C. v. Wingrod Inv. Corp.*, 1996 OK 125, ¶ 7, 932 P.2d 1100. The sheriff's sale does not recover an amount of money nor will it support a general execution for any deficiency owed by the judgment creditor. *Id.* On the other hand, section 686 authorizes the court to determine the market value of the property on the date of the sheriff's sale and to enter a "post-judgment deficiency order" if the proceeds of that sale are insufficient to satisfy the personal judgment previously entered in the foreclosure action. 12 O.S.2011 § 686.

¶8 Because section 686 makes no reference to the "appraised value" used during the sheriff's sale, Oklahoma's anti-deficiency statute requires the district court to make a determination of the value of the property that is independent of the previous valuation. *Neil Acquisition*, 1996 OK

125, ¶ 9 (section 686 mandates a hearing and a determination of any deficiency in accordance with the statutory formula). In this regard, my view and the view of the Majority are the same.

¶9 However, the Majority and I do not agree that the district court was required to use the appraisers' estimated value in this case which, according to the Majority, was "the only actual evidence of fair market value". If that were the case, there would be no need for a hearing or the district court's involvement. The deficiency would simply be determined by a mathematical calculation. *See Neil Acquisition*, 1996 OK 125, n.12 (noting that section 686 replaced the "automatic" common law method of subtracting the sheriff's sale price from the amount owed to determine the deficiency). Section 686 "requires a judicial determination of a deficiency . . . ." *Id.* The court's determination of the market value may or may not agree with the appraisers' previous valuation. But, and by necessity, the court's determination can only be based on the evidence presented during the section 686 hearing. "An adjudication of an issue of fact by the trial court must be based upon evidence that supports the decision . . . ." Christian v. Gray, 2003 OK 10, ¶ 44, 65 P.3d 591. "[A] trial court commits an abuse of discretion when it decides an issue based upon a fact not of record." *Id.* ¶ 52.

¶10 According to the Cooks and the Majority, the district court "had no evidence of fair market value as of the time of sale other than the appraisal of $279,000." I respectfully disagree.

¶11 At the section 686 hearing, the record before the district court established the following facts: (1) Three individuals were appointed by the sheriff as appraisers; (2) Each appraiser signed an oath stating that they were a resident of Tulsa County, not interested in the matter and promising to make a fair and impartial estimate of the real value of the property; (3) There is no evidence that any of the three individuals appointed by the sheriff was a professional appraiser or otherwise qualified by training or experience as an expert on the value of commercial property in the area, as they are identified by name only; (4) Each appraiser signed a return, under oath, stating that they had actually viewed the property "and estimated the real value thereof to be . . . $279,000;" (5) The basis for the appraisers' valuation is not disclosed nor do they disclose their method or the substance of their analysis; (6) At the sheriff's sale, Charles Sanders Homes was the only bidder; (7) Charles Sanders Homes bid $186,000, a statutorily sufficient amount on which the sheriff could sell the property and issue a deed to the purchaser; (8) Although all other interested parties and the public were properly notified of the sale, no one else, including the Cooks, was willing to pay more than $186,000 for the property. These facts not only constitute evidence, but also they provide evidence on the weight to be accorded the appraisers' estimated value. *See also Sides v. John Cordes, Inc.*, 1999 OK 36, ¶ 16, 981 P.2d 301 (noting that the weight to be given expert testimony is for the trier of fact, who may reject the opinion of experts).

¶12 The $186,000 Charles Sanders Homes was willing to pay is clearly some evidence of the market value of the property. *City of Tulsa v. Creekmore,* 1934 OK 57, ¶ 0, 29 P.2d 101 (Syllabus 2) ("By fair market value is meant the amount of money which a purchaser willing but not obliged to buy the property would pay to an owner willing but not obliged to sell it …."). Even though this was a judicial sale, it was not "a forced sale," as the Majority contends, or an auction where the sheriff was required to accept any offer. The sheriff could not sell the property unless he received an offer equal to or exceeding two-thirds of the "estimated value" of the property reported by the three appraisers. 12 O.S.2011 § 762. Further, if no one bid at least two-thirds of the appraisers' estimated value, the court was required to "set aside such appraisement and order a new one to be made . . . ." 12 O.S.2011 § 801. The fact that this was a judicial sale does not entirely negate the fact that only one purchaser was "willing" to purchase the property. The fact that this was a judicial sale, in my view, only goes to the weight the district court should accord the evidence of the purchase price in light of the principle announced in *City of Tulsa v. Creekmore.*

¶13 Further, this was a public, not a private sale. It is undisputed that proper notice of the sale was given to the Cooks and the public. The Cooks intentionally chose not to appear in order to avoid "unnecessary expense." That, they were free to do. But, in doing so, they failed to protect their perceived equity. And even though the district court ordered this sale, anyone could have appeared at the sheriff's sale and offered to purchase the property. The fact that no one did is evidence that the "market" for this property was limited and did not exceed the price paid by Charles Sanders

Homes. That fact also suggests that, but for the two-thirds requirement in section 762, the true "market value" for which Charles Sanders Homes would have been able to purchase the property was less than $186,000.

¶14 The Majority relies on footnote 23 in *Founders Bank and Trust Company v. Upsher,* 1992 OK 35, 830 P.2d 1355, for the legislative intent behind section 686 based on the proposition that a sheriff's sale "seldom brings a property's fair market value." In this dicta, the Supreme Court opined that lenders often require "a guaranty for at least that portion of the indebtedness which would be lost by application of the anti-deficiency proceedings." *Id. Upsher* holds that the contract language of a guaranty determines whether a guarantor is entitled to credit for the sheriff's sale price or the fair market value of the property. *Upsher* involved the contractual liability of guarantors of a mortgage debt, not mortgagors like the Cooks. *Upsher* did not involve a deficiency hearing conducted pursuant to section 686 and did not construe "the anti-deficiency statute." *Id.* ¶ 15. Here, we deal with the amount of the deficiency owed by the mortgagors determined after the hearing conducted pursuant to section 686, not a lender's prudent business practice "to protect a loan's soundness." *Id.* n.23.

¶15 I find *Riverside National Bank v. Manolakis*, 1980 OK 72, 613 P.2d 438, more applicable to the legislative intent of section 686: "Anti-deficiency statutes much like our § 686 were adopted in many states to protect mortgagors from personal liability after a foreclosure sale has been effected at a time of greatly deflated land values in a depressed economy." *Id.* ¶ 7 (footnote omitted). There is no evidence in the record that this sale was conducted "at a time of greatly deflated land values in a depressed economy." *Id.*

¶16 Although originally derived from Kansas law, *see Mehojah v. Moore*, 87 OK CIV APP 43, 744 P.2d 222 (approved for publication by the Supreme Court), Oklahoma's anti-deficiency statute has a recognized affinity with New York law as well. *Manolakis,* 1980 OK 72, ¶ 7. *See also Ingerton v. First Nat'l Bank and Trust Co.*, 291 F.2d 662, 665 (10th Cir. 1961). The generally recognized purpose of anti-deficiency statutes was explained in *Tompkins County Trust Company v. Herrick*, 13 N.Y.S.2d 825, 830 (1939):

> The right to deficiency judgment remains intact. The changes in procedure, viewed in the light of the existing law, are not so oppressive as to cut down the value of the obligation. Mortgagees may still recover their debts in full. The effect of the statute is to prevent recovery of more.

Based on the evidence available at the deficiency hearing, Charles Sanders Homes recovered its debt in full, it did not recover more.

¶17 Based on the evidence at the hearing, the district court concluded that the market value of the property was equal to or less than the $186,000 sale price. The district court did not simply determine the "deficiency as the difference between the foreclosure price and the mortgage obligation." *Neil Acquisition, L.L.C. v. Wingrod Inv. Corp.*, 1996 OK 125, n.12, 932 P.2d 1100. The district court conducted the hearing required by section 686, considered the available evidence, determined the market value of the property and the Cooks' deficiency by subtracting that value from the amount owed. Although the Cooks have failed to preserve the issue, it is important to note that a deficiency proceeding is equitable in nature and the district court's determination of the amount of a deficiency will not be set aside on appeal unless shown to be against the clear weight of the evidence. *Reliable Life Ins. Co. of St. Louis v. Cook,* 1979 OK 88, ¶ 11, 601 P.2d 455.

¶18 Like the Majority, I too agree with this Court's reasoning in *Little Bear Resources, LLC v. Nemaha Services, Inc.*, 2011 OK CIV APP 18, 249 P.3d 957 (holding that judgment debtor in a general execution proceeding is entitled to set off the market value of real property sold at sheriff's sale if judgment creditor is the purchaser). However, I find that case distinguishable.

¶19 *Little Bear* did not involve a mortgage foreclosure proceeding or a deficiency hearing conducted pursuant to section 686. Nonetheless, the *Little Bear* Court applied the equitable principles it found mandated by that statute to foreclosure proceedings conducted pursuant to a general writ of execution. However, the judgment debtor appeared at the hearing to confirm the sheriff's sale and argued, without objection, that the estimated value was, in fact, the actual market value of the property. Here, Charles Sanders Homes challenges the appraisers' "drive by appraisal" and their estimate of the property's value derived without inspection of the interior of this commercial building. Most importantly, the judgment debtor in *Little Bear* appealed the order confirming the sher-

iff's sale preserving for appellate review the merits of the district court's finding regarding the market value of the property.

¶20 The Cooks did not appear at the sheriff's sale, and they did not appeal the order confirming the sheriff's sale. They did not even appeal the deficiency order and, therefore, have failed to preserve for appellate review any challenge to the district court's determination of the market value of this property. *Yery v. Yery*, 1981 OK 46, ¶ 14, 629 P.2d 357) ("[T]he correctness of an amount of a judgment under the evidence before the court is contestable as a direct appeal from the judgment, but that issue is not presented on the occasion of a motion to vacate the judgment, nor an appeal therefrom.").

¶21 In order to have their deficiency orders vacated, the Cooks are required to show that in denying their motions to vacate, the district court failed "to adhere to the established rules or mode of procedure in the orderly administration of justice." *Knell v. Burnes*, 1982 OK 35, ¶ 5, 645 P.2d 471. In my view, they have not done so. Nonetheless, the Majority not only reverses the order denying the motions to vacate but also vacates the previously entered deficiency judgments finding that the district court erred as to "the correctness of [the] amount of [the deficiency] judgment under the evidence." *Yery v. Yery*, 1981 OK 46, ¶ 14. And, the Majority does so in the absence of a "direct appeal" from the deficiency judgments. *Id.*

¶22 Oklahoma's statutory procedure clearly authorizes the sheriff to sell the property for two-thirds of the value reported by the three individuals appointed by the sheriff. 12 O.S.2011 § 762. Oklahoma statutes recognize that the value determined by the three individuals appointed by the sheriff is only an "estimate of the real value of the property." 12 O.S.2011 § 759(B). And, fatal to this appeal, the Cooks have not shown that the district court was required to find that the three appraisers' "estimate of the real value" was, in fact, the actual market value of the property.

¶23 The district court conducted the hearing required by section 686 in accordance with the established rules and procedure. Based on the evidence available at that hearing, the court determined the amount of the Cooks' deficiency "in accordance with the statutory formula . . . ." *Neil Acquisition, L.L.C. v. Wingrod Inv. Corp.*, 1996 OK 125, ¶ 9, 932 P.2d 1100. No "irregularity" in the section 686 procedure has been or was attempted to be shown, much less the stronger showing required on appeal when the district court has refused to vacate a judgment. *See Schweigert v. Schweigert*, 2015 OK 20, ¶ 5, 348 P.3d 696.

¶24 Finally, it is unclear what is to be accomplished on remand. If the only "evidence of fair market value" at the section 686 hearing was the $279,000 appraisers' estimated value, then the district court should be instructed to use that number in determining the deficiency, a function this Court could perform. *In re Reyna*, 1976 OK 18, ¶ 22, 546 P.2d 622 (in cases of equitable cognizance, the appellate court may enter the judgment the trial court should have rendered). However, if a new hearing is to be conducted, additional evidence from all parties should be permitted. If Charles Sanders Homes proves that the market value of the property at the time of sale was less than the appraisers' estimated value, the amount of the Cooks' deficiency will be the same as previously determined by the district court.

¶25 I would affirm the orders appealed.

JANE P. WISEMAN, PRESIDING JUDGE:

1. The determination of a deficiency in a mortgage foreclosure proceeding does not result in a judgment. *See generally Mehojah v. Moore*, 1987 OK CIV APP 43, 744 P.2d 222 (approved for publication by the Supreme Court); *see also Neil Acquisition, L.L.C. v. Wingrod Inv. Corp.*, 1996 OK 125 n. 6, 932 P.2d 1100. Although often referred to as a judgment by custom and practice, it is "a post-judgment deficiency order." 12 O.S.2011 § 686.

2. Although Homes would like to denigrate the Sheriff's appraisers' value as a "drive by appraisal," there is no evidence to support that characterization. And, although the Dissent takes issue with the appraisers' "estimated value" and the lack of evidence of their qualifications, they were appointed by the Sheriff and were willing to lend their names under oath to their appraisal. This cannot be said of the unknown bidding agent for Homes and his or her qualifications, training or expertise in valuing such property, based as it was solely on the minimum 2/3 required by 12 O.S.2011 § 762.

3. The Court noted that it found no "authority that the value of the property realized at the forced sale in Alabama automatically establishes the fair and reasonable market value for this debt action in Oklahoma." *Eufaula Bank & Trust Co.*, 1983 OK CIV APP 21, ¶ 12.

4. Although the Dissent maintains that our Opinion requires the district court to use the appraisers' value, this is clearly not our holding, as we have just stated, and as shown by our remand for a determination of the property's "fair and reasonable market value" as mandated in § 686.

5. By state law, the three disinterested sheriff's appraisers are oathbound to actually view the property, impartially appraise its "real value," and file their signed return so stating. 12 O.S.2011 § 759(B) (We note that this statute was amended in 2019 but these requirements remain).

6. If Homes and the Dissent are correct – that the $186,000 bid is the fair market value – we would be hard-pressed to say an almost identical bid but a dollar less ($185,999) is not equally defensible as the fair market value, though it could not be accepted as such based on 12 O.S.2011 § 762.

FISCHER, J., dissenting:

1. The Cooks also argue that the mathematical calculation used to fix the total amount of their deficiency was erroneous. That is the kind

of procedural error within the purview of section 1031(3). See n.2. However, Charles Sanders Homes appears to concede this issue.

2. The kinds of irregularities for which courts have previously vacated a judgment have involved prejudice to the rights of a party "because of a failure to adhere to the established rules or mode of procedure in the orderly administration of justice." *Knell v. Burnes,* 1982 OK 35, ¶ 5, 645 P.2d 471 (vacating judgment determined to be entered prematurely, before expiration of time to file brief). *See also Nation v. Savely,* 1927 OK 350, 260 P. 32 (vacating a judgment where the defendants had no actual notice of the trial date); *Adachi v. Bickford,* 1929 OK 86, 275 P. 306 (vacating default judgment rendered after case was placed on the nonjury docket in action at law in which defendant previously demanded a jury trial); *National Valve & Mfg. Co. v. Wright,* 1951 OK 381, 240 P.2d 766 (vacating judgment based on settlement reached by attorney without knowledge or consent of client).

3. *See Bank of Oklahoma v. Red Arrow Marina Sales & Serv.*, 2009 OK 77, n.8, 224 P.3d 685.

4. Section 686 uses the terms "fair and reasonable market value" and "market value" interchangeably, and to refer to the same thing, that is, the property value the district court will use when establishing a mortgagor's deficiency. For convenience, I will use the shorter "market value" to describe the property value referenced in section 686.

2020 OK CIV APP 15

HOME VEST CAPITAL, LLC, Plaintiff, vs. RETIREMENT APPLICATION SERVICES, INC. and JOHN DOUGLAS HALVE, individually, Defendants, and MICHAEL MARES, individually, Defendant, and DEANA MARES, an individual, GM4US, LLC, and RAS, INC., Plaintiffs/Appellants, vs. BANK OF AMERICA, N.A., Defendant/Appellee, and BANK OF AMERICA, N.A., f/k/a Nations Bank, Plaintiff/Counter-Defendant/Appellee, vs. MICHAEL MARES, Defendant/Counter-Claimant/Appellant.

Case No. 115,897. August 10, 2018

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

HONORABLE MARY F. FITZGERALD, JUDGE

REVERSED AND REMANDED FOR JURY TRIAL

Joseph L. Hull, III, Joseph Norwood, Tulsa, Oklahoma, for Michael Mares, Deanna Mares, GM4US, LLC, and RAS, Inc.,

Joe E. Edwards, Melanie Wilson Rughani, CROWE & DUNLEVY, Oklahoma City, Oklahoma, and

Elliot P. Anderson, CROWE & DUNLEVY, Tulsa, Oklahoma, and

Justin Nichols, Brian Fries, LATHROP & GAGE, LLP, Kansas City, Missouri, for Bank of America.

Kenneth L. Buettner, Judge:

¶1 Plaintiffs/Appellants Deana Mares, GM4US, LLC, and RAS, Inc. and Defendant/Counter-Claimant/Appellant Michael Mares (collectively, Appellants) appeal from the trial court's February 2017 Decision in favor of Bank of America (Bank) following a bench trial. The dispute between Appellants and Bank arose out of Bank's refusal to honor checks it found Michael Mares negotiated without authority. The trial court erred in enforcing a waiver of jury trial included in the deposit agreement Michael Mares signed when opening accounts with Bank because the Oklahoma Constitution plainly commands that a contractual waiver of a constitutional right, one of which is the right to a jury trial, is void. We reverse and remand for jury trial.

¶2 The trial court consolidated three cases filed in 2007.[1] The dispute between Bank and Appellants arose when Michael Mares negotiated four checks from Wycliffe USA, Ltd., an entity he was previously associated with, at Bank and had the funds converted to cashiers checks which he gave to himself, his wife, Deana Mares, GM4US, and RAS. Wycliffe then reported Mares did not have authority to negotiate the checks and Bank recalled the cashiers checks. In their claims or counterclaims, Appellants argued that Bank wrongfully dishonored the checks, totaling $144,500, which caused Appellants harm. Appellants asserted claims for liability under Articles 3 and 4 of the Uniform Commercial Code (UCC), as well as claims for negligence, libel, slander, libel per se, slander per se, intentional infliction of emotional distress, breach of contract, violation of the Oklahoma Consumer Protection Act, abuse of process, bad faith, negligent supervision/ratification, conversion, negligence per se, and wrongful dishonor.

¶3 Appellants demanded a jury trial, which Bank opposed based on a waiver of jury trial included in the Deposit Agreement Michael Mares entered with Bank. In an order filed September 30, 2014, the trial court granted Bank's motion to enforce jury trial waiver and found Appellants had waived their right to a jury trial by executing the Deposit Agreement. In its judgment following the bench trial, the trial court expressly found the waiver of jury trial was valid and enforceable.

¶4 Appellants' first allegation of error is that the trial court erred in enforcing the contractual jury trial waiver.[2] The Oklahoma Constitution provides the right of a trial by jury in cases such as this: "The right of trial by jury shall be and remain inviolate, except in civil cases wherein the amount in controversy does not

exceed One Thousand Five Hundred Dollars ($1,500.00), ..." OK Const. Art. II, §19. Under the Oklahoma Constitution, no Oklahoma constitutional right may be waived by contract: "Any provision of a contract, express or implied, made by any person, by which any of the benefits of this Constitution is sought to be waived, shall be null and void." OK Const. Art. XXIII, §8. Appellants argue the jury waiver was void based on that section. Bank cites cases from other jurisdictions approving contractual jury waivers, but those cases are not helpful because Oklahoma is unique among the states in having a constitutional bar to contractual waivers of constitutional rights. *See* Amanda R. Szuch, *Reconsidering Contractual Waivers of the Right to a Jury Trial in Federal Court*, 79 U. Cin. L. Rev. 435, 439 (2010).[3] The Oklahoma cases cited by Bank all involve arbitration agreements, which are distinguishable from jury trial waivers.[4]

¶5 Bank also contends that the contractual waiver in its deposit agreement is valid in Oklahoma based on 12 O.S.2011 §591. That section provides:

> The trial by jury may be waived by the parties, in actions arising on contract, and with the assent of the court in other actions, in the following manner: By the consent of the party appearing, when the other party fails to appear at the trial by himself or attorney. By written consent, in person or by attorney, filed with the clerk. By oral consent, in open court, entered on the journal.

Bank urges that it filed the deposit agreement as an attachment and that it therefore showed Appellants' written consent, filed with the clerk. Bank's argument that §591 allows a contractual waiver of the right to a jury trial is unpersuasive for two reasons. First, it ignores the fact that §591 is part of the Oklahoma civil procedure statutes devoted to jury trials and cannot supersede the constitution. *See* 12 O.S. 2011 §571-§591. Second, and more important, §591 does not address contractual waiver of the right to a jury trial, but rather how to waive the right to a jury trial after an action on a contract has been commenced in court. Bank's reading of §591 would make article XXIII, section 8 superfluous as far as the constitutional right to a jury trial because any contractual waiver of that constitutional right would not be void so long as the waiver were filed with the clerk. Section 591 provides the ways in which parties to a current action may waive their right to a jury trial in that action; it does not allow a blanket contractual waiver of a jury trial in any future case between the contracting parties.

¶6 No published Oklahoma decision has addressed the validity of a contractual waiver of a jury trial in light of article XXIII, section 8.[5] We apply the plain language of that section to find that the contractual waiver in this case was void and therefore the trial court erred in denying Appellants' demand for a jury trial.[6]

¶7 Because we reverse and remand for jury trial, we do not consider Appellants' remaining claims of errors in the bench trial.

¶8 REVERSED AND REMANDED FOR JURY TRIAL.

BELL, P.J., concurs and JOPLIN, J., dissents.

Kenneth L. Buettner, Judge:

1. Plaintiff Home Vest Capital, LLC, dismissed its claims without prejudice in 2009.

2. The relevant part of the Deposit Agreement provides:

> . . . (Y)ou have the right to compel us at your option, and we have the right to compel you at our option, to determine any individual Claim with a value of less than $1 million by arbitration. All other Claims will be resolved in court without a jury; except those brought in California state court, in which case such Claims will be determined by reference to a referee . . . .
> * * *
> A Claim that is not submitted to arbitration or judicial reference will be decided by a judge without a jury as permitted by law.

3. Noting Montana has a statute barring jury trial waivers and judicial decisions in California and Georgia have barred such waivers.

4. Bank also relies on *Massey v. Farmers Ins. Group*, 1992 OK 80, 837 P.2d 880, which addressed whether a statute mandating that fire insurance policies require appraisers to determine the amount of damage to the property violated the right to a jury trial. The court noted that the right to a jury trial is inviolate and concluded that to protect that right, the damage appraisal "has no preclusive effect upon the party who did not demand the appraisal process."

5. The only case we have found discussing this specific issue is an unpublished decision of the Oklahoma Court of Civil Appeals which involved a lease provision waiving the right to have a jury resolve disputes under the lease. Case No. 95,121, mandated Jan. 16, 2003 (*cert. denied*) (withdrawn from publication).

6. Because the jury trial waiver here was void under the Oklahoma Constitution, we need not consider Bank's arguments that Michael Mares knowingly consented to the waiver or that Michael Mares bound the other Appellants as their agent.

2020 OK CIV APP 16

HETRONIC INTERNATIONAL, INC., Plaintiff/Appellee, vs. KIMBERLY CURTIS, Defendant/Appellant.

Case No. 116,180. August 30, 2019

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE PATRICIA PARRISH, JUDGE

AFFIRMED

John E. Barbush, Oklahoma City, Oklahoma, for Defendant/Appellant,

John N. Hermes, Sam R. Fulkerson, Oklahoma City, Oklahoma, for Plaintiff/Appellee.

Larry Joplin, Presiding Judge:

¶1 Defendant/Appellant, Kimberly Curtis, seeks review of the trial court's order of June 15, 2017 imposing sanctions, costs and attorney fees upon finding Curtis "refused to cooperate" and engaged in "obstructive conduct," which "significantly increased the time and labor required to litigate this matter." Plaintiff/Appellee, Hetronic International Inc., was granted the following attorney fees, expert fees and costs in the form of sanctions and prevailing party attorney fees and costs: a) attorney fees sanctions $46,866.75, prevailing party attorney fees $228,380.98, total $275,247.73; b) expert fees sanctions $42,733.81, prevailing party expert fees $0, total $42,733.81; c) costs sanctions $2,384.78, prevailing party costs $16,515.35, total $18,900.13. The total awarded to Appellee/Hetronic for attorney fees, expert fees and costs was $336,881.67.

¶2 Appellant/Curtis is a former employee of Hetronic International Inc. She began her employment in 2002 as the accounting manager and when she resigned on September 6, 2013 she was vice president of accounting.[1] On September 10, 2007, during Curtis's employment tenure, Hetronic required her to sign an Amended and Restated Confidentiality and Noncompetition Agreement. The agreement contained a provision for payment of Hetronic's attorney fees in the event the company prevailed in pursuit of its rights under the agreement. In addition, there was a provision for Curtis to receive fifty-percent of her salary for a year after her employment ceased if she did not work for a competitor.[2]

¶3 In November 2013, after Curtis provided her notice and prior to her end of employment in January 2014, Curtis and other employees were given a notice of litigation pertaining to an unrelated lawsuit, the notice prohibited the deletion, transfer or manipulation of Hetronic electronic files. In February 2014, shortly after Curtis's employment ended, Hetronic became aware that in excess of 14,000 electronic files had been transferred to Curtis's personal Dropbox and were deleted from Curtis's computer. On March 14, 2014, Curtis and her attorney were asked to return all company information Curtis had retained, including electronic files and files that had been transferred to her Dropbox account. On April 16, 2014, Hetronic's attorney sent a letter to Curtis's attorney in which Hetronic's counsel summarized the existing understanding between itself and Curtis regarding the location and "return" of the electronic files. Curtis asked to be present with the Hetronic IT professional in order to allow access to her Dropbox account. To facilitate the request, a meeting between Curtis and a Hetronic IT professional was arranged for May 16, 2014, but Curtis did not appear for this meeting. Hetronic filed its Petition later that same month, on May 28, 2014, asserting claims for breach of the 2007 confidentiality and noncompetition agreement, breach of fiduciary duty, breach of loyalty, and unjust enrichment.

¶4 On the same day the Petition was filed, May 28, 2014, Hetronic filed a motion for a temporary restraining order (TRO) and motion for temporary and permanent injunction, requesting Curtis be enjoined "from accessing, using, transferring, deleting, sharing or otherwise manipulating electronic files now or previously in Curtis's personal Dropbox account that belong to, were created by, or are otherwise related to Hetronic's business or Curtis's prior employment by Hetronic, and to require her to allow Hetronic access to, and for Curtis to relinquish control of, her personal Dropbox account to Hetronic, including all electronic files and data included therein."

¶5 On July 23, 2015, the trial court issued an "Order for Sanctions" in which the court found Curtis willfully violated the court's orders of June 10, 2014, June 12, 2014 and July 23, 2014. The order found that on June 23, 2014, Curtis deleted the event logs from her personal computer and what was termed the "AZ control computer." Curtis admitted she changed the AZ control computer's name from "kcurtis" to "generic" to "laptop" on June 20, 2014. The court also found evidence establishing Curtis changed the name of her personal computer from "kimbot0282" to "kcurtis" approximately thirty minutes after the court's June 12, 2014 order was issued. The court did not find credible Curtis's testimony claiming she did not change the name of the computer. On the day Curtis was served with the instant lawsuit, she deleted three files from her Dropbox account, at least one of which contained Hetronic documents. The July 23, 2015 sanctions order decreed, "Hetronic is awarded a monetary sanction against Defendant, in an amount to be determined at a later hearing, for all attorney's fees,

expert fees, and other costs incurred in obtaining this Order[.]"

¶6 The matter came on for a jury trial on November 2, 2015 for Hetronic's breach of contract claim and Curtis's counterclaim for breach of contract.[3] The jury returned a verdict in favor of Hetronic for $180,000.00 in damages and found against Curtis on her counterclaim. Hetronic made an oral motion for remittitur, as the jury's verdict was greater than the money damages Hetronic sought; the motion was granted and the award was reduced to $34,345.00, said to represent Curtis's salary, benefits and other compensation paid from September 6, 2013 to January 4, 2014 and the costs incurred up to the time litigation was filed on May 28, 2014 for one of Hetronic's computer forensics consultants. The request for costs and attorney fees was to be determined at a later time upon Hetronic's motion as the prevailing party.

¶7 The costs and fee hearing was bifurcated, the first part of the proceeding was conducted on April 7, 2017 to determine whether Hetronic was entitled to fees and costs and the second part of the proceeding on May 2, 2017 was conducted to determine the amount to be awarded to Hetronic. Curtis appealed the resulting June 15, 2017 order for attorney fees, expert fees and costs, which awarded Hetronic a total of $336,881.67 in sanctions, fees and costs.

¶8 Curtis's first proposition on appeal argues the 2007 confidentiality and noncompetition agreement is unconscionable and unenforceable and the $228,380.98 prevailing party attorney fee award, given under the auspices of paragraph 8 of the 2007 noncompete agreement, is invalid.[4] Curtis also argues the 2007 noncompete agreement fails for lack of consideration and the one-sided attorney fee provision lacked mutuality. Curtis's second proposition of error argues the total fees and costs award of $336,881.67 is unreasonable and bears no relationship to the $34,345.00 jury award. Also incorporated under Curtis's second proposition of error, she asserts the costs, attorney fees and expert fees were not appropriately limited to the actual costs of obtaining the sanctions order (July 23, 2015). And the sanctions award is not in keeping with similar sanctions awards given in other cases.

¶9 The question of a party's entitlement to an attorney fee award is a question of law subject to a *de novo* standard of review on appeal. *Elmore v. Doenges Bros. Ford, Inc.*, 2001 OK CIV APP 27, ¶6, 21 P.3d 65, 69. With respect to whether or not the fee award is reasonable, the trial court's decision will be affirmed unless the decision is marked by an abuse of discretion. *Hastings v. Kelley*, 2008 OK CIV APP 36, ¶8, 181 P.3d 750, 752.

¶10 Curtis's first argument on appeal asserts the 2007 confidentiality and noncompetition agreement fails for lack of consideration. Consideration is an essential part of any contract. 15 O.S. 2001 §2. Curtis did not, however, appeal the underlying judgment in this case which found in favor of Hetronic and against Curtis's counterclaim. Curtis attempts to appeal the failed consideration for the underlying agreement here by appealing the attorney fee proceedings order. Hetronic argues she is out of time to do so having not appealed the underlying judgment after the jury verdict.[5]

¶11 Timely commencement of an appeal is jurisdictional. *Stites v. DUIT Constr. Co.*, 1995 OK 69, 903 P.2d 293, 303. Curtis failed to appeal the underlying decision which reached a merits issue regarding the validity of the 2007 agreement, which found a contract had been formed. It was at the merits stage, after the jury's verdict on the underlying issues, that Curtis needed to bring her appeal regarding the presence of or lack of consideration. The record reveals Curtis's appeal of the attorney fee decision is not effective in extending an appeal for the underlying issues decided by the jury. The attorney fee order and its corresponding appeal do not "extend or affect the time to appeal" the underlying judgment. 12 O.S. Supp.2004 §990.2(D). We find no relief is warranted on this proposition of error.

¶12 Similarly, the second component of Curtis's first proposition of error argues paragraph eight (8) of the 2007 agreement is unconscionable and unenforceable due to its one-sided and unfair lack of mutuality, as it only provides for attorney fees to Hetronic. This proposition also attacks the validity of the underlying contract decision and attempts to reach the merits of the contract case which was decided by the jury in 2015. As with the proposition addressing the failure of consideration, this issue too is not ripe for appeal in the context of the attorney fees and costs proceedings and resulting order. 12 O.S. §990.2(D). No relief is warranted on this proposition of error.

¶13 Curtis's second proposition of error asserts the $336,881.67 in awarded attorney

fees, expert fees and costs does not bear a reasonable relationship to the result obtained, a $180,000.00 jury award remitted to $34,345.00. Curtis breaks this proposition into three subparts. First, Curtis argues the attorney fee award ignores Oklahoma authority requiring the fee to bear a reasonable relationship to the amount in controversy and the result obtained. Second, the sanction award for attorney fees, expert fees and costs was not limited to the cost of obtaining the sanction order itself. Third, the trial court improperly ignored sanctions awarded in a similar case.

¶14 The Oklahoma Supreme Court, quoting a Texas Court of Appeals case, said the following in *Southwestern Bell Telephone Co. v. Parker Pest Control, Inc.*, 1987 OK 16, 737 P.2d 1186, 1189.

> "Attorney's fees, where recoverable by law, must be reasonable under the particular circumstances of the case and must bear some reasonable relationship to the amount in controversy." ...
>
> *See also Lytle v. Lytle,* 266 Ark. 124, 583 S.W.2d 1 (1979).
>
> We make these observations and quote from the other jurisdictions with approval to demonstrate that not in *Burk* [*v. City of Oklahoma City,* 1979 OK 115, 598 P.2d 659] nor anywhere else have we rejected the notion that an attorneys' fee must bear some reasonable relationship to the amount in controversy. It does, and that relationship must be considered in each case where an attorneys' fee is awarded.

Southwestern Bell, 737 P.2d at 1189.

¶15 Based on the authority recounted in *Southwestern Bell,* we agree the attorney fee must bear a "reasonable relationship to the amount in controversy." *Id*. However, as Hetronic explained throughout these proceedings, Curtis's unwillingness to cooperate in the retrieval and return of Hetronic's electronic information is what made this case balloon in the first place. Curtis failed to be forthcoming with respect to renaming her computer, she deleted computer documents and information making the computer forensics work more difficult, and violated multiple court orders. As the trial court explained in its appealed from order, enforcement of the confidentiality agreement to "insure [Hetronic's] confidential information [was not] misappropriated" was a primary goal in this suit and made the end result difficult to monetize. It should also be noted Hetronic reduced the requested fees across the board by 15% and did not request recovery for any fees by coordinating counsel.

¶16 "The reasonableness of attorney fees depends on the facts and circumstances of each individual case and is a question for the trier of fact. The standard of review for considering the trial court's award of an attorney fee is abuse of discretion." *Hess v. Volkswagen Group of America, Inc.,* 2014 OK 111, ¶14, 341 P.3d 662, 666. Originally, the trial court in *Hess* awarded a seven million dollar attorney fee upon a class action recovery of $45,780.00. *Id.* at 664. The Oklahoma Supreme Court reversed and remanded the multi-million dollar attorney fee award. On remand, the court awarded an attorney fee of $983,616.75; this award was affirmed on appeal. *Hess v. Volkswagen Group of America, Inc*., 2017 OK CIV APP 35, 398 P.3d 27. The appellate court found no abuse of discretion in the reduced fee award, even though it far outpaced the underlying settlement by more than twenty times. In the present case, the $336,881.67 fees, sanctions, and costs award is roughly ten times the underlying verdict. The instant fee/cost/sanction award is within the parameters permitted in the 2017 *Hess* decision and is in keeping with the lodestar method, which calculates the number of hours worked multiplied by a reasonable hourly rate. The lodestar method carries with it a "strong presumption" that it results in a reasonable attorney fee. *Id*. at 32. Based on several factors in this case, a) wherein Curtis was remarkably uncooperative and not forthcoming with Hetronic's information, b) the ratio of fees awarded to results obtained, including the results that were not easily monetized, c) the trial court's decision is in keeping with previous Oklahoma authority, d) Hetronic's preemptive reduction of fees (by 15%) before submitting its request and e) the presumption in favor of the lodestar method used, we do not find the fee/sanctions/cost award in this case to be unreasonable.

¶17 The second component of Curtis's second proposition asserts the sanctions award total of $91,985.34 in fees, expert fees and costs (attorney fee sanctions $46,866.75, expert fees sanctions $42,733.81, and costs sanctions $2,384.78) was not appropriately limited to the cost of obtaining the sanction order itself. Extant authority provides:

> When considering an application for attorney fees, the Oklahoma Supreme Court has given special guidance to the lower courts, stating that "recovery for counsel fee allowance must be set upon and supported by evidence presented in an adversary proceeding in which the facts and computation upon which the trial court rests its determination are set forth in the record with a high degree of specificity." *Payne v. DeWitt,* 1999 OK 93, ¶ 18, 995 P.2d 1088, 1096. (Footnotes omitted.) During the hearing, "(l)awyers are obligated to provide the trial court with the data necessary to document the work performed together with the method used to arrive at a counsel-fee allowance." *Id.*

Garage Storage Cabinets, L.L.C. v. Mitchell, 2007 OK CIV APP 84, ¶21, 169 P.3d 1211, 1217.

¶18 Hetronic provided detailed billing entries for both time and descriptions of the work done in support of its sanctions request. The billing demonstrated the requested fees and costs were targeted at Hetronic's IT forensics work to determine the extent of the Hetronic files Curtis had obtained and what needed to be returned, whether and to what extent Curtis violated the confidentiality agreement, which devices and accounts contained Hetronic information, and the extent to which Curtis was required to comply with court orders, particularly with respect to the computer information. The billing provided was specific and gave the trial court the necessary documentation for the work performed and the price for which it was done. The record shows the fee proceedings were done in accordance with the guidelines provided in *Garage Storage Cabinets,* we find no relief is warranted on this proposition of error.

¶19 Curtis's final argument in her second proposition of error argues the trial court did not properly consider a similar case in which a relatively nominal $500.00 sanction was imposed for an adverse party's "cleaning" (erasing) a computer disk drive, just prior to having to produce discovery materials. *Food Serv. of America, Inc. v. Carrington*, 2013 WL 4507593 (D.Ariz. 2013). This case was presented to the trial court below, argued by Curtis as being on-point and by Hetronic as distinguishable. On the record presented, we find the trial court was within its discretion to consider both parties' arguments and give the unpublished, out of state, opinion the consideration the trial court deemed necessary. Okla.Sup.Ct.R. 1.200, 12 O.S. Ch.15, App.1. The record does not reveal the trial court abused its discretion in its consideration of the *Carrington* case, no relief is warranted on this proposition of error.

¶20 The decision of the trial court is AFFIRMED.

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

Larry Joplin, Presiding Judge:

1. The record indicates Curtis and Hetronic agreed she would continue working through January 3, 2014. At trial, Curtis asserted she had been fired, Hetronic said she was not fired. In either event, her employment ended on January 3, 2014.
2. The paragraph pertaining to the 50% post employment compensation was deleted after the contract was reformed by the trial court.
3. The trial court having previously granted Curtis's motion for summary judgment on Hetronic's claims for breach of the confidentiality agreement, breach of fiduciary duty, breach of loyalty, and unjust enrichment.
4. Paragraph 8, 2007 Confidentiality and Non-competition Agreement reads in part:
> ...Further, in the event legal action is necessary to enforce any of Employee's obligations here under and the Company prevails in such legal action, the Company shall be entitled to a recovery of its attorneys' fees expended in such action.
5. The journal entry of judgment was entered on January 8, 2016.

2020 OK CIV APP 17

STATE OF OKLAHOMA, Plaintiff/Respondent, vs. L.G., Defendant/Petitioner/Appellee, and OKLAHOMA STATE BUREAU OF INVESTIGATION, Respondent, and THE CITY OF OKLAHOMA CITY, Respondent/Appellant.

Case No. 116,533. September 6, 2019

APPEAL FROM THE DISTRICT COURT OF CLEVELAND COUNTY, OKLAHOMA

HONORABLE STEVEN L. STICE, JUDGE

REVERSED

Riley W. Mulinix, Joshua K. Hefner, MULINIX GOERKE & MEYER, PLLC, Oklahoma City, Oklahoma, and

Samuel L. Talley, Eugene Bertman, Katie Magee, TTB LAW, Norman, Oklahoma, for Petitioner/Appellee,

Kenneth Jordan, Cindy L. Richard, Orval Edwin Jones, CITY OF OKLAHOMA CITY, Oklahoma City, Oklahoma, for Respondent/Appellant The City of Oklahoma City.

Bay Mitchell, Presiding Judge:

¶1 Respondent/Appellant The City of Oklahoma City (the City) appeals the trial court's order expunging Defendant/Petitioner/Appellee L.G.'s[1] criminal records as it applies to

the Oklahoma City Police Department's (OCPD) arrest records. We find that to expunge criminal records, including arrest records, pursuant to 22 O.S. Supp. 2016 §§18-19 one must file a petition to expunge in a new civil action. L.G.'s petition was filed in the underlying criminal case in Cleveland County. The criminal court's order expunging L.G.'s criminal records, including the OCPD's arrest records, pursuant to 22 O.S. §§18-19 was not authorized by law. Furthermore, venue is not proper in Cleveland County as L.G.'s arrest information is located at the OCPD in Oklahoma County. We reverse the Order of Expungement.

¶2 On April 25, 2014, L.G. was arrested by the OCPD in a part of Oklahoma City located in Cleveland County, Oklahoma. L.G. was charged with domestic assault and battery in the District Court of Cleveland County. The charge was later amended to disturbing the peace. L.G. pleaded guilty and received a one year deferred sentence. He successfully completed his deferred sentence and the charge was dismissed September 3, 2015. On June 13, 2017, L.G. filed a Petition for Expungement in the closed criminal case in Cleveland County. He sought to have records of his arrest, charges, and the court disposition sealed pursuant to 22 O.S. §§18-19. The Cleveland County District Attorney's Office, the OCPD, and the Oklahoma State Bureau of Investigation were given notice.

¶3 The City, on behalf of the OCPD, filed a motion to dismiss the petition to expunge as it pertained to the OCPD's arrest records. The City argued venue was improper in Cleveland County, because the arrest records were located in Oklahoma County and, according to 22 O.S. §19(A), venue is proper in Oklahoma County. The City also argued the criminal court's authority is limited to its own court records and does not extend to arrest records. L.G. filed a response and requested sanctions. L.G. argued the venue statute is ambiguous and that the City's interpretation of 22 O.S. §19(A) would result in an absurdity and conflict with other provisions. L.G. argued the City's interpretation would require two expungement proceedings for the same records – one in Cleveland County for the case file which contains the OCPD's arrest records and a second in Oklahoma County where the original arrest records are stored.

¶4 After a hearing July 25, 2017, the trial court denied the City's motion to dismiss. On October 31, 2017, the trial court entered an Order of Expungement sealing "any record of the arrest, charges, and/or court disposition" made in connection with L.G.'s criminal case and any reference to such records in the public index pursuant to 22 O.S. §§18-19. The City appeals.

¶5 It is undisputed that L.G. successfully completed his deferred sentence and qualifies for the expungement of his criminal records under 22 O.S. §18(A)(8).[2] The City's appeal revolves around the interpretation of 22 O.S. Supp. 2016 §19(A), which provides: "Any person qualified under Section 18 of this title may petition the district court of the district in which the arrest information pertaining to the person is located for the sealing of all or any part of the record, except basic identification information." Statutory construction presents a question of law which we review *de novo*. *See Fanning v. Brown*, 2004 OK 7, ¶8, 85 P.3d 841. We have plenary, independent and nondeferential authority to determine whether the trial court erred in its legal rulings. *Id.*

¶6 There are two statutes providing for the expungement of criminal records after successfully completing a deferred sentence. Title 22, §18 provides for a general expungement of all criminal records. For purposes of this section, "expungement" is defined as "the sealing of criminal records, as well as any public civil record, involving actions brought by and against the State of Oklahoma arising from the same arrest, transaction or occurrence." 22 O.S. §18(B). This includes arrest records. Section 19 sets forth the procedure for expungement. The other statute addressing the expungement of records after successfully completing a deferred sentence is 22 O.S. §991c. Section 991c provides for a more limited expungement of the criminal court's own records:

> C. Upon completion of the conditions of the deferred judgment, and upon a finding by the court that the conditions have been met and all fines, fees, and monetary assessments have been paid as ordered, the defendant shall be discharged without a court judgment of guilt, and *the court shall order the verdict or plea of guilty or plea of nolo contendere to be expunged from the record* and the charge shall be dismissed with prejudice to any further action. The procedure to expunge the record of the defendant shall be as follows:

1. *All references to the name of the defendant shall be deleted from the docket sheet;*

2. *The public index of the filing of the charge shall be expunged by deletion, mark-out or obliteration;*

. . .

5. *Defendants qualifying under Section 18 of this title may petition the court to have the filing of the indictment and the dismissal expunged from the public index and docket sheet. This section shall not be mutually exclusive of Section 18 of this title.*

22 O.S. Supp. 2015 §991c(C) (emphasis added).

¶7 The Oklahoma Supreme Court and the Oklahoma Court of Criminal Appeals have clarified that arrest records can be expunged only by 22 O.S. §§18-19. In *State v. Freeman*, 1990 OK CR 45, 795 P.2d 110, the parties agreed §991c authorized the expungement of the petitioner's guilty pleas. *Id.* ¶7, at 112. The issue was whether §991c authorized the expungement of criminal arrest records. *Id.* The Court of Criminal Appeals held "there is absolutely no language in [§991c] authorizing the expunction of criminal arrest records. Expunction of such records, under limited circumstances, is authorized only by 22 O.S. Supp. 1987 §18, and this section [§991] does not authorize expunction of arrest records following completion of a deferred sentence." *Id.* ¶9, at 112. The Court went on to note "the legislature has specifically provided for the expunction of arrest records by enacting § 18" and found the criminal court's order expunging the arrest records pursuant to §991c was unauthorized by law. *Id.* ¶10, at 112. The Oklahoma Supreme Court addressed this issue in *City of Lawton v. Moore*, 1993 OK 168, 868 P.2d 690. In *Lawton*, the petitioner's guilty plea was expunged pursuant to 22 O.S. §991c. *See id.* ¶2, at 691. The petitioner complained the records of his arrest also should have been expunged. *Id.* ¶10, at 693. The Oklahoma Supreme Court disagreed and, relying on *Freeman*, interpreted §991c as not authorizing the expungement of arrest records. *Id.* ¶¶10-11, at 693. According to these cases, the district court which sentenced the petitioner and dismissed the charges in the underlying criminal case cannot expunge arrest records under 22 O.S. §991c. Arrest records must be expunged pursuant to 22 O.S. §§18-19.

¶8 Here, the first issue on appeal is whether a petition to expunge criminal records *pursuant to 22 O.S. §18(A)(8) and §19* may be filed in the underlying criminal case or it must be filed in a new civil action. The City relies on *Freeman* and *Lawton* to support its argument that the criminal court's jurisdiction is limited to its own court records and does not extend to arrest records. The City argues a petition to expunge arrest records pursuant to 22 O.S. §§18-19 cannot be filed in the underlying criminal case and that the petitioner must file a new civil action. L.G. argues the District Court of Cleveland County's local practice of allowing an expungement pursuant to 22 O.S. §§18-19 to proceed in the underlying criminal case is not prohibited by case law or statute and 22 O.S. §19(A) does not require the filing of a new civil action.

¶9 Title 22, §19(A) provides: "Any person qualified under Section 18 of this title may petition ***the district court*** of the district in which the arrest information pertaining to the person is located for the sealing of all or any part of the record, except basic identification information." 22 O.S. §19(A) (emphasis added). The issue is whether the language "the district court" means the petitioner may file a petition to expunge in the district court that sentenced the petitioner and dismissed the charges in the underlying criminal case or it means the petitioner must file the petition to expunge in a new civil action.

¶10 The fundamental purpose of statutory construction is to determine and give effect to the intent of the Legislature. *See Humphries v. Lewis*, 2003 OK 12, ¶7, 67 P.3d 333. If the language is clear and unambiguous, this Court must apply the plain meaning. *See id.* However, when the legislative intent cannot be determined from the statutory language due to ambiguity or conflict, rules of statutory construction should be employed. *See Keating v. Edmondson*, 2001 OK 110, ¶8, 37 P.3d 882.

¶11 We look to other relevant provisions to determine the meaning of the term "the district court" as used in 22 O.S. §19(A). "Intent 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." *World Publ'g Co. v. Miller*, 2001 OK 49, ¶7, 32 P.3d 829 (footnotes omitted).

> When construing a statute, the Court does not limit itself to the consideration of a single word or phrase. Rather, we look to the various provisions of the relevant legis-

> lative scheme to ascertain and give effect to the legislative intent. Nevertheless, the plain and ordinary meaning of the language utilized is the standard for determining intent.

Id. (footnotes omitted). Two provisions shed light on the legislative intent behind the phrase "the district court." Subsection (C) provides that an order granting or denying an expungement pursuant to §§18-19 is appealed to the Oklahoma Supreme Court, which is the court of last resort for civil cases. *See* 22 O.S. §19(C). Section 991c provides that the expungement of the verdict or plea, references to the defendant's name, the indictment, and the dismissal from the docket sheet and public index pursuant to §991c "shall not be mutually exclusive of Section 18 of this title." 22 O.S. §991c(C)(5). This suggests the Legislature intended for a §18 expungement to be a separate proceeding.

¶12 We find 22 O.S. §19(A) is not ambiguous when read with other relevant provisions. To have criminal records, including arrest records, expunged pursuant to 22 O.S. §§18-19, the petitioner must file the petition to expunge in a new civil action. Unlike a §991c expungement, a §18 expungement may not proceed through the underlying criminal case. According to 22 O.S. §991c, *Freeman*, and *Lawton*, the criminal court's authority is limited to expunging its own court records. The District Court of Cleveland County's local practice of allowing a petition to expunge pursuant to 22 O.S. §§18-19 to be filed in the underlying criminal case is contrary to law. The expungement of L.G.'s criminal records, including the OCPD's arrest records, pursuant to 22 O.S. §§18-19 was not authorized by law. We reverse the Order of Expungement.

¶13 The other issue on appeal is whether venue is proper in Cleveland County. A petition to expunge criminal records pursuant to 22 O.S. §§18-19 is to be filed in "the district court ***of the district in which the arrest information pertaining to the person is located.***" 22 O.S. §19(A) (emphasis added). We find this language is also clear and unambiguous. It is undisputed L.G.'s arrest information is located at the Oklahoma City Police Department at 700 Colcord Drive, Oklahoma City, Oklahoma, in Oklahoma County. Therefore, venue is proper in the District Court of Oklahoma County.[3]

¶14 In summary, the Cleveland County criminal court may expunge its own court records pursuant to 22 O.S. §991c.[4] But, to have other criminal records, including the OCPD's arrest records, expunged pursuant to 22 O.S. §18(A)(8) and §19, L.G. must file a petition to expunge in a new civil action in the District Court of Oklahoma County.[5]

¶15 REVERSED.

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

Bay Mitchell, Presiding Judge:

1. Appellee's name has been redacted upon Appellant's request.

2. A person may have his criminal records and related civil records sealed to the public if he or she was charged with a misdemeanor, the charge was dismissed following the successful completion of a deferred sentence, the person has never been convicted of a felony, no misdemeanor or felony charges are pending against the person, and at least one (1) year has passed since the charge was dismissed. *See* 22 O.S. Supp. 2016 §§18(A)(8), (B).

3. The District Court of Oklahoma County's local court rules conform with our interpretation of 22 O.S. §19(A). Local Court Rule No. 41(D) for the Seventh Judicial and Twenty-Sixth Administrative Districts comprised of Oklahoma and Canadian Counties requires that "[a]ll requests for expungements made pursuant to Title 22 O.S. §§ 18, 19, & 19a, shall be made by Petition and filed as a civil action, subject to civil fees and assessments[.]"

4. On September 22, 2017, the Cleveland County criminal court entered a separate order expunging L.G.'s entire Cleveland County court record pursuant to 22 O.S. §991c. That order has not been appealed. The City is only concerned with the expungement of the OCPD's arrest records pursuant to 22 O.S. §§18-19 and does not question the Cleveland County criminal court's authority to expunge its own court records pursuant to 22 O.S. §991c. Our decision today does not disturb the Cleveland County criminal court's expungement of its own court records.

5. We are sympathetic to L.G.'s concern that requiring two expungement proceedings is inefficient and costly to the petitioner. However, we cannot reconcile 22 O.S. §19, 22 O.S. §991c, and case law to find that one proceeding in the underlying criminal case is sufficient to expunge the arrest records located in Oklahoma County. Expungement procedures are a matter of public policy within the purview of the Legislature. Recently, the Legislature has been focused on criminal justice reform. Now may be the time for the Legislature to streamline the expungement procedures.

2020 OK CIV APP 18

JOHN MACK NORTON, Plaintiff/Appellant, vs. SPRING OPERATING COMPANY, a Domestic For Profit Business Corporation, Defendant/Appellee.

Case No. 116,886. October 25, 2019

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE RICHARD OGDEN, TRIAL JUDGE

JUDGMENT AFFIRMED AND ORDER AWARDING COSTS REVERSED IN PART

Duke Halley, Daniel Talbot, HALLEY, TALBOT & SMITHTON, Oklahoma City, Oklahoma, for Plaintiff/Appellant

Tim D. Cain, Roger K. Gofton, WILSON, CAIN & ACQUAVIVA, Oklahoma City, Oklahoma, for Defendant/Appellee

DEBORAH B. BARNES, PRESIDING JUDGE:

¶1 In this premises liability action, John Mack Norton appeals from the trial court's entry of judgment upon a jury verdict in favor of Spring Operating Company claiming the trial court erred in giving certain jury instructions and in refusing to give certain requested instructions and in awarding costs to Spring Operating for legal and courtroom assistance. We affirm the journal entry of judgment entered on the jury verdict, but reverse, in part, the trial court's post-judgment order awarding certain costs to Spring Operating.

BACKGROUND

¶2 The following facts are uncontroverted. Mr. Norton, a truck driver, was employed by Enterprise Crude Oil. Enterprise, a non-party in this lawsuit, purchased crude oil from various suppliers including Spring Operating. Spring Operating stored its crude oil in tanks located on its property. Spring Operating placed steps on the tanks so drivers, like Mr. Norton, could go up to and down from the tank to test and measure the crude before loading the crude and hauling it away. Enterprise's drivers hauled the crude to Enterprise's storage tanks for delivery into its pipelines. Mr. Norton had been to the Spring Operating site and went up and down the steps in daylight and in the evening numerous times without incident. However, on his last trip to Spring Operating's tank – an evening trip – Mr. Norton fell and sustained serious injury as he descended the steps.

¶3 Mr. Norton testified the steps were a hazard and that he first reported them as dangerous sometime before he fell. Conflicting evidence was presented, among other issues, about whether the stairs were, in fact, defective, whether Spring Operating was informed about any danger, and whether Enterprise was notified of any danger.

¶4 The trial court instructed the jury. Mr. Norton had objected to several instructions the trial court gave and the trial court refused several of his requested instructions. The jury returned a white verdict form finding Mr. Norton 10% negligent, Spring Operating 0% negligent, and Enterprise 90% negligent.

¶5 Mr. Norton appeals contending the judgment entered on the jury verdict must be reversed because of legal errors the trial court made in giving erroneous instructions and refusing to give certain instructions and that a new trial should be granted. Mr. Norton also appeals from the trial court's order granting costs to Spring Operating for certain courtroom assistance.

STANDARD OF REVIEW

¶6 One of the issues raised on appeal is whether Spring Operating owed Mr. Norton a duty to take remedial measures to correct an open and obvious danger on its premises. The question of whether a duty exists is a question of law. *Scott v. Archon Grp., L.P.,* 2008 OK 45, ¶ 17, 191 P.3d 1207. Questions of law are subject to *de novo* review. *Kluver v. Weatherford Hosp. Auth.,* 1993 OK 85, ¶ 14, 859 P.2d 1081.

¶7 Also presented for review on appeal is whether the trial court committed reversible error in giving certain jury instructions and excluding certain instructions requested by Mr. Norton. The standard of review applied by an appellate court when reviewing jury instructions "considers the accuracy of the statement of law, the applicability of the instructions to the issues when the instructions are considered as a whole, and above all, whether the probability arose that jurors were misled and reached a different conclusion due to an error in the instruction." *Cimarron Feeders, Inc., v. Tri-County Elec. Coop., Inc*., 1991 OK 104, ¶ 6, 818 P.2d 901 (footnote omitted). The appellate court will not reverse for error in the trial court's jury instructions unless it is persuaded the error "has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right." 20 O.S. 2011 § 3001.1; *See also* 12 O.S. 2011 § 78.

¶8 Further presented for this court's review is Mr. Norton's argument that the Occupational Safety and Health Administration (OSHA) regulation upon which he relied to show negligence per se applies to any employee in a given workplace. He therefore raises a question of statutory interpretation that calls for a *de novo* standard of review. *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)).

¶9 Finally, Mr. Norton contends the trial court erred in awarding certain costs to Spring Operating under 12 O.S. 2011 § 942. The trial court has discretion in determining "the amount of cost awarded for items" listed

under § 942, but it has "no discretion in determining whether a particular type of cost awarded in § 942 would be allowed." *Atchley v. Hewes,* 1998 OK CIV APP 143, ¶ 6, 965 P.2d 1012 (citation omitted). "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." *Christian v. Gray,* 2003 OK 10, ¶ 43, 65 P.3d 591 (citation omitted).

ANALYSIS

¶10 Mr. Norton argues the judgment must be reversed because: (1) under the facts herein presented, the trial court gave an inapplicable open and obvious jury instruction; (2) the defective steps violated OSHA regulations, and the trial court therefore erred in refusing to give his instructions concerning negligence per se; (3) Spring Operating had a non-delegable duty to keep its premises in reasonably safe condition, and the trial court therefore erred in including Enterprise as a non-party tortfeasor and instructing the jury about the jury's ability to assign negligence to Enterprise; (4) the trial court erred in giving an assumption of the risk instruction; (5) the trial court erred in failing to give his requested instruction concerning the availability of a comparative negligence defense to willful and wanton or intentional misconduct; and (6) the trial court erred in awarding costs to Spring Operating for costs it incurred for legal and courtroom assistance.

I. Open and Obvious Danger

¶11 Mr. Norton argues the trial court erroneously gave unmodified Oklahoma Uniform Jury Instructions – Civil (OUJI) No. 11.10 (duty to maintain premises generally), No. 11.11 (hidden danger) and No. 11.12 (open and obvious danger) instead of his requested instruction, a modification of OUJI No. 11.10. When the OUJI contains an applicable instruction, the OUJI instruction "shall be used unless the court determines that it does not accurately state the law." 12 O.S. 2011 § 577.2. Mr. Norton's argument hinges on the legal question of whether Spring Operating owed him a duty to take remedial measures to correct the allegedly defective stairs about which he was aware. We conclude no duty to remediate was owed under the facts of this case.

¶12 Whether an ordinary negligence or a premises liability claim, "[i]t is fundamental that three elements must be shown in order to establish actionable negligence": proof of a duty, a breach of that duty, and causation. *Scott v. Archon Grp., L.P.*, 2008 OK 45, ¶ 17, 191 P.3d 1207. In a premises liability action, however, the duty a landowner or occupant of the land owes to invitees on the premises is "the duty to use ordinary care to keep [the] premises in a reasonably safe condition for the use of . . . invitees" and "to remove or warn the invitee of any hidden danger on the premises" the landowner "either actually knows about, or that" the landowner "should know about in the exercise of reasonable care, or that was created by" the landowner "or any of" the landowner's "employees who were acting within the scope of their employment."[1]

¶13 The duty a landowner owes in a premises liability action "varies with the status occupied by the entrant." *Scott*, ¶ 18.[2] *See also Sutherland v. St. Francis Hosp., Inc.*, 1979 OK 18, ¶ 5, 595 P.2d 780. "[A] landowner owes to an invitee . . . a duty to protect him from conditions which are in the nature of hidden dangers, traps, snares and the like." *Pickens*, 1997 OK 152, ¶ 10. "Even *vis-a-vis* an invitee, to whom a landowner owes the highest duty . . . , the law does not require that the landowner protect the invitee against dangers which are so apparent and readily observable that one would reasonably expect them to be discovered." *Id.* ¶ 10 (footnote omitted). "[T]he invitor is not a guarantor of the safety of its invitees. If the hazard causing the fall was known or should have been observed by the invitee, the invitor has no duty to alter its premises or to warn." *Dover v. W.H. Braum, Inc.,* 2005 OK 22, ¶ 5, 111 P.3d 243 (citation omitted).

¶14 Mr. Norton argues, however, that in certain circumstances a landowner has a duty to take remedial measures to protect an invitee even from conditions that are not hidden and are open and obvious, citing *Wood v. Mercedes-Benz of Oklahoma City*, 2014 OK 68, 336 P.3d 457. In *Wood,* an employee of a catering company hired by defendant car dealership was injured when she slipped and fell on ice she observed surrounding defendant's property. The plaintiff sued the defendant alleging it failed to maintain its premises in a reasonably safe condition. The defendant denied liability and moved for summary judgment, which the trial court granted. On appeal, the Court of Civil Appeals affirmed holding the defendant did not owe the plaintiff a duty because she "readily acknowledges the ice presented a known danger." *Id.* ¶ 3. On certiorari review, the Oklahoma

Supreme Court vacated the Court of Appeals' decision, reversed the district court judgment and remanded for further proceedings.

¶15 In *Wood*, a divided Court carved out an exception to the open and obvious defense in a premises liability case because the plaintiff

> was not a customer of the [invitor], but was present to fulfill her employer's contractual duty to provide service for an event sponsored by the [invitor]. [The plaintiff's] presence and exposure to the hazardous icy condition was compelled to further a purpose of the [invitor].

Id. ¶ 5 n.6. "[U]nder the peculiar facts of [that] case," the Supreme Court held the defendant owed a duty to the injured plaintiff to take remedial measures to protect the plaintiff from an open and obvious danger of icy conditions surrounding the defendant's property. *Id.* ¶ 9. However, the *Wood* Court indicated that the open and obvious defense still applies "[i]n the typical case," where "the invitee can protect herself by leaving the premises when an open and obvious hazard is encountered or by avoiding the premises altogether." *Id.* ¶ 5 n.6. Mr. Norton argues the present case is not such a "typical case"; therefore, the trial court's instruction constitutes reversible error because it misled the jury.[3] We disagree.

¶16 Mr. Norton argues that Enterprise came on to Spring Operating's well site "only when it was requested" to do so by Spring Operating, and Mr. Norton was "assigned to go to the well site on the night he was injured and was performing the duties of his employment." He argues these facts are comparable to those in *Wood.* In *Wood,* the plaintiff's employer was hired by the defendant to cater an event on the defendant's property. Plaintiff "reported to [defendant] to assist with" the catered event. *Id.* ¶ 1. The evening before plaintiff's arrival, a sprinkler system on defendant's property activated causing ice to cover surfaces throughout the entire property because nighttime temperatures dropped to freezing. When plaintiff arrived at defendant's property, she noticed "the whole building was covered in ice, all the way around, all the sidewalks." *Id.* (footnote omitted). She noticed ice on the grass, pavements and sidewalks. Nevertheless, plaintiff parked her vehicle and carefully navigated the icy grass and sidewalk to gain entry into defendant's building. Unable to locate her supervisor inside, plaintiff exited the building and walked back to her vehicle to retrieve her cell phone so she could call the supervisor. On the walk back, plaintiff slipped and fell, sustaining injuries. Plaintiff stated that in a subsequent conversation she had with one of defendant's employees, the employee "acknowledged, '[y]eah, I should have [put salt down] when I got here.'" *Id.* ¶ 2.

¶17 Spring Operating argues the facts in the present case are distinguishable from those in *Wood* because Enterprise was a customer of Spring Operating and not present on its property to provide a service for Spring Operating, and because Mr. Norton was not required to perform his job for Enterprise in any circumstance where he felt he was placed in danger. Further, it argues, the evidence at trial was that no reprisals were taken by Enterprise against employees who refused to enter or work within premises they considered to be unsafe. Therefore, unlike the plaintiff in *Wood*, Mr. Norton could have avoided the known danger presented by the allegedly dangerous staircase at the well site.

¶18 Mr. Norton dismisses these factual differences because, he argues, *Wood* requires a duty to remediate a problem when it is foreseeable to a landowner that an invitee who enters its premises upon the landowner's request could be injured by a dangerous condition: "One can hardly imagine a more foreseeable event. There is no doubt that it was foreseeable that [he,] Enterprise's employee, . . . would encounter the hazardous stairs created by [Spring Operating] and would likely proceed through the dangerous condition in furtherance of his employment."

¶19 While no published Oklahoma appellate court decisions have given further guidance about the reach of the duty recognized in *Wood*,[4] several Oklahoma federal courts have. As discussed by Mr. Norton, the court in *Martinez v. Angel Exploration, LLC*, 798 F.3d 968 (10th Cir. 2015), applied *Wood* in reversing the trial court's grant of summary judgment to the defendant even though an unguarded pump jack that caused the plaintiff's injury was an open and obvious danger. The plaintiff, a "pumper," was employed by a company that was hired by the defendant to provide day-to-day management and servicing of its wells. The pumpers "check on the wells routinely" and "make sure the engines are running, monitor output, and when necessary, tighten loose belts on the pump jack." *Id.* at 972. Any needed

repairs were made by another company the defendant hired to perform that work. The plaintiff had been to the well site on occasions prior to the day of his injury and had noticed that the pump jack in question was not covered by safety guards. On the day of his injury, the plaintiff had successfully restarted an engine and tightened its belts, but dropped a wrench. As he bent to retrieve it, his sweatshirt was caught in the belt and his thumb was severed and later amputated.

¶20 The plaintiff sued the defendant for negligence, alleging, among other things, that the defendant failed to take action to reduce the risk posed by the unguarded pump jack. The *Martinez* Court agreed that "under long-standing Oklahoma law," "a landowner has no duty to render safe an 'open and obvious danger'" because "under similar or like circumstances an ordinary prudent person would have been able to see the defect in time to avoid being injured." *Id.* at 974 & 975. The court determined, however, that the then-recently decided *Wood* case cast doubt on that rule.

¶21 The *Martinez* Court noted the *Wood* Court's conclusion that the defendant owed a duty to take remedial measures to protect the plaintiff in that case, but further observed "the [Oklahoma Supreme Court] emphasized the unique circumstances under which the plaintiff had encountered the open and obvious condition." *Id.* at 975. Addressing a concern of the four Justices who dissented in *Wood*, the *Martinez* Court observed that "*Wood* appears to represent a significant shift in Oklahoma premises liability law. Before *Wood*, the Oklahoma Supreme Court had consistently rejected attempts by plaintiffs to merge ordinary negligence principles with the common law of premises liability." *Id.* (citation omitted).

¶22 Characterizing the Oklahoma Supreme Court's decision in *Wood* as aligned "with an emerging majority of states to reconsider the open and obvious doctrine," *id.* at 976, the *Martinez* Court correctly noted the *Wood* Court did not refer to or explicitly adopt Restatement (Second) of Torts § 343A(1) (1965).[5] However, the court recognized that the reasoning used in *Wood* was the same reasoning used by scholars in explaining part of comment f of the Restatement section.[6] As discussed by the *Martinez* Court, those scholars explain the open and obvious defense will not apply where "the plaintiff must take the risk to fulfill an obligation or to carry out employment obligations," or where "the invitee is forced, as a practical matter, to encounter a known or obvious risk in order to perform his job." 798 F.3d at 977.[7]

¶23 Recognizing the "reach of Oklahoma's newly recognized exception to the open and obvious doctrine is yet to be determined," the *Martinez* Court concluded the new rule clearly applies to situations like those present in *Wood*

> where a business invitee is "present to fulfill [his or] her employer's contractual duty to provide service," the invitee's "presence and exposure to the hazardous . . . condition was compelled to further a purpose of the [defendant]," and the invitee was "required" to encounter "the hazardous condition in furtherance of [his or] her employment."

798 F.3d at 978 (citations omitted). The court, therefore, vacated the summary judgment as to the open and obvious defense and remanded the case to the trial court for reconsideration in light of *Wood.*

¶24 Contrary to Mr. Norton's assessment of *Martinez,* we agree with Spring Operating that the *Martinez* Court found it significant that the plaintiff was present on the defendant's property to fulfill his employer's contractual duty to provide service to the defendant, and was *required* to encounter the hazardous condition in furtherance of his employment as a pumper. Other courts have also found these fact differences, particularly whether the invitee was required to be present on the premises for purposes of his or her employment, to be determinative of whether the duty to remediate a dangerous condition recognized in *Wood* applies and, thus, negates the open and obvious defense.[8]

¶25 We agree with those federal courts that have restricted the reach of the foreseeability rule recognized in *Wood* to factual circumstances like those in *Wood*. Based on the Oklahoma Supreme Court's analysis in *Wood,* an owner or occupier of land owes a duty to invitees to take remedial measures to correct open and obvious dangers or dangers known by the invitee where the invitee was not a customer of the owner of the premises, but was present to fulfill his or her employer's contractual duty to provide service for the owner of the premises such that the invitee's presence and exposure to the dangerous condition was required to further a purpose of the owner of the premises. 2014 OK 68, ¶ 5 n.6. We also agree with the trial court's implicit finding in giving OUJI Nos.

11.10, 11.11, and 11.12, that under the facts of this case, Spring Operating did not owe a duty to take remedial measures to correct the allegedly dangerous steps.

¶26 As argued by Spring Operating, Mr. Norton was not present at its well site to perform any services to its wells or to collect its product for delivery to some other person or entity for Spring Operating's benefit. Enterprise is a multi-state corporation that buys and collects oil and gas products from companies like Spring Operating and then transports the product to its storage tanks for delivery through its pipeline. Mr. Norton, as Enterprise's employee, was Spring Operating's customer and on its premises to collect the oil for Enterprise's benefit. While it is true Mr. Norton was present on the property so he could collect the oil for his employer – that is, he was doing his job – unlike the plaintiff in *Wood* he was not required to enter any property he thought was dangerous. In other words, he had a choice as do invitees generally to avoid the dangerous condition about which he had knowledge.

¶27 Mr. Norton argues he was "faced with the same alternative" as the "tenant" in one of the illustrations to Restatement § 343A(1), cmt. f,[9] "because [the tenant's] only alternative to being exposed to the risk was to forgo her employment." Even if the rule recognized in *Wood* is predicated on this illustration in comment f, Mr. Norton presented no evidence that he would forgo his employment with Enterprise if he refused to use Spring Operating's allegedly dangerous steps. He also argues Spring Operating "knew that Enterprise employees apparently felt compelled to encounter the danger, since they had continued to do so for months following the complaint Enterprise had lodged with [Spring Operating]." Thus, he argues, he "had the same choice that the Plaintiff in *Wood* had, which was the only choice or option, encounter the danger in pursuit of his employment." The trial testimony, however, does not demonstrate Mr. Norton's choices were limited.

¶28 Mr. Norton's supervisor testified that if a driver thinks there is an unsafe condition, the driver is supposed to fill out "a Lease Condition Report." The driver is supposed to leave a copy at the location in a jar where the run ticket is left (as a type of failsafe measure) and to give a copy to his supervisor. He testified Enterprise will then "get a hold of the producer and have the producer fix the problem before we go on the tank." He testified no Lease Condition Report was brought to Enterprise before Mr. Norton's fall. The supervisor testified that if a driver writes up a safety complaint, Enterprise contacts the producer to "make sure that it's fixed. And when it's fixed we can go back out and haul their oil." The supervisor, as well as another supervisor, testified that if a driver encounters an unsafe condition he has the right not to expose himself to it and no ramifications or threat from management will occur if the driver chooses to avoid the danger.

¶29 Mr. Norton testified that he had written a Lease Condition Report for the Spring Operating well about the hazardous condition of its stairs and left copies at the designated locations. He testified nothing was done as a result of his report, but he thought "[he]'d done [his] part," that he had "done everything that [he] could do about it and that's write it up." He further testified, however, that he knew oil fields were dangerous places, and that he had to watch out for his own safety. He agreed that not only was he to report dangers he encountered but that he did not "even have to go into the danger . . . ."

¶30 With respect to the written complaint Mr. Norton said he made and which Enterprise claimed it never received, Mr. Norton testified he could have filed another complaint. Although Mr. Norton testified he "felt like" he had to go up and down the unsafe steps, his own testimony was that he knew he was authorized to avoid a danger he encountered and he would not suffer reprisal from Enterprise if he did. Even if it is assumed his first complaint was lost or ignored by Enterprise, he acknowledged he could have written another complaint or otherwise refused to use the unsafe steps.

¶31 The factual differences between Mr. Norton's circumstances and those of the Wood plaintiff are significant. As an employee of Enterprise – Spring Operating's customer – Mr. Norton had a customer relationship with Spring Operating and had authority without reprisal to avoid a danger encountered in his work for Enterprise. These facts take his situation out of the non-typical invitee situation found in *Wood*.

¶32 We, therefore, conclude the trial court did not err as a matter of law in instructing the jury on open and obvious danger and did not

err in refusing to give Mr. Norton's modified instruction.

II. Negligence Per Se

¶33 "When courts adopt statutory standards for causes of action for negligence, the statute's violation constitutes negligence per se." *Howard v. Zimmer, Inc.*, 2013 OK 17, ¶ 13, 299 P.3d 463 (footnote omitted). To establish negligence per se, the plaintiff must show that a statute or regulation was violated which caused the claimed injury, that the injury was of the type intended to be prevented by the statute, and that the plaintiff is one of a class of persons the statute or regulation was intended to protect. *Id.* In general, OSHA regulations establish duties for employers to protect employees from workplace injuries. *Marshall v. Hale-Halsell Co.*, 1997 OK 3, ¶ 7, 932 P.2d 1117 (citing 29 U.S.C.A. §§ 652, 654). In *Marshall,* the Oklahoma Supreme Court stated:

> [Plaintiff] cites to no authority showing how this regulation applies to his action against [defendant] whom he admits was not his employer. Indeed, under 29 U.S.C.A. §§ 652 and 654, the duties mandated by OSHA regulations flow from an employer to an employee. [Plaintiff] points to no statute, regulation or case which indicates [defendant] owes the [regulation's] duty to train a lumper hired by an independent contractor. Federal regulations do not support [plaintiff's] claim against [defendant].
>
> At best, [plaintiff] occupied the position of an invitee, i.e. "[o]ne going onto another's property . . . as an independent contractor's employee." *See Hatley* [*v. Moble Pipe Line Co.*, 1973 OK 42,] 512 P.2d [182,]185 (quoting 41 Am. Jur. 2d, Independent Contractors, § 27). The property owner, [defendant], was liable to [plaintiff], an invitee, only for:
>
> "an injury occasioned by an unsafe condition of the premises encountered in the work, which is known to the property owner but unknown to the injured person." *Id.*

Marshall, ¶¶ 7-8.

¶34 Mr. Norton argues that although he is not Spring Operating's employee, Spring Operating is nevertheless required to comply with OSHA's safety standards pursuant to 29 U.S.C. § 654(a)(2), a subsection, he argues, the *Marshall* Court's reasoning "overlooked" when § 654 is considered in its entirety.[10] He concedes § 654(a)(1) specifically applies to employees, but argues subsection (a)(2) "does not limit its compliance directive to the employer's own employees but requires employers to implement the Act's safety standards for the benefit of all employees, in a given workplace, even employees of another employer," quoting *Universal Construction Company, Inc. v. Occupational Safety and Health Review Commission,* 182 F.3d 726, 728 (10th Cir. 1999). Mr. Norton relies on *Universal Construction* and cases cited therein and others for his further argument that whether violation of OSHA regulations is negligence per se is determined case by case and "the determining factor" is who had control of the workplace. He argues that because Spring Operating had control of the workplace and the hazardous stairs and that hazard is allegedly an OSHA violation, Spring Operating's violation is negligence per se; consequently, the trial court erred in failing to give the negligence per se instruction he requested.

¶35 We disagree with Mr. Norton's interpretation of who falls within the protected class in § 654(a)(2) and conclude he is not a member of the protected class. We find particularly persuasive the court's reasoning in *Universal Construction*,[11] wherein the Tenth Circuit joined "the majority of circuits and adopt[ed] the multi-employer doctrine." *Id.* at 728.[12] The court explained:

> The multi-employer doctrine is particularly applicable to multi-employer construction worksites, and in fact has been limited in application to that context. The nature of construction requires that subcontractors work in close proximity with one another and with the general contractor at the same worksite. In this situation, a hazard created and controlled by one employer can affect the safety of employees of other employers on the site.

Id. at 730 (citations omitted) (internal quotation marks omitted). The court reiterated, "As noted, a general contractor is responsible under § 654(a)(2) for safety standard violations it could reasonably have been expected to prevent or abate *by reason of its supervisory capacity,* regardless of whether it created the hazard or whether its employees were exposed to the hazard." *Id.* at 732 (emphasis added). Indeed, while several courts, in the cases upon which Mr. Norton relies, used sweeping language

that § 654(a)(2) applies to "all employees" and that "Congress' purpose [was to assure] so far as possible every working man and woman in the Nation safe and healthful working conditions,"[13] those courts found that an OSHA violation under § 654(a)(2) could be a basis for negligence per se against contractors as well as property owners only for injuries incurred in multi-employer construction worksites.[14]

¶36 Because we agree that § 654(a)(2) is limited in its application to multi-employer construction worksites, it is inapplicable to the facts of this case.[15] Moreover, Mr. Norton may have been engaged in his work for Enterprise and required to be on Spring Operating's premises to undertake that employment responsibility, but he was not an independent contractor working for Spring Operating, nor did Spring Operating exercise any supervisory control over Mr. Norton's work on behalf of Enterprise.[16]

¶37 We conclude that even if Spring Operating was in violation of OSHA regulations pertaining to the condition of its stairs, such violation is not a basis for negligence per se under § 654(a)(2) for the injuries Mr. Norton incurred because Mr. Norton was not in the class of persons the statute was intended to protect. Consequently, the trial court did not err in refusing to give Mr. Norton's requested negligence per se jury instruction.

III. Comparative Negligence of Non-Party Enterprise

¶38 Mr. Norton argues the trial court erred in giving OUJI No. 22, Comparative Negligence: Non-Party Involved, and OUJI Nos. 27 and 29 explaining the verdict forms used for the comparative negligence instruction and the circumstances under which they are to be used. He does not argue the instructions given incorrectly state the law of comparative negligence.

¶39 By statute,

> In all actions hereafter brought . . . for negligence resulting in personal injuries[,] . . . contributory negligence shall not bar a recovery, unless any negligence of the person so injured, damaged or killed, is of greater degree than any negligence of the person, firm or corporation causing such damage, or unless any negligence of the person so injured, damaged or killed, is of greater degree than the combined negligence of any persons, firms or corporations causing such damage.

23 O.S. 2011 § 13. The Oklahoma Supreme Court has explained "the negligence of non-parties, or 'ghost tortfeasors,'[17] should be considered in assessing proportionate fault in comparative negligence cases . . . in order properly to apportion the negligence of the parties." *Bode v. Clark Equip. Co.*, 1986 OK 21, ¶ 10, 719 P.2d 824 (citations omitted). "The cornerstone of comparative negligence is founded on attaching liability in direct proportion to the fault of each entity whose negligence caused the damage." *Id.* ¶ 12 (footnote omitted).[18]

¶40 Mr. Norton's argument appears to be that Enterprise cannot be a ghost tortfeasor because the only basis for such fault would be an impermissible delegation by Spring Operating of its duty to maintain its premises in a reasonably safe condition. He relies upon *Thomas v. E-Z Mart Stores, Inc.*, 2004 OK 82, 102 P.3d 133, for this argument. As argued by Spring Operating, we conclude the issues presented in *Thomas* are inapplicable to the present case.[19]

¶41 The *Thomas* Court agreed with the plaintiff that "the *liability* (ultimate legal responsibility) of that duty which is owed to [the plaintiff], as an invitee, cannot be delegated by [the defendant]." *Id.* ¶ 11. The Court explained:

> Moving for a new trial, [the defendant] claimed that it had a defense to a premises liability claim that was not heard by the jury. This defense, as put forward succinctly on certiorari, is that a third-party, with whom it does not have a special relationship (e.g., employee or independent contractor), caused the negligence. As we have said, [the defendant] has a duty the performance of which it may not delegate to escape risk of liability to an invitee.

Id. ¶ 28. In reversing the trial court's order granting the defendant's motion for new trial, the Court concluded:

> [The defendant's] argument for a new trial was that its claim of a third-party's negligence involved with the injury-causing condition on its premises was a sufficient showing to warrant a new trial as to its liability to [the plaintiff] and for the jury to hear its contribution/indemnity claim. This is an erroneous view and the order granting the motion for new trial is reversed.

Id. ¶ 29.

¶42 Spring Operating argues it did not contract with Enterprise to maintain its premises or delegate its responsibility for the stairs on its premises to Enterprise. Mr. Norton agrees, arguing: Spring Operating "admitted it had retained control of the premises, including the defective stairs. It admitted that it would not permit Enterprise to correct or repair the stairs and that all Enterprise could do was advise Spring [Operating] the steps were dangerous and ask Spring [Operating] to correct it." Spring Operating argues the circumstances in *Thomas* are different from the circumstances here because the evidence presented was sufficient to show Enterprise was at fault in causing Mr. Norton's injuries.[20]

¶43 Relying on *Angel v. Cornell Construction Co.*, 1992 OK CIV APP 65, 841 P.2d 1163, Spring Operating argues that "[a]lthough an employer's exclusive liability under the Workers' Compensation Act bars further indirect liability for contribution or indemnification, when an injured employee elects to sue a third-party tortfeasor, that tortfeasor can claim 'ghost-tortfeasor' liability against the employer as a defense to the injured worker's suit."[21] Although in his appellate brief, Mr. Norton asserts "[u]nder the uncontroverted facts[,] Enterprise" did apprise Spring Operating of the dangerous steps and asked Spring Operating to correct the danger, the testimony from Mr. Norton and that of Enterprise's employees was controverted about what Enterprise knew and whether it ever asked Spring Operating to correct the condition.[22] Thus, the jury had evidence from which it could determine that Enterprise was negligent in its handling of Mr. Norton's alleged complaint (e.g., losing or misplacing it or never following up on it) and in continuing to assign him to Spring Operating's wells.

¶44 We, therefore, conclude the trial court did not err in instructing the jury on the comparative negligence of Enterprise and in refusing Mr. Norton's requested instructions.

IV. Assumption of the Risk

¶45 Mr. Norton claims it was error for the trial court to have instructed the jury on assumption of the risk because "[t]here is no suggestion [he] consented to harm in this instance."[23]

¶46 As argued by Mr. Norton, the Oklahoma Supreme Court has emphasized that assumption of risk is a defense distinct from contributory negligence. In T*homas v. Holliday ex rel. Holliday*, 1988 OK 116, 764 P.2d 165, the Supreme Court explained, "The touchstone of the assumption-of-risk defense is consent to harm and not heedlessness or indifference." *Id.* ¶ 8. Assumption of the risk requires either "an express agreement, a pre-existing status between the defendant and plaintiff, or an element of consent to the harm that is known and appreciated by the plaintiff." *Id.* ¶ 10. Assumption of the risk doctrine has been held applicable in premises liability cases. *Byford v. Town of Asher*, 1994 OK 46, ¶ 14 n.3, 874 P.2d 45 (citations omitted).

¶47 The *Byford* Court explained,

> The Oklahoma Constitution provides in Article 23, Section 6, that "[t]he defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact, and shall, at all times, be left to the jury." We have honored the plain meaning of these words, and have repeatedly required the issue of assumption of risk to be submitted to the jury.

Id. ¶ 6 (citations omitted). The Court stated it has recognized two exceptions to this constitutional rule:

> First, the defense of assumption of risk need not be submitted to the jury if the plaintiff fails to present evidence showing primary negligence on the part of the defendant. Second, the defense need not be submitted to the jury where there are no disputed material facts and reasonable people exercising fair and impartial judgment could not reasonably reach differing conclusions.

Id. ¶ 7 (citations omitted). Mr. Norton appears to rest his argument on the second exception to the constitutional rule because he asserts "[t]here is no suggestion [he] consented to harm in this instance." However, he does not argue there was no evidence presented from which the jury could have reached the conclusion that he was aware of the danger of the defective steps, appreciated the danger of the defective steps, yet proceeded to use them anyway although not required to do so by his employer, Enterprise.

¶48 We conclude the trial court did not err in instructing the jury on assumption of the risk.

V. Clear and Convincing Evidence: Wanton and Willful Conduct

¶49 Mr. Norton argues the trial court erred in refusing to give his requested burden of proof instruction of clear and convincing evidence pertaining to Spring Operating's wanton and willful conduct. He argues evidence of wanton and willful conduct was presented for the jury's consideration because, he asserts, the evidence shows Spring Operating's conduct in installing the defective steps and then not repairing the steps though put on notice of the danger was unreasonable under the circumstances and there was a high probability of serious harm because at least one Spring Operating employee said the steps were bad. Spring Operating points to other testimony that refutes Mr. Norton's view of the evidence.

¶50 Even assuming the trial court erred in not giving the jury the requested instruction, in our view, the error, if any, was harmless. The jury's verdict placed 0% liability on Spring Operating. That is, the jury found Spring Operating exercised ordinary care under the circumstances of this case. That determination makes it highly unlikely the jury was misled by the absence of the requested instruction and reached a conclusion different from the conclusion it would have reached had that instruction been given. We are not persuaded the error "has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right." 20 O.S. 2011 § 3001.1; *See also* 12 O.S. 2011 § 78.

¶51 We conclude the refusal to give the requested jury instruction is not a basis for reversal and the grant of a new trial.

VI. Costs

¶52 Mr. Norton also argues the trial court erred in awarding Spring Operating $4,000 in costs under 12 O.S. 2011 § 942 because the items for which those costs were awarded – legal and courtroom assistance – are not of the type listed in § 942. Relying on *Fuller v. Pacheco*, 2001 OK CIV APP 39, 21 P.3d 74, he argues that for a cost to be recoverable under § 942, the costs must be specifically listed.[24] The *Fuller* Court explained:

> Included in the cost award for [defendant] was a fee of $31 for an enlarged copy to be used as an exhibit at trial. Since this type of expense is not specifically listed in section 942, we must determine whether it is recoverable under section 1101.1,[25] which provides for the recovery of reasonable litigation costs. However, neither section 1101.1 nor Oklahoma case law has defined what "reasonable litigation costs" entails. We, therefore, must examine the ways in which federal authorities have defined litigation costs.
>
> Title 26 of the United States Internal Revenue Code defines reasonable litigation costs as: (1) reasonable court costs; (2) the reasonable expenses of expert witnesses; (3) "the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case"; and (4) reasonable attorney fees. 26 U.S.C.A. § 7430(c)(1) (West Supp. 2000). Similarly, a federal court recently interpreted the phrase "reasonable litigation costs" to include such things as "copying, expert witnesses, transcripts, deposition fees, on-line research, travel and meals, postage and delivery services, subpoena service, and witness fees and telephone." *See Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136, 151 (E.D. Pa. 2000). We conclude that, pursuant to the foregoing definitions of reasonable litigation costs, [defendant's] cost for the exhibit is recoverable as a cost of litigation under section 1101.1.

Id. ¶¶ 29-30. As argued by Mr. Norton, neither § 1101.1 nor any other basis for the award of costs other than § 942 was referenced by the trial court or by Spring Operating for the cost of the demonstrative evidence Mr. Norton challenges.

¶53 While § 1101.1 references "reasonable litigation costs," none of the bases for the award of costs in § 942 references "reasonable litigation costs." Spring Operating makes its argument for costs under § 942(7), which provides, "[a]ny other expenses authorized by law to be collected as costs," and relies on federal cases that discuss the award of costs "reasonably necessary to litigation of the case." However, the award of costs in those cases was based on 28 U.S.C.A. § 1920.[26]

¶54 The appellate court in *In re Williams Securities Litigation-WCG Subclass*, 558 F.3d 1144 (10th Cir. 2009), determined the trial court's award of costs for "exemplification and the

costs of making copies of any materials" pursuant to § 1920(4) was not an abuse of discretion. It was in the context of the statutory language that the court reasoned that "[t]he standard is one of reasonableness. If 'materials or services are reasonably necessary for use in the case,' even if they are ultimately not used to dispose of the matter, the district court 'can find necessity and award the recovery of costs.'" *Id.* at 1148 (citations omitted).

¶55 Similarly, in *BP America Production Company v. Chesapeake Exploration, LLC,* Case No. CIV-10-519-M, 2013 WL 6002832 (W.D. Okla. Nov. 12, 2013), another case upon which Spring Operating relies, the district court determined that BP satisfied its burden of showing that demonstrative exhibits used during the non-jury trial were reasonably necessary for use in the case pursuant to § 1920(4). *Id.* *3 (discussing *In re Williamson*). The court further explained that "'[e]xemplification' under § 1920(4) has been interpreted to include a variety of demonstrative evidence, including models, charts, photographs, illustrations, and other graphic aids." *Id.* at *3 (citation omitted).

¶56 As reasoned by the *Fuller* Court, it may be appropriate to reference federal statutes and decisional law when our state statutes use language similar to such law. Here, no showing is made that § 1920(4) is comparable to any provision of § 942, including subsection 7. Thus, because the costs for the demonstrative evidence Spring Operating sought is not set forth in § 942 and no other basis for such an award has been identified, we conclude the trial court abused its discretion in awarding those costs to Spring Operating and reverse that portion of the trial court's award of costs to Spring Operating.

CONCLUSION

¶57 For the reasons discussed herein, we conclude the trial court did not abuse its discretion in giving the jury instructions it did and in refusing to give other instructions requested by Mr. Norton. We further conclude, however, the trial court erroneously awarded $4,000 in costs to Spring Operating for demonstrative evidence used during trial because that cost is not among the costs set forth in 12 O.S. 2011 § 942. Accordingly, we affirm the journal entry of judgment entered upon the jury's verdict in favor of Spring Operating, and reverse in part the court's post-judgment order awarding certain costs to Spring Operating.

¶58 **JUDGMENT AFFIRMED AND ORDER AWARDING COSTS REVERSED IN PART.**

RAPP, J., concurs, and WISEMAN, V.C.J., concurs specially.

WISEMAN, V.C.J., concurring specially:

¶1 I write specially to continue to urge that Oklahoma law does not permit assessing percentages of comparative negligence when the jury is asked to consider premises liability and determine the nature of the condition, that is, whether hidden or open and obvious. The Majority is correct in rejecting Mr. Norton's analogy to *Wood v. Mercedes-Benz of Oklahoma City*, 2014 OK 68, 336 P.3d 457 – the facts, as the Majority holds, will not support that argument.

¶2 The exception in *Wood* to the established Oklahoma common law of premises liability pertaining to open and obvious dangers is not present here. If it were, this might constitute the rare instance in which comparing a plaintiff's and a defendant's percentages of negligence could be legally appropriate in a premises liability case. This is conceivable only because *Wood* allows liability to attach to a defendant for failing to protect a plaintiff from an open and obvious danger under *Wood*'s unique circumstances. Because both parties would then have a duty regarding the open and obvious condition, the jury would be entitled to assess the parties' relative percentages of negligence, if any, in reaching their verdict.

¶3 But, unlike *Wood*, this is not the case here as the Majority concludes. And I continue to maintain that it is not legally or factually possible in a premises liability verdict to reconcile a finding of a hidden danger (triggering a defendant's potential liability) with a plaintiff's failure to discern/avoid an open and obvious condition (contributory negligence). Allowing a fact-finder to compare the parties' percentages of negligence for their mutually exclusive conduct, which must be accepted to find both parties negligent, cannot be the law in Oklahoma.

¶4 Although it was error for the trial court to instruct on comparative negligence – *Wood* not being applicable – the jury found Spring Operating was not negligent and there is no error to correct. I concur specially with the Majority's Opinion.

DEBORAH B. BARNES, PRESIDING JUDGE:

1. OUJI No. 11.10 (Amended 2016).
2. The Oklahoma Supreme Court has explained as follows:

> It is well-settled premises liability law that the duty of care which an owner or occupier of land has toward one who comes upon his or her land and is injured because of the condition of the premises, varies with the status occupied by the entrant. The determination of the entrant's status-based classification under traditional common law terms – trespasser, licensee or invitee – is therefore essential in resolving the issue of the existence of a duty.

Scott, ¶ 18 (citation omitted). An invitee is "[o]ne who uses the premises of another for the purpose of a common interest and mutual advantage." *Pickens v. Tulsa Metro Ministry*, 1997 OK 152, ¶ 10 n.12, 951 P.2d 1079 (citation omitted).

3. "The test of reversible error in giving jury instructions is whether the jury was misled to the extent of rendering a different verdict than it would have rendered had the errors not occurred." *Taliaferro v. Shahsavari*, 2006 OK 96, ¶ 25, 154 P.3d 1240 (footnote omitted). Thus, even if the jury instruction correctly states the law, if the instruction is inapplicable to the facts of the cause, the instruction may warrant the grant of a new trial because the instruction misled the jury. See *id.* ¶ 26.

4. *Wood* has been cited in a number of Oklahoma decisions, but not for the rule with which we are concerned here. *See, e.g., Logan Cnty. Conservation Dist. v. Pleasant Oaks Homeowners Ass'n.*, 2016 OK 65, ¶ 12, 374 P.3d 755.

5. Section 343A(1) provides: "A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness."

6. Comment f provides, in part:

> There are, however, cases in which the possessor of land can and should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger. In such cases the possessor is not relieved of the duty of reasonable care which he owes to the invitee for his protection. This duty may require him to warn the invitee, or to take other reasonable steps to protect him, against the known or obvious condition or activity, if the possessor has reason to expect that the invitee will nevertheless suffer physical harm.
>
> . . . . Such reason may also arise where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk. In such cases the fact that the danger is known, or is obvious, is important in determining whether the invitee is to be charged with contributory negligence, or assumption of risk. It is not, however, conclusive in determining the duty of the possessor, or whether he has acted reasonably under the circumstances.

(Citation omitted.)

7. We note *Wood* conspicuously failed to cite to the Restatement or to any authority that adopted the Restatement section in support of the rule it recognized. Indeed, that the Oklahoma Supreme Court appears to have crafted a rule along the lines suggested in *Martinez* that is in line with part of one comment to § 343A, suggests even more strongly that the Supreme Court did not adopt all of the circumstances to which the foreseeability rule in § 343A might apply. Further, the Supreme Court explicitly limited the rule in *Wood* to the "particular" facts before it that involved an employee required to be on defendant's premises to fulfill her job responsibilities. While the Supreme Court may expand the rule to different contexts or adopt Restatement § 343A at some future time, we conclude the Court clearly signaled in *Wood* its intent to recognize a much more limited exception to the open and obvious defense.

8. *Compare Husmann v. Sundance Energy, Inc.*, Case No. CIV-14-1436-R, 2015 WL 9094936, *4 (Dec. 16, 2015, W.D. Okla.) (appeal dismissed 10th Cir. 16-6015, June 9, 2016) (The open and obvious defense was available because "[b]oth *Wood* and *Martinez* relied on the fact, absent here, that the injured party was required to be on the premises for purposes of employment."), *with Hoagland v. Okla. Gas & Electric Co.*, Case No. CIV-15-0751-HE, 2016 WL 3523755, *2 (W.D. Okla. June 22, 2016) (There the court denied summary judgment to the defendant on its claim that it did not owe a duty of care to plaintiff, the employee of an independent contractor, because there was "evidence that defendant *required* its loads to be tarped. [Plaintiff] indicates he *was directed* by [defendant's] worker to tarp his load outside the plant's gate, where the ground sloped down and away from the trailer, arguably increasing the risk to [plaintiff]." (emphasis added)).

More recently, in *Shank v. Whiting-Turner Contracting Company*, Case No. 17-CIV-446-JED-FHM, 2018 WL 6422466 (N.D. Okla. Dec. 6, 2018), the district court, having discussed *Wood* and *Martinez*, denied summary judgment to the defendant where the plaintiff, an employee of a subcontractor employed to work on a project for the defendant, was injured when he tripped over Masonite panels that had been laid on the ground. The plaintiff admitted he had been aware of the fall hazard and filled out a "slip/trip potential identified," pointed out the problem to a safety supervisor, had once himself stumbled on the panels, and saw others stumble before he fell. The court explained that "[d]istrict courts asked to apply the Wood exception have generally considered it applicable where the owner could foresee the plaintiff's injury because there was evidence that *plaintiff had no choice but to traverse an obvious and open danger." Id.* *3 (emphasis added) (citations omitted). While defendant argued plaintiff was not required to walk in the area of danger, the court found summary judgment was not appropriate because of factual issues about how widespread or unavoidable the danger was.

9. Illustration 5 presents the following scenario:

> A owns an office building, in which he rents an office for business purposes to B. The only approach to the office is over a slippery waxed stairway, whose condition is visible and quite obvious. C, employed by B in the office, uses the stairway on her way to work, slips on it, and is injured. Her only alternative to taking the risk was to forgo her employment. A is subject to liability to C.

10. Section 654 provides:

> (a) Each employer –
>
> > (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;
> >
> > (2) shall comply with occupational safety and health standards promulgated under this chapter.

11. In *Universal Construction*, a general contractor for a construction project was cited for serious violations of OSHA requirements that were committed by employees of subcontractors on the job site. The citation was justified by the contractor's "ability to control the hazardous conditions that led to the violations." *Id.* at 727. "[A]n administrative law judge upheld the citation, concluding [the contractor] was properly cited under the multi-employer doctrine because it controlled the worksite and had authority to direct a subcontractor to abate any hazardous conditions created by the subcontractor." *Id.*

12. The court explained:

> The multi-employer doctrine provides that an employer who controls or creates a worksite safety hazard may be liable under [OSHA] even if the employees threatened by the hazard are solely employees of another employer. The doctrine has its genesis in the construction industry where numerous employers, often subcontractors, work in the same general area, and where hazards created by one employer often pose dangers to employees of other employers. The Secretary has imposed liability under the doctrine since the 1970's and has steadfastly maintained the doctrine is supported by the language and spirit of the Act. The Secretary's interpretation has been accepted in one form or another in at least five circuits, and rejected outright in only one.

Id. at 728 (citations omitted). The court further explained:

> The Secretary construes § 654(a)(1) & (2) as imposing two distinct duties. First, (a)(1) requires employers to protect their own employees from hazards in the workplace. The employer's duty under (a)(1) flows only to its employees, as indicated by the language specifically limiting the employer's obligation to maintain a hazard-free workplace to "his employees." Second, (a)(2) requires employers to comply with the Act's safety standards. Unlike (a)(1), it does not limit its compliance directive to the employer's own employees, but requires employers to implement the Act's safety standards for the benefit of all employees in a given workplace, even employees of another employer. OSHA issues citations based on the multi-employer doctrine under (a)(2).

Id.

13. *E.g., Arrington v. Arrington Bros. Const., Inc.*, 781 P.2d 224, 228 (Idaho 1989) (emphasis omitted) (internal quotation marks omitted) (quoting *Teal v. E.I. DuPont de Nemours and Co.*, 728 F.2d 799 (6th Cir. 1984)).

14. *E.g., Teal*, 728 F.2d at 804-05 (negligence per se instruction should have been given where employee of independent contractor hired by defendant plant owner to perform work on the plant owner's site was allegedly injured as a result of plant owner's violation of OSHA regulations under § 654(a)(2)); *Arrington*, 781 P.2d at p. 228 (violation of OSHA standards may establish negligence per se when the injured worker is a subcontractor on a multi-contractor site).

15. The Oklahoma Supreme Court's reasoning in *Marshall* is supportive of this conclusion. There the Court no doubt did not directly discuss the multi-employer doctrine because the facts before it did not concern a multi-employer construction worksite. The Court did state, however,

> This duty [to provide a reasonably safe place to work] is qualified, however, by the rule that one who engages an independent contractor to do work for him, *and who does not himself undertake to interfere with or direct that work*, is not obligated to protect the employees of the contractor from hazards which are incidental to or part of the very work which the independent contractor has been hired to perform.

Id. ¶ 10 (emphasis added) (citation omitted). As to Mr. Norton's contention that *Marshall* is distinguishable because the type of OSHA violation involved there and here are not the same, we agree with the observation made by the federal district court in *Estes v. Airco Service, Inc.*, Case No. 11-CV-776-GKF-FHM, 2012 WL 1899839 (N.D. Okla. May 24, 2012), wherein the court reasoned:

> Plaintiff argues *Marshall* is inapplicable because the alleged OSHA violations in that case were for failure to train and this case involves unsafe conditions. However, in *Marshall,* the court relied upon OSHA's general definition statute, 29 U.S.C. § 652, and its statutory description of duties of employers to employees, 29 U.S.C. § 654, to conclude the duties mandated by OSHA regulations flow from the employer to employees. Those statutes are applicable [to] *all* duties imposed on employers and not, as plaintiff asserts, only the duty to train.

Estes, *7 n.5

16. In this regard, Mr. Norton's reliance on *Hargis v. Baize*, 168 S.W.3d 36 (Ky. 2005) is unpersuasive. As explained by the Kentucky Supreme Court in *Auslander Properties, LLC v. Nalley*, 558 S.W.3d 457 (Ky. 2018):

> We recognized in *Hargis v. Baize* that an employer subject to [Kentucky]OSHA regulations for the protection of its own employees is also bound to comply with the same regulations for the benefit of an independent contractor *performing on the employer's premises the same work as the employer's employees*. 168 S.W.3d at 43. Consequently, in *Hargis,* a lumber mill operator was negligent per se for failing to provide KOSHA protections to an independent contractor performing the same job of hauling and unloading logs as its own employees. *Hargis* rests largely upon the rationale expressed by the Sixth Circuit Court of Appeals in [Teal] holding that the OSHA (or KOSHA) regulations applicable to an employer's own employees are equally applicable to employees of independent contractors working on the premises *doing the same kind of work*. *Hargis* added that protections owed to employees of an independent contractor under *Teal* are also owed to the independent contractor himself.

Id. at 465 (emphasis added).

17. *See, e.g., PFL Life Ins. Co. v. Franklin*, 1998 OK 32, ¶ 17 & n.22, 958 P.2d 156 ("The blame of a 'ghost tortfeasor,' not uncommon in comparative negligence, may be assessed in its absence from the action as a party defendant." "Any tort defendant can predicate its defense on a non-party's negligence. This is known as 'ghost tortfeasor' liability." (citations omitted)). As noted in a recent federal case:

> The Oklahoma Supreme Court has made clear that "the negligence of tortfeasors not parties to the lawsuit should be considered by the trial jury in order to properly apportion the negligence of those tortfeasors who are parties." *Myers v. Missouri Pacific R. Co.*, 52 P.3d 1014, 1030 (Okla. 2002) (internal quotes omitted). This rule exists "to reduce [a defendant's] potential liability where the negligence of one or more 'ghost tortfeasors' contributed to the plaintiff's damages." *Id.*; *see also Thomas v. E-Z Mart Stores, Inc.*, 102 P.3d 133, 138 (Okla. 2004) (acknowledging the "general proposition that a tort defendant may predicate its defense on a non-party's negligence").

Loos v. Saint-Gobian Abrasives, Inc., Case No. CIV-15-411-R, 2016 WL 5017335, *6 (W.D. Okla. Sept. 19, 2016).

18. The precise question raised in *Bode* concerned the degree of fault of the plaintiff relative to any other tortfeasor, party and/or non-party. The Court determined that because comparative negligence is premised on the fault of each entity whose negligence caused the damage,

> and taking into consideration our decisions in *Laubach* [*v. Morgan*, 1978 OK 5, 588 P.2d 1071], *Paul* [*v. N.L. Industries, Inc.*, 1980 OK 127, 624 P.2d 68], and *Gaither* [*v. City of Tulsa*, 1983 OK 61, 664 P.2d 1026], as well as the express language of 23 O.S. 1981 [now 2011] § 13, we reach the unavoidable conclusion that the negligence of a party defendant must be combined with the percentage of negligence attributable to non-party tortfeasors in order to determine if the degree of fault charged to the plaintiff is greater than that owing to all persons, firms or corporations causing such damage.

Bode, ¶ 12.

19. In *Thomas*, a premises liability action, the defendant invitor brought contribution and indemnity claims against the manufacturer and supplier of mats used in the defendant's store and upon which the plaintiff slipped and fell sustaining injury. Upon a jury verdict in favor of plaintiff, the defendant moved for a new trial on the ground that it should have been permitted to present evidence of the supplier's negligence and the jury should have been instructed on the negligence of the third party supplier. On certiorari review of the trial court's grant of a new trial to the defendant, the Oklahoma Supreme Court stated:

> The issue presented for our review on certiorari is whether the trial court was correct in determining in the context of a premises liability lawsuit that a business invitor's claims against a third party and its claim that the third party caused the invitee's injury should be heard by the jury determining the liability of the invitor to the invitee. That issue may not be unequivocally answered in this case. The trial court did not consider whether the third party was an independent contractor of the invitor, or whether the invitor's indemnity claim against the third party was based upon vicarious liability of an invitor for the act of an independent contractor, or whether the separate claims could be simultaneously considered by a jury using proper instructions without causing confusion.

Id. ¶ 1. The court declined to make those first instance determinations. *Id.* ¶ 28.

20. The record indicates Mr. Norton filed a workers' compensation claim against Enterprise for the injuries he sustained in the fall.

21. Although concerned with contribution actions by tortfeasors who may have acted jointly or concurrently with the State in causing a claimant's "loss," the *Angel* Court analogized the exclusive liability of the State under the Governmental Tort Claims Act to the exclusive liability of employers under the Workers' Compensation Act:

> An employer's exclusive liability under the Workers' Compensation Act bars further indirect liability for contribution or indemnification where an injured employee elects to sue a third-party tortfeasor. *Harter Concrete Products, Inc. v. Harris,* 592 P.2d 526 (Okla. 1979). In the place of contribution, the court recognized that the tortfeasor could claim responsibility on the part of the employer as a defense to the injured worker's suit. *Id.* at 529. This is known as "ghost-tortfeasor" liability. *Paul v. N.L. Industries, Inc.*, 624 P.2d 68 (Okla. 1980).

1992 OK CIV APP 65, ¶ 2.

22. For example, as previously discussed herein, Mr. Norton testified that he filled out a Lease Condition Report the first time he encountered the stairs on Spring Operating's premises and left a copy of the form at Spring Operating and at the location specified by Enterprise. He testified nothing was done about that complaint. Enterprise's supervisors testified no such complaint was ever received by Enterprise. Spring Operating's employee testified someone from Enterprise complained about the stairs at some point.

23. OUJI No. 9.14 provides:

> [Plaintiff] assumed the risk of injury resulting from [Defendant's] negligence if [he/she] voluntarily exposed [himself/herself] to injury with knowledge and appreciation of the danger and risk involved. To establish this defense, [Defendant] must show by the weight of the evidence that:
>
> 1. [Plaintiff] knew of the risk and appreciated the degree of danger;
> 2. [Plaintiff] had the opportunity to avoid the risk;
> 3. [Plaintiff] acted voluntarily; and
> 4. [Plaintiff]'s action was the direct cause of [his/her] injury.

24. *See, e.g., State ex rel. Dep't of Trans. v. Cedars Grp., L.L.C.*, 2017 OK 12, ¶ 21, 393 P.3d 1095 ("Every party is responsible for its own litigation costs unless provided by statute." (citation omitted)).

25. 12 O.S. 2011 § 1101.1 provides for an award of attorney fees when the plaintiff has rejected a valid offer of judgment and then loses at trial or recovers less than the amount of the offer of judgment.

26. Section 1920 provides, in part, as follows:

> A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshal;
>
> (2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;
>
> (5) Docket fees under section 1923 of this title;
>
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

2020 OK CIV APP 19

THE MATTINGLY LAW FIRM, P.C., Plaintiff/Appellee, vs. MELVIN D. HENSON, JR., a/k/a DEE HENSON, Defendant/Appellant.

Case No. 116,960. May 10, 2019

APPEAL FROM THE DISTRICT COURT OF SEMINOLE COUNTY, OKLAHOMA

HONORABLE TRISHA D. SMITH, JUDGE

AFFIRMED

Erika Mattingly, MATTINGLY & ROSELIUS, P.L.L.C., Seminole, Oklahoma, for Plaintiff/Appellee,

Dan Little, LITTLE LAW FIRM, P.L.L.C., Madill, Oklahoma, for Defendant/Appellant.

Kenneth L. Buettner, Judge:

¶1 Plaintiff/Appellee Mattingly & Roselius, P.L.L.C. (formerly known as Mattingly Law Firm) (the Firm) obtained a default judgment against Defendant/Appellant Melvin "Dee" Henson (Henson) in an action to collect unpaid attorneys' fees. After nearly three years of nonpayment on the judgment, the Firm requested a hearing on Henson's assets. The Firm then sought a charging order assigning Henson's alleged interests in two limited liability companies (LLCs). The trial court granted the charging order, holding that the LLCs were "alter egos" of Henson and that the court should "pierce the corporate veil" of the entities. Henson appeals. We affirm.

¶2 The Firm filed suit against Henson March 20, 2014, alleging Henson had committed fraud in avoiding paying legal fees due for work performed by the Firm. After the Firm filed suit, the parties initially agreed upon a payment plan, but Henson soon stopped making payments. The Firm moved for default judgment September 12, 2014. Henson failed to appear at the hearing and the trial court granted default judgment in the Firm's favor October 8, 2014.

¶3 On April 25, 2017, after over two years of no payment on the judgment, the Firm filed an application for order to appear for hearing on assets. The first hearing was held May 16, 2017. The parties appeared before the trial court several times thereafter, though Henson continued to fail to present evidence of assets. At the December 5, 2017 hearing, the trial court ordered Henson to provide "corporate books of any and all LLC[s] [Henson] is associated with, including all records from Henson Farms, LLC and Henson Insurance Group, LLC. Henson to also provide all bank statements in which he has signing privileges."

¶4 At the December 27, 2018 hearing, Henson presented the operating agreement for Henson Insurance Group, LLC, bank statements from two bank accounts for the Insurance Group, and statements from one bank account for Henson Farms, LLC. Henson testified that although he worked "at the LLCs," he never drew a paycheck from either LLC. Henson further admitted that he sometimes used funds from the LLC bank accounts for personal purposes, such as buying groceries. Upon further questioning, Henson admitted that he and his wife essentially "lived out" of the LLC accounts. At the end of the hearing, the court issued a list of items Henson was to bring to the next hearing, including documentation of realty owned by the Insurance Group, a list of clients of the Insurance Group, and records of payment transactions by both LLCs.

¶5 The Firm filed a motion for charging order January 30, 2018, seeking to assign Henson's potential interest in the LLCs to the Firm for satisfaction of the judgment. Following the Firm's motion, on February 2, 2018, Henson was removed from having signing privileges for the bank accounts for both LLCs as a result of a "special meeting" of the LLCs' sole member – Henson's wife. The parties appeared before the trial court February 6, 2018, at which time the court continued the matter and ordered that Henson present the previously requested documentation.

¶6 A hearing on the motion for charging order was held February 20, 2018, and continued on March 9, 2018.[1] During the hearing, Erika Mattingly (Mattingly), counsel for the Firm, testified to her review of Henson's financial records. Mattingly testified that, according to the LLC bank account records provided, 53% of the account transactions were cash withdrawals, 99% of which were withdrawn by Henson (approximately $52,000 in cash withdrawals). Mattingly further testified that the accounts did not reflect any paychecks deposited or paid. The court also heard testimony from Henson and Henson's wife, who both maintained that Henson had never owned an interest in the LLCs and that the LLC bank accounts were not personal in nature.

¶7 Following the hearing, both parties submitted proposed journal entries of judgment. The trial court ruled in favor of the Firm and granted the charging order March 26, 2018. The court held that the LLCs were "alter egos" of Henson and that the court should pierce the corporate veil of the entities because (1) the LLCs were undercapitalized; (2) Henson failed to maintain books for the LLCs separate from his personal finances; (3) finances of the LLCs were not kept separate from Henson's finances and Henson had used LLC funds to pay personal obligations; and (4) Henson failed to maintain LLC formalities. Henson appeals.

¶8 The single issue on appeal is whether the trial court properly granted the charging order by determining the LLCs were Henson's "alter egos" and the court should pierce the corporate veil of the entities. In making this determination, we consider whether the trial court correctly applied 18 O.S. Supp. 2017 § 2034, which enumerates the circumstances in which a court may assign a debtor's capital interest in an LLC to a creditor. *Southlake Equip. Co. v. Henson Gravel & Sand, LLC,* 2013 OK CIV APP 87, ¶ 5, 313 P.3d 289. "A legal question involving statutory interpretation is subject to *de novo* review . . . *i.e.,* a non-deferential, plenary and independent review of the trial court's ruling." *Id.* (citing *Duncan v. Okla. Dep't of Corrs.*, 2004 OK 58, ¶ 3, 95 P.3d 1076 (quoting *Fulsom v. Fulsom*, 2003 OK 96, ¶ 2, 81 P.3d 652)). We also consider whether the trial court properly applied the equitable doctrine of piercing the corporate veil. We will not reverse an equitable ruling of a trial court unless the judgment is clearly against the weight of the evidence. *Puckett v. Cornelson*, 1995 OK CIV APP 72, ¶ 7, 897 P.2d 1154 (citing *Marshall v. Marshall,* 1961 OK 86, ¶ 19, 364 P.2d 891).

¶9 "Under Oklahoma's limited liability company statutes, the exclusive remedy of a creditor of a member in a limited liability company with respect to the member's interest is a 'charging order,' which may not be foreclosed upon." *Scottsdale Ins. Co. v. Tolliver,* No. 04-CV-0227-CVE-FHM, 2012 WL 524421, at *3 (N.D. Okla. Jan. 11, 2012) (citing 18 O.S. Supp. 2017 § 2034). At trial, the Firm argued that it should be permitted to attach the LLCs' assets in satisfaction of the judgment against Henson based upon the doctrine of "piercing the corporate veil." The trial court agreed and held that the court should be able to pierce the corporate veil of the LLCs and granted a charging order upon Henson's "50% interest" in the entities.

¶10 The doctrine the Firm attempts to employ in this case is not a traditional piercing of the corporate veil, wherein shareholders or members of a corporate entity are held liable for the debts or obligations of the corporate entity. *Fanning v. Brown*, 2004 OK 7, ¶ 16, 85 P.3d 841 (citing *Frazier v. Bryan Mem'l Hosp. Auth.*, 1989 OK 73, ¶ 16, 775 P.2d 281). Instead, the legal tool the Firm proposes here is a distinct equitable mechanism referred to as "reverse piercing," wherein a business entity – such as an LLC or corporation – is held responsible for the liabilities of an individual member or shareholder (*i.e.,* the opposite of traditional piercing). *U.S. v. Badger,* 818 F.3d 563 (10th Cir. 2016). Reverse piercing has never been explicitly recognized in Oklahoma. *Lind v. Barnes Tag Agency, Inc.,* 2018 OK 35, ¶ 22, 418 P.3d 698.

¶11 Additionally, the Oklahoma Supreme Court has never applied any form of veil piercing to LLCs. While the doctrine of traditional piercing the veil of corporations is well established in Oklahoma, *see, e.g., Fanning*, 2004 OK 7, ¶ 16, 85 P.3d 841 (citing *Mid-Continent Life Ins. Co. v. Goforth*, 1943 OK 244, ¶ 10, 143 P.2d 154), Oklahoma has yet to apply this doctrine to the newer entity structure of LLCs.[2]

¶12 Henson strenuously argues that he was not a member of either of the LLCs, but was, ostensibly, a manager of the businesses. Under Oklahoma law, charging orders are normally granted regarding a member's interest in an LLC. 18 O.S. Supp. 2017 § 2034. Non-member managers of LLCs are not traditionally deemed to have a "membership interest" against which a charging order may be granted. *Id.* Oklahoma has also not yet recognized piercing the corporate veil against an individual who holds no formal financial interest in the business entity.

¶13 The trial court order combined the equitable doctrine of piercing the corporate veil with the statutory mechanism of an LLC charging order. The traditional piercing the veil analysis is an equitable tool created in common law to allow courts to ignore the corporate shield and "hold stockholders personally liable for corporate obligations or corporate conduct under the legal doctrines of fraud, alter ego and when necessary to protect the rights of third persons and accomplish justice." *Fanning,* 2004 OK 7, ¶ 16, 85 P.3d 841 (citing *Goforth,* 1943 OK 244, ¶ 10, 143 P.2d 154). Reverse pierc-

ing – also arising out of common law – was created to achieve a similar goal: to prevent shareholders and members of business entities from defrauding creditors by maintaining a sham business in which an individual could dishonestly shield his or her personal assets. *In re Denton,* No. 99-6059, 2000 WL 107376, at *3 n. 1 (10th Cir. Jan. 31, 2000) (citing *Gregory S. Crespi, The Reverse Pierce Doctrine: Applying Appropriate Standards,* 16 J. Corp. L. 33, 36 (1991)).

¶14 Piercing and reverse piercing of the corporate veil allows an obligee to access all of the assets of the individual or entity on the other side of the veil, treating the pierced entity as synonymous with the obligor-defendant. On the other hand, a charging order allows a creditor to attach only a member's capital interest in an LLC. 18 O.S. Supp. 2017 § 2034. "Membership interest" is defined by statute as "only the flow of profits or surplus from the member's economic interest in his units of the LLC, and only allows this flow until the judgment is satisfied." *Id.*; *Southlake Equip. Co.,* 2013 OK CIV APP 87, ¶ 7, 313 P.3d 289. Thus, reverse piercing the corporate veil allows a creditor greater access to the assets of the business entity on the other side of the veil, whereas an LLC charging order allows only a narrower remedy.

¶15 Though the trial court may have been flawed in its analysis, we consider whether it was correct in its result. In so doing, we consider whether the application of reverse piercing in this case is consistent with Oklahoma law.

¶16 The reverse piercing analysis draws greatly from the traditional piercing framework. *See generally, Acceptance and Application of Reverse Veil-Piercing – Third-Party Claimant* (2005) 2 A.L.R.6th 195. In Oklahoma, under the traditional veil piercing analysis, courts may disregard the distinction between a business association and its stakeholders under the legal doctrines of fraud and alter ego, and where justice so requires to protect the interests of third parties. *Fanning,* 2004 OK 7, ¶ 16, 85 P.3d 841 (citing *Goforth,* 1943 OK 244, ¶ 10, 143 P.2d 154). The legal fiction that a corporation is separate and distinct from its stakeholders was created to further the interests of convenience and justice. *Goforth*, 1943 OK 244, ¶ 10, 143 P.2d 154. Where in the context of particular facts the employment of this fiction no longer supports these ends, courts may choose to disregard it and pierce the veil. *Id.*

¶17 The Oklahoma LLC Act provides that the "rules of law and equity" shall supplement the Act with regard to any case not addressed therein. Accordingly, we see no reason why the well recognized practice of piercing the corporate veil should not apply to LLCs. 18 O.S. Supp. 2017 § 2060. *See also Estrada v. Kriz,* 2015 OK CIV APP 19, ¶ 24, 345 P.3d 403 (holding that a plaintiff's veil-piercing theory against an LLC was not subject to dismissal on the basis of failure to plead fraud with specificity); *Dickson Indus., Inc., v. Thomas Grinding, Inc*., 2009 WL 10687735 at *1 n. 1 (W.D. Okla. Jan. 14, 2009) ("[T]here is no significant difference between the standard for piercing the veil of a corporation versus an LLC . . . ."). One instance where a court may choose to disregard the corporation as a separate entity is where a business association becomes the "alter ego" of one or more stakeholders, such that a court will consider the stakeholder(s) and business association to be synonymous. *Fanning,* 2004 OK 7, ¶ 16, 85 P.3d 841; *see Pennmark Res. Co. v. Okla. Corp. Comm'n,* 2000 OK CIV APP 63, ¶ 15, 6 P.3d 1076. The factors to be considered by Oklahoma courts in determining whether an LLC is the alter ego of a member are whether (1) the LLC is undercapitalized, (2) without separate books, (3) its finances are not kept separate from individual finances, individual obligations are paid by the LLC or vice versa or (4) the LLC is merely a sham.[3] This list of factors is not exclusive or exhaustive and is meant merely as guidance in determining the level of control exerted by an individual over an LLC. *Frazier,* 1989 OK 73, ¶ 17, 775 P.2d 281. The most important element in any veil piercing analysis is control. *Id.*[4]

¶18 The Oklahoma Supreme Court has never explicitly employed the tool of reverse piercing. *In re Denton,* No. 99-6059, 2000 WL 107376, at *4 (10th Cir. Jan. 31, 2000). In its only acknowledgment of the practice, the Supreme Court stated that it "continues to stress the legal distinction between a corporation and its shareholders," at least in the Workers' Compensation context. *Lind*, 2018 OK 35, ¶ 22, 418 P.3d 698.

¶19 The practice of reverse piercing has been met with varied reception.[5] Critics of reverse piercing emphasize the danger to innocent third parties, such as innocent shareholders/members, as well as creditors of the business entity. *In re Denton*, 2000 WL 107376 at *3; *Floyd,* 151 F.3d at 1299-1300; *Cascade Energy & Metals*

Corp., 896 F.2d at 1577. Other criticisms include the likely availability of other, legal remedies in the majority of reverse piercing cases – such as "conversion, fraudulent conveyance of assets, respondeat superior and agency law . . . ." *Cascade*, 896 F.2d at 1577.

¶20 We acknowledge the above-stated concerns associated with the practice of reverse piercing. We also acknowledge, however, that these concerns may be lessened or eliminated in the presence of particular facts, such as "where a corporation is controlled by a single shareholder [and] there are . . . no third-party shareholders to be unfairly prejudiced by disregarding the corporate form." *Floyd,* 151 F.3d at 1300.

¶21 Regarding piercing and reverse piercing the corporate veil theory as applied to non-owners, the Oklahoma Supreme Court has recognized that reverse piercing may apply even where the controlling person or entity does not have a formalized financial interest in the organization. *Lind,* 2018 OK 35, ¶ 22, 418 P.3d 698 ("[The doctrine of reverse piercing] applies in situations where a plaintiff seeks to hold a corporation liable for the actions of its shareholders or someone else who controls the entity.") (citing *Badger,* 818 F.3d at 568 ("Under reverse piercing . . . a corporation or other entity can be liable for the debt of someone who controls the entity.")).

¶22 Though the veil piercing analysis most often arises in the context of controlling shareholders of a corporation, other jurisdictions have applied the concept of veil piercing to a controlling non-stakeholder – referred to as an "equitable owner." Mark J. Loewenstine, *Veil Piercing to Non-Owners: A Practical and Theoretical Inquiry*, 41 Seton Hall L. Rev. 839, 867 (2011); *see also, Angelo Tomasso, Inc. v. Armor Constr. & Paving, Inc.*, 447 A.2d 406, 412 (Conn. 1982) ("[S]tock ownership . . . is not a prerequisite to piercing the corporate veil but is merely one factor to be considered in evaluating the entire situation"). In Illinois, an appellate court held that where a wife was the sole shareholder of the corporation, but where her non-owner husband exerted dominant control over the entity, the husband could be construed as the "equitable owner" of the company such that there was adequate "unity of interest and ownership" to allow piercing the corporate veil and hold the husband personally liable. *Fontana v. TLD Builders, Inc.*, 840 N.E.2nd 767, 778-81 (Ill. App. Ct. 2005).

¶23 Colorado has employed similar reasoning in a line of three cases. In the first case, *LaFond v. Basham*, 683 P.2d 367, 369 (Colo. App. 1984), the Colorado Court of Appeals held a non-shareholder liable for the obligations of a corporation where he was the president and general manager of the business, made unilateral decisions subject to review only by the Board of Directors (of which he was a member), and generally dominated his wife and son (the only two shareholders) as the company's main decision-maker. The Colorado Court of Appeals extended this reasoning to LLCs in *Sheffield Services Co. v. Trowbridge*, 211 P.3d 714, 721-22 (Colo. App. 2009), *overruled on other grounds by Weinstein v. Colborne Foodbotics, LLC,* 2013 CO 33, 302 P.3d 263, 269, where the court held that a non-owner manager of an LLC could be held personally liable for the LLC's obligations where he "(1) clearly dictated all policy and activity for both corporations; (2) ran the corporations, alone determined when he would draw money from them . . . and (3) when the corporations were virtually insolvent, demanded payment upon his notes and took over corporate assets to the detriment of other creditors." The Colorado court reiterated this reasoning in *McCallum Family L.L.C. v. Winger,* 221 P.3d 69, 74 (Colo. App. 2009), where the court held that a non-shareholder employee of a corporation could be construed as an "equitable owner" for purposes of piercing the veil because he "essentially functioned as an owner." Similar to the facts in *LaFond*, the equitable owner in *McCallum* was closely related to the only two shareholders – his wife and mother – and admitted that his mother was "a shareholder and officer in name only." *Id.* at 77.[6]

¶24 We find the analysis of the above-mentioned courts to be well reasoned and find that the extension of the "equitable ownership doctrine" to the piercing the veil analysis is consistent with principles of fairness and efficiency valued in Oklahoma corporate law. Applying the equitable ownership analysis here, we hold that Henson was an equitable owner of both Henson Farms LLC and Henson Insurance Group LLC. The facts here closely resemble those in *Fontana, LaFond*, and *McCallum*, where both LLCs have a sole member to whom Henson is closely related (his wife), where the record indicates Henson acts as the companies' primary decision maker for extended periods of time, and where Henson has unfettered discretion in making cash withdrawals for his own personal use.

¶25 At the hearing for the charging order on March 9, 2018, both Henson and his wife testified that he alone ran both businesses for prolonged periods of time during which his wife was disabled by various health issues. Records of checks written from the LLCs bank accounts – presented at both the December 27, 2017 hearing on assets and the March 9, 2018 hearing on the motion for charging order – indicate that Henson signed a large majority of the checks and counterchecks withdrawing funds from the LLCs' bank accounts, some of which have been traced to personal uses (e.g. buying groceries and eating lunch at Pizza Hut). Henson even signed a $30,000 commercial loan agreement on behalf of Henson Insurance LLC, though in the designated capacity as "manager."

¶26 Henson and his wife assert that Henson is merely the manager of the LLCs, and that he acts only at the direction of Henson's wife, the sole member. This argument, however, is inconsistent with the operating agreement of at least one of the LLCs, Henson Insurance Group LLC. Article V of the Insurance Group's operating agreement states, "The business of the Company shall be managed by its Members." The operating agreement does not provide for a non-member manager, nor does it enumerate the powers and responsibilities of such. Like the non-owner manager in *Sheffield*, Henson's unchecked control of the two LLCs does not resemble that of a manager, but that of an owner.

¶27 Henson appears to use his wife's name only as a defensive shield against creditors, allowing her to be the symbolic figurehead of the companies while he carries on the majority of the business. This use of a sole "straw member" in order to shield a controlling non-owner from liability goes against the purposes intended by the creation of corporate entities. Therefore, there was substantial evidence to support the trial court's holding that Henson should be construed to be an equitable owner of both companies, where he essentially ran both businesses and initiated the large majority of financial transactions, some of which can be construed as cash distributions to himself. This conclusion is consistent with the LLC's operating agreement, which does not provide for a non-member manager, but states that the association's members shall manage it.

¶28 Having concluded that Henson is the equitable owner of the LLCs, we apply the reverse piercing analysis to the facts in this case and hold that the trial court correctly concluded that the alter ego veil piercing factors are satisfied here. Firstly, the record indicates that Henson was insolvent such that he could not pay his personal debts. At the December 12, 2017 hearing on assets, Henson stated that he does not own the pickup he uses for personal use, and that all of his properties are mortgaged. Henson testified that the two LLC bank accounts are the only two accounts on which Henson or his wife were listed or had signing privileges.

¶29 Secondly, Henson and his wife failed to maintain separate books and records for the LLCs. When asked whether Henson knew of additional business records for the two companies, Henson stated that the only business records for the LLCs were the bank statements for the checking accounts. Henson stated he was unaware of any additional evidence – such as invoices or a ledger book – indicating the cash flow and expenses for the businesses.

¶30 Thirdly, Henson commingled the LLCs funds with his own personal finances, such that the LLCs' bank accounts were used to pay his personal expenses. Henson testified multiple times that he withdrew funds from the LLCs' bank accounts for personal use. The photocopies of checks withdrawn on the accounts indicate at least a handful of instances in which the checks were written to pay for household expenses, such as groceries or eating out at a restaurant, though most of the checks were for cash withdrawals. Henson also testified that money was withdrawn from the LLCs' bank accounts in order "to send [his oldest son] to school." When asked how he and his wife are able to maintain daily life, Henson stated they "get by the best [they] can" by taking money from the LLC accounts. Henson agreed that he and his wife were "living out of the accounts."

¶31 Lastly, the evidence as a whole suggests that the LLCs are merely a sham, wherein the LLC accounts are not used for business purposes, but rather simply as a means to wrongfully shield Henson's personal assets. Despite having extensive control over both companies and using the LLCs' assets for personal use, Henson maintains that the money in LLC bank accounts is "not [his] money," and that those assets should be treated as separate from his own.

¶32 Henson cannot have it both ways. He may not enjoy the legal protections provided by the creation of distinct legal entities and also continue to use those entities' assets as his own. Oklahoma's corporate law provides protections for formalized business associations in the interests of fairness and efficiency. Where the extension of those protections no longer furthers those interests, as here, the law discontinues its protections.

¶33 Because the LLCs are Henson's alter egos and reverse piercing of the corporate veil is warranted in this case, the trial court's grant of a charging order against Henson's membership interest is superfluous. A charging order allows a judgment creditor to attach only to an LLC member's membership interest, which is personal property distinct from the LLC's assets. 18 O.S. Supp. 2017 §§ 2032, 2034. Because a reverse piercing allows a creditor to attach directly to a business association's assets, treating the business's property as the debtor's property, a charging order against the debtor's capital interest in the company is unnecessary.

¶34 We hold that Henson exerted almost exclusive control over the LLCs and the LLCs' assets, especially where his wife was the sole member of both companies. Because Henson is insolvent, failed to maintain separate books for the LLCs, used the LLCs' funds for personal uses, and generally operated the LLCs as a sham, we affirm the trial court and hold that the LLCs are Henson's alter egos and that reverse piercing of the corporate veil was consistent with the weight of the evidence. The trial court's order essentially held that 50% of the funds in certain LLC bank accounts, and any funds payable to Henson Insurance Group, LLC, were subject to garnishment by Firm to pay its judgment. Based on our analysis, the charging order is unnecessary because the assets of the LLCs are subject to collection activities allowed by law to pay Firm's judgment.

¶35 AFFIRMED.

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

Kenneth L. Buettner, Judge:

1. After the first day of the hearing, on February 21, 2018, Henson Farms LLC (which had been previously inactive) was reinstated with the Secretary of State. Henson Insurance Group LLC was similarly reinstated March 5, 2018.

2. *See* David L. Cohen, *Theories of the Corporation and the Limited Liability Company: How Should Courts and Legislatures Articulate Rules for Piercing the Veil, Fiduciary Responsibility and Securities Regulation for the Limited Liability Company?*, 51 Okla. L. Rev. 427, 454 (1998) (explaining the uncertainty in predicting how courts will apply common law doctrines of corporate law – including piercing the corporate veil – to LLCs).

3. We slightly modify the alter ego analysis applicable to corporations, found in *Home-Stake Productions Co. v. Talon Petroleum, C.A.*, 907 F.2d 1012, 1018 (10th Cir. 1990), to fit the LLC context. Because of the nature of LLCs, members often run LLCs in a very informal manner, making the fourth element of the corporation alter ego analysis – whether corporate formalities are followed – largely inapplicable to LLCs. *See* M. Thomas Arnold and H. Wayne Cooper, *Limited liability – Piercing the limited liability veil in Oklahoma corporations and limited liability companies*, 3A Vernon's Okla. Forms 2d, Bus. Orgs. § 2.07.

4. *See Cohen*, *supra* note 2.

5. *See, e.g., In re Denton*, No. 99-6059, 2000 WL 107376 at *4 (10th Cir. Jan. 31, 2000) (calling reverse piercing "potentially problematic"); *Floyd v. I.R.S. U.S.*, 151 F.3d 1295, 1299-1300. (10th Cir. 1998) (enumerating concerns arising from employing the reverse piercing analysis); *Cascade Energy & Metals Corp. v. Banks*, 896 F.2d 1557, 1577 (10th Cir. 1990) ("The reverse-pierce theory presents many problems.").

6. The *McCallum* court noted additional jurisdictions that recognize the "equitable ownership doctrine" when piercing the corporate veil, including Minnesota and New York. *Id.* at 76.

2020 OK CIV APP 20

FAUST CORPORATION, Plaintiff/Appellee/Counter-Appellant, vs. MYKAL ROYETTA HARRIS a/k/a ROYETTA M. HARRIS, Defendant/Appellant/Counter-Appellee, and JOHN LOWE and ELIZA LOWE, MIDLAND CREDIT MANAGEMENT, INC., and STATE OF OKLAHOMA ex rel. OKLAHOMA TAX COMMISSION, Defendants, and LINDA HOLTZCLAW, as Special Administrator of the ESTATE OF MARY E. WENSAUER, Intervenor/Appellant/Counter-Appellee.

Case No. 117,037. December 17, 2019

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE RICHARD OGDEN, TRIAL JUDGE

AFFIRMED IN PART, AND REVERSED IN PART AND REMANDED WITH DIRECTIONS

Stephen L. Bruce, Everette C. Altdoerffer, Edmond, Oklahoma and

Sharon T. Thomas, Kristin D. Meloni, THE RUDNICKI FIRM, Oklahoma City, Oklahoma, for Plaintiff/Appellee

Gerard F. Pignato, RYAN WHALEY COLDIRON JANTZEN PETERS & WEBBER, PLLC, Oklahoma City, Oklahoma, for Defendant/Appellant Mykal Royetta Harris and Intervenor/Appellant Linda Holtzclaw as Special Administrator of the Estate of Mary E. Wensauer

JANE P. WISEMAN, VICE-CHIEF JUDGE:

¶1 Mykal Royetta Harris and Linda Holtzclaw, Special Administrator of the Estate of Mary E. Wensauer,[1] appeal a trial court order finding that each owned a one-half interest in the property at issue. Faust Corporation coun-

ter-appeals asserting its judgment lien against Harris attached to the whole property, not just an undivided one-half interest. After review, we conclude Harris had no remaining interest in the property when Faust's judgment lien was filed in Oklahoma County and Harris therefore had no interest to which the lien could attach. We affirm the trial court's judgment in part and reverse in part and remand with directions.

FACTS AND PROCEDURAL BACKGROUND

¶2 Faust Corporation filed its petition on September 25, 2008, to foreclose a judgment lien on property it alleged was owned by Harris. Faust described the property as Lots 17, 18, 19, and 20, of Block A in the Crestwood Addition, Oklahoma City, Oklahoma (the Property). On October 31, 2008, Mary E. Wensauer filed a motion to intervene stating she owned the Property on which Faust claimed a lien.

¶3 Faust filed a motion for summary judgment asserting the following: It was granted judgment in Pottawatomie County for $11,712.62 and obtained a lien on the Property. It alleged Harris filed a bankruptcy petition and received a discharge in 2003, but "[t]he bankruptcy court did not order [Faust's] judgment lien avoided." Faust renewed its judgment in 2007 and filed a certified copy in Oklahoma County. Faust claimed that although served with summons and petition, Harris failed to appear and was in default and that Mary Wensauer claimed some right, title, or interest in the Property through two unfiled deeds which Harris allegedly executed in 1988.

¶4 In her response to the summary judgment motion, Mary asserted she owned the Property, not Harris, and further that Harris had not included it in her bankruptcy estate because she did not own the Property.

¶5 On September 28, 2010, a judgment in favor of Faust was filed. Mary, the trial court found, "has no right, title, interest, estate, lien or equity of redemption in and to the real property and premises or any part thereof." The court held that Faust was entitled to foreclose its judgment lien, ordered the lien foreclosed, and authorized the issuance of a special execution and order of sale of the Property to satisfy the lien.

¶6 After the trial court denied Mary's motion for new trial, she filed a petition in error with the Supreme Court. When a sheriff's sale was held, the purchaser at the sale asked the trial court to set aside the sale and refund the amount he paid for the Property due to clouds on the title that had not been foreclosed. Because the purchaser asked to cancel his bid, the bid of the next highest bidder (Faust) was accepted. The order confirming sheriff's sale was filed on June 24, 2011.

¶7 In a previous appeal, Case No. 109,056, the Court of Civil Appeals reversed the trial court's summary judgment in Faust's favor. The Court concluded:

> [A] question of material fact exists regarding what interest, if any, Wensauer and/or PMSI holds in the Property and when they acquired it. Any interest of Wensauer and/or PMSI acquired prior to the 2002 filing of Faust's Statement of Judgment cannot be disturbed by Faust's judgment lien. Pursuant to 12 O.S. §706, the lien only affects property of the judgment debtor Harris.

The Court remanded the case for further proceedings.

¶8 The Court found that Harris owned the property, but in 1988, she "granted Wensauer a one-half undivided interest in . . . Property." Mary, however, did not record the deeds from Harris. The Court stated:

> In 1992, Harris entered into an agreement with Wensauer and Property Management Services, Inc. (PMSI) to sell PMSI all of Harris' right, title and interest in the Property. The Agreement was never filed of record nor were any deeds transferring title from Harris to PMSI. The only documents produced by Wensauer to show PMSI fulfilled its end of the Agreement were two handwritten notes from Harris to PMSI in 2006 requesting the deeds from Harris be filed. From 2002 through 2010, the Oklahoma County Assessor's website listed the owners of the property as "Mykal R. Harris c/o Property Mgmt Services." In May 2003, Harris filed a petition for bankruptcy. On Schedule A of her bankruptcy petition, Harris indicated she held no interest in any real property. In September 2003, Harris' debts were discharged.

(Footnote omitted.)

¶9 Faust claimed its judgment lien was superior to both Harris' and Mary's interests in the Property. The Court explained:

> Faust contends 16 O.S. §15 as amended in 1993, modified the definition of "third persons" to include holders of unrecorded interests which would allow judgment liens priority over unfiled deeds. In support of such argument, Faust relied upon a 1997 article from the Oklahoma Bar Journal which cited a 1996 unreported decision from Division 4 of the Oklahoma Court of Civil Appeals.

(Footnote omitted.) Mary, on the other hand, asserted that § 15 "contained nothing suggesting it was intended to overrule 'almost 100 years of jurisprudence' holding that a judgment creditor's lien only attaches to the actual interest of the judgment debtor in the real property." Mary argued the Property's title "was transferred to PMSI and her in 1992 when the terms of the Agreement were fulfilled." She presented "two handwritten letters from Harris dated in 2006 wherein Harris requested the deeds between the parties be recorded." Mary pointed out that the Property was not listed on Harris' bankruptcy petition, and she claimed Faust had notice of PMSI's interest in the Property before it filed its Statement of Judgment.

¶10 The Court in the first appeal offered the following analysis:

> The Oklahoma Supreme Court has long recognized that "the grantee in a valid unrecorded conveyance of real estate has a superior claim to that of a judgment creditor claiming under a judgment subsequent to the effective date of the conveyance." *Harty v. Hertzler,* 1939 OK 211, ¶ 9, 90 P.2d 656, 657. "[T]he reason for the rule is in the fact that the judgment creditor is not a bona fide purchaser as he parts with nothing to acquire his lien." *Herndon v. Shawnee Nat'l Bank*, 1924 OK 1167, ¶ 2, 232 P. 432, 433.
>
> Title 16 O.S. Supp. 1993 § 15 provides a deed does not have to be acknowledged and recorded in order to be valid as between the parties to the conveyance, but that it is not valid as against third persons unless it has been acknowledged and recorded. The language added to §15 in 1992 provides:
>
> > "No judgment lien shall be binding against third persons unless the judgment lienholder has filed his judgment in the office of the county clerk as provided by and in accordance with Section 706 of Title 12 [12-706] of the Oklahoma Statutes."
>
> Contrary to Faust's assertion, nothing in §15 suggests Wensauer/PMSI as the holder of a prior unrecorded deed would be considered a "third person" over whom Faust, the judgment lienholder, would have priority. Section 15 instead protects judgment lienholders who file a statement of judgment as required by 12 O.S. Supp. 1997 §706 against subsequent bona fide purchasers for value. The Oklahoma Supreme Court reiterated the definition of "third persons" in *Breeding v. NJH Enter., L.L.C.,* 1997 OK 65, ¶14, 940 P.2d 502, 505:
>
> > We have previously construed a statute that uses the term "third persons." Title 16 [O.S.] 1991 §15 provides that deeds and mortgages "shall not be valid as against third persons unless acknowledged and recorded." We held in *Whitehead v. Garrett,* 199 Okla. 278, 280, 185 P.2d 686, 688 (1947), "The 'third persons' defined by § 15, supra, refer to innocent purchasers for value."
>
> Further, nothing in §15 alters the nearly 100 years-old Supreme Court precedent in *Lunn v. Kellison*, 1915 OK 1100, 153 P. 1136: "The judgment lien contemplated by section 5941, Comp. Laws 1909 (Rev. Laws 1910, § 5148)[now 12 O.S. § 706], is a lien only on the actual interest of the judgment debtor, whatever that may be; therefore, though he appear to have an interest, if he has none in fact, no lien can attach." *Id.* ¶¶ 5-6, 153 P. at 1136 (citations omitted). Neither Wensauer nor PMSI was Faust's judgment debtor. Accordingly, Faust's judgment lien cannot affect their interest in the property if that interest was acquired prior to the filing of Faust's Statement of Judgment.

(Footnote omitted.)

¶11 On remand, Harris testified at trial she first met Brent Wensauer 35 or 40 years ago. She sold over 20 properties to Property Management Services, Inc. (PMSI). When asked about Brent Wensauer's relationship to PMSI, she stated, "As far as I knew he was the company." She testified Mary Wensauer was Brent's mother. PMSI managed properties it owned as well as properties it did not own. Harris contacted Brent in the 1980s to ask if he wanted to

invest in a property with her. Brent identified properties in which they could invest. When asked if she was "going to own the property outright," Harris replied, "No. We were halfies." She confirmed the agreement was for her to own half the Property and Brent and PMSI to own the other half. She denied she owned any interest in the Property at the time of trial, when she filed for bankruptcy in 2003, or when there was a judgment entered against her in 2002 by Faust. A warranty deed, dated September 25, 1987, and recorded October 1, 1987, was admitted into evidence that showed a transfer of the interest of John and Eliza Lowe in the Property to Harris. Harris stated she did not know the Lowes and she did not think she understood that the Property "was going to be transferred in total to [her] upon purchase and then [she] would transfer a half interest into PMSI afterwards." A warranty deed dated February 22, 1988, transferred from Harris to Mary Wensauer an undivided one-half interest in Lots 17 and 18 of the Property. A second warranty deed dated that same day transferred from Harris to Mary Wensauer an undivided one-half interest in Lots 19 and 20 of the Property. Although the deeds were notarized, nothing indicates they were recorded. Harris testified she signed the deeds and she had no doubt she was conveying a one-half interest in the Property to Mary. When asked what she thought was the effect of executing the warranty deed, Harris replied, "Mary Wensauer and I held it in total, but in half." She explained, "Well, we owned the property altogether, but half of it was owned by her and half by me." She does not recall a purchase money mortgage being executed for the Property.

¶12 A real estate mortgage dated September 28, 1987, for Lots 17 and 18 and another of the same date for Lots 19 and 20 each granted a mortgage to the Lowes as security for the payment of $30,375. Harris denies making any mortgage payments to the Lowes and she did not know if PMSI ever did so. Although she "put money up front to assist in the purchase of [the Property]," she does not recall how much money she provided.

¶13 A handwritten letter dated September 26, 1991, from Harris to Brent showed Harris provided $10,000 principal to purchase the Property. But as early as 1988, Harris was "asking to be bought out of the project" because she needed the money. After asking more than once, she was finally bought out. Harris signed the document identified as Exhibit 4 titled "Agreement" which lists and describes the lots comprising the Property. It states, "Harris wishes to sell and PMSI wishes to purchase, as nominee, all of Harris' right, title and interest in the Property." The Agreement says PMSI will pay Harris $6,500 in six monthly installments of $1,000 and one installment of $500. In the section titled "Deeds," it states, "If and only if full and final payment of the sum set forth in paragraph 1 hereof is made, PMSI shall record with the Registrar of Deeds for Oklahoma County deeds previously executed (dated February 22, 1988) by Harris for the Property." Harris testified she conveyed all of her interest in the Property to Mary, she had no intention of retaining any interest in the Property, she recalled receiving payment for the Property, and she considered the transaction complete on receiving payment. Harris claimed she asked Brent to record the agreements and conveyances. Although she initially could not recall signing any other deeds or documents, she later recalled signing a quitclaim deed, but she did not retain a copy of it. In 2006, she wrote Brent two letters asking "[t]o be removed from any ownership of the property." She believes PMSI owns the Property.

¶14 On cross-examination, she could not explain why the original deed conveyed the entire Property to her. On redirect, she testified PMSI managed and paid taxes on the Property.

¶15 Brent Wensauer testified he is the president of PMSI and Mary Wensauer was the principal shareholder in PMSI before her death. Mary's estate retains majority ownership in PMSI. The following exchange took place regarding the Property:

> Q. . . . . How was it that this [*sic*] specific properties – duplexes on 23rd, were determined to be the investment property that the two of you would enter into business concerning?
>
> A. Based on the amount of financing that the Lowes were willing to carry as a purchase money mortgage, the amount that she had to invest fit those properties. Would, you know, buy into the equity of those properties and give an operating reserve.

Brent testified Harris had no role in selection of the properties. When asked why the deed conveyed the full interest in the Property to Harris, Brent explained:

> Part of it was because she was – this was having to be conveyed back and forth to Florida. And it was being handled – it was closed by State Title Company and it was going to be difficult and unwieldy to try to do it initially, so it was just agreed we'd go ahead and let her step in initially and then we would buy back in our half interest.

¶16 But ultimately, Brent stated, the Agreement provided each would own one-half interest in the Property. PMSI was to manage, maintain, and rent the Property, and pay taxes because Harris was in Florida. At closing, the sellers carried purchase money mortgages. The mortgaged amount for each duplex was $30,375. Brent stated Harris incurred no personal liability for the two mortgages. He did not remember the exact date the mortgages were paid off, but he remembers they were paid off early and were fully satisfied with a final payment in August 2001.

¶17 Brent testified Harris executed a quitclaim deed at the same time they entered into the Agreement to pay Harris for her investment. The quitclaim deed released any interest Harris may have had in the Property. He stated he specified in the Agreement that the quitclaim deed would not be recorded until Harris was paid in full. He explained:

> She signed off on it. And the agreement was, you know, I didn't know, you know, if we would have trouble locating her or what her status would be. I wanted to make sure that, you know, we could end, you know, get back, you know, full interest in the property once she'd been paid in the full. So at my request she trusted me enough to go ahead and execute that Quit Claim Deed, but it was clear in the deal that that couldn't be recorded until such time as she had been paid in full.

¶18 Brent testified the quitclaim deed was executed in February 1992, but he could not locate a copy of it. He testified that Harris "kept bugging [him] to get it recorded," but he thought he would "just get her to issue another one." He said that "it didn't affect her interest in [the Property] . . . it was us getting the [P]roperty back." Brent stated, "It never occurred to me that over a decade later some other judgment creditor would come in and claim a property that she'd had nothing [to] do with for a dozen years, which somehow they – they had a right to come in and grab." He detailed that PMSI paid Harris the full amount due pursuant to the Agreement and therefore purchased Harris' remaining interest in the Property. PMSI has exercised exclusive ownership over the Property since 1992. Neither Brent nor PMSI had any further business relationship with Harris since the Agreement was fulfilled. He received paperwork regarding Faust's garnishment and filled it out to indicate Harris was not employed by PMSI and PMSI was not holding any funds for Harris.

¶19 During cross-examination, Brent clarified that the quitclaim deed was not to supersede the two warranty deeds but to memorialize that they had paid Harris according to their Agreement. He claimed the Agreement extinguished Harris' interest in the Property and the quitclaim deed was intended to clean up title to the Property. When asked if he had any documentary evidence that Harris had been paid $6,500 pursuant to the Agreement, he said he had letters admitted into evidence in which Harris asked him to record the deed. He asserted she would not have wanted him to file the quitclaim deed had she not been paid.

¶20 On redirect examination, Brent testified Harris executed four deeds – the two warranty deeds from 1988 and two quitclaim deeds when they made the Agreement to buy Harris out. He could not locate the quitclaim deeds.

¶21 The trial court found that Harris transferred an undivided one-half interest in the Property to Mary by written conveyance executed February 22, 1988. It further found the February 18, 1992, written Agreement regarding Harris' remaining interest in the Property was not effective to transfer her remaining one-half interest in the Property. The court concluded that on August 21, 2001, when Faust filed its statement of judgment in Oklahoma County, the Property was owned by Harris and Mary Wensauer "with each party possessing an undivided one-half interest . . . in fee simple absolute." The trial court held Faust's judgment lien attached only to Harris' one-half interest in the Property.

¶22 Both Linda Holtzclaw, on behalf of Mary's estate, and Harris (collectively, Harris) appeal from the trial court's order as does Faust, arguing that it was error not to find its judgment lien attached to the entire Property, not just an undivided one-half interest.

STANDARD OF REVIEW

¶23 Foreclosure of a lien is a matter of equitable cognizance. *See, e.g., First Nat'l Bank of Pauls Valley v. Crudup,* 1982 OK 132, ¶ 12, 656 P.2d 914. "In an action of equitable cognizance there is a presumption in favor of the trial court's findings and they will not be set aside unless the trial court abused its discretion or the finding is against the clear weight of the evidence." *Smith v. Villareal*, 2012 OK 114, ¶ 7, 298 P.3d 533.

ANALYSIS

¶24 The dispositive issues on appeal concern the validity of the 1988 warranty deeds and the 1992 Agreement. Harris asserts the 1988 deeds are valid and the trial court did not err in enforcing those deeds. Harris further asserts that the 1992 Agreement is valid, or in the alternative Harris, at a minimum, transferred all of her equitable interest, right, and title in the Property to PMSI. In its counter-appeal, Faust asserts the trial court erred in concluding that the 1988 deeds transferred from Harris to Mary an undivided one-half interest in the Property, but properly concluded the 1992 Agreement was ineffective to transfer title to PMSI. Faust further asserts, "The trial court's finding that the sheriff's sale did not pass title is contrary to 12 Okla. Stat. § 774."

¶25 We will first examine the 1988 warranty deeds. As the Court of Civil Appeals noted in Case No. 109,056, "Title 16 O.S. Supp. 1993 §15 provides a deed does not have to be acknowledged and recorded in order to be valid as between the parties to the conveyance, but that it is not valid as against third persons unless it has been acknowledged and recorded." Section 15, not amended since 1993, reads:

> Except as hereinafter provided, no acknowledgment or recording shall be necessary to the validity of any deed, mortgage, or contract relating to real estate as between the parties thereto; but no deed, mortgage, contract, bond, lease, or other instrument relating to real estate other than a lease for a period not exceeding one (1) year and accompanied by actual possession, *shall be valid as against third persons unless acknowledged and recorded* as herein provided. No judgment lien shall be binding against third persons unless the judgment lienholder has filed his judgment in the office of the county clerk as provided by and in accordance with Section 706 of Title 12 of the Oklahoma Statutes.

16 O.S.2011 § 15 (emphasis added). For example, in *Kaylor v. Kaylor,* 1935 OK 530, ¶ 0, 45 P.2d 743 (syl. no. 2 by the Court), the Supreme Court noted: "An unrecorded real or chattel mortgage, or an assignment of interest, to secure a specific advancement or loan of money, is binding between the assignor and assignee, and all persons having actual knowledge of same." The 1988 deeds, although unrecorded, were valid between Harris and Mary Wensauer.

¶26 But Faust did not have notice of the deeds before it filed its lien. The question remains whether Faust is a "third person" within the meaning of § 15 and thus within the class of those entitled to the statute's protection. We conclude it is not.

¶27 The Supreme Court has previously held, "The third person defined by 16 O. S. 1941, § 15 (recordation statute) refers to one who is an innocent purchaser for value, or an incumbrancer, and does not apply to the purchaser at a tax resale or his transferee." *Whitehead v. Garrett,* 1947 OK 303, ¶ 0, 185 P.2d 686 (syl. no. 5 by the Court). Of more importance to our analysis here, in *Oklahoma State Bank of Wapanucka v. Burnett*, 1917 OK 338, ¶ 0, 162 P. 1124 (syl. no. 2 by the Court), the Court held, "The 'third person' defined by [the recordation statute] refers to one who is an innocent purchaser for value, or an incumbrancer, and does not in any manner apply to a judgment creditor with a lien." In *Whitehead,* the Court concluded, "Owner of fee simple title by virtue of unrecorded deed from record owner can maintain action to defeat resale tax deed as a cloud on his title." *Whitehead,* 1947 OK 303, ¶ 0 (syl. no. 3 by the Court). In *J. I. Case Threshing Machine Co. v. Walton Trust Co.*, 1913 OK 658, ¶ 0, 136 P. 769 (syl. no. 6 by the Court), the Supreme Court tells us: "The judgment lien contemplated by section 5941, Comp. Laws 1909 (Rev. Laws 1910, sec. 5148), is a lien only on the actual interest of the judgment debtor, whatever that may be; therefore, though he appear to have an interest, if he has none in fact, no lien can attach." Section 5148 provided in relevant part: "Judgments of courts of record of this State, except county courts, and courts of the United States rendered within this State, shall be liens on the real estate of the debtor within the county in which the judgment is rendered …." Revised Laws of Oklahoma 1910, section 5148.

¶28 The *Walton* Court offered the following explanation for the distinction between a judgment creditor and a bona fide purchaser:

> It may be asserted as a rule very generally recognized that a judgment creditor is not a bona fide purchaser. He parts with nothing to acquire his lien. He is in a very different position from one who has bought and paid, or who has loaned, on the face of the recorded title. The equities are entirely unlike, as one has, and the other has not, parted with value relying upon the record. If the real avails over the apparent title, the one is no worse off than before he acquired his lien – has lost nothing; while the other has lost the value paid or loaned. Hence equity will help the latter, while it cares nothing about the former.

Walton, 1913 OK 658, ¶ 3.

¶29 At issue in *Lunn v. Kellison*, 1915 OK 1100, ¶ 4, 153 P. 1136, was:

> whether the judgment lien was superior to the title of the purchasers of said lots who had bought same from defendant in execution prior to the rendition of said judgment, upon which said execution was issued, but whose deeds had not been filed for record in the office of the register of deeds of said county prior to the levy of said execution upon said lots.

The *Lunn* Court quoted "*Gilbreath v. Smith*, 50 Okla. 42, 150 P. 719," for this statement of law: "'The lien of a judgment attaches only to the interest in real estate owned by the judgment defendant; and judgment creditors are not bona fide purchasers. Such creditors part with nothing to acquire the lien.'" *Lunn*, 1915 OK 1100, ¶ 5.

¶30 We conclude, as the trial court did, that the warranty deeds of February 22, 1988, conveyed from Harris to Mary an undivided one-half interest in the Property although not recorded.

¶31 But we depart from the trial court's ruling regarding the 1992 Agreement between Harris and PMSI and hold the completion of payment under the Agreement established title in PMSI. Harris and Brent both testified payments were completed as contemplated by the Agreement. Introduced at trial were two receipts for cashier's checks, one for $1,000 dated April 2, 1992, payable to Harris, and a second one for $1,000 dated May 4, 1992, also payable to Harris. Documentary evidence admitted at trial showed partial payment, and Brent and Harris testified that PMSI and Brent paid Harris the total amount due. Brent and Harris both testified that Harris executed a quitclaim deed. A letter admitted into evidence dated September 21, 2006, from Harris to Brent stated, "Please file the Quit Claim deed on 23rd you've had in my name for 12 years." A second letter admitted into evidence from Harris to PMSI dated October 23, 2006, stated, "Please file the Quit Claim deed that I gave you under nickname 'Mykal Harris' over 15 years ago on the duplex located at 2824 & 26 NW 23rd St. OKC, OK." Evidence at trial showed two real estate mortgages executed on the Property to the Lowes as security for the payment of $30,375 and Harris stated she never made any mortgage payments to the Lowes. Brent testified Harris incurred no personal liability for the two mortgages. He also testified that, although he did not remember the exact date the mortgages were paid off, he remembers they were paid off early and were fully satisfied with a final payment in August 2001. A copy of a PMSI check dated August 3, 2001, shows a payment of $8,388 and a notation that the check represented payment in full for the notes and mortgage for 2824-26 NW 23rd, 2826-30 NW 23rd, and a third property. Tax returns for Mary and Donald Wensauer for 1992, 1993, 1994, 1995, and 1996 listed 2824-26 & 2828-1/2 NW 23rd on Schedule E, Supplemental Income and Loss. Harris did not include the Property as an asset when she filed bankruptcy in 2003. These facts clearly show that the Agreement was completed and Harris no longer had any interest in the Property.

¶32 In *Adams v. White,* 1913 OK 609, ¶ 1, 139 P. 514, the Court explained:

> It has also been held that the possession of real property carries with it the presumption of ownership, and it is the duty of those purchasing such property from others than those in possession to ascertain the extent of their claims, and the open, actual possession of such property gives notice to the world of just such interest as the possessor actually has therein. *Russell v. Gerlach,* 24 Okla. 556, 103 P. 604; *Cooper v. Flesner,* 24 Okla. 47, 103 P. 1016, 23 L. R. A. (N. S.) 1180, 20 Ann. Cas. 29; *Edwards v. Montgomery,* 26 Okla. 862, 110 P. 779. Having reached the conclusion that the oral contract of sale is

> not invalid under the statute of frauds, the case of *Hampson v. Edelen*, 2 Har. & J. (Md.) 64, 3 Am. Dec. 531, seems to be in point. Mr. Chief Justice Chase, speaking for the court, says: "In this case it appears that a considerable part of the purchase money was paid, and possession given of the land, prior to the obtention of the judgments by Hampson against Wade. A contract for land, bona fide, made for a valuable consideration, vests the equitable interest in the vendee from the time of the execution of the contract, although the money is not paid at that time. When the money is paid, according to the terms of the contract, the vendee is entitled to a conveyance, and to a decree in chancery for a specific execution of the contract, if such conveyance is refused. *A judgment obtained by a third person against the vendor, mesne the making the contract and the payment of the money, cannot defeat or impair the equitable interest thus acquired, nor is it a lien on the land to affect the right of such cestui que trust.* A judgment is a lien on the land of the debtor, and attaches on it as a fund for its payment; but the legal estate in the land is not vested in the judgment creditor, although he can convert it into money, to satisfy his debt, by pursuing the proper means."

(Emphasis added.) As we explain below, even if the Agreement were simply a contract for the sale of Harris' interest in the Property, this transfers at least equitable title.

¶33 Similarly, in *City Guaranty Bank of Hobart v. Boxley*, 1928 OK 448, ¶ 0, 270 P. 69 (syl. no. 1 by the Court), the Court instructed:

> A bona fide contract, made for a valuable consideration for the sale of real estate, vests the equitable interest in the vendee from the time of the execution of the contract, and the vendee is entitled to a conveyance, and to a decree in chancery for specific performance of the contract, if such conveyance is refused; *and a judgment obtained by a third person against the vendor subsequent to the making of such contract, but prior to the time of its complete performance, cannot defeat or impair the equitable interest thus acquired*, nor is it a lien on the land to affect the right of such cestui que trust.

(Emphasis added.) The Court concluded, *"A judgment lien does not reach the mere legal title of property in the debtor, when the equitable title is in another.* Open, actual, and peaceful possession of real estate gives notice to the world of just such interest as the possessor actually has therein." *Id.* (syls. no. 2-3 by the Court) (emphasis added).

¶34 Even without full payment by PMSI, pursuant to Oklahoma law, PMSI clearly had at least equitable title to the Property. In *First Mustang State Bank v. Garland Bloodworth, Inc.*, 1991 OK 65, ¶ 10, 825 P.2d 254, the Supreme Court explained the doctrine of equitable conversion: "The doctrine of equitable conversion, long recognized by Oklahoma, 'is a fiction resting upon the fundamental rule of equity that equity regards that as done which ought to be done.'" *Id*. (quoting *First Sec. Bank v. Rogers,* 429 P.2d 386, 389 (Idaho 1967)). "Under the doctrine, an equitable conversion may take place when a contract for sale becomes binding on the contracting parties." *Id*. "The theoretical basis for the doctrine is founded on the concept that at the time the contract for sale is entered into by the parties, the purchaser becomes the true owner of the realty, with the seller retaining the right to possession and legal title as security for the payment price." *Id.* The Court further clarified the doctrine:

> The doctrine of equitable conversion divides the "bundle" of property rights between the seller and the purchaser. The purchaser is regarded as the owner and generally has the right to possession of the realty. The seller's position is analogous to that of the mortgagee who retains legal title as security for the purchase price. In other words, the buyer's interest is converted to realty and the seller's interest is converted to personalty.

Id. ¶ 11 (citations omitted). The Court stated that the purchaser does not obtain the right to obtain legal title until he or she has complied with the obligation to pay. *Id.* ¶ 12. "Until the purchaser has paid the full amount of the contract price, the seller continues to have a real property interest in the land." *Id*. ¶ 13. "This interest is not only mortgagable to third parties, but is also subject to other liens." *Id*. The Court stated, "These third-party mortgagees and creditors have a valid claim to the realty, subject to the prior claim of the purchaser." *Id*. "The claims of third-party creditors extend to the seller's remaining interest in the land and operates to bind the land to the extent of the unpaid purchase price." *Id.*

¶35 The clear weight of the evidence establishes PMSI paid Harris the full purchase price. Faust's judgment lien "is a lien only on the actual interests of the judgment debtor, whatever they may be. Therefore, though he appear to have an interest, if he has none in fact, no lien can attach." *Oklahoma State Bank of Wapanucka v. Burnett*, 1917 OK 338, ¶ 0, 162 P. 1124 (syl. no. 1 by the Court). Although Harris may have appeared to have an interest in the Property, the Agreement and payment of the agreed price extinguished any interest she may have had and the judgment lien could not attach to the Property. The record shows that either PMSI/Brent or Mary paid the mortgages on the Property and re-paid Harris for her initial $10,000 investment. There is nothing nefarious about PMSI's or Brent's failure to file the quitclaim deeds that both Brent and Harris testified Harris executed. To allow Faust to foreclose a lien on property in which Harris has no remaining interest and for which PMSI/Brent and/or Mary paid would be iniquitous.

¶36 In its counter-appeal, Faust asserts 12 O.S.2011 § 774 mandates that the order confirming the sheriff's sale should be left undisturbed. Section 774 states:

> If any judgment or judgments, in satisfaction of which any lands or tenements are sold, shall at any time thereafter be reversed, such reversal shall not defeat or affect the title of the purchaser or purchasers; but in such cases, restitution shall be made, by the judgment creditors, of the money, for which such lands or tenements were sold, with lawful interest from the day of sale.

12 O.S.2011 § 774. However, Oklahoma case law has specifically found § 774 does not apply in situations like this:

> [Section 774] which provides that "if any judgment or judgments, in satisfaction of which any lands or tenements are sold, shall at any time thereafter be reversed, such reversal shall not defeat or affect the title of the purchaser or purchasers," has no application to a case where the judgment creditor purchases the land at the sheriff's sale, nor to the grantee of such purchaser. Nor does said section apply when the judgment and sale based thereon are void on their face.

Morgan v. City of Ardmore ex rel. Love & Thurmond, 1938 OK 227, ¶ 0, 78 P.2d 785 (syl. no. 4 by the Court) *overruled on other grounds in part by City of Bristow ex rel. Hedges v. Groom*, 1944 OK 223, 151 P.2d 936.

¶37 Because Harris had no interest in the Property when Faust filed its judgment lien, Harris had no interest to which the lien could attach. We reverse the decision of the trial court finding that only one-half of Intervenor Holtzclaw's interest is unaffected by the lien and hold that none of Intervenor Holtzclaw's interest is affected by or subject to the judgment lien.

CONCLUSION

¶38 We affirm the trial court's decision that the 1988 warranty deeds transferred an undivided one-half interest in the Property to Mary Wensauer. But we conclude the trial court's decision regarding the 1992 Agreement was against the clear weight of the evidence and contrary to law – subsequent completion of the 1992 Agreement's terms and the execution of quitclaim deeds, although unrecorded, resulted in transfer of title to PMSI. Because Harris had no interest in the Property when Faust filed its judgment lien, application of the lien to the Property and foreclosure of the lien were improper, requiring reversal with directions on remand to enter judgment in favor of Harris and Holtzclaw in conformity with this Opinion.

¶39 **AFFIRMED IN PART, REVERSED IN PART AND REMANDED WITH DIRECTIONS.**

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

JANE P. WISEMAN, VICE-CHIEF JUDGE:

1. Linda Holtzclaw, as Special Administrator of the Estate of Mary E. Wensauer, was substituted as a party in this lawsuit after Mary Wensauer's death.

2020 OK CIV APP 21

GREG KENT, AMY KENT, LEISHA KNIGHT, RICHARD KNIGHT, LOLA KNIGHT, SHELLY KNIGHT, VICKI WALLACE, LIBBY DAVIS, CHARLES DAVIS, Petitioners/Appellants, vs. THE CITY OF OKLAHOMA CITY, Oklahoma, a Municipality, et al., Respondents/Appellees, and KILPATRICK AT EASTERN, LLC, an Oklahoma limited liability company, Intervenor.

Case No. 117,206. March 25, 2020

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE TREVOR PEMBERTON, TRIAL JUDGE

AFFIRMED

R. Robyn Assaf, Oklahoma City, Oklahoma and Lana J. Tyree, Oklahoma City, Oklahoma, for Petitioners/Appellants

Daniel T. Brummitt, ASSISTANT MUNICIPAL COUNSELOR, Oklahoma City, Oklahoma, for Respondents/Appellees

Paul Lefebvre, David R. Box, John Michael Williams, Michael D. O'Neal, WILLIAMS, BOX, FORSHEE & BULLARD, P.C., Oklahoma City, Oklahoma, for Intervenor

P. THOMAS THORNBRUGH, PRESIDING JUDGE:

¶1 Petitioners/Appellants (Petitioners) seek review of trial court orders that denied their petition for a writ of mandamus or prohibition against the City of Oklahoma City (City), and denied Petitioners' motion for leave to amend the petition. Petitioners also challenge trial court's decisions allowing property developers Kilpatrick at Eastern, LLC (Kilpatrick), to intervene in this action, and granting City's motion to consolidate this proceeding with a related case in the court below. On review of the record, the parties' briefs and the applicable law, we find no reversible error in the trial court's decisions and affirm.

BACKGROUND

¶2 In March 2017, City approved Kilpatrick's application for a Planned Unit Development District (PUD-1630) changing the zoning classification of approximately 110 acres (the property) located in northeast Oklahoma City, at the corner of Northeast 122nd Street and North Eastern Avenue, just south of the Kilpatrick Turnpike, and adjacent to or near property owned by Petitioners. Kilpatrick, a local developer and the property's owner, had filed the PUD-1630 application in December 2016, asking City to rezone the property from an agricultural, residential, and general office classification, to mixed-use office and commercial. According to the application, the property was partially developed with a paved street, water, and sewer but was otherwise vacant. Kilpatrick intended to use the property for general commercial office space, mixed-use retail space, and a large multi-screen indoor movie theater.

¶3 The PUD-1630 application included in the record indicates that, of the 110-acre area, approximately 56 acres are for office space and 20 acres are for commercial space. About 30 acres are devoted to open, greenbelt areas to buffer the office or commercial space from nearby residential properties and an equestrian center located south of Northeast 122nd Street.

¶4 City ultimately approved PUD-1630 at its March 28, 2017 meeting, following review and two meetings of the City Planning Commission in January and February of 2017. Neither planning commission meeting was attended by any protestors.[1] By the time of City Council's March 28, 2017 meeting, however, several hundred residents living within several square miles around PUD-1630 had signed a petition in opposition to it, asserting it presented a "drastic departure" from the current use of the property. A written objection was presented on behalf of homeowners and other individuals living in the large area that Petitioners referred to as "Urban Low Intensity" (ULI) based on the area's general typology in Oklahoma City's Comprehensive Master Plan, known as "PlanOKC," which City adopted in 2015.[2] At its March 28 meeting, however, City rejected the protests, approved PUD-1630, and adopted Ordinance No. 25,599 reclassifying the property accordingly.

¶5 City's approval of PUD-1630 prompted Petitioners to file a petition for "mandamus or prohibition" (petition for mandamus) against City in April 2017 (amended in June 2017). The petition requested a peremptory writ of mandamus based on City's alleged "non-discretionary, mandatory duty to the residents and registered voters" living in the area where Petitioners reside "to comply fully and completely" with Oklahoma statutes, City ordinances, and "critically important … PlanOKC." Petitioners also complained that City had rushed through the process for PUD-1630, and that City had negligently failed to give sufficient notice to parties interested in the project. They also suggested that City had improperly colluded with Kilpatrick, principally by entering into a "joint defense agreement" with counsel for Kilpatrick after the litigation was filed. They asserted that such an arrangement was illegal and void.

¶6 Petitioners attached more than 300 pages of exhibits to their petition for mandamus, not including "PlanOKC" itself, which Petitioners "incorporated by reference" by referring to its location online, at "www.okc.gov." The gist of Petitioners' requested relief was a court order requiring City to invalidate its approval of PUD-1630 due to City's use of an allegedly unfair, "corrupt," "biased," and arbitrary and capricious hearing process and methods in order to reach a decision in breach of City's duty to obey the law.

¶7 Kilpatrick requested to intervene, which the trial court allowed. The court also granted City's motion to consolidate this action with Oklahoma County District Court Case No. CV-2017-955, an injunction action against City, also by homeowners, on grounds similar to those listed in Petitioners' mandamus action. The latter case was based primarily on the claim that City's approval of PUD-1630 was without adequate notice to individuals entitled to notice, in violation of their right to due process.

¶8 Kilpatrick and City filed answers, followed by motions for summary judgment, challenging, *inter alia*, (1) the propriety of Petitioners' use of a mandamus action against City to invalidate a zoning action; and (2) the claim, by both Petitioners and plaintiffs in the consolidated case, of inadequate notice concerning City's approval of PUD-1630. The trial court ultimately found that notice was given as required by Oklahoma City Municipal Code § 59-4150.3, and granted summary judgment in favor of City and Kilpatrick on the adequacy of notice provided to Petitioners and plaintiffs in the injunction case. No party has appealed from that determination.[3]

¶9 Petitioners moved to strike the answers filed by City and Kilpatrick as improper pleadings in a mandamus action. The court granted Petitioners' motion to strike pending its decision on Petitioners' petition.

¶10 During a pre-trial conference, Petitioners requested the court to rule on their request for a peremptory writ of mandamus. The court denied the writ and dismissed the petition, finding that mandamus was an extraordinary remedy to which Petitioners were not entitled because they had not shown City had a non-discretionary duty to Petitioners to deny Kilpatrick's rezoning request. The court also found that Petitioners had an alternate legal remedy available to them, and noted particularly the injunction action with which Petitioners' mandamus case was consolidated. In a separate order, the court denied a motion by Petitioners to file a second amended petition, which Petitioners had claimed would support additional grounds for relief against City.

¶11 Petitioners filed this appeal.

STANDARD OF REVIEW

¶12 "Generally, an adjudication determining the proper legal procedure for a particular controversy presents an issue of law, and is reviewed by a non-deferential *de novo* standard." *Christian v. Gray,* 2003 OK 10, ¶ 40, 65 P.3d 591. At the same time, the Supreme Court has held that in a mandamus proceeding, the party aggrieved by the trial court's decision has the burden to "show on appeal that the trial court abused its discretion in declining to award relief." *Clay v. Indep. Sch. Dist. No. 1 of Tulsa County,* 1997 OK 13, ¶ 31, 935 P.2d 294. An abused judicial discretion may be found in either an erroneous conclusion of law or where there is no rational basis in evidence for the ruling. *Christian,* 2003 OK 10 at ¶ 43.

¶13 The Court has also held, in reversing a trial court's grant of mandamus, that there has been "a clear and uninterrupted pattern of decisions by this Court to keep judicial intermeddling with the legislative functions of municipalities at a minimum," and that "the only legitimate basis for interference by the courts is when the municipality has acted unreasonable [sic], arbitrarily or in such a way as to constitute a violation of the constitutional guarantees of equal protection or due process." *McConnell v. Town Clerk of Tipton,* 1985 OK 61, ¶ 21, 704 P.2d 479. "[A municipality's] acts will not meet with judicial interference unless they are manifestly unreasonable and oppressive, unwarrantedly invade private rights, clearly transcend the police powers given to them, or infringe upon the rights secured by fundamental law." *Farmer v. City of Sapulpa*, 1982 OK 58, ¶ 12, 645 P.2d 518 (quoting *Utility Supply Co., Inc. v. City of Broken Arrow*, 1975 OK 106, ¶ 14, 539 P.2d 740).

ANALYSIS

I. The Trial Court Correctly Denied a Writ of Mandamus

¶14 The remedy of mandamus in Oklahoma is governed by 12 O.S.2011 §§ 1451 through

1462. These provisions recognize a court's authority to issue a writ "to compel the performance of any act which the law specially enjoins as a duty, resulting from an office, trust or station." *State Highway Comm'n v. Green-Boots Const. Co.*, 1947 OK 221, ¶ 12, 187 P.2d 209. To obtain mandamus relief, a petitioner must demonstrate they meet the requirements of the following, five-factor test:

> (1) the [petitioner] has no plain and adequate remedy in the ordinary course of the law; (2) the [petitioner] possesses a clear legal right to the relief sought; (3) the respondent has a plain legal duty regarding the relief sought; (4) the respondent has refused to perform that duty; and (5) the respondent's duty does not involve the exercise of discretion.

Miller Dollarhide, P.C. v. Tal, 2006 OK 27, ¶ 10, 174 P.3d 559 (footnote omitted). However a court "may also issue the writ to correct an arbitrary abuse of discretion." *Id*.

¶15 In this appeal, the gist of Petitioners' argument is that City had a plain legal duty to deny PUD-1630 because it allowed a zoning change that Petitioners claim did not comply with PlanOKC and therefore violated 11 O.S. § 43-103. Pursuant to § 43-103, "Municipal regulations as to buildings, structures and land shall be made in accordance with a comprehensive plan. . . ." Petitioners interpret the statute as imposing a mandatory duty, enforceable by writ, that "where a long-range plan is adopted, it be followed." They also argue City violated state law when it adopted Municipal Code § 59-3150.2, which they claim allows "PlanOKC to be used as merely a guideline or tool, as opposed to the statutory mandate that the adopted long-range plan be followed." Because PUD-1630 included a zoning change, it did not strictly adhere to PlanOKC as adopted, and Petitioners urge that City had no choice but to deny it. Thus, in addition to their rights and City's obligations under the zoning and planning statutes that Petitioners cite, the "plain legal right" that Petitioners claim, appears to lie within the provisions of PlanOKC.

¶16 Petitioners' argument presents several problems. First, the record designated by Petitioners does not make clear what provision(s) of PlanOKC on which they rely as the source of their "plain legal right" or City's "plain legal duty." As noted above, Petitioners simply incorporated PlanOKC by referring generally to a City Internet website, and gave no direction as to where, within the document, to find the information relevant to their claim.

¶17 Petitioners also have a strained interpretation of 11 O.S.2011 § 43-103. While the statute does state that municipal regulations must be "in accordance with" a comprehensive plan, it clearly does *not* dictate the regulations a municipality must or must not adopt, or the manner in which a city decides how to accomplish any of multiple objectives set forth in the provision.[4] Section 43-103 also states, unambiguously, that a *municipality's* "governing body shall provide the manner in which regulations, restrictions and district boundaries shall be determined, established and enforced, and amended, supplemented or changed."

¶18 There also is no support in the record for Petitioners' reference to City's Municipal Code § 59-3150.2 as violating state law because it allows PlanOKC to be used only as a "guideline." The ordinance itself contains no such language.[5] However, even if we assume that the Municipal Code at some point contains such a provision, Petitioners' argument ignores the language of 11 O.S.2011 §§ 47-106 and 47-107. Those provisions specifically concern comprehensive municipal plans adopted by "cities with populations over 200,000." Pursuant to § 47-107 (emphasis added), the plan "shall be made with the general purpose of *guiding* and accomplishing a coordinated, adjusted, and harmonious development of the municipality and its environs . . . ." Moreover, § 47-106 specifically contemplates that a city's planning commission "may amend, extend, or add to the plan from time to time."

¶19 Petitioners also are mistaken in their claim that they had no other remedy in the "ordinary course of the law" than a writ of mandamus. Their argument on this issue appears focused on City's alleged failure to employ a fair process in its approval of PUD-1630 by failing to provide Petitioners with notice and an opportunity to challenge the proposed change. While there is no question that City has a clear legal duty to give notice as prescribed by City's zoning ordinances, it is undisputed that the question of notice was litigated and decided in the trial court, and has not been appealed. No Petitioners appeared to protest PUD-1630 when it was heard before City's Planning Commission despite the fact that adequate notice had been given.

¶20 Petitioners further argue the trial court erred in finding that they had an adequate remedy in the form of an injunction as exemplified by the relief sought by plaintiffs in the consolidated case. They contend their mandamus action includes issues broader in scope than the facts of the injunction case, which, they say, was limited to only the "facts arising from and related to the singular approval of PUD-1630."[6] This broader scope of facts apparently concerns allegations by Petitioners to the effect that City has repeatedly engaged in collusion with Kilpatrick's counsel or has engaged in other improper acts, as to which discovery would be needed.

¶21 Petitioners then suggest, without citation to authority, that an injunction action does not allow for the use of discovery procedures that would allow them to pursue their theories. This is simply wrong. *See, e.g., Tibbits v. Miller,* 1900 OK 45, 60 P. 95 (where facts lie in the knowledge of the defendant, and discovery is sought, the plaintiff is permitted to state that he is informed and believes that a fact is true and the request for injunction should not be dismissed). The Oklahoma Discovery Code provides for discovery in all suits of a civil nature in Oklahoma courts. 12 O.S.2011 § 3224. "The only exception to this principle is where the Legislature has explicitly exempted a certain type of special proceeding from the scope of the Code." *Sunderland v. Zimmerman*, 2019 OK CIV APP 27, ¶ 17, 441 P.3d 179. We know of no provision whereby injunction proceedings are exempted from discovery procedures, and reject Petitioners' argument for this reason as well.[7]

¶22 Finally, even if we were to determine that an injunction is not an adequate, alternative remedy for Petitioners, their mandamus quest would still fail, because Petitioners have not shown that City's alleged breach of duty in this matter either "did not involve the exercise of discretion" or that City abused its discretion in reaching its decision.

¶23 The trial court order cited *Midcontinent Life Ins. Co. v. City of Oklahoma City*, 1985 OK 41, ¶ 9, 701 P.2d 412, holding that municipal zoning is a legislative function which requires the exercise of legislative judgment, and such decisions are afforded the presumption of validity by the courts when challenged. In *Kelly v. City of Bethany,* 1978 OK 163, ¶ 14, 588 P.2d 567, the Court recognized that a city council's approval of a plat and acceptance of an offer of dedication within the plat is "discretionary and not subject to mandamus," and that "the expedience or wisdom of this acceptance *is a matter for municipal legislative determination with which courts are not authorized to interfere." Id.,* ¶ 15 (emphasis added). The Court in *Kelly* cited with approval to *Dorris v. Hawk*, 1956 OK 19, 292 P.2d 417, where the Court refused to enjoin or invalidate a city commission's "legislative determination" to accept a dedication and open a street that violated city zoning ordinances, holding the commission's decision "rest[ed] in the discretion of the municipal authorities." *Id.*, ¶¶ 0 and 4; *see also* 8 McQuillin Mun. Corp. § 25:102 (3d ed.)("Rezoning . . . is subject to the legislative discretion of the city council or other zoning authority, and courts will not interfere therewith except for abuse clear beyond dispute.").

¶24 Just as a decision to accept a plat and offer of dedication lies within the discretion of municipal authorities, the decision to approve a PUD application that includes rezoning a particular area is a legislative and therefore discretionary act by a municipality's governing body. Title 11 O.S.2011 § 43-110 authorizes municipal governing bodies to establish PUD requirements and procedures "in a zoning ordinance," and defines a PUD as including "cluster housing, planned residential and nonresidential development, community unit plan, *and other zoning requirements*." (Emphasis added.) We find no clear, mandatory, non-discretionary duty, explicitly or impliedly, within the statutory provisions cited by Petitioners or within PlanOKC itself that would require a state court to order the invalidation of a city's legislative approval of a PUD application.

¶25 Accordingly, we reject Petitioners' claim that City's approval of PUD-1630 so far departed from state law and/or the "Urban Low Intensity" area designation in PlanOKC that it committed a breach of a mandatory duty between City and Petitioners. It is undisputed that PUD-1630 involves a 110-acre tract of land in what appears to be a relatively vacant area located at the northeast corner of Northeast 122nd Street and Eastern Avenue, just south of the Kilpatrick Turnpike. As indicated above, Petitioners have used the description of the area as "Urban Low Intensity," or ULI. This is a land use typology designation from PlanOKC for a large area situated between US Highway 77 on the west, I-35 on the east, I-44 on the south, and Memorial Road on the north. City's

Planning Commission "Staff Report" for PUD-1630, attached as an exhibit to Petitioners' petition, reflects that the site "is currently zoned under PUD-1156 which allows for office and residential uses," that a private road system had already been constructed, and that PUD-1630 planned to use the existing infrastructure.

¶26 The Report describes the ULI typology designation as applying to "the least intensively developed areas of the city that still receive urban water, sewer, police, park and fire services," and cautions that "development in this area should provide horizontal integration of land uses, connectivity within and between individual developments, and design that facilitates pedestrian and bicycle transportation." The Report notes that immediately to the south is a "recently approved PUD-1617 for Oklahoma Christian Academy," while immediately to the north is "Kilpatrick Turnpike frontage."

¶27 The Report devotes three pages to evaluating the proposed PUD-1630 in comparison to PlanOKC, and delineates the ways in which the PUD either meets or "commits to meeting" current requirements or recommendations for PlanOKC's "Land Use Typology Area (LUTA)" map's ULI designations. The Report recommends approval of PUD-1630, but cautions that "determination of conformance with policies contained in the comprehensive plan is the purview of the Planning Commission," which may consider other relevant information than the technical evaluation appearing in the Report.

¶28 As noted above, the Planning Commission recommended approval at a public hearing where no protestors appeared. By the time the City Council took up the matter, numerous signatures had been gathered to support a petition protesting rezoning, and Petitioners presented written objections to the proposal. However, the objections primarily claimed that PUD-1630 was inconsistent with the ULI area and violated PlanOKC altogether. Aside from those written objections, however, Petitioners direct us to no evidence countering the evidence that PUD-1630 either met or "commits to meeting" relevant current requirements or recommendations for PlanOKC's LUTA map's ULI designation.

¶29 The evidentiary material that Petitioners presented in support of their contentions clearly failed to convince the trial court that in approving PUD-1630, City had acted unreasonably, arbitrarily, capriciously, "or in such a way as to constitute a violation of the constitutional guarantees of equal protection or due process." *McConnell*, 1985 OK 61 at ¶ 21. We find the trial court's decision supported by both the record and the law. The court did not abuse its discretion in denying Petitioners' request for a writ of mandamus. We reject Petitioners' claims of error on this issue and do not disturb the trial court's determination.

II. The Trial Court Properly Denied Motion to File a Second Amended Petition

¶30 Petitioners allege reversible error occurred when the trial court refused to grant their motion to file a "Second Amended Petition for a Writ of Mandamus and/or Prohibition" (second amended petition). Their argument is critically deficient, however, in that they claim *only* that the proposed amendment sought a writ requiring City:

> [T]o follow the Statute mandating that the adopted long-range plan be followed (11 O.S. § 43-103 which is non-discretionary) and further instruct [City] to strike as void the Oklahoma City Code that is inconsistent with the Statute where it purports to allow the City to utilize the long-range plan as a tool only.[8]

These are the same provisions identified in Petitioners' first amended petition. The argument is the same argument that we have discussed and rejected above. The only new matter set forth in the proposed second amended petition is Petitioners' request that the court deem invalid the "joint defense agreements" (JDAs) between City and Kilpatrick;[9] however, on appeal Petitioners do not challenge the denial of their motion on this ground.

¶31 We find no abuse of discretion by the trial court in refusing to allow an amendment that simply reiterated the same allegations and arguments the court had already rejected. *See Prough v. Edinger,* 1993 OK 130, ¶ 9, 862 P.2d 71 (quoting *Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 230 (1962)) (no abuse of discretion in refusal to allow request to amend based on "futility of amendment"). We presume Petitioners have abandoned a claim of error based on the refusal to allow amendment on grounds related to the JDAs.[10] Accordingly, we find no fault with the trial court's order denying the request to file a second amended petition.

III. Case Consolidation was Warranted and Proper

¶32 Petitioners' Proposition No. III asserts the trial court's alleged error in consolidating Petitioners' mandamus action with the injunction action that was filed by area residents to prevent enforcement of the rezoning ordinance. Petitioners argue, first, that because City's motion to consolidate was filed four days prior to Petitioners' filing their first amended petition, City's motion to consolidate could only have referred to Petitioners' original petition. They then claim that the first amended petition added a number of issues and allegations that rendered consolidation of the two cases inappropriate. This argument ignores the date of the trial court's *order* granting City's consolidation request, which was entered several months *after* Petitioners' first amended petition was filed. We presume the trial court entered an order responsive to the most recent petition on file in the case and reject Petitioners' claim of error on this ground.

¶33 Petitioners also contend that consolidation was improper because Petitioners' allegations against City encompassed more issues than the question of adequate notice, and because the two actions sought different forms of relief and presented different questions of law. Presuming, without finding, that Petitioners were somehow prejudiced by the consolidation, we again reject their argument.

¶34 Pursuant to 12 O.S.2011 § 2018(C), a trial court may consolidate pending actions "involving a common question of law or fact." "Consolidation is a procedural mechanism to enhance the efficiency of judicial process and its economy," and is a matter in which a trial court has "broad discretion." *State v. One Thousand Two Hundred Sixty-Seven Dollars,* 2006 OK 15, ¶ 15, 131 P.3d 116.

¶35 Here, both cases involve the same defendant/respondent, the same tract of land, the same property owner/developer, the same PUD and rezoning application, and the same approval process by City, *i.e.*, the same basic core of facts. Both actions also had, as a primary issue of law, the adequacy of notice to affected residents. While it is true that this action sought mandamus and the other action sought an injunction, Petitioners' contention that the parties could not have pursued discovery due to the injunction case is without basis in law, as we discussed above. Presuming again that Petitioners were actually prejudiced by consolidation early in the case, however, we reject their argument and find that, based on the record presented, the trial court did not abuse its discretion in consolidating the cases.

IV. Allowing Intervention by the Rezoned Property's Owner/Developer was not an Abuse of Discretion

¶36 Petitioners' final proposition is that the trial court committed reversible error by allowing Kilpatrick to intervene in the case. They contend first that Kilpatrick lacked "standing" to intervene because it is a "private entity" rather than a governmental agency or an agent for City, and therefore lacked legal standing to defend against a writ of mandamus. This argument appears to be premised in Petitioners' reading of 12 O.S.2011 § 1451 as precluding a writ of mandamus from issuing against a "private entity," therefore precluding Kilpatrick from having "standing" to defend against a writ request. Petitioners cite no authority for this argument other than the statute itself, § 1451, which expressly provides that "mandamus may be issued . . . to any inferior tribunal, *corporation, board or person,* to compel the performance of any act which the law specially enjoins as a duty. . . ." (Emphasis added). We reject Petitioners' contention on this issue.

¶37 Petitioners also contend that even if Kilpatrick had "standing," intervention was unnecessary because City could have adequately protected Kilpatrick's interests. We disagree. As City argues in its answer brief, although City and Kilpatrick had a "joint goal" of defending the validity of PUD-1630, the parties' respective interests are "not identical," in that City "has no interest in the Subject Property itself, whereas [Kilpatrick] is the owner of the Subject Property and has expended and will expend millions of dollars to develop" the property. Kilpatrick undisputedly owns the property at issue, initiated the rezoning process, plans to invest heavily in the property's further development, and therefore has a clear and present interest in defending an attack on the rezoning decision that occurred as a result of its application. As such, Kilpatrick is one who is "so situated that the disposition of the action may as a practical matter impair or impede" its ability to protect its interest. This is one of the definitions of a person entitled to "intervention of right" under 12 O.S.2011 § 2024(A), and the trial court correctly allowed the intervention to occur.

CONCLUSION

¶38 For the reasons set forth above, we reject Petitioners' arguments for reversal of the trial court's orders at issue herein. The court did not abuse its discretion in concluding that mandamus is not an appropriate or available remedy to address City's legislative decision rezoning the area in question, and the evidence does not otherwise support a claim that City acted unreasonably, arbitrarily, or capriciously. We further find the court did not abuse its discretion by allowing case consolidation and intervention of right by the property owner, Kilpatrick, nor did it err by refusing to allow Petitioners to file a second amended petition. Accordingly, the judgment is affirmed in all respects.

¶39 **AFFIRMED**.

WISEMAN, C.J., and BARNES, J. (sitting by designation), concur.

P. THOMAS THORNBRUGH, PRESIDING JUDGE:

1. Issues were raised and vigorously litigated in the trial court concerning the sufficiency of notice of the proposed rezoning to all affected landowners. The issues were resolved in favor of Kilpatrick prior to this appeal, and notice is not an issue here.

2. PlanOKC was adopted by City after a lengthy information-gathering and planning process, for use in shaping City's future physical development, including zoning and land use. According to the PlanOKC website, https://www.okc.gov/departments/planning/comprehensive-plan, "PlanOKC is the manifestation of a common vision developed through years of analysis and input from Oklahoma City residents, business professionals, community stakeholders and local government officials."

3. The trial court ultimately dismissed Case No. CV-2017-955 because each plaintiff had voluntarily dismissed the action without prejudice. The dismissals occurred after the court entered its order in favor of City and Kilpatrick on the issue of adequacy of the notice given to landowners of the PUD-1630 application.

4. Section 43-103 provides that regulations be designed to accomplish any of a number of objectives, including, *inter alia*, reducing traffic congestion; securing public safety and promoting public health and the general welfare; providing adequate light and air; preventing overcrowding of land; promoting historical preservation; avoiding "undue concentration of population"; or facilitating "the adequate provision of transportation, water, sewerage, schools, parks" and the like.

5. Section 59-3150.2 is found in Chapter 59 of the Municipal Code, under Article III, and specifically deals with City's Planning Commission. It states, in pertinent part:

> 3150.2. *Powers*. In general, the Planning Commission shall have such powers as may be necessary to enable it to fulfill its function, to promote municipal planning, and to carry out the purposes of the State statutes empowering the Commission to act. Specifically, the Planning Commission shall have the following powers:
>
> A. *Comprehensive Plan*. To make, update and adopt a Comprehensive Plan for the physical development of the City. This may include any areas outside its boundaries that, in the Planning Commission's judgment, bear relation to the planning of the City. The Planning Commission may cooperate with other Planning Commissions and organizations in connection with planning for areas beyond the corporate limits of Oklahoma City.

6. Brief in Chief at p. 10.

7. In *Gregory v. Bd. of County Comm'nrs of Rogers County*, 1973 OK 101, 514 P.2d 667, the Court held that an appeal is not available from a zoning reclassification decision, because such decisions are legislative rather than quasi-judicial functions, and must be challenged by means of a request for injunction or mandamus. In 2004 the legislature enacted 11 O.S. § 43-109.1, which provides that any suit to challenge an action, decision, ruling, or order of a municipal governing body must be filed within 30 days from the challenged order. A similar provision is found at § 47-124, providing for judicial review of municipal actions "alleged to be arbitrary, unreasonable or capricious," by reason of which the action, "if enforced, will work an unnecessary hardship on or create substantial harm or loss to the complaining party."

8. Petitioners' Brief in Chief at p. 11.

9. In all other respects, the first amended petition and proposed second amended petition appear to be identical.

10. Prior to their motion to file a second amended petition, Petitioners filed a motion in limine to prevent the court from considering any of City's or Kilpatrick's evidence due to City's alleged involvement in "unprincipled and Machiavellian collusion" with Kilpatrick and its counsel because of the JDA concerning this litigation. The court denied the motion in limine, finding that City and Kilpatrick had a common interest in defending the validity of PUD-1630 and the rezoning ordinance. Petitioners have not challenged this order on appeal.

2020 OK CIV APP 22

REBECCA MADRID, Plaintiff/Appellant, vs. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant/Appellee.

Case No. 117,274. August 30, 2019

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE DON ANDREWS, TRIAL JUDGE

REVERSED

Rex Travis, Greg Milstead, Margaret Travis, Oklahoma City, Oklahoma, for Plaintiff/Appellant,

Bill Molinsky, MOLINSKY LAW FIRM, Edmond, Oklahoma, for Defendant/Appellee.

BRIAN JACK GOREE, CHIEF JUDGE:

¶1 In this action to recover uninsured motorist benefits, the trial court granted summary judgment in favor of the automobile insurer. It is undisputed that the claimant settled with the insured tortfeasor for less than the liability limits and executed a release of all claims. We hold that a settlement and release for less than the policy limits is not an absolute forfeiture or an unassailable bar to recovery under 36 O.S. Supp. 2004 §3636. The evidentiary materials show there is a genuine factual controversy concerning the value of the claim in this case. The summary judgment must be reversed.

¶2 Rebecca Madrid was injured in an accident allegedly caused by the negligence of Barbara Carlisle. Carlisle was operating a motor vehicle insured by USAA County Mutual Insurance Company. The USAA policy insured Carlisle against liability for bodily injury for up to $100,000. Madrid was an insured

under a policy issued by State Farm Mutual Automobile Insurance Company. The State Farm policy included uninsured motorist coverage as provided by 36 O.S. Supp. 2004 §3636 and the policy limit was $200,000.

¶3 In 2011, Madrid sued Carlisle for negligence in San Antonio where the accident occurred and her counsel began negotiating with USAA. State Farm opened an underinsured motorist claim and monitored the Texas action. In March 2015, State Farm wrote a letter to Madrid's counsel advising that it had not received any medical bills or treatment records. State Farm asked plaintiff's counsel to either confirm Madrid was not pursuing a UIM claim, or provide medical bills and records.

¶4 Madrid's attorney responded in April 2015 with a written demand for the UIM policy limits. The letter included a police report showing Madrid was rear-ended by Carlisle, an intoxicated driver. It referred to medical records indicating treatment for disk protrusions of the cervical and thoracic spine and medical bills totaling approximately $52,000. It discussed a surgical evaluation and a physician's opinion estimating future medical care would cost more than $400,000. The letter also stated:

> *The negligent party tendered $90,000.00 of their $100,000.00 policy to settle the third party case. The $90,000.00 was accepted because it would have been cost prohibitive to litigate for the full amount of the claim. The additional $10,000.00 that would have been obtained through litigation would be more than offset by litigation related costs and expenses; indeed, the cost of the two experts that were set to testify live at trial alone would have consumed this amount.*

Madrid executed a full release of all claims against Carlisle in August 2015.

¶5 Madrid sued State Farm in Oklahoma County in March 2018. She alleges she was rear-ended by a drunk driver in Texas, the other driver had $100,000 of liability coverage, she settled her case for $90,000, and her damages exceed that sum. She further alleges she is an insured under the State Farm policy and State Farm has failed to pay her the uninsured motorist benefits it owes her.

¶6 State Farm filed an answer denying it owes UIM benefits. It stated numerous affirmative defenses but we will confine our review to the issues presented to the trial court. The issues are: (1) whether State Farm is entitled to summary judgment on its defense that the amount of Madrid's claim does not exceed the tortfeasor's liability limits, and (2) whether State Farm is entitled to summary judgment on its defense that Madrid was not legally entitled to recover damages against the tortfeasor because she gave the tortfeasor a release of all claims.

¶7 Uninsured motorist insurance protects persons who sustain a bodily injury and are legally entitled to recover damages from owners or operators of motor vehicles that are uninsured. §3636(B). The term "uninsured motor vehicle" includes "an insured motor vehicle, the liability limits of which are less than the amount of the claim of the person or persons making such claim, regardless of the amount of coverage of either of the parties in relation to each other." §3636(C). If the liability limits of a motor vehicle are less than the amount of the injured insured's claim, that vehicle is classified as uninsured. *Burch v. Allstate Ins. Co.*, 1998 OK 129, ¶13, 977 P.2d 1057, 1064. The injured insured has the burden to demonstrate she meets the statutory conditions before she can recover uninsured motorist coverage. *Gates v. Eller,* 2001 OK 38, ¶12, 22 P.3d 1215, 1219; *Ply v. National Union Fire Ins. Co.*, 2003 OK 97, ¶8, 81 P.3d 643, 647.[1] Central to this appeal is Madrid's burden to demonstrate that the liability limit of the USAA policy is less than the amount of her claim.

¶8 State Farm filed a motion for summary judgment pursuant to Rule 13 of the Rules for District Courts of Oklahoma. "If it appears to the court that there is no substantial controversy as to the material facts and that one of the parties is entitled to judgment as a matter of law, the court shall render judgment for said party." Rule 13(e). An appellate court reviews a summary judgment *de novo* because it is a purely legal determination. *Carmichael v. Beller,* 1996 OK 48, ¶2, 914 P.2d 1051, 1053.

¶9 In its motion, State Farm demonstrated with evidentiary material the fact that Madrid settled her claims against Carlisle for less than Carlisle's $100,000 liability limit. It argues that acceptance of Carlisle's $90,000 settlement offer establishes that the value of Madrid's claim was less than the limit of liability of Carlisle's insurance policy thus precluding Madrid from recovering uninsured motorist benefits. State Farm relies on P*orter v. State Farm Mutual Automobile Ins. Co.*, 2010 OK CIV APP 8, 231 P.3d 691.

¶10 In *Porter v. State Farm*, a claimant accepted a settlement of $85,000 where the liability policy limit was $100,000. Division III of the Court of Civil Appeals decided that accepting less than the liability policy limit, and releasing the tortfeasor from further liability, established that the claim did not exceed the available liability coverage and therefore plaintiff could not prove the tortfeasor was underinsured. *Porter,* ¶9.

¶11 Madrid criticizes *Porter* as creating a permanent irrebuttable presumption that the value of the claim is below the tortfeasor's policy limit. She cites *Vlandis v. Kline,* 412 U.S. 441, 446, 93 S.Ct. 2230, 2233, 37 L.Ed.2d 63 (1973) for the proposition that permanent irrebuttable presumptions are disfavored under the Due Process Clauses of the U.S. Constitution. According to Madrid, the rule adopted in *Porter* unconstitutionally deprives an insured of the right to establish whether her damages exceed the liability limits of the tortfeasor.

¶12 The Supreme Court has never determined whether an insured who settles for less than the tortfeasor's policy limits automatically forfeits benefits under an uninsured motorist policy.[2] Our analysis begins with §3636(C) which necessitates figuring the amount of the claim of the person requesting UM benefits. The statute requires a comparison between the amount of the claim and the amount of the liability *coverage* – not the amount of a *settlement*.

¶13 We are persuaded that the value of a bodily injury claim might in some cases exceed the amount of a settlement. Madrid's release states she compromised a disputed claim. Her lawyer's letter indicates she strategically settled for less than the value of her claim to avoid substantial litigation expenses associated with a jury trial. *Porter v. State Farm* holds that the value of a claim for UIM purposes is established by the settlement and release when it is less than policy limits. There is no indication in *Porter* that the plaintiff submitted evidence demonstrating her loss exceeded the settlement as Madrid did in this case.

¶14 State Farm presented documentation showing a settlement and release for less than the policy limit. The burden then shifted to Madrid to tender evidentiary materials to justify a trial. *See, Oklahoma Dept. Of Securities v. Wilcox,* 2011 OK 82, ¶18, 267 P.3d 106, 111. The documents she attached to her responsive brief are reasonably supportive of her claim that she sustained actual losses exceeding $100,000.[3] There is a factual controversy in this case and it is a question for the trier of fact.

¶15 State Farm also sought summary judgment on grounds that Madrid became ineligible for UM benefits once she released the tortfeasor because she was no longer legally entitled to recover damages. Section 3636 provides that UM coverage is available only for insured persons who are "legally entitled to recover damages from owners or operators of uninsured motor vehicles . . ." The Supreme Court has considered this phrase on multiple occasions and has steadfastly held that it simply means that the insured must be able to establish fault on the part of the uninsured motorist. *Torres v. Kansas City Fire & Marine Ins.*, 1993 OK 32, ¶7, 849 P.2d 407, 410, citing *Barfield v. Barfield,* 1987 OK 72, 742 P.2d 1107; *Karlson v. City of Oklahoma City*,1985 OK 45, 711 P.2d 72; and *Uptegraft v. Home Insurance Company,* 1983 OK 41, 662 P.2d 681. Madrid has established that the intoxicated driver who rear-ended her was at fault. We hold Madrid was legally entitled to recover damages against an uninsured motorist within the meaning of §3636 and the fact that she ultimately released the tortfeasor is irrelevant to that issue.

¶16 In conclusion, we hold that the record demonstrates a genuine issue of fact on the material question of whether the liability limit of the tortfeasor's motor vehicle is less than the amount of Madrid's claim. The undisputed fact that Madrid settled and released her claim for less than the liability limit is relevant evidence but not an absolute forfeiture or an unassailable bar to her recovery under §3636. The summary judgment is REVERSED.

JOPLIN, P.J., concurs.

BUETTNER, J., dissents.

¶1 I would follow *Porter v. State Farm Mutual Automobile Ins. Co.*, 2010 OK CIV APP 8, 231 P.3d 691 (cert. denied).

BRIAN JACK GOREE, CHIEF JUDGE:

1. Title 36 O.S. §3636 "mandates UM coverage where: 1) the injured person is an insured under the UM provisions of a policy; 2) the injury to the insured has been caused by an accident; 3) the injury to the insured has arisen out of the 'ownership, maintenance or use' of a motor vehicle; and 4) the injured insured is 'legally entitled to recover damages from the owner or operator of the uninsured motor vehicle.' These four elements of an UM claim are determined from the facts and circumstances of each claim." *Ply v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pennsylvania*, 2003 OK 97, ¶8, 81 P.3d 643, 647.

2. In *Sexton v. Continental Casualty,* 1991 OK 84, ¶9, 816 P.2d 1135, 1136, the Supreme Court declined to resolve the question of whether there can be UM coverage once the insured settled for less than the liability policy limits.

3. We have held that a valid claim must be reasonably supported by evidence of the actual losses sustained. *Lamfu v. Guideone Ins. Co.*, 2006 OK CIV APP 19, ¶22, 131 P.3d 712, 716.

2020 OK CIV APP 23

IN RE A.S., A.S., and J.S., Jr., minor children: STATE OF OKLAHOMA, ex rel DEPARTMENT OF HUMAN SERVICES, Petitioner/Appellee, vs. AMBER SMITH and MARC SMITH, Respondents/Appellants, and JAROD SMITH, Respondent/Appellee.

Case No. 117,326; Comp. w/117,459
June 20, 2019

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE SUSAN K. JOHNSON, JUDGE

AFFIRMED

Robert Ravitz, OKLAHOMA COUNTY PUBLIC DEFENDER, Sean Chesley, ASSISTANT PUBLIC DEFENDER, Oklahoma City, Oklahoma, for minor children,

David W. Prater, OKLAHOMA COUNTY DISTRICT ATTORNEY, Nonie Hawkins, ASSISTANT DISTRICT ATTORNEY, Oklahoma City, Oklahoma, for State of Oklahoma,

David J. Batton, Norman, Oklahoma, for Respondent/Appellant Amber Smith,

R. Kevin Butler, DENKER & BUTLER, PLLC, Oklahoma City, Oklahoma, for Respondent/Appellant Marc Smith,

Roe T. Simmons, Nicholas E. Thurman, SMITH SIMMONS, PLLC, Oklahoma City, Oklahoma, for Respondent/Appellee Jarod Smith,

Kenneth L. Buettner, Judge:

¶1 Amber Smith (Mother) appeals from an order granting a Motion to Deny Genetic Testing and Adjudicate Jarod Smith (Jarod) to be the Father of the minor child (J.S.). In the appealed order, the trial court determined that it was in the best interests of the child that the presumed father, Jarod, be adjudicated the legal father of J.S., and that any motions for genetic testing to determine paternity should be denied. Mother and Marc (Marc) Smith – the alleged biological father of J.S. – appeal, arguing that the court improperly granted the motion to deny any motions for genetic testing where no such motion for genetic testing was then before the court. Mother and Marc also argue that the trial court erred by not appointing a Guardian Ad Litem to J.S. We hold that the trial court did not err and affirm.

¶2 Mother and Jarod were married January 6, 2007. Two minor children were born to the marriage whose paternity is not challenged in this action. In 2015, Mother and Jarod separated. Mother filed for a protective order against Jarod April 14, 2015. *Smith v. Smith,* No. PO-2015-00070 (Pottawatomie Cty., Okla. dismissed September 10, 2015). During her separation from Jarod, Mother entered into a relationship with Marc and became pregnant with J.S. Later in 2015, however, Mother and Jarod reconciled. On September 10, 2015, Mother dismissed the protective order against Jarod, and filed for a protective order against Marc. *Smith v. Smith,* No. PO-2015-2109 (Okla. Cty., Okla. vacated July 23, 2018). In reconciling with Mother, Jarod recognized Marc as the biological father of J.S., but still chose to raise J.S. as his own child. J.S. was born November 29, 2015, and Jarod was present for the birth.

¶3 In March 2017, sixteen months after J.S.'s birth, Mother and Jarod again separated, at which point Mother removed herself and the three minor children from the marital home. Mother filed for a protective order against Jarod March 13, 2017. *Smith v. Smith*, No. PO-2017-442 (Okla. Cty., Okla. protective order issued April 20, 2017). Eight days later, on March 21, 2017, Mother filed a motion to vacate the protective order against Marc.[1] Three days after that, Mother filed a Petition for Dissolution of Marriage and Application for Temporary Orders in which she requested genetic testing to determine the paternity of J.S. *Smith v. Smith*, No. FD-2017-980 (Okla. Cty., Okla. filed March 24, 2017). On the same day she filed for divorce, Mother also filed a paternity proceeding, naming Marc as the defendant. *Smith v. Smith,* No. FP-2017-304 (Okla. Cty., Okla. filed March 24, 2017).

¶4 On May 12, 2017, the Department of Human Services (DHS) sought and was granted emergency custody of Mother's three minor children. *In re A.S., A.S., & J.S.*, No. JD-2017-136 (Okla. Cty., Okla. filed May 12, 2017). DHS filed a petition alleging the children to be deprived May 31, 2017. The petition stated that the two school-aged children had not attended school in more than twenty days, that Mother had brainwashed the two older children, that Mother had fabricated allegations of sexual abuse by Jarod, that Mother had falsely alleged that the older children suffered from various mental

deficiencies and disorders, and that Mother was unfit due to her own mental health issues. The petition also alleged that Jarod was unfit as a parent because of the allegations of domestic abuse against him. The petition stated that Marc was unfit as a parent to J.S. because he had not contributed to J.S.'s upbringing.

¶5 On July 18, 2017, Mother stipulated to the deprived petition and adopted an Individualized Service Plan (ISP) recommended by the court, which included Abuse-Mental Injury as one of the goals. Jarod also stipulated to the petition and adopted an ISP that mandated he participate in Compassionate Parenting classes. Summons and notice regarding the deprived child proceedings was mailed to Marc July 24, 2017, but was returned unclaimed August 22, 2017.[2] Marc did not enter an appearance in the deprived child proceedings. DHS spoke with Marc October 9, 2018, at which time Marc stated that he was unsure whether he wanted to participate in the deprived child proceedings. Marc did not attend subsequent hearings in the deprived child matter.

¶6 On May 14, 2018, as part of the deprived child proceedings, counsel for J.S. filed a Motion to Deny Genetic Testing and Adjudicate Jarod Smith to be the Father of J.S. Jarod filed a brief in support of child's motion June 5, 2018. Jarod also submitted an affidavit signed by Marc. The affidavit stated that Marc was fully aware of the paternity proceedings, that he supported Jarod's motion to deny genetic testing, that it was in J.S.'s best interest that Jarod be adjudicated J.S.'s father, and that Marc understood the affidavit's effect on his rights as a parent. Mother responded to Jarod's brief in support of child's motion to deny genetic testing June 14, 2018, and opposed the motion and Jarod's brief in support.

¶7 A hearing on child J.S.'s motion to deny genetic testing and adjudicate Jarod as the father was held July 3, 2018.[3] At the hearing, Marc alleged that he had signed the affidavit in support of the motion to deny genetic testing while he was under duress because he felt pressured by Jarod's attorney, and that he had not actually read the affidavit. Marc agreed, however, that he picked the location at which he and Jarod's counsel met in order for Marc to sign the affidavit. Marc further testified that he never contacted Jarod to say Marc wanted nothing to do with J.S. Audio evidence presented by Jarod, however, controverted Marc's testimony and revealed that Marc had, in fact, called Jarod to apologize and indicate his disinterest in being a father to J.S.

¶8 After hearing testimony from Mother, Jarod, Marc, and other witnesses, the trial court entered its order July 31, 2018. The trial court ruled that because Jarod is the presumed father of J.S., and because the requirements listed in 10 O.S. § 7700-608 were satisfied in this case, any future motions for genetic testing to determine the paternity of J.S. should be denied and Jarod should be adjudicated to be the father of J.S.

¶9 Mother and Marc appeal from the trial court's order granting child J.S.'s motion to deny genetic testing and adjudicate Jarod as the father. On appeal, Mother and Marc assert that the trial court erred by (1) ruling on the motion to deny genetic testing when no motion for genetic testing had been brought before the court, (2) failing to appoint a Guardian Ad Litem on behalf of J.S., and (3) ruling that it was in the best interest of the child to adjudicate Jarod as the father of J.S. The first and second issues on appeal require the "construction and application of . . . statutes to the undisputed facts," which presents questions of law that we review *de novo*. *Bates v. Copeland*, 2015 OK CIV APP 30, ¶ 10, 347 P.3d 318. We review the court's ruling regarding the best interests of the child for abuse of discretion. *Dunham v. Dunham*, 1989 OK CIV APP 44, 777 P.2d 403.

¶10 Oklahoma has adopted the Uniform Parentage Act (UPA). 10 O.S. § 7700-101. According to the UPA, in a paternity action in which the child has a presumed or acknowledged father, a court shall deny a motion seeking genetic testing if (1) the conduct of the mother or the presumed/acknowledged father estops them from denying parentage, or (2) it would not be in the best interests of the child to disprove the paternity of the presumed/acknowledged father. *Id.* § 7700-608. Subsection 608(B) provides a list of factors to be considered in determining the child's best interests. *Id.*

¶11 Here, the parties do not dispute that Jarod is the presumed father of J.S. according to 10 O.S. 2011 § 7700-204, because Jarod and Mother were legally married when J.S. was born. Mother and Marc instead contend that the trial court erred in granting the child's motion to deny genetic testing because no motion for genetic testing had been made in the paternity action. The record indicates otherwise.

¶12 In her Petition to Establish Paternity, Mother requested that the trial court "order the

putative father, Marc Smith, to genetic testing in order to determine parentage of this child." On appeal, Mother argues the request in her petition did not amount to a request for "an order for genetic testing of the mother, the child, and the presumed or acknowledged father," as referenced by the statute, because she only specifically requested testing of Marc. *Id.* § 7700-608. This argument is nonsensical. Because Mother requested genetic testing of Marc in order to establish his paternity of J.S., genetic testing of the child would also be necessary in order to confirm genetic similarity. As such, we hold that Mother's request for genetic testing in her petition falls within the category of motions which can be denied according to the standards in Subsection 608.

¶13 We similarly reject Mother's argument that the trial court was required to appoint a Guardian Ad Litem (GAL) for J.S. Subsection 7700-608(C) states that a GAL shall be appointed in a proceeding to disprove that paternity of a presumed/acknowledged father when the child is over two years of age. *Id.* § 7700-608(C). Where the child is under two years old, however, the court's appointment of a GAL is discretionary. *Id.* Here, child J.S. was approximately 16 months old at the time Mother filed for divorce and paternity proceedings. As such, it was within the trial court's discretion to appoint a GAL for J.S. in the paternity proceeding. There is nothing in the record to suggest an abuse of discretion in the trial court's determination not to appoint a GAL, and we therefore hold that the trial court did not err by not appointing a GAL in this matter.[4]

¶14 Lastly, Mother and Marc argue that the trial court abused its discretion by ruling that it was in the best interests of the child, J.S., that Mother's request for genetic testing be denied and that Jarod be adjudicated the father of J.S. We disagree. Subsection 7700-608(B) of the UPA lists nine factors to be considered in determining the best interest of the child in ruling on a motion seeking genetic testing in a paternity action where there is a presumed or acknowledged father:

> 1. The length of time between the proceeding to adjudicate parentage and the time that the presumed or acknowledged father was placed on notice that he might not be the genetic father;
>
> 2. The length of time during which the presumed or acknowledged father has assumed the role of father of the child;
>
> 3. The facts surrounding the presumed or acknowledged father's discovery of his possible nonpaternity;
>
> 4. The nature of the relationship between the child and the presumed or acknowledged father;
>
> 5. The age of the child;
>
> 6. The harm that may result to the child if presumed or acknowledged paternity is successfully disproved;
>
> 7. The nature of the relationship between the child and any alleged father;
>
> 8. The extent to which the passage of time reduces the chances of establishing the paternity of another man and a child-support obligation in favor of the child; and
>
> 9. Other factors that may affect the equities arising from the disruption of the father-child relationship between the child and the presumed or acknowledged father or the chance of other harm to the child.

10 O.S. Supp. 2014 § 7700-608(B).

¶15 In its July 31, 2018 order, the trial court explained at length its application of the § 7700-608(B) factors. First, the court considered that the presumed father, Jarod, had been on notice that he was not the biological father from the time he and Mother reconciled – *i.e.*, for the duration of J.S.'s life (16 months when Mother filed for paternity, and nearly three years at the time of the trial court's order). Second, the court acknowledged that Jarod had taken on the role of J.S.'s father for the duration of the child's life. Third, the court stated that Jarod knew of the child's biological paternity since before the child was born. Fourth, the trial court particularly emphasized the strength of the relationship between Jarod and J.S., noting that Marc had not participated in the proceedings prior to the July 31, 2018 hearing and had filed an affidavit agreeing that Jarod should be adjudicated J.S.'s father. On the other hand, the court noted that Jarod had been following his court ordered ISP in order to reunite with J.S. and his siblings. Fifth, the court noted J.S.'s age at the time of the court order, 2.6 years old. Sixth, the court noted that J.S. could be traumatized by the disproving of

Jarod as J.S.'s father, where Jarod is the only father the child had ever known and Marc had previously failed to demonstrate an interest in being a father to J.S. Seventh, the court again noted the nonexistence of a relationship between Marc and J.S., and the fact that Marc had largely failed to participate in the paternity proceedings. The court did not deem the eighth factor largely important. Ninth, the court determined that, overall, the equities were in favor of the adjudication of Jarod as J.S.'s father.

¶16 In determining the best interests of the child, the trial court examined the facts and applied the relevant statutory factors. We give deference to the trial court's determination and will not disturb the ruling unless it is found to be against the clear weight of the evidence or an abuse of discretion. We hold that the trial court's determination that it was in J.S.'s best interests that Mother's request for genetic testing be denied and Jarod be adjudicated J.S.'s father was not against the weight of the evidence or an abuse of discretion. Further, we hold that Mother's request for genetic testing was properly before the court such that the court did not err in ruling upon J.S.'s motion to deny genetic testing, and that the court did not err by not appointing a GAL to J.S. in this matter. Accordingly, we affirm.

¶17 AFFIRMED.

Kenneth L. Buettner, Judge:

1. The protective order against Marc was vacated July 23, 2018.

2. Marc was successfully served with the Petition to Establish Paternity September 27, 2017. The paternity proceedings were stayed via court minute October 5, 2017, in deference to the deprived child proceedings. On July 13, 2018, Marc filed an answer and counter petition in the paternity action, in which he requested sole custody of J.S.

3. During the July 3, 2018 hearing, the trial court ruled that it had jurisdiction over both the deprived child matter and the paternity action. The actions were properly joined according to 10 O.S. Supp. 2014 § 7700-610.

4. At the July 3, 2018 hearing the trial court initially ordered that child J.S.'s counsel should be appointed as the child's GAL, but then retracted its initial ruling and took the matter under further advisement. In its July 31, 2018 order, the trial court held it was not required by statute to appoint a GAL because the child was under two years of age when the action was filed.

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Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS
Thursday, June 11, 2020

F-2019-237 — Appellant Garret Don Wilson was tried by jury for the crime of Lewd Molestation in Oklahoma County District Court Case No. CF-2016-8341. In accordance with the jury's recommendation the trial court sentenced Appellant to 14 years imprisonment. From this judgment and sentence Garret Don Wilson has perfected his appeal. AFFIRMED. Opinion by: Kuehn, V.P.J.: Lewis, P.J.: concur; Lumpkin, J.: concur; Hudson, J.: concur; Rowland, J.: concur.

F-2019-214 — Derek Michael Funk, Appellant, was tried by jury for the crime of Aggravated Possession of Child Pornography (Count 1) and Pornography – Procure/Produce/Distribute/Possess Juvenile Pornography (Count 2) in Case No. CF-2018-134 in the District Court of Wagoner County. The jury returned verdicts of guilty and set as punishment twenty years imprisonment and a $10,000.00 fine on Count 1 and five years imprisonment and a $10,000.00 fine on Count 2. The trial court sentenced accordingly and ordered the sentences to run concurrently. From this judgment and sentence Derek Michael Funk has perfected his appeal. AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs in results; Hudson, J., concurs.

S-2019-532 — Brian Dominic Flores is charged in Okmulgee County District Court Case No. CF-2018-318 with Trafficking in Methamphetamine and several misdemeanors. After preliminary hearing, Flores filed a motion to suppress evidence, and the Honorable Kenneth E. Adair granted Flores's motion. Appellant, the State of Oklahoma, has perfected its appeal of that ruling. The order of the District Court of Okmulgee County to suppress the evidence is VACATED, and the case is REMANDED. Opinion by: Kuehn, V.P.J.: Lewis, P.J.: concur; Lumpkin, J.: concur; Hudson, J.: concur; Rowland, J.: concur.

F-2019-122 — Appellant Dillon Garrett Bell was tried in a bench trial and convicted of Assault with a Dangerous Weapon in the District Court of Oklahoma County, Case No. CF-2017-6897. The Honorable Timothy R. Henderson sentenced Appellant to 10 years imprisonment, all but the first two years suspended, with credit for time served. Dillon Garrett Bell has perfected his appeal. AFFIRMED. Opinion by: Kuehn, V.P.J.: Lewis, P.J.: concur; Lumpkin, J.: concur; Hudson, J.: concur; Rowland, J.: concur.

Thursday, June 18, 2020

RE-2019-232 — Jennifer Ellen Daniel, Appellant, appeals from the revocation in full of her twenty year suspended sentence in Case No. CF-2015-269 in the District Court of Muskogee County, by the Honorable Robin Adair, Special Judge. AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs in Results; Rowland, J., Concurs.

S-2019-242 — Appellee, Wesley Warren Peritt Weaver, II, was charged with Sexual Abuse – Child Under 12, in the District Court of Craig County, Case No. CF-2017-4. Weaver was bound over at preliminary hearing. Appellant, the State of Oklahoma, filed a Notice to Introduce Evidence of Defendant's Other Sexual Assault Offense(s) and/or Other Child Molestation Offense(s). Weaver filed a written objection to the State's notice and at a motion hearing held that same day, the Honorable Shawn S. Taylor, District Judge, heard evidence and argument on the State's motion to admit sexual propensity evidence and took the matter under advisement. After the motion hearing resumed, Judge Taylor denied the State's request and the State announced its intent to appeal. The ruling of the trial court denying Appellant's motion to introduce sexual propensity evidence in this case is AFFIRMED and this case is REMANDED to the trial court for further proceedings not inconsistent with this opinion. Opinion by: Hudson, J., J.; Lewis, P.J., Concurs in Results; Kuehn, V.P.J., Concurs in Results; Lumpkin, J., Specially Concurs; Rowland, J., Specially Concurs.

C-2019-358 — Howard Clay Timken, Jr., Petitioner, entered blind guilty pleas to the follow-

ing charges, in the District Court of Stephens County, before the Honorable Ken Graham, District Judge:

CF-2017-151 – Count 1: Distribution of Controlled Dangerous Substance (Methamphetamine), After Former Conviction of Two or More Felonies; and Count 2: Distribution of Controlled Dangerous Substance (Methamphetamine), After Former Conviction of Two or More Felonies.

CF-2017-158 – Count 1: Trafficking in Illegal Drugs (Methamphetamine), After Former Conviction of Two or More Felonies; Count 2: Possession of Controlled Dangerous Substance with Intent to Distribute, After Former Conviction of Two or More Felonies; Count 3: Possession of a Firearm After Felony Conviction, After Former Conviction of a Felony; Count 4: Attempting to Elude Police Officer, a misdemeanor; and Count 5: Driving with License Suspended, a misdemeanor.

CF-2018-62 – Count 1: Trafficking in Illegal Drugs (Methamphetamine), After Former Conviction of Two or More Felonies; Count 2: Possession of Controlled Dangerous Substance with Intent to Distribute, After Former Conviction of Two or More Felonies; Count 3: Possession of a Firearm After Felony Conviction, After Former Conviction of Two Felonies; Count 4: Possession of Firearm During the Commission of a Felony, After Former Conviction of Two or More Felonies; Count 5: Possession of Proceeds from Drug Activity, After Former Conviction of Two or More Felonies, Count 7: Eluding Police Officer, a misdemeanor; Count 8: Unlawful Possession of Drug Paraphernalia, a misdemeanor; and Count 9: Driving with License Suspended, a misdemeanor.

CF-2018-86 – Count 1: Trafficking in Illegal Drugs (Methamphetamine), After Former Conviction of Two or More Felonies; Count 2: Trafficking in Illegal Drugs (Heroin), After Former Conviction of Two or More Felonies; and Count 3: Conspiracy to Distribute CDS.

Judge Graham accepted Timken's pleas and passed sentencing pending the completion and filing of a presentence investigation report. After a hearing, Judge Graham sentenced Timken as follows:

CF-2017-151 – Twenty-five years imprisonment and a $2,500.00 fine on Counts 1 and 2 to be served concurrently each to the other. Judge Graham further imposed various costs and fees.

CF-2017-158 – Life imprisonment and a $25,000.00 fine on Count 1; twenty-five years and a $2,500.00 fine on Count 2; life imprisonment and a $1,000.00 fine on Count 3; and one year in the county jail and a $100.00 fine on Counts 4 and 5 each. Sentences for all five counts were ordered to run concurrent each to the other and concurrent with the sentences imposed in Stephens County District Court Case No. CF-2017-151, but consecutively to Case No. CF-2018-62. The court granted Timken credit for time served. Judge Graham further imposed various costs and fees.

CF-2018-62 – Life imprisonment and a $25,000.00 fine on Count 1; twenty-five years imprisonment and a $1,000.00 fine on Count 2; life imprisonment and a $1,000.00 fine on Count 4; twenty-five years and a $1,000.00 fine on Count 5; one year in the county jail and a $250.00 fine on Count 7; one year in the county jail and a $500.00 fine on Count 8; and one year in the county jail and a $100.00 fine on Count 9. Sentences for all seven counts were ordered to run concurrent each to the other and consecutively to the sentences in Case Nos. CF-2017-151 and CF-2017-158. The court granted Timken credit for time served. Judge Graham further imposed various costs and fees.

CF-2018-86 – Life imprisonment and a $25,000.00 fine on Count 1; life imprisonment and a $25,000.00 fine on Count 2; and twenty-five years imprisonment and a $2,500.00 fine on Count 3. Sentences for all three counts were ordered to run concurrent each to the other and concurrent with the sentences imposed in Case No. CF-2018-62, but consecutively to Case Nos. CF-2017-151 and CF-2017-158. The court granted Timken credit for time served. Judge Graham further imposed various costs and fees.

Timken filed a motion to withdraw his blind pleas in all four cases. After a hearing was held before Judge Graham the Petitioner's motion to withdraw pleas was DENIED. Timken now seeks a writ of certiorari. The Petition for Writ of Certiorari is DENIED. The Judgments and Sentences of the District Court are AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs; Rowland, J., Concurs.

PCD-2017-806 — Ronnie Eugene Fuston, Appellant, was tried by jury for the crime of Count One First Degree Malice Murder and Count Two Possession of a Firearm in Case No. CF-2013-438 in the District Court of Oklahoma County. The jury returned a verdict of guilty and recommended as punishment Count One

Death and Count Two ten years to run concurring. The trial court sentenced accordingly. From this judgment and sentence Ronnie Eugene Fuston has perfected his appeal. Application for Post-Conviction Relief and Motions for Evidentiary Hearing and Discovery are DENIED and MANDATE is ORDERED. Opinion by: Lumpkin, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur in Results; Hudson, J., Concur; Rowland, J., Recuse; Darby, J., Concur.

F-2019-294 — Dacuries Daguion Hunt, Appellant, was tried by jury for the crime of two Counts of Lewd Molestation in Case No. CF-2017-5733 in the District Court of Tulsa County. The jury returned verdicts of guilty and recommended as punishment twenty-five years imprisonment on each count. The trial court sentenced accordingly. Judge Mussman ordered the sentences to be served consecutively, with Count 1 and the first five years of Count 2 served in prison and the remaining twenty years of Count 2 suspended. From this judgment and sentence Dacuries Daguion Hunt has perfected his appeal. AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs in results; Kuehn, V.P.J., concurs; Lumpkin, J., concurs in results; Hudson, J., concurs.

F-2018-1270 — Dustin Robert Lee Sinner, Appellant, was tried by jury for the crime of First Degree Robbery, After Former Conviction of a Felony in Case No. CF-2017-23 in the District Court of Choctaw County. The jury returned a verdict of guilty and set as punishment twenty years imprisonment. The trial court sentenced accordingly. From this judgment and sentence Dustin Robert Lee Sinner has perfected his appeal. AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs in results; Kuehn, V.P.J., dissents; Lumpkin, J., concurs; Hudson, J., concurs.

Thursday, June 25, 2020

C-2019-15 — Nicholas Allen Daniel, Petitioner, was charged in Case No. CF-2017-6968, in the District Court of Oklahoma County, with Count 1: First Degree Felony Murder (Distribution of a Controlled Dangerous Substance); and Count 2: Robbery with a Firearm. Daniel entered a blind plea of guilty to the charges, before the Honorable Bill Graves, District Judge. The trial court accepted Daniel's plea and deferred sentencing. After a hearing Judge Graves sentenced Daniel to life imprisonment for each count. The court suspended the Count 2 life sentence, ordered the sentences be served concurrently and granted credit for time served. Judge Graves further imposed various costs and fees. Daniel then filed a timely application to withdraw his guilty plea. A hearing on Daniel's motion was held and Judge Graves denied Daniel's motion to withdraw his plea. Daniel now seeks a Writ of Certiorari. The Petition for Writ of Certiorari is GRANTED. Petitioner's Count 1 Judgment is MODIFIED to reflect a conviction for First Degree Felony Murder (Robbery with a Firearm). Petitioner's Count 2 conviction for Robbery with a Firearm is REVERSED WITH INSTRUCTIONS TO DISMISS. Petitioner's Judgement and Sentence on Count 1 is AFFIRMED as MODIFIED. Opinion by: Hudson, J.; Lewis, P.J., Concurs in Results; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs in Part/Dissents in Part; Rowland, J., Concurs in Results.

F-2019-14 — Frederick Durell Green, Appellant, was tried by jury for the crime of Murder in the First Degree (Count 1), Possession of a Firearm After Former Conviction of a Felony (Count 2), and Child Neglect (Count 3), in Case No. CF-2017-1012 in the District Court of Tulsa County. The jury returned verdicts of guilty and set as punishment life imprisonment and a $10,000.00 fine on Count 1, ten years imprisonment on Count 2, and life imprisonment on Count 3. The trial court sentenced accordingly and ordered the sentence on Count 3 to run consecutively to Count 1, and ordered Count 2 to run concurrently with Count 3. From this judgment and sentence Frederick Durell Green has perfected his appeal. AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs in results; Lumpkin, J., specially concurs; Hudson, J., concurs.

COURT OF CIVIL APPEALS
(Division No. 1)
Wednesday, June 10, 2020

118,644 — Bobby G. Warden, an individual, Plaintiff/Appellant, v. The City of Grove, Oklahoma an Oklahoma Municipal Corporation, Defendant/Appellee. Appeal from the District Court of Delaware County, Oklahoma. Honorable Barry Denney, Trial Judge. Bobby G. Warden, Plaintiff/Appellant, appeals an order granting the motion to dismiss the City of Grove, Defendant/Appellee. Plaintiff argues it was error for the court to grant the motion without permitting him the opportunity to conduct discovery to establish a defense. There is nothing in the record that indicated Warden requested, or that the court denied, an opportunity to

conduct discovery. AFFIRMED. Opinion by Goree, J.; Bell, P.J., and Buettner, J., concur.

Thursday, June 11, 2020

117,713 — Danette Mackey, Plaintiff/Appellant, v. Okmulgee County Family Resources Center, Inc., Defendant/Appellee. Appearl from the District Court of Okmulgee County, Oklahoma. Honorable Ken Adair, Judge. Plaintiff/Appellant Danette Mackey (Mackey) instigated a claim for unpaid overtime wages under the Oklahoma Protection of Labor Act against her former employer, Defendant/Appellee Okmulgee County Family Resource Center, Inc. (Center). The trial court granted summary judgment to Center. The court then granted Center's motion for attorney fees and costs, which Mackey appeals. Because the trial court did not abuse its discretion in granting an award of attorney's fees and costs to Center, we affirm. Opinion by Buettner, J.; Bell, P.J., and Goree, J., concur.

117,719 — Roni Ann Curry, R.N., Appellant, v. State of Oklahoma, ex rel Oklahoma Board of Nursing, Appellee. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Patricia G. Parrish, Judge. Appellant Roni Curry (Curry) appeals the district court's affirmation of an order by the Oklahoma Board of Nursing (Board) revoking Curry's nursing license and imposing penalties (the Order). The professional disciplinary proceedings against Curry related to Curry's treatment of a patient that died while in Curry's care on the night of December 16-17, 2013. Curry appealed the Board's Order to the district court on the grounds that the Board improperly admitted security video footage of the night in question. Curry also asserted that the Board failed to require expert medical testimony of her misconduct, improperly altered its oral order, and curtailed Curry's witnesses' testimony. The trial court affirmed the Board's Order. Curry appeals. Because the Board's Order was supported by competent substantial evidence and is not otherwise clearly erroneous, we affirm the Board's Order. Opinion by Buettner, J.; Bell, P.J., and Goree, J., concur.

Monday, June 15, 2020

118,455 — In The Matter Of The Estate Of Billy Pat Eberhart, Deceased. David Shawn Fritz, Petitioner/Appellant, v. Estate Of Billy Pat Eberhart, Respondent/Appellee. Appeal from the District Court of Love County, Oklahoma. Honorable Wallace Coppedge, Trial Judge. This is an interlocutory appeal, appealable by right, from a probate court order. Respondent/Appellee, Michael Eberhart, Personal Representative of the Estate of Billy Pat Eberhart (Decedent), deceased, filed a motion to sell certain real property of the intestate estate. Petitoner/Appellant, David Shawn Fritz, *pro se*, filed a motion to stay and objected to the sale of the real property. Appellant is not Decedent's heir, nor is Appellant a creditor of the estate. Instead, Appellant is a judgment debtor of the estate. In *Fritz v. Eberhart*, Case No. CV-2013-09, in the District Court of Love County, Appellant sued Decedent, then living, in a dispute over a portion of the real property at issue in the probate. Decedent was awarded judgment and prevailing party attorney fees in the amount of $6,133.65 against Appellant. Appellant appealed the judgment against him in Appellate Case No. 115,445. This appeal is pending in the Court of Civil Appeals, Tulsa Division. We hold Appellant has no standing to stay or object to the sale of the estate's real property and affirm the probate court's order. AFFIRMED. Opinion by Bell, P.J.; Buettner, J., and Goree, J., concur.

Tuesday, June 16, 2020

118,154 — Jeffery R. Litty, individually and in his capacity as General Partner in J&J Midstream Energy Construction Services, an Oklahoma Partnership, Plaintiff/Appellant, v. DCP Midstream, LP, a Foreign Limited Partnership; and Brady Lopp, individually and in his capacity as an Employee of DCP Midstream, LP, Defendants/Appellees, -and- Jeffrey J. Bowen, individually and in his capacity as General Partner in J&J Midstream Energy Construction Services, an Oklahoma Partnership; and Bowen Field Service, LLC, an Oklahoma Limited Liability Company, Defendants. Appeal from the District Court of McClain County, Oklahoma. Honorable Leah Edwards, Trial Judge. Plaintiff/Appellant, Jeffery R. Litty, appeals an order dismissing claims against Defendant/Appellee, Brady Lopp for defamation and dismissing Defendant/Appellee, DCP Midstream, L.P. based on a forum selection clause. It was error to dismiss the defamation claim without permitting the opportunity to amend the pleading pursuant to 12 O.S. §2015(G). It was error to grant a motion to dismiss pursuant to 12 O.S. §2012(B)(6) based on a contract that was neither attached to the petition nor integral to the claims alleged without requiring the parties to comply with the procedures for summary

judgment pursuant to Rule 13 of the Rules for District Courts of Oklahoma. REVERSED. Opinion by Goree, J.; Bell, P.J., and Buettner, J., concur.

Wednesday, June 17, 2020

117,382 — Alpha Concrete Products, LLC, Plaintiff/Appellant, v. CF Alexander & Associates, LLC, Defendant/Appellee. Appeal from the District Court of Oklahoma County, Oklahoma, Honorable Don Andrews, Trial Judge. Plaintiff/Appellant, Alpha Concrete Products, LLC, appeals from the trial court's order staying Plaintiff's declaratory judgment action and compelling arbitration for Plaintiff's contract dispute with Defendant/Appellee, CF Alexander & Associates, LLC. Plaintiff contracted with defendant, a business broker, to market Plaintiff's business. The contract provided (1) any controversy between the parties be submitted to binding arbitration and (2) a commission was due Defendant if Plaintiff withdrew the business from the market. About two months later, Plaintiff requested the listing be withdrawn. Defendant then initiated arbitration proceedings to collect the commission and Plaintiff sought declaratory relief. The district court stayed Plaintiff's action and ordered the parties to submit to arbitration. We hold: the inclusion in the contract of a venue provision did not create any ambiguity; Plaintiff's allegations concerning contract validity as a whole are to be submitted to arbitration; and 18 O.S. Supp. 2017 §2055.3 validates Defendant's status as a reinstated limited liability company capable of seeking arbitration, notwithstanding such status was cancelled at the time the contract was signed. AFFIRMED. Opinion by Bell, P.J.; Buettner, J., concurs, and Goree, J., concurs in result.

(Division No. 2)
Tuesday, June 9, 2020

117,768 — Phillip Shadid, Plaintiff/Appellant, vs. Jason Lashley, M.D., and Integris Canadian Valley Hospital, Defendants/Appellees. Appeal from Order of the District Court of Canadian County, Hon. Paul Hesse, Trial Judge. Plaintiff Phillip Shadid appeals from the district court's orders dismissing his medical negligence case against Jason Lashley, M.D., and Integris Canadian Valley Hospital. The district court dismissed the case because Shadid failed to serve the defendants within one hundred and eighty days as required by 12 O.S. Supp. 2014 § 2004(I), and because he failed to show good cause why that service was not made. The district court did not abuse its discretion in dismissing Shadid's petition, and the appealed judgments are affirmed. AFFIRMED. Barnes, P. J., and Rapp, J., concur.

Wednesday, June 17, 2020

117,023 — Rose Mary McMahan Heatly, Rose Mary Knorr, and Ralph Heatly, Plaintiffs/Appellees, v. Robert Heatly, Defendant/Appellant. Appeal from Order of the District Court of Harmon County, Hon. Richard B. Darby, Trial Judge. Appellant Robert Heatly appeals the district court's order finding that he unduly influenced his mother, Rose Mary Heatly, to transfer real property to him, that he improperly transferred funds from a joint account with his mother, and denying his claim of entitlement to certain insurance proceeds paid to Rose Mary Heatly's estate. We find that the district court properly applied the presumption of undue influence and find no abuse of discretion in the district court's determination that Robert unduly influenced his mother. However, we find the district court's determination that Robert improperly transferred funds from a joint account with Rose Mary Heatly to be against the weight of the evidence. The district court's judgment is affirmed in all aspects except the judgment in favor of Rose Mary Heatly's estate in the amount of $5,500 for one-half of the balance of funds in the farm account. That aspect of the judgment is reversed. Likewise, we find no abuse of discretion in the district court's denial of Robert's motion to vacate and affirm the order denying that motion. The award of attorney fees to Rose Mary Heatly's estate is also affirmed. However, the amount of the attorney fee awarded is vacated and that matter is remanded to the district court for a hearing to determine the reasonable amount of expenses and attorney fees to be awarded Rose Mary Heatly's estate. AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division II, by Fischer J.; Barnes, P.J., and Rapp, J., concur.

Friday, June 19, 2020

118,108 — In re D.P., Jr., M.P., and E.P., adjudicated deprived children: Marguerite Pollock, Appellant, v. State of Oklahoma, Appellee. Appeal from Order of the District Court of Oklahoma County, Hon. Susan K. Johnson, Trial Judge. Marguerite Pollock (Mother) appeals the district court's order terminating her paren-

tal rights after jury trial. We find that the State met its burden of proof. The record reveals clear and convincing evidence that Mother failed to correct the conditions of threat of harm, substance abuse, and lack of proper parental care and guardianship. We further find that the State presented clear and convincing evidence to support the jury's verdict that termination of Mother's parental rights was in the best interest of the children. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Fischer, J.; Barnes, P.J., concurs, and Rapp, J., concurs in result.

(Division No. 3)
Monday, June 15, 2020

117,769 — Kelly Ann Durr, Petitioner/Appellant, v. Gerald Barry Durr, Respondent/Appellee. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Martha Oakes, Trial Judge. A non-custodial father stopped paying child support when the custodial mother moved with the parties' minor children to whereabouts unknown. The mother did not notify the father as to where she had moved and never sought to enforce the child-support order during the children's minority. After the children reached majority, the mother sued the father for the child-support arrearage. The trial court applied the doctrine of unclean hands to absolve the father of any judgment on the arrearage. Because equitable defenses are available in child-support cases, and the evidence supports the result below, we AFFIRM. Opinion by Mitchell, P.J.; Swinton, V.C.J., and Buettner, J. (sitting by designation), concur.

Wednesday, June 17, 2020

117,670 — Blake Allen Burleson, Petitioner/Appellant, v. Savannah Leann Chaves, Respondent/Appellee. Appeal from the District Court of Tillman County, Oklahoma. Honorable Brad L. Benson, Trial Judge. Petitioner/Appellant Blake Burleson (Father) appeals from an order determining paternity, awarding custody of the parties' minor child to Respondent/Appellee Savannah Chavez (Mother), and ordering child support and an arrearage in favor of Mother. Father argues that it was an abuse of discretion to award custody to Mother and to order Father to pay a child support arrearage. Because we see no abuse of discretion, we AFFIRM. Opinion by Swinton, V.C.J.; Buettner, J. (sitting by designation), concurs, and Mitchell, P.J., dissents.

(Division No. 4)
Friday, June 12, 2020

118,211 — Gerald Edward Poe, Petitioner, vs. Multiple Injury Trust Fund and The Workers' Compensation Commission, Respondent. Proceeding to Review an Order of The Workers' Compensation Commission. Gerald Edward Poe appeals from an order of the Oklahoma Workers' Compensation Commission En Banc. The Commission affirmed an order of an Administrative Law Judge denying Claimant's request for permanent total disability benefits from the Multiple Injury Trust Fund. The ALJ's denial of Multiple Injury Trust Fund Permanent Disability Benefits was supported by substantial evidence. Finding no error, we sustain the WCC's order affirming the ALJ's order determining Claimant was not entitled to benefits. SUSTAINED. Wiseman, C.J., and Thornbrugh, P.J., concur.

Thursday, June 18, 2020

118,304 — Douglas A. Spitznas, #118334, Plaintiff/Appellant, vs. Robert Patton, Director, Oklahoma Department of Corrections, Defendant/Appellee. Appeal from an order of the District Court of Oklahoma County, Hon. Cindy H. Truong, Trial Judge, granting summary judgment in favor of Robert Patton, Director of the Oklahoma Department of Corrections. The question on appeal is whether the trial court correctly concluded Director is entitled to judgment as a matter of law. As the material facts are not in dispute, we are left with the following question of law: Does the Director's retention of 20% of Petitioner's inmate wages pursuant to 57 O.S. Supp. 2014 § 549(A)(5) violate his constitutional rights? Based on Supreme Court precedent, we conclude that it does not. Finding no error in the trial court's decision that Director is entitled to judgment as a matter of law, we affirm the trial court's decision. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, C.J.; Thornbrugh, P.J., and Hixon, J., concur.

ORDERS DENYING REHEARING
(Division No. 1)
Wednesday, June 10, 2020

116,944 (cons. w/117,449) — Boomer State Outdoors, LLC, a Domestic Limited Liability Company, Plaintiff/Appellee/Counter-Appellant, vs. Canadian River Ranch, LLC, a Domestic Limited Liability Company, Defendant/Appellant/Counter-Appellee. Defendant/Appellant/Counter-Appellee's Petition for Re-

hearing and Brief in Support, filed April 23, 2020, is *DENIED*.

(Division No. 2)
Wednesday, June 10, 2020

117,747 — Lifetouch National School Studios, Inc., a Minnesota Corporation, Plaintiff/Appellant, vs. Oklahoma School Pictures, LLC, an Oklahoma Limited Liability Company; Bart Baker, an Individual; and Nathan Dunn, an Individual, Defendants/Appellees. Appellee's Petition for Rehearing is hereby *DENIED*.

(Division No. 3)
Thursday, June 11, 2020

117,354 — Advanced Urology & Wellness Center Muskogee, LLC, an Oklahoma Limited Liability Company, Plaintiff/Appellant, vs. Newground Resopurces, Inc., a Delaware Corporation, and Newground International, Inc., an Illinois Corporation, Defendants/Appellees. Appellee's Petition for Rehearing, filed April 23rd, 2020, is *DENIED*.

Monday, June 15, 2020

116,063 — First Trinity Financial Corporation, an Oklahoma Corporation, and Gregg Zahn, an Individual, Plaintiffs/Appellees, vs. Wayne Pettigrew, an individual, and Group & Pension Planners, Inc., Defendants/Appellants. Appellee's Petition for Rehearing, filed March 18th, 2020, is *DENIED*.

(Division No. 4)
Monday, June 15, 2020

118,067 — Greenway Park, LLC, Plaintiff/Appellant/Counter-Appellee, vs. Nautilus Insurance Company and Alexander & Strunk, Inc., Defendant/Appellee/Counter-Appellant. Defendant/Appellee, Alexander & Strunk, Inc.'s Petition for Rehearing is hereby *DENIED*.

Wednesday, June 17, 2020

118,132 — In Re the Matter of the Estate of Jay S. Ross, Deceased: Roscoe L. Williams, Appellant, vs. Timothy J. Ross, as Trustee of the Jay S. Ross and Katherine C. Ross Revocable Living Trust and Individually; Will S. Johnson; and all Named Beneficiaries in Said Trust, Appellees. Appellant's Petition for Rehearing is hereby *DENIED*.

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FEATURED PRESENTER:

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

ABOUT OUR PRESENTER:

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

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