THE OKLAHOMA BAR
Journal
Volume 91 — No. 15 — 8/7/2020

Court Issue

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8:55 A.M. - 4:30 P.M.

Cox Convention Center
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MCLE 7/0

PROGRAM PLANNERS:

Stephen Beam,
Melissa DeLacerda

MODERATOR:

Bob Burke,
Attorney, Author and Historian

OBA Remembers the Oklahoma City Bombing

Topics and Speakers include:

- The Crime: Jon Hersley and Larry Tongate, Retired FBI
- The Evidence: Bob Burke, Attorney, Author, Historian
- The Trial Proceedings: Brian Hermanson, District Attorney, District #8, Kay & Noble Counties, Defense attorney for Terry Nichols.
- The Trial Reflections: The Honorable Steven W. Taylor, Oklahoma Supreme Court Justice (Ret.) Presided over the Nichols' trial.
- A Unique Moment in History: Charlie Hanger, Sheriff, Noble County, Made historic traffic stop and arrest of Timothy McVeigh.
- The Response: A panel discussion featuring:
  Moderators: Bob Burke and Justice Steven W. Taylor
  Panel: Frank Keating, former Governor of the State of Oklahoma
  David Page, survivor, Special Projects Editor, Journal Record
  M. Courtney Briggs, Derrick and Briggs, Oklahoma City
  Chief Gary Marrs, former Oklahoma City Fire Chief and incident commander
- The Memorial: Kari Watkins, Executive Director, Oklahoma City National Memorial & Museum

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THE OKLAHOMA BAR
Journal

Volume 91 – No. 15 – Aug. 7, 2020

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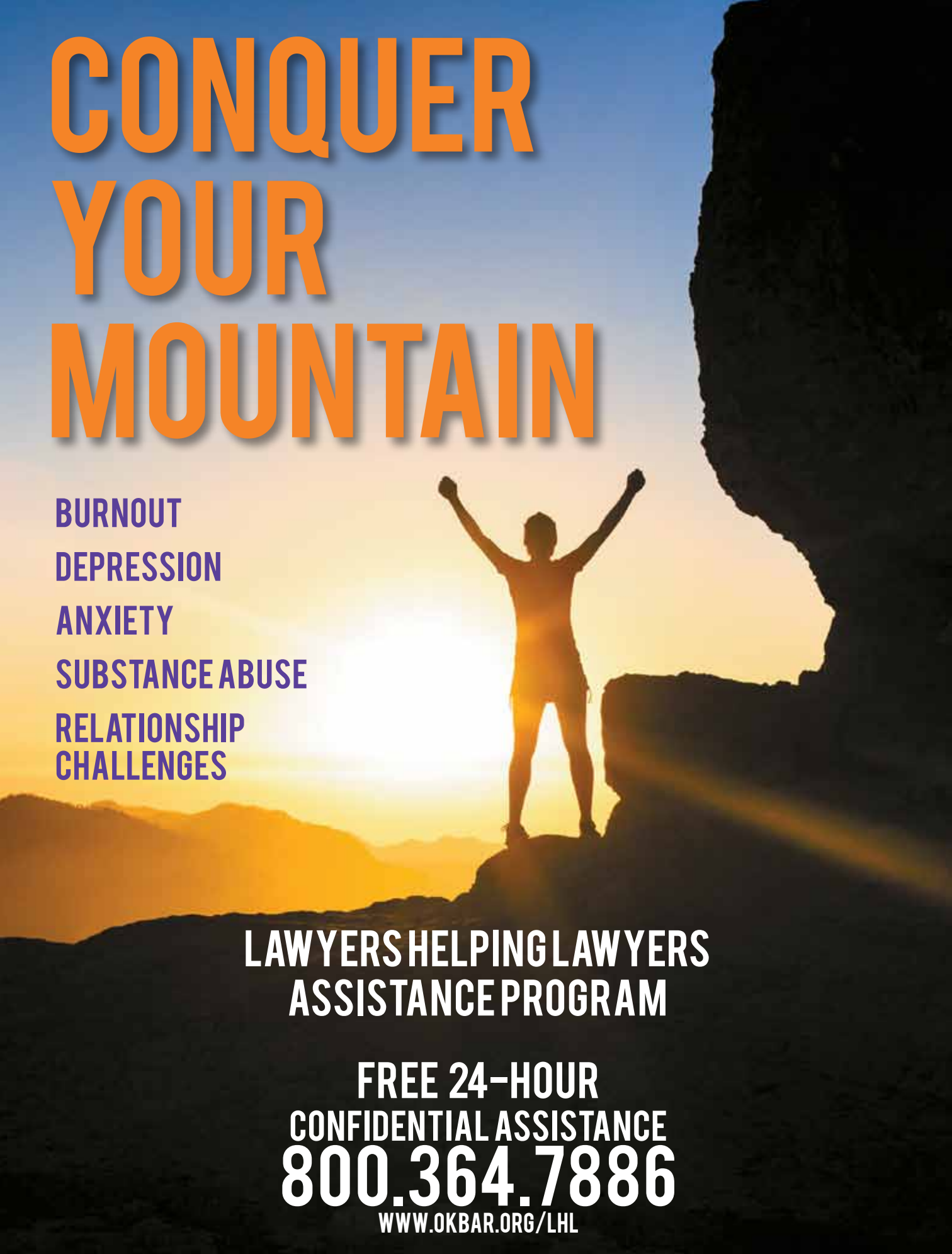
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2020 OK 64

THE HONORABLE GREG TREAT, SENATE PRESIDENT PRO TEMPORE, in his official capacity, and THE HONORABLE CHARLES MCCALL, SPEAKER OF THE HOUSE, in his official capacity, Petitioners, v. THE HONORABLE J. KEVIN STITT, GOVERNOR OF THE STATE OF OKLAHOMA, in his official capacity, Respondent.

No. 118,829. July 21, 2020
As Corrected July 22, 2020

MEMORANDUM OPINION

¶0 Petitioners brought this action seeking declaratory relief that Respondent lacked authority to enter into two tribal gaming compacts on behalf of the State and that the agreements do not bind the State. Original jurisdiction is assumed, and the declaratory relief sought by Petitioners is granted.

Winchester, J.

¶1 Original jurisdiction is assumed. Okla. Const. art. VII, § 4. The Court invokes its *publici juris* doctrine to assume original jurisdiction here as the Petitioners, the Honorable Greg Treat, Senate President Pro Tempore, and the Honorable Charles McCall, Speaker of the House, have presented this Court with an issue of public interest in urgent need of judicial determination. *Fent v. Contingency Review Bd.*, 2007 OK 27, ¶ 11, 163 P.3d 512, 521. The declaratory relief sought by Petitioners is granted. *Ethics Comm'n of State of Okla. v. Cullison*, 1993 OK 37, ¶ 4, 850 P.2d 1069, 1072.

¶2 Through mediation efforts in connection with a federal lawsuit pending in the United States District Court for the Western District of Oklahoma,[1] Respondent, the Honorable J. Kevin Stitt, Governor of the State of Oklahoma, negotiated and entered into new tribal gaming compacts with the Comanche Nation and Otoe-Missouria Tribes to increase state gaming revenues. The tribal gaming compacts were submitted to the United States Department of the Interior, and the Department of the Interior deemed them approved by inaction, only to the extent they are consistent with the Indian Gaming Regulatory Act (IGRA). 25 U.S.C. § 2710(d)(8)(C). The Court acknowledges that the Comanche Nation and Otoe-Missouria Tribes are not parties in this matter; these tribes are sovereign nations and have not submitted to the jurisdiction of this Court.

¶3 The limited question before this Court is whether Governor Stitt had the authority to bind the State with respect to the new tribal gaming compacts with the Comanche Nation and Otoe-Missouria Tribes. We hold he did not.

¶4 This question implicates the core notion of our constitutional structure: separation of powers. The legislative branch sets the public policy of the State by enacting law not in conflict with the Constitution. Okla. Const. art. V, § 1. The Governor has a role in setting that policy through his function in the legislative process, but the Governor's primary role is in the faithful execution of the law. Okla. Const. art. VI, §§ 8 & 11. Oklahoma's separation of powers doctrine is evident in the State's negotiation of tribal gaming compacts with Indian Tribes.

¶5 The Legislature, through the vote of the people, enacted those laws in the State-Tribal Gaming Act. 3A O.S. Supp. 2018, §§ 261-282. The State-Tribal Gaming Act sets forth the terms and conditions under which the State's federally recognized tribes can engage in Class III gaming on tribal land through Model Gaming Compacts. The Governor has the statutory authority to negotiate gaming compacts with Indian tribes to assure the State receives its share of revenue. However, the Governor must negotiate the compacts within the bounds of the laws enacted by the Legislature, including the State-Tribal Gaming Act. *See* 74 O.S. Supp. 2012, § 1221; *Griffith v. Choctaw Casino of Pocola*, 2009 OK 51, ¶ 12, 230 P.3d 488, 492.

¶6 The tribal gaming compacts Governor Stitt entered into with the Comanche Nation and Otoe-Missouria Tribes authorize certain forms of Class III gaming, including house-banked card and table games and event wagering. Any gaming compact to authorize Class III gaming must be validly entered into under

state law, and it is Oklahoma law that determines whether the compact is consistent with the IGRA. *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1557 (10th Cir. 1997); *see also* 25 U.S.C. § 2710(d)(8)(C).

¶7 Under Oklahoma law, conducting and participating in Class III gaming is not subject to criminal penalties as long as it occurs in conformance with the State-Tribal Gaming Act. 3A O.S. Supp. 2018, § 262(A). The State-Tribal Gaming Act is "game-specific" and allows for specified forms of Class III gaming. The State-Tribal Gaming Act expressly bars house-banked card games, house-banked table games involving dice or roulette wheels, and event wagering. See 3A O.S. Supp. 2018, § 262(H). The Legislature has yet to amend the State-Tribal Gaming Act to include house-banked card and table games and event wagering as covered games. As a result, the tribal gaming compacts at issue authorize types of Class III gaming expressly prohibited by the State-Tribal Gaming Act. In turn, any revenue to the State, the Comanche Nation Tribe or the Otoe-Missouria Tribe that would result from the tribal gaming compacts is prohibited. The Court must, therefore, conclude Governor Stitt exceeded his authority in entering into the tribal gaming compacts with the Comanche Nation and Otoe-Missouria Tribes that included Class III gaming prohibited by the State-Tribal Gaming Act. Even if the Governor had sought and obtained the Joint Committee's approval of these compacts as set forth in 74 O.S. Supp. 2012, § 1221, they would nevertheless be invalid. Just as the Governor is constrained by the statutory limitations on Class III gaming, so too is the Joint Committee.

CONCLUSION

¶8 The tribal gaming compacts Governor Stitt entered into with the Comanche Nation and Otoe-Missouria Tribes are invalid under Oklahoma law. The State of Oklahoma is not and cannot be legally bound by those compacts until such time as the Legislature enacts laws to allow the specific Class III gaming at issue, and in turn, allowing the Governor to negotiate additional revenue.

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

Kane, J., dissents.

Kane, J., dissenting:

"The Comanche Nation and Otoe-Missouria Tribes are indispensable parties to this action. I would dismiss the case for lack of indispensable parties. *See* 12 O.S.2011 § 2019; *Northern Arapaho Tribe v. Harnsberger,* 697 F.3d 1272, 1277-84 (10th Cir. 2012); *Dewberry v. Kulongoski,* 406 F.Supp.2d 1136, 1146-48 (D. Or. 2005); *see also* 12 O.S.2011 § 1653(A)."

Edmondson and Colbert, JJ., recused.

Rowe, J., concurring specially:

¶1 In order to expand the scope of permissible Class III gaming, the full Legislature would need to approve any new games by amendment to the State Tribal Gaming Act ("STGA") in accordance with the language of the Model Compact. Specifically, the definition of "covered game" under the Model Compact allows for approval of new games by amendment to the STGA. 3A O.S. § 281. In keeping with this requirement, when the State sought to expand the scope of Class III gaming in 2018 to include non-house-banked table games, it did so through legislation. 3A O.S. § 280.1.

Winchester, J.

1. Complaint, *The Cherokee Nation, et al. v. J. Kevin Stitt*, Case No. CIV-19-1198-D (W.D. Okla. Dec. 31, 2019).

2020 OK 65

RYAN KIESEL and MICHELLE TILLEY, PROPONENTS STATE QUESTION NO. 807, Petitioners, v. THE HONORABLE SECRETARY OF STATE MICHAEL ROGERS, IN HIS OFFICIAL CAPACITY, Respondents.

No. 118,919. August 3, 2020

ORDER

¶1 Original jurisdiction is assumed. *In re: State Question No. 805, Initiative Petition No. 421,* 2020 OK 45, ¶1, ___ P.3d ____; *Fent v. Contingency Review Bd.*, 2007 OK 27, ¶11, 163 P.3d 512 (holding the Court may assume original jurisdiction in a *publici juris* controversy where there is an urgent need for judicial determination). The extraordinary relief sought by Petitioners, the proponents of State Question No. 807 (SQ 807) is hereby denied.

¶2 The first power reserved by the people of Oklahoma is that of initiative, and that power is guaranteed by Okla. Const. art. 5, § 2. Pursuant to that provision, the Respondent has mandatory and non-discretionary duties that include the filing of initiative petitions submitted to him. *See*

In re: State Questions No. 805, 2020 OK 45 at ¶2; *Threadgill v. Cross*, 1910 OK 165, ¶5, 109 P. 558 (distinguished on other grounds by *In re Initiative Petition No. 349, State Question No. 642*, 1992 OK 122, 838 P.2d 1). Other duties required of Respondent are derived from statute, including 34 O.S. Supp. 2015 § 8. This Court has previously upheld the constitutionality of these statutory provisions, *see Assoc. of Indus. of Okla. v. Okla. Tax. Comm'n*, 1936 OK 156, ¶0, 55 P.2d 79, and determined they must be complied with. *Id.; In re Initiative Petition No. 281*, 1967 OK 230, ¶50, 434 P.2d 941.

¶3 Pursuant to 34 O.S. Supp. 2015 § 8(E), when an initiative petition has been filed and all appeals, protests, and rehearings have been resolved, Respondent "shall set the date for circulation" and "**in no event** shall the date be less than fifteen (15) days nor more than thirty (30) days from the date when all appeals, protests and rehearings have been resolved or have expired." (Emphasis added). Section 8 further provides that "the signatures are due within ninety (90) days of the date set."

¶4 Recently, in *In re: State Question No. 805,* the Court noted other duties imposed upon Respondent by Section 8 are ministerial and mandatory. 2020 OK 45 at ¶6; *Norris v. Cross*,1909 OK 316, syll., 105 P. 1000. Those requirements include a directive that Respondent begin the counting process when proponents of an initiative petition terminate the circulation period and tender the signed petitions. 36 O.S. Supp. 2015 § 8(G) (noting that when requirements are met, Respondent "shall begin the counting process"). In that matter, Respondent sought to delay the counting process because of ongoing safety concerns stemming from the COVID-19 pandemic. The Court determined Respondent had "not established the signature-counting process cannot be performed in an efficient manner, while also taking the necessary safety precautions for those involved." *In re: State Question No. 805,* 2020 OK 45 at ¶6.

¶5 In this matter, Petitioners ask this Court to order Respondent to not enforce the statutorily-mandated circulation period due to similar safety concerns. Respondent's statutory duty to set a 90-day circulation period within a certain time frame after all challenges have been resolved is no less ministerial and mandatory than his duty to begin the counting process when signatures are submitted. Further, based on the materials provided, Petitioners have not established that the process of signature gathering cannot be performed while taking the necessary safety precautions.

¶6 Petitioners also assert Section 8 is unconstitutional as applied under the facts of this case because COVID-19 makes successful signature gathering within the statutory time period impossible. Therefore, Petitioners argue Section 8's requirements serve to deny them their right to initiative guaranteed by Okla. Const. art. 5, § 2. Demonstrating a statute's unconstitutionality is a heavy burden that requires a showing the statute is clearly, palpably, and plainly inconsistent with the Constitution. *Benedetti v. Cimarex Energy Co.*, 2018 OK 21, ¶5, 415 P.3d 43. Every presumption is to be indulged in favor of the constitutionality of a statute. *CDR Systems Corp. v. Okla. Tax Comm'n,* 2014 OK 31, ¶10, 339 P.3d 848. Petitioners have failed to show that even under current conditions, Section 8 denies or places an undue burden on their right to initiative.

¶7 Accordingly, the extraordinary relief sought by Petitioners is denied. Any petition for rehearing in this matter must be filed no later than August 5, 2020.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 3rd DAY OF AUGUST, 2020.

/s/ Noma D. Gurich
CHIEF JUSTICE

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

Kane, J., concurs in result.

2021 OBA Board of Governors Vacancies

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

OFFICERS

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Ardmore
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Mr. Mordy automatically becomes OBA president Jan. 1, 2021
Nominee: **Vacant**

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

BOARD OF GOVERNORS

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Nominee: **Vacant**

Supreme Court Judicial District Six
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Tulsa
Tulsa county
(Three-year term: 2021-2023)
Nominee: **Vacant**

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

Member At Large
Current: Brian K. Morton
Oklahoma City

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

SUMMARY OF NOMINATIONS RULES

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

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

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

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

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

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

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

2020 OK CR 15

THE STATE OF OKLAHOMA, Appellant, vs. JULIO HUMBERTO CARDENAS-MORENO, Appellee.

No. S-2019-797. July 23, 2020

SUMMARY OPINION

KUEHN, VICE PRESIDING JUDGE:

¶1 Julio Humberto Cardenas-Moreno, Appellee, was charged with Driving a Motor Vehicle While Under the Influence of Alcohol in the District Court of Texas County, Case No. CM-2019-94. After a hearing on October 28, 2019, the Honorable A. Clark Jett granted Appellee's Motion to Suppress. The State appealed this decision under 22 O.S.2011, § 1053(5).

¶2 Appellant, the State, raises the following sole proposition of error in support of its appeal:

> The district court erred in suppressing evidence of the PBT as 47 O.S. 11-902 (N) allows all field sobriety tests into evidence in a DUI trial.

¶3 After thorough consideration of the entire record before us, including the original record, transcripts, and briefs, we reverse and remand for further proceedings. We review the decision to grant a motion to suppress for abuse of discretion, deferring to the trial court's findings of fact and reviewing the legal conclusions *de novo. State v. Hodges,* 2020 OK CR 2, ¶ 3, 457 P.3d 1093, 1095. "An abuse of discretion is any unreasonable or arbitrary action made without proper consideration of the relevant facts and law, also described as a clearly erroneous conclusion and judgment, clearly against the logic and effect of the facts." *Id.* (citation omitted).

¶4 Oklahoma prohibits a person from driving a vehicle while under the influence of alcohol. 47 O.S.Supp.2018, § 11-902(A)(2). Admissible evidence of impairment (but not of a specific alcohol concentration level) includes testimony regarding the results of standard field sobriety tests, given by a trained and experienced witness. 47 O.S.Supp.2018, § 11-902(N). The question here is whether a preliminary breath test (PBT) should be treated as a field sobriety test, or is more like a test for specific blood alcohol concentration, such as a breath test given under 47 O.S.Supp.2019, § 752.

¶5 Appellee's claim that a PBT is a form of breathalyzer test is unconvincing. Sampling and testing under 47 O.S.Supp.2015, 2019, §§ 752 and 759 are performed to obtain specific alcohol concentration levels, which are intended to be admitted in court proceedings to prove that a defendant has a specific alcohol level greater than that allowed by statute. The record shows that the PBT here did not produce a numerical value for a specific alcohol concentration. Neither the arresting officer nor the prosecutor claim the result of the PBT showed any specific alcohol level, nor was there evidence the test was used to get such results.

¶6 Appellee argues that the Legislature did not include PBTs in a list of standard field sobriety tests. In fact, the Legislature did not provide a list of standard field sobriety tests in 47 O.S.Supp.2018, § 11-902(N). Instead, the statute refers to standard tests "including, but not limited to" horizontal gaze nystagmus tests. Nothing in this language suggests that the Legislature intended to exclude PBTs from this category. Appellee claims there are three standard tests. He cites no Oklahoma law or regulations for that claim, and no evidence supports it. Appellee admits that PBT devices are not included in the list of approved devices for measurement of specific alcohol concentrations. He claims that PBT instruments are intended to be regulated, and there was no evidence that this PBT instrument had been approved by the State. Any merit this argument might have would go to the weight to be given the test results, not their admissibility. *State v. Hovet*, 2016 OK CR 26, ¶ 9, 387 P.3d 951, 954-55.

¶7 Appellee relies on a Montana Supreme Court case, *State v. Crawford,* 2003 MT 118, 68 P.3d 848. Given the significant differences between this case and Oklahoma law, its reasoning is unpersuasive. In a different case, the Montana Supreme Court found that, despite statutory language suggesting otherwise, PBTs could not be admitted at trial to prove a specific alcohol concentration, though they could be admissible to show an estimated concentration, as probable cause evidence before trial

proceedings. *State v. Weldele,* 2003 MT 117, ¶¶ 56-58, 69 P.3d 1162, 1175-76.

¶8 The *Crawford* case reiterated the substance of the *Weldele* ruling. In both *Crawford* and *Weldele*, the State's PBT results were in the form of a specific alcohol concentration number – the very thing the Montana court had said could not be admitted. Here, by contrast, the State has not sought to admit a PBT result with a number purporting to show a specific alcohol concentration; the claim that Appellee had a "failing" result is merely an estimate, and a rough one at that. Moreover, there is no evidence supporting a finding that a PBT is not among the standard field sobriety tests normally given to suspects at the scene in Oklahoma.

¶9 The trial court below ruled simply that "The PBT test is not admissible in Oklahoma." No law supports that statement, and the finding is an abuse of discretion. Reviewing the law *de novo,* we find that PBT tests, when used as a field sobriety test to estimate a suspect's level of impairment, and without including a specific number purporting to equal an alcohol concentration level, may be admissible to support an allegation that a person accused of driving under the influence was impaired. 47 O.S.Supp.2018, § 11-902(N). Like any other evidence, their admissibility in any given case must be determined by the trial court on a case-by-case basis, using the relevant standards for measuring reliability. The proposition is granted, and the case reversed and remanded for further proceedings.

DECISION

¶10 The decision by the District Court of Texas County to suppress the evidence is **REVERSED** and the case is **REMANDED** for further proceedings. 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 TEXAS COUNTY

THE HONORABLE A. CLARK JETT
ASSOCIATE DISTRICT JUDGE

ATTORNEYS AT HEARING ON MOTIONS

Christopher J. Liebman, Christopher J. Liebman, PLLC, 104 NE 4th St., Guymon, OK 73942, Counsel for Defendant

Taos C. Smith, Asst. District Attorney, 319 N. Main St., Guymon, OK 73942, Counsel for the State

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James M. Boring, District Attorney, Taos C. Smith, Asst. District Attorney, Texas Co. District Attorney's Office, 319 N. Main St., Guymon, OK 73942, Counsel for State/Appellant

Christopher J. Liebman, Christopher J. Liebman, PLLC, 104 NE 4th St., Guymon, OK 73942, Counsel for Appellee

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

LEWIS, PRESIDING JUDGE, CONCURS IN RESULTS:

¶1 Initially, the issue of whether this appeal is proper must be addressed by the Court. The State files this appeal under 22 O.S.2011, § 1053(5), which requires a showing that appellate review is in the best interest of justice. *See State v. Strawn,* 2018 OK CR 2, ¶ 18, 419 P.3d 249, 253. Because this is an issue of first impression, as pointed out by the State, I would find that appellate review is in the best interest of justice.

¶2 This Court has never addressed the admissibility of the results of a "portable (or pre-) breathalyzer test" or an alcohol screening device; therefore, the discussion requires more than just a blanket holding that opinions of intoxication are admissible when based on the results of these devices. These devices are obviously scientific tools that must be tested against standards of accepted scientific process before opinions based on their results are admissible. *See* 12 O.S.Supp.2013, § 2702. *See Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993); *Taylor v. State,* 1995 OK CR 10, ¶ 14, 889 P.2d 319, 326; *see also Day v. State*, 2013 OK CR 8, ¶ 4, 303 P.3d 291, 295; *cf. Anderson v. State,* 2010 OK CR 27, 252 P.3d 211. One of my biggest concerns is whether this device is reliable and accurate enough on which to base an opinion about a person's consumption of an alcoholic beverage.[1] Unlike our holding in *Anderson,* these portable breath alcohol testing devices are considered to be scientific and, therefore, should require a measure of scientific reliability. The record concerning this device is com-

pletely absent here; therefore, this Court is unable to address this question.

¶3 I would hold that the trial court abused its discretion in making a blanket holding that a screening device is not a proper field sobriety tool. I would further hold that, when challenged, opinions based on these portable breath alcohol testing devices should be supported by a foundation of scientific reliability.[2]

¶4 I would remand for further hearing on the matter.

1. At one point this Court held that the Horizontal Gaze Nystagmus test was inadmissible because it had not gained acceptance in the concerned scientific community. *See Yell v. State*, 1993 OK CR 34, 856 P.2d 996, overruled by *Anderson v. State*, 2010 OK CR 27, 252 P.3d 211 (reasoning that nystagmus was "a physical act on the part of Appellant observed by the deputies contributing to the cumulative portrait of Appellant as intoxicated in the deputies' opinion").

2. A quick search on *Amazon.com* shows a plethora of these devices. How is this Court to determine whether these devices are reliable or not?

LUMPKIN, JUDGE: CONCUR IN RESULTS

¶1 I concur in reversing the District Court's decision to suppress the evidence of the Preliminary Breath Test (PBT). The PBT is just another tool provided to law enforcement officers to aid in their determination, made in the field, whether there is sufficient probable cause for an arrest. Just like the HGN, walk and turn, and other field sobriety tests, the PBT aids the officers in forming an opinion as to the sobriety of a person stopped along the side of the road. It is a tool that helps assure the officer of the validity of his or her observations and opinion. This Court has previously recognized this function of field sobriety tests. *See Anderson v. State*, 2010 OK CR 27, ¶¶ 7-8, 252 P.3d 211, 212-13 (testimony relating to HGN test results "was offered and admitted for the same purpose as other field sobriety test evidence – a physical act on the part of Appellant observed by the deputies contributing to the cumulative portrait of Appellant as intoxicated in the deputies' opinion."); *Yell v. State*, 1993 OK CR 34, ¶¶ 10-11, 856 P.2d 996, 997 (this Court determined that results of field sobriety tests, such as the HGN, are not admissible as "scientific evidence creating a presumption of intoxication" but are admissible to establish probable cause for arrest).

¶2 I am authorized to state that Judge Hudson joins in the opinion.

Opinions of Court of Civil Appeals

2020 OK CIV APP 31

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

Case No. 118,080. July 30, 2020

CORRECTION ORDER

The Opinion in the above styled cause filed on February 28, 2020, is hereby corrected in the following particulars:

In the seventh paragraph located on page 3, "12 O.S. 2011 §4" is corrected to read "16 O.S. 2011 §4".

In Judge Goree's special concurrence on page 10, "Title 16 O.S. Supp.2011 §4" is corrected to read "Title 16 O.S. 2011 §4".

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

DONE BY ORDER OF THE COURT OF CIVIL APPEALS this 30th day of July, 2020.

/s/ E. Bay Mitchell
Presiding Judge

2020 OK CIV APP 40

TRACY A. PEUPLIE, Appellant/Plaintiff, vs. OAKWOOD RETIREMENT VILLAGE, INC., d/b/a GOLDEN OAKS NURSING HOME, Appellee/Defendant.

Case No. 117,019. November 1, 2019

APPEAL FROM THE DISTRICT COURT OF GARFIELD COUNTY, OKLAHOMA

HONORABLE DENNIS HLADIK, JUDGE

AFFIRMED

Mark Hammons, Amber L. Hurst and Kristin E. Richards, Oklahoma City, Oklahoma, for Appellant,

Douglas L. Jackson, Julia Christina Rieman, Patrick L. Neville, Jr., Enid, Oklahoma, for Appellee.

Larry Joplin, Presiding Judge:

¶1 Plaintiff/Appellant, Tracy Peuplie, seeks review of the district court's April 19, 2018 order granting Defendant/Appellee's, Oakwood Retirement Village, Inc., d/b/a Golden Oaks Nursing Home, motion for summary judgment, upon Peuplie's wrongful termination claim, alleging her employer fired her in violation of a clearly established public policy.

¶2 Peuplie began working for the Defendant nursing home as a CNA (certified nursing assistant) on March 5, 2016 and her employment was terminated on February 2, 2017, for what Defendant said was a violation of its social media policy.[1] On January 23, 2017, Peuplie posted two entries on her Facebook account, making negative comments about her employer and fellow employees, although neither Golden Oaks Nursing Home, Oakwood Retirement Village, nor any fellow employees were mentioned by name within the text of the posts. The posts read as follows:

> 10:33am: It's just amazing in 30 years I have never in my life worked with an administration staff or a nursing crew that just don't give a shit!!!! God I wish I could find another place to work weekend doubles with my copilot!!!!!
>
> 12:34pm: I FEEL SORRY FOR THE ELDERLY AND THE NEXT GENERATION TO TAKE CARE OF THEM THEY HAVE NO WORK ETHICS OR EVEN CARE!!! ITS VERY SAD YOUR BETTER OFF LIVING UNDER A BRIDGE IN A BOX THE HOMELESS TAKE BETTER CARE OF EACH OTHER!!!!! IM JUST REALLY DISAPPOINTED IN WHAT I HAVE SEEN AND WORKED WITH LATELY ITS VERY SAD AND HEARTBREAKING ANYWAY THANK YOU TO ALL OF YOU WHO DO MAKE A DIFFERENCE KEEP IT UP!!!!!

Peuplie did not deny making the Facebook posts.

¶3 The district court found Peuplie was an at-will employee and was required to demonstrate that her termination from employment was in violation of public policy, an exception to the termination of an at-will employee rule as articulated in *Burk v. K-Mart Corp.*, 1989 OK 22, 770 P.2d 24. The district court found Peuplie's Facebook comments were not protected under the rationale of *Burk* and characterized the posts as "grousing." The court found De-

fendant was permitted to implement and enforce a social media policy and Peuplie violated that policy, her comments having failed to rise to the level of whistleblower complaints or public policy goals.

¶4 Appeal of the district court's grant of summary judgment is reviewed using a *de novo* standard of review. *Carmichael v. Beller,* 1996 OK 48, ¶ 2, 914 P.2d 1051, 1053; *Bank of America, NA v. Kabba*, 2012 OK 23, ¶2, 276 P.3d 1006, 1007-08. All inferences and conclusions from the underlying facts in the record are to be considered in the light most favorable to the party opposing summary judgment. *Rose v. Sapulpa Rural Water Co.*, 1981 OK 85, 631 P.2d 752; *Bank of America v. Kabba*, 2012 OK 23, ¶2, 276 P.3d at 1007-08.

¶5 In *Burk v. K-Mart,* the Oklahoma Supreme Court adopted a "public policy exception to the at-will termination rule" in which "[a]n employer's termination of an at-will employee in contravention of a clear mandate of public policy is a tortious breach of contractual obligations." *Burk,* 770 P.2d at 28. A *Burk* claim must allege 1) an actual or constructive discharge, 2) of an at-will employee, 3) for a reason that violates an Oklahoma public policy goal, 4) the public policy goal is found in the Oklahoma constitution, statutes, or decisional law or in a federal constitutional provision that prescribes a norm of conduct for Oklahoma and 5) no statutory remedy exists that is otherwise adequate to protect the public policy goal. *Vasek v. Bd. of County Comm'rs of Noble County*, 2008 OK 35, ¶14, 186 P.3d 928, 932.

¶6 Peuplie has not presented allegations which support a *Burk* claim, because she has not been able to "articulate a specific, well established, clear and compelling Oklahoma public policy" which applies to nursing home employees complaining on social media about "administration staff or a nursing crew that just don't give a s***!!!!" or Peuplie's sadness and disappointment "in what I have seen and worked with lately[.]" *Barker v. State Ins. Fund,* 2001 OK 94, ¶26, 40 P.3d 463, 470. These complaints lack any specifics about the nature of the conduct she is criticizing, whether the conduct violated a statutory or otherwise articulated duty of care, such as outlined in the Oklahoma Nursing Home Care Act, or the Nursing Practice Act, or whether conduct she observed rose to the level of a crime or neglect against the elderly people in Defendant's care. 64 O.S. 2001 §1-1900.1 (Nursing Home Care Long-Term Care Reform and Accountability Act of 2001); 59 O.S. 2001 §567.1 (Nursing Practice Act).

¶7 Peuplie claimed in her petition that her "report of unlawful neglect and/or abuse of patients is protected by Oklahoma's clearly established public policy." However, posting to Facebook about witnessing nursing and administrative staff that simply do not "give a s***," "feel[ing] sorry for the elderly," being "really disappointed" and witnessing "very sad and heartbreaking" situations at the nursing home does not rise to the level of reporting by an employee who is acting in furtherance of a "clear mandate of public policy." *Burk,* 770 P.2d at 28. *Burk* states specifically, "the public policy exception must be tightly circumscribed." *Id.* at 29. Peuplie's rambling and generalized complaints do not address the public policy of protecting the elderly or disabled in nursing facilities. Any finding that these vague Facebook posts rose to the level of protected whistleblower conduct as imagined in *Burk,* would mark a failure to "tightly circumscribe" the *Burk* exception to the employment at-will rule. This court will not disturb the district court's April 19, 2018 order finding Peuplie's "Facebook postings do not meet the requirements of *Burk v. K-Mart Corp.*"

¶8 Peuplie argues Defendant's stated reason for her termination, violation of the nursing home's social media policy, was a pretext and she was actually fired for reporting patient abuse, which included reporting a nurse's inadequate treatment for a patient's leaking feeding tube on January 28 or 29, 2017. Peuplie then reported the duty nurse's unprofessional conduct regarding the feeding tube leak to the assistant director of nursing. During this same weekend, Peuplie sought medication for a patient with sores, but a nurse refused to provide Peuplie with the medication. Peuplie stated in her petition that she told both the nurse at issue and the assistant director of nursing that she would be making a report of the incident to the state ombudsman regarding patient neglect or abuse; Peuplie stated in her petition that she called the ombudsman's office on or around January 30, 2017 (Monday) and reported her observations of abuse and neglect. Peuplie's employment was terminated on February 2, 2017 (Thursday).

¶9 Demonstrating a pretext can take the terminated employee (plaintiff) "over the hurdle

of summary judgment." *Bausman v. Interstate Brands Corp.*, 252 F.3d 1111, 1120 (10th Cir. 2001).

> Pretext can be shown by " 'such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons.' " *Olson v. General Elec. Astrospace,* 101 F.3d 947, 951--52 (3d Cir.1996) (quoting *Fuentes v. Perskie*, 32 F.3d 759, 765 (3d Cir.1994) (further citation omitted)).
>
> *Id*. Of course, " '[M]ere conjecture that [the] employer's explanation is a pretext ... is an insufficient basis for denial of summary judgment.' *Branson v. Price River Coal Co.,* 853 F.2d 768, 772 (10th Cir.1988)." Id.

Bausman, 252 F.3d at 1120.

¶10 In support of her pretext claims, Peuplie offers the following: a) she argued Defendant offered contradictory testimony regarding who made the termination decision; b) she argued Defendant denied Peuplie made internal complaints; c) she argued Defendant claimed it did not learn of the Facebook posts until February 1st or 2nd; d) she claimed Defendant denied an obligation to care for its patients; e) she asserted Defendant treated other employees who vi-olated the social media policy differently than it treated her; f) Defendant later added an allegation of a violation of the cell phone policy as a reason to terminate Peuplie's employment. Peuplie argued the shifting rationale for her termination was evidence of a pretextual firing. However, the record does not support Peuplie's pretext argument. Peuplie's attempts to offer record facts in support of her pretext claims are not sufficient to elevate her argument beyond mere conjecture that a pretext existed and provide an insufficient basis to deny summary judgment for the Defendant. The contradictions Peuplie claimed existed were not evident from the record and Defendant's social media reasoning for her termination from employment was not weak, implausible or inconsistent with the record. Peuplie was wholly unable to demonstrate she was terminated from her at-will employment for any reason other than the Facebook posts at issue.

¶11 Appellant/Peuplie also appealed the district court's order, filed May 11, 2018, granting Appellee's Motion to Strike Witness, Debbie Addington Maxey. Appellant attempted to add Maxey as a witness outside the parameters of the scheduling order, which directed final witness and exhibit lists be exchanged by January 15, 2018 and discovery completed by February 1, 2018. Appellant issued a supplemental witness list on February 27, 2018 listing Maxey as a witness. Maxey is the daughter and sister of two former residents of Appellee's nursing center; Maxey alleged her family members suffered neglect as a result of improper care in Appellee's nursing facility. Neither Maxey's mother, nor her sister, are the patients at issue in Appellant's Petition. Appellant claims Maxey should have been identified by Appellee as a witness with material knowledge of issues in the case; and had Appellee responded properly to Appellant/Peuplie's discovery, Maxey's identity as a witness would have been known to Appellant and she could have provided the name within the scheduling order deadlines, but any delay is the result of Appellee's gamesmanship.

¶12 We do not find the district court erred in excluding Maxey from the witness list, as the name and proposed testimony regarding neglect and abuse of other residents at the Appellant's facility was not presented in accordance with the scheduling order. *Middlebrook v. Imler, Tenny & Kugler, M.D.'s Inc.*, 1985 OK 66, 713 P.2d 572, 582 ("These witnesses were not listed on the pretrial order. In *Short v. Jones,* 613 P.2d 452 (Okl.1980), this Court upheld the District Court's refusal to allow an unlisted witness to testify, noting that the District Court has the power to enforce its own pretrial order. Rule 5(c)(3) of the District Court is specifically designed to prevent surprise testimony."). Maxey's testimony also operated outside the parameters of Appellant's Petition, as Maxey's relatives were not those at issue in the Petition. The district court has broad discretion in addressing discovery issues and the court's decision will not be disturbed absent an abuse of discretion or a decision contrary to law. *State ex rel. Protective Health Serv. v. Billings Fairchild Center, Inc.*, 2007 OK CIV APP 24, ¶8, 158 P.3d 484, 488. This witness's name was provided outside of the discovery deadlines and pertained to residents or patients who were not at issue in Appellant's Petition, as a result, we do not find the district court abused its discretion or acted contrary to law in excluding this witness's testimony.

¶13 The district court's grant of summary judgment to Defendant/Appellee, Oakwood

Retirement Village, Inc., d/b/a Golden Oaks Nursing Home, is AFFIRMED.

BUETTNER, J., concurs.

GOREE, C.J., dissents.

¶1 Tracy Peuplie testified at her deposition that she told the assistant director of nursing on January 30, 2017 that she was going to report patient neglect to the state ombudsman's office. On January 31, 2017 she made that report by telephone and Defedant fired her three days later. An employee has an actionable claim when she is discharged for performing an act consistent with a clear and compelling public policy, *Burk v. K-Mart,* 1989 OK 22, ¶19, 770 P.2d 24, 29. Reporting patient neglect is consistent with the state's policy to protect residents of nursing homes from abuse and neglect. 63 O.S. §1-1901 *et seq. See Morgan v. Galilean,* 1998 OK 130, 977 P.2d 357.

¶2 I agree with the majority that Peuplie's social media posts do not fall within the public policy exception to Oklahoma's terminable-at-will rule. However reasonable minds could reach different conclusions as to whether her report to the state ombudsman was a significant factor in her discharge. *See Vasek v. Board of County Commissioners of Noble County*, 2008 OK 35, ¶30, 186 P.3d 928, 934. Retaliatory intent is a jury question. *Id.* Summary judgment was improper.

1. The Defendant's multi-page social media policy reads in part as follows:

Procedure:

1. Acknowledgement (sic):

When using Social Media, employees must adhere to the same Federal and State compliance requirements that the company follows. For example, employees must maintain resident privacy and comply with all HIPPA (sic) regulations. Employees must take into consideration and follow all Golden Oaks policies when utilizing social media.

2. As an employee of Golden Oaks the use of social media to voice any concerns or issues with the company, supervisors, co-workers, etc. is not acceptable and is not the proper place to do so. If employee has a concern they should go through the proper chain of command. Golden Oaks expects their employees to be respectful to fellow employees, business partners, competitors and residents.

2020 OK CIV APP 41

KIRT THACKER, Plaintiff/Appellant, vs. RANDY COWLING, BAILEY DABNEY, SALESHA WILKEN, NEWSPAPER HOLDINGS, INC. (d/b/a) *The Claremore Daily Progress*, COMMUNITY NEWSPAPER HOLDINGS, INC. (d/b/a *The Claremore Daily Progress*), Defendants/Appellees.

Case No. 117,479. June 9, 2020

APPEAL FROM THE DISTRICT COURT OF ROGERS COUNTY, OKLAHOMA

HONORABLE RUSSELL VACLAW, TRIAL JUDGE

SUPPLEMENTAL OPINION VACATING THE PORTION OF THE DISTRICT COURT'S JULY 27, 2018 JUDGMENT DISMISSING APPELLANT'S PETITION WITH PREJUDICE BASED ON THE STATUTE OF LIMITATIONS

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

Douglas S. Dodd, Michael Minnis, DOERNER, SAUNDERS, DANIEL & ANDERSON, L.L.P., Tulsa, Oklahoma, for Defendant/Appellee

JOHN F. FISCHER, PRESIDING JUDGE:

¶1 This Supplemental Opinion is issued pursuant to the Supreme Court's March 9, 2020 Order "to address the issue of whether the trial court properly dismissed [Kirt Thacker's] November 30, 2015, petition with prejudice as barred by the applicable statute of limitations." The July 28, 2018 judgment at issue granted a motion to quash summons and a motion to dismiss for failure to state a claim based on the statute of limitations. Those motions were filed at the outset of the case by the Newspaper Defendants, Randy Cowling, Bailey Dabney, Salesha Wilken, Newspaper Holdings, Inc., and Community Newspaper Holdings, Inc.

¶2 The motion to quash argued that service of summons more than one hundred and eighty days after the case was filed was prohibited by section 2004(I) of Title 12. The district court agreed and dismissed Thacker's case without prejudice.

¶3 The Newspaper Defendants' motion to dismiss was filed at the same time, but as an alternative to the relief sought in Defendants' motion to quash summons. The motion to dismiss argued that Thacker's November 2015 petition had been filed after expiration of the applicable statute of limitations. The district court granted this motion as well but, in doing so, dismissed Thacker's case with prejudice.

¶4 The trial court did not have jurisdiction to resolve the statute of limitations issue. Any attempted dismissal of Thacker's November 30, 2015 petition with prejudice based on the statute of limitations was not proper.

BACKGROUND

¶5 This case concerns a grand jury petition filed in the district Court on August 26, 2013. That petition sought to investigate Thacker for alleged improper bid-splitting and unauthorized use of county assets for private purposes. At that time, Thacker was a county commissioner. Thacker denies the wrongdoing alleged in the grand jury petition. According to Thacker, the grand jury proceeding was also the subject of several defamatory newspaper articles written and/or published by the Newspaper Defendants. Thacker alleged that Cowling was the editor of the newspaper, Dabney was the publisher and Wilken was a reporter for the newspaper and the author of the articles.

¶6 Thacker filed his verified petition in this case on November 30, 2015. In general, Thacker alleged that the Newspaper Defendants conspired with each other and others to file and circulate a false grand jury petition in order to destroy his reputation and ruin him politically. Thacker also alleged that the Newspaper Defendants defamed him and placed him in a false light by publishing false newspaper articles about him and the grand jury proceeding. Thacker's November 30, 2015 petition asserted six tort theories of liability: (1) libel, (2) slander, (3) filing a false grand jury petition in violation of 38 O.S.2011 § 108, (4) abuse of process, (5) false light invasion of privacy, and (6) civil conspiracy.

¶7 Thacker's petition also alleged that he did not discover the Newspaper Defendants' tortious conduct until November 30, 2014. Specifically, Thacker alleged that until that date he did not learn that Wilken had been involved in circulating the grand jury petition "on behalf of herself, and her co-conspirators, including her co-defendants sued herein." Finally, Thacker alleged that Wilken not only wrote defamatory articles, but also that she conspired with the other defendants to write the articles to further the circulation of the false grand jury petition.

¶8 Although Thacker filed this action on November 30, 2015, within one year after the alleged discovery of the Newspaper Defendants' involvement, he did not immediately serve Defendants as required by 12 O.S. § 2004(I): "service of process [shall be] made upon a defendant within one hundred and eighty (180) days after the filing of the petition …." When Thacker did serve the Newspaper Defendants more than two years later, the Newspaper Defendants moved to quash the summons. The Newspaper Defendants argued that because Thacker had failed to comply with section 2004(I), his petition was deemed dismissed.[1]

¶9 The district court held that the 2017 version of section 2004(I) required Thacker to serve the Newspaper Defendants within one hundred and eighty days after he filed his petition on November 30, 2015, or show good cause within that same period why he was not able to do so. The district court found that Thacker had done neither and, therefore, Thacker's petition was "deemed dismissed" as of May 30, 2016, one hundred and eighty days after Thacker filed his petition. The district court granted the Newspaper Defendants' motion to quash and dismissed Thacker's petition without prejudice in its July 27, 2018 judgment.

¶10 Our original Opinion held that the 2013 version of section 2004(I) was the applicable statute and, pursuant to that statute, Thacker was not required to make his showing of good cause within the one hundred and eighty days following the filing of his petition. Nonetheless, we affirmed the district court's dismissal without prejudice. We held that Thacker failed to provide any evidence on which the district court could find that good cause existed for Thacker's failure to serve the Newspaper Defendants within the initial one hundred and eighty days. We found that issue dispositive. Consequently, we did not address additional issues concerning the statute of limitations or Thacker's ability to refile his action that were addressed by the district court.

¶11 For example, in addition to their motion to quash, the Newspaper Defendants also filed a motion to dismiss pursuant to 12 O.S.2011 § 2012(B)(6). The Newspaper Defendants argued that the statute of limitations for defamation (one year - 12 O.S. Supp. 2017 § 95(4)), and false light invasion of privacy (two years - 12 O.S. Supp. 2017 § 95(3)), had expired at the latest two years after the August 2013 grand jury petition was filed, more than a year before Thacker filed his November 2015 petition. The Newspaper Defendants' motion to dismiss did not address the issue of whether Thacker's statutory claim for violation of 38 O.S.2011 § 108 was subject to the three-year limitation of section 95(2) ("action upon a liability created by statute"). Thacker's petition was filed within three years after the August 2013 grand jury petition was filed.

¶12 The Newspaper Defendants also generally argued in support of both motions that Thacker's time to refile his petition pursuant to 12 O.S.2011 § 100 expired on May 30, 2016, one year after his petition was deemed dismissed as a matter of law for failure to make timely service, and that no second petition had been filed within that time. In paragraph 2 of the district court's July 27, 2018 judgment, the court stated: "Thacker's November 30, 2015 Petition was deemed dismissed without prejudice on May 30, 2016 by operation of law; that Thacker failed to commence a new action within one (1) year from May 30, 2016 dismissal without prejudice."

¶13 The district court granted the Newspaper Defendants' motion to dismiss, but this time, dismissed Thacker's petition with prejudice.[2] In paragraph 3 of the court's judgment, the district found that the one and two year statutes of limitations for libel and false light invasion of privacy actions began to run from the August 26, 2013 filing of the grand jury petition. The court concluded that Thacker's November 30, 2015 petition was filed outside the applicable statute of limitations.

ANALYSIS

¶14 In any action, a defendant may voluntarily appear, 12 O.S.2011 2004(C)(5), or waive any defects in the service of summons. 12 O.S. 2011 § 2012(F)(1)(b). The Newspaper Defendants did not waive their right to proper service. They filed a special appearance and raised the service issue in their initial pleading. The district court's judgment granting that motion and dismissing Thacker's petition without prejudice terminated the action. The additional rulings were unnecessary and unauthorized. *See Firestone Tire & Rubber Co. v. Barnett,* 1970 OK 93, 475 P.2d 167 (after the dismissal of an action, the district court is without further jurisdiction).

¶15 *Firestone* involved a voluntary dismissal without prejudice filed by the plaintiff pursuant to 12 O.S. § 684 (superseded eff. Nov. 1, 2004). The Supreme Court found that the dismissal complied with the statute and was effective to "terminate" the jurisdiction of the district court. *Firestone,* 1970 OK 93, ¶ 22. With regard to the district court's jurisdiction, we find no material difference between a voluntary dismissal without prejudice filed by a plaintiff and a judicial dismissal without prejudice pursuant to court order.

¶16 Nonetheless, even after such a dismissal, the district court does retain jurisdiction for some purposes. *See, e.g., Stites v. Duit Constr. Co., Inc.*, 1995 OK 69, ¶ 23, 903 P.2d 293 (after dismissal, the district court retains jurisdiction to resolve certain ancillary matters); and Okla. Sup. Ct. R. 1.37, 12 O.S. Supp. 2013, ch. 15, app. 1. We also agree with this Court's holding in *Linam v. Walmart Stores, Inc.*, 2014 OK CIV APP 95, ¶ 14, 339 P.3d 901, that the district court retains jurisdiction to inquire into the validity of the dismissal. Finally, the district court retains jurisdiction to "correct, open, modify or vacate a judgment, decree, or appealable order on its own initiative not later than thirty (30) days after the judgment, decree, or appealable order . . . has been filed." 12 O.S. Supp. 2013 § 1031.1(A). However, the district court's rulings in this case subsequent to granting the Newspaper Defendants' motion to quash were not made pursuant to any retained jurisdiction. "Once an action has been dismissed, no jurisdiction remains in district court to go forward with the action." *General Motors Acceptance Corp. v. Carpenter,* 1978 OK 39, ¶ 8, 576 P.2d 1166. In our original Opinion, we declined to review the rulings made subsequent to the dismissal without prejudice.[3] "The point is that dismissals without prejudice leave the parties as if no action had ever been commenced." *Hamilton By and Through Hamilton v. Vaden,* 1986 OK 36, ¶ 9, 721 P.2d 412 (footnote omitted).

¶17 Consequently, after granting the Newspaper Defendants' motion to quash and dismissing the case, the district court lost jurisdiction to decide the Defendants' motion to dismiss based on the statute of limitations. That aspect of the court's judgment and paragraph 3 of the judgment are vacated.

¶18 In addition, paragraph 2 of the district court's judgment regarding the applicability of the savings clause in 12 O.S.2011 § 100, is problematic. The district court addressed this issue without the benefit of the Supreme Court's Opinion in *Cole v. Josey,* 2019 OK 39, 457 P.3d 1007. Pursuant to the holding in *Josey*, the time provided by the section 100 savings clause "begins to run when there is finality in the judgment." *Id.* ¶ 16. Although we decided this case on the basis of an earlier version of section 2004(I) than was at issue in *Josey,* that case clearly calls into question the validity of the district court's treatment of the savings clause issue. If the holding in *Josey* applies, Thacker's time to refile did not begin to run until the dis-

trict court's July 27, 2018 judgment dismissing his petition was filed. It is also clear from the holding in *Josey* that the one year to refile provided by section 100 was tolled by Thacker's motion for new trial and his appeal in this case. "The one year period begins the day after there is finality to the appeal or on the day after the order is filed if the judgment is not appealed." *Id.*

¶19 Further, the district court's observation about the timing of Thacker's ability to refile his case did not resolve any issue the court had jurisdiction to decide. No second petition had been filed and, therefore, the Newspaper Defendants had filed no motion or pleading challenging the validity of a second petition. "The jurisdiction of the trial court is limited to the particular subject matter presented by the pleadings . . . ." *Josey,* 2019 OK 39, n.4 (quoting *La Bellman v. Gleason & Sanders, Inc*., 1966 OK 183, 418 P.2 949). Further, a justiciable controversy is one "which presents antagonistic material facts and law to the trial court by pleading and evidence." *Tulsa Indus. Auth. v. City of Tulsa,* 2011 OK 57, ¶ 12, 270 P.3d 113. We declined to address this issue in our original Opinion because it was not ripe for review. *See Smith v. Oklahoma Dep't of Corrections,* 2001 OK 95, ¶ 11, 37 P.3d 872. This Court "will not decide abstract or hypothetical questions." *Rogers v. Excise Bd. of Greer Cnty.,* 1984 OK 95, ¶ 15, 701 P.2d 754 (footnote omitted). Paragraph 2 of the district court's July 27, 2018 judgment is also vacated.

CONCLUSION

¶20 In our original Opinion, we held that the district court did not err when it granted the Newspaper Defendants' motion to quash and affirmed the dismissal of Thacker's petition without prejudice. However, the district court did not have jurisdiction to render any ruling or decision subsequent to granting the motion to quash. Paragraphs 2 and 3 of the district court's July 27, 2018 judgment are vacated, as is its dismissal of Thacker's petition with prejudice based on the statute of limitations.

¶21 THE PORTION OF THE DISTRICT COURT'S JULY 27, 2018 JUDGMENT DISMISSING APPELLANT'S PETITION WITH PREJUDICE BASED ON THE STATUTE OF LIMITATIONS IS VACATED.

THORNBRUGH, J., and HIXON, J. (sitting by designation), concur.

July 8, 2020

APPEAL FROM THE DISTRICT COURT OF ROGERS COUNTY, OKLAHOMA

HONORABLE RUSSELL VACLAW, TRIAL JUDGE

AFFIRMED

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

Douglas S. Dodd, Michael Minnis, DOERNER, SAUNDERS, DANIEL & ANDERSON, L.L.P., Tulsa, Oklahoma, for Defendant/Appellee

JOHN F. FISCHER, PRESIDING JUDGE:

¶1 Kirt Thacker appeals the judgment dismissing his case against the defendants Randy Cowling, Bailey Dabney, Salesha Wilken, Newspaper Holdings, Inc., and Community Newspaper Holdings, Inc., and the denial of his motion to reconsider that judgment. The appeal has been assigned to the accelerated docket pursuant to Oklahoma Supreme Court Rule 1.36(b), 12 O.S. Supp. 2013, ch. 15, app. 1, and the matter stands submitted without appellate briefing. Because Thacker failed to serve the defendants within one hundred and eighty days as required by 12 O.S. § 2004(I), and because Thacker failed to show good cause why that service was not made, his case was deemed dismissed one hundred and eighty-one days after it was filed, and we affirm the district court's dismissal of this case.

BACKGROUND

¶2 This case concerns a grand jury petition filed in the District Court of Rogers County on August 26, 2013. That petition sought to investigate Thacker for alleged improper bid-splitting and unauthorized use of county assets for private purposes. At that time, Thacker was a county commissioner. Several civil and criminal cases were filed concerning the subject matter of the grand jury petition. Thacker eventually pled guilty to a misdemeanor in the criminal case filed against him. In this case, Thacker alleges that the defendants conspired with others to defame him and destroy his reputation by publishing newspaper articles about the grand jury proceeding. Thacker claims that he did not discover the defendants' involvement in the conspiracy until November 30, 2014. He filed this action on November 30, 2015, but did not immediately serve the defendants as required by 12 O.S. § 2004(I): "service of process [shall

be] made upon a defendant within one hundred and eighty (180) days after the filing of the petition . . . ."

¶3 On February 15, 2018, more than two years after he filed his petition, Thacker filed Plaintiff's Motion for an Extension of Time to Effect Service upon Defendants. The motion recited various reasons why summons had not been served and sought an additional forty-five days within which to do so. The motion also cited this Court's Opinion in *Thibault v. Garcia*, 2017 OK CIV APP 36, 398 P.3d 331, and argued that failure to extend the time for service would effectively terminate his right to litigate this claim. At that time, none of the defendants had been served and none had voluntarily entered an appearance in the case. Thacker did not serve his motion on any of the defendants or any of the attorneys who currently represent the defendants. And, none of the defendants filed a response to Thacker's motion. Thacker did serve a copy of his motion on Larry R. Steidley as "Co-Counsel for Plaintiff." Thacker mailed a copy of his motion to the assigned judge with a proposed order. The proposed order stated, in part: "the court finds that, for good cause, the motion should be granted." That order was signed and filed on February 27, 2018. Thacker caused summons to be issued on March 9, 2018.

¶4 On March 27, 2018, the defendants filed a special appearance and motion to quash summons and dismiss the case. They argued, among other things, that the petition was deemed dismissed after Thacker failed to serve summons within the one hundred and eighty days required by 12 O.S. § 2004(I). The district court granted the defendants' motion and dismissed Thacker's case in a judgment filed July 27, 2018. In that judgment, the district court stated that if the court had known that the time to serve summons had expired, Thacker's motion for an extension of time would not have been granted. On August 6, 2018, Thacker filed Plaintiff's Motion for Reconsideration. The district court's July 27 judgment and the court's September 24, 2018 Order Denying Motion for Reconsideration are the subject of Thacker's appeal.

STANDARD OF REVIEW

¶5 This appeal involves statutory interpretation of 12 O.S. § 2004(I). Legal questions involving statutory interpretation are subject to *de novo* review. *Heffron v. Dist. Ct. of Okla. Cnty.*, 2003 OK 75, ¶ 15, 77 P.3d 1069. *De novo* review is non-deferential, plenary and independent. *Neil Acquisition, L.L.C. v. Wingrod Inv. Corp.*, 1996 OK 125, n.1, 932 P.2d 1100.

¶6 Dismissal of a petition for failure to show good cause why service was not completed within the one hundred and eighty days required by 12 O.S. § 2004(I) is discretionary and will be reviewed for an abuse of discretion. *Willis v. Sequoyah House, Inc.*, 2008 OK 87, ¶ 11, 194 P.3d 1285.[1] "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." *Gowens v. Barstow*, 2015 OK 85, ¶ 11, 364 P.3d 644 (citing *Fent v. Okla. Natural Gas Co.*, 2001 OK 35, ¶ 12, 27 P.3d 477).

ANALYSIS

¶7 The dispositive issue in this case concerns the requirement in section 2004(I) of the Pleading Code, 12 O.S.2011 and Supp. 2018 §§ 2001 through 2056, that a plaintiff serve process within one hundred and eighty days after filing the petition or show good cause why that was not done. We begin the analysis with Thacker's motion for reconsideration. "A motion seeking reconsideration, re-examination, rehearing or vacation of a judgment . . . which is filed within 10 days of the day such decision was rendered, may be regarded as the functional equivalent of a new trial motion, no matter what its title." *Horizons, Inc. v. Keo Leasing Co.*, 1984 OK 24, ¶ 4, 681 P.2d 757. Thacker's motion was filed within ten days of the district court's July 27, 2018 judgment dismissing this case, seeks reconsideration of that judgment and is properly treated as a motion for new trial.

¶8 "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 (emphasis omitted). "If a motion for a new trial be filed and a new trial be denied, the movant may not, on the appeal, raise allegations of error that were available to him at the time of the filing of his motion for a new trial but were not therein asserted." 12 O.S.2011 § 991(b). The Supreme Court has consistently invoked this statute to restrict the appellate issues to those raised in a motion for new trial. *See, e.g., Slagell v. Slagell*, 2000 OK 5, 995 P.2d 1141; *Horizons*, 1984 OK 24,

681 P.2d 757; *Federal Corp. v. Indep. Sch. Dist. No. 13 of Pushmataha Cnty.*, 1978 OK CIV APP 55, 606 P.2d 1141 (approved for publication by the Supreme Court). A "motion for new trial . . . acts to limit the issues reviewed on appeal to those raised by that motion." *City of Broken Arrow v. Bass Pro Outdoor World, L.L.C.*, 2011 OK 1, ¶ 11, 250 P.3d 305. Thacker's motion for new trial raised three issues: (1) the district court erred in rescinding its order granting him an extension of time to serve process; (2) the district court erred in interpreting section 2004(I) as requiring a showing of good cause prior to the expiration of the one hundred and eighty day time period; and (3) Thacker had good cause for not serving summons within the original one hundred and eighty days.[2]

I. Rescission of the Order Granting an Extension of Time

¶9 Thacker argues that the district court erred when, in essence, it rescinded its original finding that good cause existed for his failure to serve summons within one hundred and eighty days. The district court's July 2018 judgment states:

> The Court further notes that in February 2018, if the Court had known that Thacker's February 15, 2018 Motion for an Extension of Time to Effect Service Upon Defendants was filed outside the initial 180-day period for service of process, it would not have granted the 45-day extension of time to effect service.

Thacker contends that this was error and that, "good cause existed and was already established and granted by the Court." In his response to the defendants' motion to dismiss, Thacker also argued that the district court's finding that good cause existed in the order granting his request for an extension of time was "now the settled law of the case." These arguments lack merit.

¶10 First, Thacker's motion for an extension of time was not served on the defendants. In failing to do so, Thacker ignored 12 O.S.2011 § 2005(A), which provides that "every written motion other than one which may be heard ex parte . . . shall be served upon each of the parties." Thacker does not argue that he had the right to resolution of this issue without providing the defendants notice or an opportunity to be heard. He merely argues that the district court cannot change its mind. Thacker is wrong. A district court "**is not bound by, and may hence reconsider**, all of its mid-litigation rulings at any time before the case comes to an end." *Conterez v. O'Donnell*, 2002 OK 67, ¶ 7, 58 P.3d 759 (emphasis in original). In the absence of a determination of finality not applicable here:

> any order . . . however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order… is subject to revision at any time before the final judgment, decree, or final order adjudicating all the claims and the rights and liabilities of all the parties is filed with the court clerk.

12 O.S.2011 § 994. An intermediate order, like the order granting Thacker's request for an extension of time to serve summons, is not a judgment, decree, or final order and remained subject to "the trial judge's compete control to modify or alter it at any time before judgement." *L.C.R., Inc. v. Linwood Props.*, 1996 OK 73, ¶ 11, 918 P.2d 1388 (emphasis omitted).

¶11 Second, even if Thacker's request for an extension had been properly presented, the order granting that request did not settle the "law" of this case regarding the presence or absence of good cause. 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. The good cause issue has not been settled by a previous appellate opinion, and the settled-law-of-the-case doctrine does not apply to the district court's February 27, 2018 order granting Thacker an extension of time to serve summons. Consequently, the district court did not err when it revisited the good cause issue in response to the defendants' motion to dismiss.

II. Construction of Section 2004(I)

¶12 Thacker next contends that the district court erred in finding that the showing of good cause required by section 2004(I) must be made within the initial one hundred and eighty-day time period allowed by the statute for service of process. Thacker argues that the statutory language, "cannot show why such service was not made within that period," clearly contem-

plates that the Legislature intended to permit a party to request an extension after one hundred and eighty days and be allowed to show good cause at that point.

¶13 In support of this argument, Thacker cites the 2013 version of section 2004(I):

> SUMMONS: TIME LIMIT FOR SERVICE. If service of process is not made upon a defendant within one hundred eighty (180) days after the filing of the petition and the plaintiff cannot show good cause why such service was not made within that period, the action shall be deemed dismissed as to that defendant without prejudice.

12 O.S. Supp. 2014 § 2004(I). This Court has previously agreed with that interpretation of the 2013 version of the statute. *See Hough Oilfield Serv., Inc. v. Newton*, 2017 OK CIV APP 31, 396 P.3d 230 (holding that the good cause showing may be made in a subsequently filed case); *Thibault v. Garcia*, 2017 OK CIV APP 36, 398 P.3d 331 (holding that the good cause issue may be presented after the one hundred and eighty day time period has expired). Because section 2004(I) has since been amended, these cases do not necessarily resolve Thacker's argument.

A. The Applicable Version of Section 2004(I)

¶14 The 2013 version of the statute applied when Thacker filed this case in 2015. However, by 2018, when he filed his request for an extension of time and when the district court ruled on that request as well as on the defendants' motions to dismiss, a different version of the statute was in effect.

> SUMMONS: TIME LIMIT FOR SERVICE. If service of process is not made upon a defendant within one hundred eighty (180) days after the filing of the petition and the plaintiff *has not shown* good cause why such service was not made within that period, the action shall be deemed dismissed as to that defendant without prejudice.

12 O.S. Supp. 2017 § 2004(I) (effective Nov. 1, 2017) (emphasis added). The only difference between this version and the 2013 version of the statute is the substitution of the emphasized "has not shown" language for the previous "cannot show" language. There is an obvious grammatical difference in the wording of the two versions. Use of the present tense, "cannot show," in the 2013 version implies that the plaintiff will have the opportunity to show good cause why timely service was not made when the issue is raised, even in a subsequent case. But use of the past tense, "has not shown," in the 2017 version of the statute implies that the plaintiff did not make that showing when required to do so and limits the time previously available to the plaintiff to show good cause. The "rules of grammar govern unless they contradict legislative intent or purpose." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 140 (Thomson/West 2012) (footnote omitted).

¶15 The district court apparently came to this conclusion and interpreted the 2017 version of section 2004(I) as requiring Thacker to show good cause within the initial one hundred and eighty day period. That interpretation has been embraced by the Supreme Court, at least in dicta, in *Cole v. Josey*, 2019 OK 39, ___ P.3d ___, decided May 29, 2019 (*petition for rehearing filed*, June 17, 2019). The Court interpreted the new "has not shown" language as "setting a time limit for the plaintiff to establish 'good cause' for not serving process, *i.e.*, requiring the plaintiff to move to make such a showing prior to the expiration of the 180 day period."[3] *Id.* ¶ 15. This interpretation requires the plaintiff to exercise some diligence in the prosecution of a case. "The Oklahoma Pleading Code . . . shall be construed to secure the just, speedy, and inexpensive determination of every action." 12 O.S.2011 § 2001. Consequently, if the 2017 version of section 2004(I) is applied retroactively, it appears that the district court's interpretation is correct and its dismissal of Thacker's case must be affirmed.

¶16 "Absent a plain legislative intent to the contrary, statutes are generally presumed to operate prospectively only." *Trinity Broadcasting Corp. v. Leeco Oil Co.*, 1984 OK 80, ¶ 6, 692 P.2d 1364 (holding an amendment which added an additional year to the statute of limitations was procedural and applied retroactively to a pre-existing claim that was not time-barred at the time of the amendment's passage). Nothing in the 2017 amendment suggests that the Legislature intended for the new statute to be applied retroactively. Nonetheless, "[s]tatutes affecting procedure only, as distinguished from those that affect substantive rights, may be applied retroactively." *Id.*

¶17 The *Josey* Court addressed, but did not decide, the retroactivity issue: "Even assuming this provision is procedural and may be applied

retroactively . . . ." *Josey,* 2019 OK 39, ¶ 15. The Court cited *Trinity Broadcasting* for the general proposition that procedural statutes are applied retroactively. And the Court noted that in *Moore v. Sneed*, involving the 1989 amendment to section 2004(I): "We held this amendment should be given retroactive application because it is procedural in nature unless plaintiff's claim is already time barred." *Josey,* 2019 OK 39, ¶ 9. This Court reached the same result, for the same reason, in *Thibault* regarding the 2013 version of section 2004(I). *Thibault v Garcia*, 2017 OK CIV APP 36, ¶ 8, 398 P.3d 331.

¶18 However, the cases in which an amendment to section 2004(I) was applied retroactively may be distinguishable because none of the amendments in those cases would "diminish" the plaintiff's existing rights. *Thomas v. Cumberland Operating Co.,* 1977 OK 164, ¶ 4, 569 P.2d 974. In *Moore*, the amendment allowed the plaintiff an opportunity to show good cause for failing to make timely service that had not previously been guaranteed by the statute. In *Thibault*, only the district court's discretion to allow a case to proceed if the plaintiff had not shown good cause was affected. Likewise, in *Trinity Broadcasting,* the amendment added an additional year to the statute of limitations.

¶19 As interpreted by the *Josey* Court, the 2017 amendment eliminates the opportunity to show good cause after the expiration of the initial one hundred and eighty days. That opportunity was available pursuant to the version of the statute in effect when Thacker filed his case. We have found no case in which a rule of procedure was applied retroactively to deprive a plaintiff of a procedural right available when the case was filed.[4] "A 'vested right' is the power to do certain actions . . . lawfully, and is substantially a property right. It may be created [by statute] . . . . Once created, it becomes absolute, and is protected from legislative invasion by Art. 5, Secs. 52 and 54 of our Constitution." *Okla. Water Res. Bd. v. Cent. Okla. Master Conservancy Dist*., 1968 OK 73, ¶ 23, 464 P.2d 748.

¶20 Even if the 2017 amendment is purely procedural, there is good reason not to apply it retroactively in this case. Retroactive application of the 2017 amendment would create a result similar to that the Supreme Court sought to avoid in *Josey*. There, the Court was concerned that a contrary construction of the statute would deprive the plaintiff of the right to file a second case pursuant to 12 O.S.2011 § 100, before the time to appeal the dismissal of the first case had expired. The "grave due process violations" with that result which concerned the *Josey* Court are also present here. *Josey,* 2019 OK 39, ¶ 16.

¶21 In the absence of precedential authority to the contrary, it was reasonable for Thacker to look to this Court's interpretation of the 2013 version of section 2004(I) to determine when he would be able to show good cause for not serving the defendants within one hundred and eighty days. Accordingly, he may have believed that he would have been able to show good cause for the delay in service after the original one hundred and eighty days had expired. But, the 2017 version of section 2004(I) became effective more than one hundred and eighty days after Thacker filed his case. Prior to the effective date of the amendment, Thacker's case could only be dismissed if he was unable to show good cause for the delayed service when the issue was raised.

¶22 If the 2017 amendment is applied retroactively, the time for Thacker to show good cause expired before the issue was ever raised. This result is problematic. *See Mott v. Carlson,* 1990 OK 10, ¶ 15, 786 P.2d 1247 (finding no due process violation but noting that the "risk of prejudice due to the procedure employed" may require that the plaintiff be given an opportunity, but not necessarily a hearing, to show good cause) (overturned on other grounds by *Josey,* 2019 OK 39, ¶ 16). We decline to apply the 2017 amendment of section 2004(I) to the extent that doing so would preclude Thacker from an opportunity to show good cause why he failed to serve the defendants within one hundred and eighty days after filing this case.

B. Thacker's Attempt to Show Good Cause

¶23 Thacker supported his motion for extension of time with statements of various events he contended showed good cause for not serving summons within the one hundred and eighty days required by section 2004(I). For example, he argued that, pursuant to this Court's decision in *Thibault v. Garcia*, if his November 30, 2015 petition is deemed to have been dismissed on the one hundred and eighty-first day after it was filed, then his one year to refile, permitted by 12 O.S.2011 § 100, would have expired in May of 2017, and he would no longer have the right to pursue his cause of action.

1. Thacker's Legal Argument

¶24 To avoid that result, Thacker cites *Espinoza v. United States*, 52 F.3d 838 (10th Cir. 1995), for the proposition that the expiration of the statute of limitations for the underlying claim constitutes grounds for extending the time permitted to serve process even in the absence of good cause. The language of Oklahoma's original version of section 2004(I) was patterned after its federal counterpart. *See Mott v. Carlson,* 1990 OK 10, ¶¶ 4-5, 786 P.2d 1247 (overturned on other grounds by *Josey,* 2019 OK 39, ¶ 16). However, the 1993 version of the federal statute at issue in *Espinoza* is substantially different than the 2013 or the 2017 version of section 2004(I). The federal statute provided that if service is not made within the specified time, the court "shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period." Fed.R.Civ.P. 4(m), 28 U.S.C.A. (West 2019). The federal court construed this statute as "broaden[ing] the district court's discretion by allowing it to extend the time for service even when the plaintiff has not shown good cause." *Espinoza,* 52 F.3d at 840-41. No such broad discretion is granted in the 2013 or 2017 versions of section 2004(I). In Oklahoma, if a plaintiff fails to show good cause for not serving process within one hundred and eighty days, "the action shall be deemed dismissed," despite the fact that a plaintiff may be prevented from filing a subsequent petition because the applicable limitations period has expired. For that reason, we decline to follow the federal court's analysis in *Espinoza*.

2. Thacker's Factual Argument

¶25 Thacker made various factual claims in his motion to support the argument that there was good cause for his failure to serve the defendants within one hundred and eighty days. Those claims are renewed in his response to the defendants' motion to dismiss and in his motion to reconsider. The problem, as pointed out by the defendants, is that none of those claims constitutes evidence on the basis of which the district court could have found that good cause existed for the delay in service. *See Willis v. Sequoyah House, Inc.*, 2008 OK 87, ¶ 12, 194 P.3d 1285 (explaining that merely inserting facts or statements in a court-filed paper is not an acceptable evidentiary substitute). "These references to proof contained in the paperwork of the case do not constitute evidence of good cause." *Id.* (emphasis omitted). Thacker's good cause "facts" were not verified and they were not supported by an affidavit or other evidentiary material. *See* Okla. Dist. Ct. R. 4(c), 12 O.S. Supp. 2013, ch. 2, app. ("Motions raising fact issues shall be verified by a person having knowledge of the facts, if possible; otherwise, a verified statement by counsel of what the proof will show will suffice until a hearing or stipulation can be provided."). Thacker had three opportunities in this case to provide evidence that good cause existed for not serving the defendants within one hundred and eighty days. Two of those opportunities came after the defendants cited *Willis* and argued to the district court that Thacker had not produced any "evidence" to support his good cause argument. Nonetheless, Thacker continued to rely on non-evidentiary submissions in his pleadings and briefs. Consequently, the district court had no basis on which to find that good cause existed for Thacker's failure to serve the defendants within one hundred and eighty days after filing his petition. And, neither do we.

¶26 The district court did not err in denying Thacker's motion to reconsider. As a result, that court's July 27, 2018 judgment dismissing Thacker's petition is also affirmed.

CONCLUSION

¶27 Thacker filed this case in 2015. He did not serve process on the defendants within one hundred and eighty days as required by section 2004(I) of the Pleading Code. In February of 2018, Thacker filed a motion for an extension of time to serve process. Thacker claimed that he had good cause for not serving process within one hundred and eighty days after he filed his case. However, the reasons offered were not verified or supported by evidentiary material, and, therefore, did not provide the district court with a basis for granting Thacker's motion. Although Thacker had the opportunity to support his claim of good cause with evidentiary material, he continued to improperly rely on the "unsworn conclusory statements" submitted by his lawyers. *Willis v. Sequoyah House, Inc.*, 2008 OK 87, ¶ 13. Consequently, the district court did not err when it denied Thacker's motion to reconsider. The district court's July 27, 2018 judgment finding that Thacker's case was deemed dismissed one hundred and eighty-one days after it was filed is affirmed.

¶28 **AFFIRMED**.

GOODMAN, J., and THORNBRUGH, J., concur.

Order for Publication
July 31, 2020

The original Opinion issued in this case on July 8, 2019, is released for publication by order of the Court of Appeals this 30th day of July, 2020, under the same public domain number as the June 9, 2020, Supplemental Opinion, at 2020 OK CIV APP 41.

ALL JUDGES CONCUR.

/s/ John F. Fischer
Presiding Judge, Division II

JOHN F. FISCHER, PRESIDING JUDGE:

1. The Newspaper Defendants also joined their motion to quash with a motion to dismiss based on 12 O.S.2011 § 2012(B)(4), arguing that because Thacker's case was deemed dismissed by operation of law for failure to complete service within one hundred and eighty days, Thacker's attempt to subsequently have summons issued in the dismissed case was, "as a matter of law, insufficient process." The district court did not address this issue, and we find it unnecessary to do so as well. Granting the motion to quash on the basis of section 2004(I) made it unnecessary to address additional issues.

2. The district court also found that because Thacker's petition was deemed dismissed without prejudice on May 30, 2016, for failure to comply with section 2004(I), Thacker had failed to refile his petition within the one year from that date as permitted by 12 O.S.2011 § 100. The district court ruled on this issue without the benefit of the Supreme Court's Opinion in *Cole v. Josey,* 2019 OK 39, 457 P.3d 1007. Pursuant to the holding in *Josey*, it is clear that the time provided by the section 100 savings clause "begins to run when there is finality in the judgment." *Id.* ¶ 16. Consequently, Thacker's time to refile did not begin to run until the district court's July 27, 2018 judgment dismissing his petition was filed. It is also clear from the holding in *Josey* that the one year to refile provided by section 100 was tolled by Thacker's motion for new trial and his appeal in this case. "The one year period begins the day after there is finality to the appeal or on the day after the order is filed if the judgment is not appealed." *Id.*

3. For example, in response to the Newspaper Defendants' motion to dismiss based on the statute of limitations, Thacker alleged that he did not discover the tortious conduct until November 30, 2014. Oklahoma "follows the discovery rule" and has adopted that rule "in a wide range of tort actions" and specifically with respect to defamation claims. *See Woods v. Prestwick House, Inc.*, 2011 OK 9, ¶¶ 24, 28, 247 P.3d 1183. Thacker invoked the discovery rule in his verified petition. The Newspaper Defendants did not support their motion to dismiss with evidentiary material, nor was there an evidentiary hearing to determine the veracity of Thacker's allegations. Unsworn statements by counsel in a motion or a response do not constitute evidence. *Crest Infiniti II, LP v. Swinton*, 2007 OK 77, ¶ 10, 174 P.3d 996. Further, when facts are disputed, application of the discovery rule is normally for the jury to decide. *Digital Design Group, Inc. v. Information Builders, Inc.,* 2001 OK 21, ¶ 23, 24 P.3d 834. The standard of review applicable to the Newspaper Defendants' motion to dismiss requires the appellate court to "take as true all of the challenged pleading's allegations together with all reasonable inferences that may be drawn from them." *Kirby v. Jean's Plumbing Heat & Air*, 2009 OK 65, ¶ 5, 222 P.3d 21 (footnote omitted). In our original Opinion, we did not decide whether the statute of limitations had been tolled based on the discovery rule.

JOHN F. FISCHER, PRESIDING JUDGE:

1. *Willis* dealt with a version of the statute that provided the district court "may" dismiss the action if the plaintiff fails to show good cause, and, therefore, held that dismissal was discretionary. Nonetheless, pursuant to the "shall be deemed dismissed" version of the statute, the district court's discretion is still invoked to determine if the plaintiff has sustained the burden to show, with acceptable evidentiary material, good cause for its failure to secure timely service. *See Willis*, 2008 OK 87, ¶ 19.

2. Thacker argued in his motion that the district court erred in finding that the statute of limitations had run before he filed this case and in finding that the court was unaware when it granted the extension that the time for serving summons had expired. Finally, Thacker argued that the effect of the district court's dismissal of this case would prevent him from filing a subsequent case because the statute of limitations had run. We find it unnecessary to address these issues. The failure to show good cause why service was not made within one hundred and eighty days is dispositive, and the district court's dismissal of this case is affirmed solely on that basis. "This Court may render the judgment which the district court should have rendered…. This Court may affirm the judgment below on a different legal rationale." *Lafalier v. Lead-Impacted Cmtys. Relocation Assistance Trust,* 2010 OK 48, n.88, 237 P.3d 181 (citing *Dixon v. Bhuiyan*, 2000 OK 56, ¶ 9, 10 P.3d 888). The effect of the district court's dismissal of this case on Thacker's ability to file a subsequent case is not an issue in this litigation and is not resolved in this Opinion.

3. In doing so, the Court also, and for the first time, interpreted the "within that period" language of section 2004(I) as referring to the time period in which the good cause showing must be made. Previously, that same language had been interpreted as referring to the time period within which service must be made, *i.e.*, one hundred and twenty days, *see Mott v. Carlson,* 1990 OK 10, 786 P.2d 1247 (overturned on other grounds by *Josey,* 2019 OK 39, ¶ 16), or one hundred and eighty days. *See Thibault v. Garcia,* 2017 OK CIV APP 36, 398 P.3d 331; *Hough Oilfield Serv., Inc. v. Newton,* 2017 OK CIV APP 31, 396 P.3d 320; *Moore v. Sneed*, 1992 OK CIV APP 107, 839 P.2d 682. In those cases, a motion filed after the statutory period allowed for service would give the plaintiff the opportunity to show good cause why service was not made "within that [statutory] period."

4. *See, e.g., Cole v. Silverado Foods, Inc.*, 2003 OK 81, 78 P.3d 542 (rejecting retroactive application of an amendment in a pending case that would have barred the claim by reducing from five to three years the time to pursue certain aspects of a claim).

2020 OK CIV APP 42

ALLAN WAYNE McLAURIN, Petitioner/Appellant, vs. OKLAHOMA DEPARTMENT OF CORRECTIONS, Respondent/Appellee.

Case No. 118,004. February 21, 2020

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE SUSAN STALLINGS, JUDGE

AFFIRMED

Allan Wayne McLaurin, Helena, Oklahoma, *Pro Se*, Appellant,

Kari Y. Hawkins, ASSISTANT ATTORNEY GENERAL, Oklahoma City, Oklahoma, for Respondent/Appellee.

Bay Mitchell, Presiding Judge:

¶1 Petitioner/Appellant, Allan Wayne McLaurin, is an inmate in custody of the Respondent/Appellee, Oklahoma Department of Corrections (ODOC). Pursuant to 57 O.S. Supp. 2014 §549(A)(5), twenty percent of McLaurin's earnings are placed in a mandatory savings account that McLaurin cannot access until his release. Under a 2014 amendment to the statute, inmates serving life sentences without the possibility of parole are exempt from this mandatory-savings

provision. McLaurin argues that because he has the functional equivalent of a sentence of life without the possibility of parole, the statutory exemption should also apply to him. The trial court granted ODOC's motion to dismiss for failure to state a claim upon which relief can be granted. Having reviewed the statutory text, McLaurin's petition, and the record on appeal, we find that although McLaurin does have the functional equivalent of a sentence of life without the possibility of parole, the statutory exemption from the mandatory-savings provision applies only to inmates who have such a sentence in fact. Accordingly, we affirm.

BACKGROUND

¶2 McLaurin is currently incarcerated and serving time under thirteen separate sentences, each to be served consecutively. His total term of imprisonment is 20,750 years.[1] Although McLaurin is eligible for parole on each conviction, because he must serve at least fifteen years on each count prior to parole eligibility, he will not be eligible for release on parole until, at the earliest possible date, the year 2191. Were McLaurin to somehow survive until that year, he would be 224 years old on the date of his release.

¶3 McLaurin performs some work at the prison for which he receives wages. Pursuant to statute, ODOC has the power to establish the percentages of an inmate's wages that are used for various purposes, with the following limitation:

> Provided that, not less than twenty percent (20%) of such wages shall be placed in an account, and shall be payable to the prisoner upon his or her discharge; *however, inmates with a sentence of life without the possibility of parole shall be exempt from this provision.* Funds from this account may be used by the inmate for fees or costs in filing a civil or criminal action as defined in Section 151 et seq. of Title 28 of the Oklahoma Statutes or for federal action as defined in Section 1911 et seq. of Title 28 of the United States Code, 28 U.S.C., Section 1911 et seq.

57 O.S. Supp. 2014 §549(A)(5) (emphasis supplied).

¶4 McLaurin sought to access funds in his mandatory-savings account to allow his fianceé to purchase clothing and religious items on his behalf. His request was first denied without explanation. After elevating his request through the appropriate administrative channels, he was told that the "mandatory savings could only be used for legal cost[s]." He pressed his request up the chain, but his claim to the funds in his mandatory-savings account was denied at each stage.

¶5 In January 2017, McLaurin filed a petition in district court seeking a writ of mandamus requiring ODOC to release the funds requested. He states in his application that he "has constitutional and statutory rights to purchase religious material as part of the Free Exercise Clause of the Oklahoma and United States Constitutions and the Religious Land Use and Institutionalized Persons Act (RLUIPA)."[2] McLaurin also makes the argument that he should be exempt from the statute because he has the functional equivalent of a life sentence without the possibility of parole.

¶6 In October 2017, ODOC moved to dismiss the action on two separate grounds. First, they noted that the 180 days permitted to serve the petition and summons had expired without service. Second, they argued that under *Cumbey v. State*, 1985 OK 36, 699 P.2d 1094, McLaurin has no property interest in his mandatory-savings account, and therefore his claim must be dismissed. In December 2017, without a hearing, the trial court granted ODOC's motion to dismiss. The court offered no explanation as to the reason for the dismissal, held no hearing, and did not afford McLaurin the opportunity to amend his pleadings.

¶7 McLaurin appealed (Case No. 116,863) and Division IV of this Court, reversed. The Court found that the trial court's dismissal without affording McLaurin any opportunity to amend his pleadings or assert a reason for the delinquency of service were both reversible errors. Division IV did not address McLaurin's statutory or constitutional arguments.

¶8 On remand, without any further proceedings, the trial court entered an amended order, which states:

> Respondent Oklahoma Department of Corrections' Motion to Dismiss is granted in part and denied in part. Specifically, Petitioner has shown good cause for failure to timely serve the Oklahoma Department of Corrections and Respondent's Motion to Dismiss for failure to timely serve is DENIED. The Court further finds that Respondent Oklahoma Department of Corrections' Motion to Dismiss is GRANTED for

> the reason that Petitioner failed to state a claim upon which relief can be granted. This action is dismissed with prejudice to refiling as Petitioner's claim fails as a matter of law and cannot be cured by re-pleading.

McLaurin timely appealed and we proceed pursuant to Oklahoma Supreme Court Rule 1.36.

STANDARD OF REVIEW

¶9 Our review of an order of dismissal is *de novo. Miller v. Miller*, 1998 OK 24 ¶15, 956 P.2d 887. The order granting ODOC's motion to dismiss must be reversed unless it appears without doubt that McLaurin can prove no set of facts that would entitle him to relief. *Niemeyer v. U.S.F.& G.*, 1990 OK 32, 789 P.2d 1318, 1321.

ANALYSIS

¶10 McLaurin is *pro se* and the contours of his legal arguments are not crystal clear. However, we read his application, and other submissions contained in the record, to make four distinct arguments that ODOC's withholding of twenty percent of his earnings for use upon release is impermissible. He first alludes to a basic statutory-interpretation argument, claiming that ODOC has simply misread §549(A)(5) in failing to include him in that group of inmates that are not exempt from the mandatory-savings provision. Second, McLaurin makes an equal-protection argument – namely, that the legislature's inclusion of him with the class of inmates that face an actual possibility of parole during their lifetime violates his right to equal protection of the laws. Third, he alludes to an argument that his religious rights were violated because ODOC's denial was of his request to purchase religious items. Fourth, McLaurin argues that the statute in question should not apply to him because he earned the majority of his wages through Oklahoma Correctional Industries and not through ODOC directly. Each argument will be addressed in turn.

THE BASIC TEXTUAL ARGUMENT

¶11 McLaurin's most basic argument is that ODOC has simply misread the statute in question.[3] He argues that his sentence is materially indistinguishable from a sentence of life without the possibility of parole because he will, as a matter of fact, spend the rest of his life in prison with no opportunity to be released on parole. McLaurin argues, in effect, that because he could be properly described as serving a sentence of life without the possibility of parole, he is in fact serving a sentence of life without parole.

¶12 Although compelling in its simplicity, this argument cannot withstand a focused analysis. A brief perusal of Title 21 reveals that there are three basic types of non-death sentences provided for in the Oklahoma statutes. There are sentences for a term of years, life sentences with the possibility of parole, and life sentences without the possibility of parole. See, e.g., 21 O.S. Supp. 2017 §701.9(A) ("A person who is convicted of or pleads guilty or nolo contendere to murder in the first degree shall be punished by death, by imprisonment for life without parole or by imprisonment for life."). Although the effect of McLaurin's combined sentences may be the same as a life sentence without the possibility of parole, he is not in fact serving any sentence of life without the possibility of parole, as is required by §549(A)(5). It is undisputed that all of McLaurin's sentences are for a term of years. That statute carves out an exception that is specifically limited to those inmates "with a sentence of life without the possibility of parole. . ." 57 O.S. 2014 §549(A)(5). Because McLaurin is not serving such a sentence, his basic textual argument must fail.[4]

THE EQUAL-PROTECTION ARGUMENT

¶13 "The Fourteenth Amendment guarantee of equal protection 'is essentially a direction that all persons similarly situated should be treated alike.'" *Straley v. Utah Bd. of Pardons*, 582 F.3d 1208, 1215 (10th Cir. 2009) (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985)). However:

> The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons. We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.

Romer v. Evans, 517 U.S. 620, 631 (1996) (citations omitted).[5]

¶14 We are persuaded that McLaurin is similarly situated with inmates serving sentences

of life without the possibility of parole for the purposes of equal protection analysis. McLaurin will be 245 years old when he is first eligible for release. Absent astronomical advances in the medical sciences or divine intervention, McLaurin will die in prison just the same as those inmates who are serving sentences of life without the possibility of parole. Indeed, the purpose of such lengthy sentences was almost certainly to ensure McLaurin would die in prison even though an actual life-without-the-possibility-of-parole sentence was not available to the sentencing judge.

¶15 As such, we move to step two of the equal-protection analysis. Because the classification presented – that is, inmates sentenced to a life-without-the-possibility-of-parole sentence versus inmates with a different sentence that has the same effect – does not target any suspect class or implicate any fundamental right, the statute must be upheld "so long as it bears a rational relation to some legitimate end." *Romer,* at 631. "When those who appear similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference . . ." *Engquist v. Oregon Dept. of Agr.*, 553 U.S. 591, 602 (2008). McLaurin's burden is significant:

> On rational-basis review, a classification in a statute … comes to us bearing a strong presumption of validity, and those attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it …

F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307, 314-15, (1993) (citations and internal quotations omitted).

¶16 The statute at issue here is the 2014 amendment which added the exception to the mandatory-savings account for life-without-the-possibility-of-parole inmates. Prior to the amendment, all inmates were required to participate in the mandatory-savings program, even though they had no possibility of release. The Oklahoma Supreme Court upheld this program in *Cumbey*, finding that it was rationally related to the legitimate governmental interests of "prevent[ing] the free flow of currency within the prison system and provid[ing] an inmate with sufficient funds upon his release to assist him in readjustment to society at large without further aid from the state treasury." *Cumbey* at ¶9, 1098. The statute as amended continues to serve those same interests. With its 2014 amendment exempting at least some inmates who will not ever be release eligible, the statute is actually *more* narrowly tailored to serve at least the second interest identified in *Cumbey*. We will not invalidate an amendment to a statute that the Oklahoma Supreme Court has previously upheld under rational basis review where the effect of the amendment is to achieve a legitimate governmental interest in a more narrowly tailored fashion than prior to the amendment.

¶17 Further, we find the line-drawing that the Legislature engaged in crafting the 2014 amendment perfectly rational. The desire for a bright-line rule as to which inmates are exempt from the mandatory-savings program and which are not serves the legitimate governmental interest of creating a program that is far easier to administer than one that draws the line at which inmates have a realistic chance of release during their life. It is obvious that a statute exempting all inmates who have no practical hope of release during their lifetimes would be far more difficult to administer than the clear exception for inmates serving a sentence of life without the possibility of parole.[6] Avoiding an individualized determination of an inmate's qualification for the mandatory-savings program is a legitimate governmental interest in and of itself. Limiting the exception to those inmates who have an actual sentence of life without the possibility of parole is a reasonable method of accomplishing that goal. Because the statute passes rational-basis review, McLaurin's arguments under the Equal Protection Clause must also fail.

THE FREE EXERCISE ARGUMENT

¶18 McLaurin alleges in his petition that he "has constitutional and statutory rights to purchase religious material as part of the Free Exercise Clause of the Oklahoma and United States Constitutions and the Religious Land Use and Institutionalized Persons Act (RLUIPA)." This statement is correct as far as it goes; however, any argument McLaurin makes that he has a property interest in the mandatory-savings fund is foreclosed by *Cumbey v. State,* 1985 OK 36, 699 P.2d 1094. *See, supra,* footnote 3. Although he may have a right to practice his religion even while incarcerated, this does not give him the unfettered right to use the funds in his mandatory-savings account to purchase religious items. After *Cumbey*, it is settled that inmates do not have any vested property right whatsoever in these accounts. *Id.* at ¶9, 1097

("We therefore view the inmates' 20% prison accounts as conditional credits of potentially accessible funds, rather than vested property interests.").

¶19 Thus, unless McLaurin's petition can be read to indicate that ODOC refused to give him access to his mandatory-savings funds on account of his religion, his claims under the Free Exercise Clause and RLUIPA, must fail. Even under the liberal pleading standards applicable in Oklahoma, we cannot read McLaurin's petition to make allegations of disparate treatment on the basis of religion. Rather, we read his petition to state that he is entitled to the mandatory-savings funds on the same basis as an inmate serving a sentence of life without the possibility of parole. Accordingly, his claims under the Free Exercise Clause and RLUIPA were properly subject to dismissal for failure to state a claim.

THE ODOC / OCI DISTINCTION

¶20 Finally, McLaurin argues that his case is distinguishable from that presented in *Cumbey* because he earned his savings working for Oklahoma Correctional Industries (OCI) as opposed to working directly for ODOC. However, neither the statutes, the case law, nor ODOC policy make any distinction between wages earned through ODOC or OCI. When discussing the statute at issue in this case, the Oklahoma Supreme Court in Cumbey spoke to wages earned "while incarcerated." *Cumbey* at ¶8, 1098. No attempt to distinguish what entity wrote the check was made in that case, and McLaurin offers no legitimate reason to make the distinction here.

¶21 AFFIRMED.

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

Bay Mitchell, Presiding Judge:

1. In 1996, McLaurin was convicted on fourteen separate felony counts, for which he received the following sentences: assault with a deadly weapon (1,500 years); two counts of robbery by fear, (500 years each); kidnapping (1,750 years); three counts of rape (2,000 years each); five counts of forcible sodomy (2,000 years each); second-degree burglary (500 years); and grand larceny (500 years). The grand larceny conviction was reversed on direct appeal, but the convictions and sentences on the remaining thirteen counts were upheld.

2. RLUIPA states: "No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person – (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C.A. § 2000cc-1.

3. ODOC does not address McLaurin's textual argument anywhere in the record, but instead relies on multiple citations to *Cumbey v. State*, 1985 OK 36, 699 P.2d 1094. That case, which was decided well before the life-without-the-possibility-of-parole exception was written into the statute in 2014, stands for the proposition that inmates have no basic property right in the twenty-percent, mandatory-savings fund. *Id.* at ¶6. It does not address the question, squarely presented here, whether an inmate serving the functional equivalent of a life-without-the-possibility-of-parole sentence should be categorized the same as an inmate serving an actual life-without-the-possibility-of-parole sentence.

4. McLaurin cites to *Moore v. Biter*, 725 F.3d 1184 (9th Cir. 2013), apparently for the proposition that a life-without-parole sentence is materially indistinguishable from a term-for-years sentence where it was clear, as here, that the offender would die in prison without a meaningful opportunity for parole. *Id.* at 1192 ("Here, we cannot ignore the reality that a seventeen year-old sentenced to life without parole and a seventeen year-old sentenced to 254 years with no possibility of parole, have effectively received the same sentence.") However, *Moore* was exploring the limits of the categorical ban, set forth in *Graham v. Florida*, 560 U.S. 48 (2010) and *Miller v. Alabama*, 567 U.S. 460 (2012) and rooted in the Eighth Amendment of the United States Constitution, on sentences of life without the possibility of parole for juvenile offenders who committed non-homicide crimes. We do not think the analysis in *Moore* and similar cases as to what is considered cruel and unusual punishment is relevant in determining the Oklahoma Legislature's intent under the statute at issue here.

5. *See also, Dean v. Multiple Injury Tr. Fund*, 2006 OK 78, ¶ 20, 145 P.3d 1097, 1103–04 ("In considering the validity of legislation challenged under equality provisions of the federal and state constitutions, the state legislature has a wide range of discretion. Where the power to regulate exists, the details of the legislation and the proper exceptions to be made rest primarily within the legislature's discretion. The legislature may distinguish between groups that otherwise resemble each other, although the power cannot be exercised arbitrarily and the distinction must have a reasonable basis.").

6. Although cases like McLaurin's would be quite easy to determine, what of the fifty-year-old inmate with forty years until he would be eligible for release? Would he be in or out of the mandatory-savings requirement? What information would the prisons be required to take into account when making this determination? The health history of the inmate? The inmate's family's medical history? The complexity and imprecision of such determinations are obvious.

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Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS
Thursday, July 9, 2020

F-2018-1262 — Eric Wayne Cowsert, Appellant, was tried in a bench trial for the crimes of Count 1, assault and battery by means likely to produce death; and Count 2, assault with a dangerous weapon, in Case No. CF-2016-587 in the District Court of Garvin County. The trial court found him guilty and sentenced him to concurrent terms of twenty-five years imprisonment, with five years suspended in Count 1, and ten years imprisonment with five years suspended in Count 2, and restitution of $6,066.18. From this judgment and sentence Eric Wayne Cowsert has perfected his appeal. The Judgment and Sentence is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs in results; Hudson, J., concurs; Rowland, J., concurs.

F-2019-437 — Eric Shawn Ray, Appellant, was tried by jury for the crime of Domestic Assault and Battery Resulting in Great Bodily Harm, in Case No. CF-2018-239 in the District Court of McCurtain County. The jury returned a verdict of guilty and recommended as punishment Thirty years in prison. The trial court sentenced accordingly. From this judgment and sentence Eric Shawn Ray has perfected his appeal. The JUDGEMENT and SENTENCE is AFFIRMED. Opinion by: Lumpkin,.J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concur in Results; Hudson, J Concur; Rowland, J., Concur.

F-2019-189 — Robert Don Coleman, Appellant, was tried by jury for the crime of first degree murder in Case No. CF-2018-106 in the District Court of McCurtain County. The jury returned a verdict of guilty and set punishment at life imprisonment without the possibility of parole. The trial court sentenced accordingly. From this judgment and sentence Robert Don Coleman has perfected his appeal. The Judgment and Sentence is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs; Rowland, J., concurs.

F-2018-1108 — Jakhai Montrell Adams, Appellant, was tried by jury for the crime of first degree murder in Case No. CF-2016-4641 in the District Court of Tulsa County. The jury returned a verdict of guilty and set punishment at life imprisonment. The trial court sentenced accordingly. From this judgment and sentence Jakhai Montrell Adams has perfected his appeal. The Judgment and Sentence is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs in result; Hudson, J., concurs; Rowland, J., concurs.

Thursday, July 16, 2020

RE-2019-0259 — Elena Marie Stewart, Appellant, entered a plea of guilty in Oklahoma County District Court Case No. CF-2017-6890 on January 25, 2019, to Count 1 – Felon in Possession of a Firearm, After Former Conviction of a Felony, and Count 3 – Possession of a Controlled Dangerous Substance with Intent to Distribute. Appellant was sentenced to fifteen years, suspended except for 15 weekends in the County Jail, on each count. The sentences were ordered to run concurrently. She was also fined $100.00. The State filed an application to revoke Appellant's suspended sentences on March 5, 2019. Following a revocation hearing on April 4, 2019, the Honorable Ray Elliott, District Judge, revoked ten years of Appellant's suspended sentences, with no credit for time served. Appellant appeals the revocation of her suspended sentences. The revocation of Appellant's suspended sentences is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J.: Concur; Lumpkin, J.: Concur; Hudson, J.: Concur; Rowland, J.: Concur.

F-2019-58 — Appellant Dveric Dante Jessie was tried and convicted by jury for two counts of First Degree Murder, in Caddo County District Court Case No. CF-2015-243. In accordance with the jury's recommendation the trial court sentenced Appellant to life imprisonment without parole on Count 1 and to life imprisonment on Count 2. The sentences were ordered to be served consecutively. From this judgment and sentence Dveric Dante Jessie has perfected his appeal. AFFIRMED. Opinion by: Kuehn, V.P.J.: Lewis, P.J.: Concur; LUMPKIN, J.: Concur in Results; Hudson, J.: Concur; Rowland, J.: Concur.

Thursday, July 23, 2020

F-2018-546 — Casey Dewayne Lemmons, Appellant, was tried by jury for the crime of Sexual Abuse of a Child Under Twelve, in Case No. CF-2017-97 in the District Court of Choctaw County. The jury returned a verdict of guilty and recommended as punishment twenty-five years in prison. The trial court sentenced accordingly. From this judgment and sentence Casey Dewayne Lemmons has perfected his appeal. Accordingly, this appeal is denied. The Judgement and Sentence is AFFIRMED, and Mandate is ORDERED. Opinion by: Lumpkin, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs in part/dissent in part; Hudson, J., specially concurs; Rowland, J., concurs.

F-2018-332 — Shaun Lovell Hurst, Appellant, was tried by jury, in Case No. CF-2016-872, in the District Court of Muskogee County, for the crimes of Count 1: Lewd or Indecent Proposals to a Child Under Sixteen; Count 2: Assault with a Dangerous Weapon; Count 3: Endangering Others While Eluding/Attempting to Elude Police Officer; and Count 4: Destroying Evidence. The jury returned a verdict of guilty and recommended as punishment a sentence of fifteen years imprisonment on Count 1; five years imprisonment on Count 2; five years imprisonment and a $5,000.00 fine on Count 3; and one year imprisonment and a $500.00 fine on Count 4. The Honorable Michael Norman, District Judge, sentenced Hurst in accordance with the jury's recommendations as to the sentences of imprisonment. However, Judge Norman imposed fines of $1,000.00 on Count 1 and $100.00 each on Counts 2, 3 and 4. Judge Norman further ordered the sentences for Counts 2, 3 and 4 to run concurrently each to the other, but consecutively with the Count 1 sentence. From this judgment and sentence Shaun Lovell Hurst has perfected his appeal. The Judgment and Sentence of the District Court is AFFIRMED. Appellant's "Motion for Leave of Court to Reply Out of Time" and his "Motion to Remove Counsel" are STRICKEN and the Clerk of this Court is DIRECTED to return same to Appellant and to retain a copy for our records. Opinion by: Hudson, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs; Rowland, J., Concurs.

F-2018-829 — Robert Lee Culp, Appellant, was tried by jury for the crime of Lewd or Indecent Acts with a Child Under sixteen, in Case No. CF-2015-7165, in the District Court of Oklahoma County. The jury returned a verdict of guilty and recommended as punishment twenty-five years imprisonment. The Honorable Michele D. McElwee, District Judge, sentenced accordingly. From this judgment and sentence Robert Lee Culp has perfected his appeal. AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs; Rowland, J., Concurs.

F-2019-368 — Obaldo Espinoza, Jr., Appellant, was tried by jury for the crime of Aggravated Trafficking in Illegal Drugs, After Former Conviction of Two or More Felonies (Count 1), Unlawful Possession of a Firearm by Convicted Felon, After Former Conviction of Two or More Felonies (Count 3), and Unlawful Possession of Drug Paraphernalia (Count 4) (a misdemeanor) in Case No. CF-2018-19 in the District Court of Garfield County. The jury returned verdicts of guilty and set as punishment thirty-five years imprisonment and a $500,000.00 fine on Count 1, one year in jail and a $1,000.00 fine on Count 3, and ten years imprisonment on Count 4. The trial court sentenced accordingly. Judge Hladik ordered the sentences on Counts 1 and 4 to be served consecutively and Count 3 to be served concurrently with Count 1. From these judgments and sentences Obaldo Espinoza, Jr. has perfected his appeal. AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs.

F-2018-1049 — Scotty Dewayne Russell, Appellant, was tried by jury for the crime of Two Counts of Assault and Battery with a Dangerous Weapon, After Former Conviction of Two or More Felonies, in Case No. CF-2017-204, in the District Court of Mayes County. The jury returned a verdict of guilty and recommended as punishment twenty years imprisonment on each count. The Honorable Terry H. McBride, District Judge, sentenced accordingly. Judge McBride also imposed a $200 Victim Compensation Assessment on each count along with other costs and fees and ordered credit for time served and further ordered the sentences for both counts to run consecutively. From this judgment and sentence Scotty Dewayne Russell has perfected his appeal. We AFFIRM the judgment and sentence of the district court, except for the imposition of the Victim's Compensation Assessment which is REVERSED AND REMANDED to the trial court for further proceedings. Opinion by: Hudson, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs in Results; Rowland, J., Concurs.

S-2019-790 — Appellant, The State of Oklahoma, charged Appellee Michael Sam in Tulsa County District Court, Case Number CF-2019-1899, with Shooting with Intent to Kill (Counts 1-4) and Possession of a Firearm After Juvenile Adjuducation (Count 5). Sam filed a motion to quash. The Honorable Sharon Holmes, District Judge, sustained Sam's motion to quash. The State of Oklahoma appeals the district court's order. We exercised jurisdiction pursuant to 22 O.S.2011, § 1053. The order of the district court sustaining Sam's motion to quash is REVERSED and the matter REMANDED for further proceedings. Opinion by: Rowland, J.; Lewis, P.J., concurs in results; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs.

F-2019-367 — Appellant Christopher Lind was tried by jury for the crime of Murder in the First Degree in Oklahoma County District Court Case No. CF-2017-7187. In accordance with the jury's recommendation the trial court sentenced Appellant to life imprisonment without the possibility of parole. From this judgment and sentence Christopher Lind has perfected his appeal. AFFIRMED; Motion to Supplement Direct Appeal Record or for Evidentiary Hearing DENIED. Opinion by: Kuehn, V.P.J.: Lewis, P.J.: concur; Lumpkin, J.: concur; Hudson, J.: concur; Rowland, J.: recuse.

F-2016-761 — Russell Lee Hogshooter, Appellant, was tried by jury in Case No. CF-2014-7491, in the District Court of Oklahoma County, for the crimes of Count 1: Conspiracy to Commit Murder in the First Degree and/or Robbery in the First Degree; Count 2: Murder in the First Degree, Malice Aforethought; and Counts 3-7: Murder in the First Degree, Felony Murder. The jury returned a verdict of guilty and recommended as punishment thirty-five years imprisonment on Count 1 and life imprisonment without the possibility of parole on Counts 2 through 7. The Honorable Timothy R. Henderson, District Judge, sentenced Appellant in accordance with the jury's verdicts. Judge Henderson further ordered the sentences to be served consecutively. From this judgment and sentence Russell Lee Hogshooter has perfected his appeal. AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs in Results; Rowland, J., Recused.

F-2019-583 — Appellant Dwight Shawn Burley, Jr. was tried by jury for the crime of First Degree Rape in Carter County District Court Case No. CF-2018-294. In accordance with the jury's recommendation the trial court sentenced Appellant to five years imprisonment with credit for time served. Dwight Shawn Burley, Jr. has perfected his appeal. AFFIRMED. Opinion by: Kuehn, V.P.J.: Lewis, P.J.: concur; Lumpkin, J.: concur in results; Hudson, J.: concur; Rowland, J.: concur.

C-2019-760 — Edmond Lee Coker, Petitioner, pled nolo contendere to Count I – Forcible Sodomy and Count 2 – Lewd or Indecent Acts with a Child Under 16 in Osage County District Court Case No. CF-2017-505. The trial court sentenced him to 20 years on Count 1 and to 25 years in Count 2, to run concurrently, followed by a year of post-imprisonment supervision. Petitioner timely moved to withdraw his pleas, and after a hearing on the matter, the district court denied his motion. Edmond Lee Coker has perfected his certiorari appeal of the district court's denial of his motion to withdraw plea. Petition for Certiorari DENIED. Opinion by: Kuehn, V.P.J.; Lewis, P.J., concur; Lumpkin, J., concur; Hudson, J., concur in results; Rowland, J., concur.

RE-2019-380 — Rose Marie Longmire, Appellant, entered pleas of guilty in the District Court of Delaware County on February 11, 2015, as follows: In Case No. CF-2013-415 Appellant pled guilty to Forgery in the Second Degree, a felony. She was sentenced to seven years, suspended, with rules and conditions of probation, and fined $100.00. In Case No. CF-2014-280 Appellant pled guilty to Count 1 – Uttering Forged Instrument, a felony, AFCFx2; Count 2 – Obtaining Cash or Merchandise by Trick or Deception, a misdemeanor; and Count 3 – Identity Theft – Use of Personal Information, a felony, AFCFx2. She was sentenced to ten years on Count 1, one year on Count 2 and ten years on Count 3, all suspended, with rules and conditions of probation. The sentences were ordered to be served concurrently, each with the other, and concurrently with CF-2014-281 but consecutive to CF-2013-415. Appellant was fined $100.00 on each count. In Case No. CF-2014-281 Appellant pled guilty to Bail Jumping, AFCFx2, a felony. She was sentenced to ten years, all suspended, with rules and conditions of probation. The sentence was ordered to be served concurrently with CF-2014-280 but consecutive to CF-2013-415. The State filed an application to revoke Appellant's suspended sentences in all three cases on October 14, 2015. Following a revocation hearing on February 5, 2016, the trial court revoked Appellant's sus-

pended sentences in full. Following a hearing for Judicial Review on February 2, 2017, the remaining balance of Appellant's sentences was suspended upon successful completion of the Regimented Treatment Program, and with rules and conditions of probation. The State filed a second motion to revoke Appellant's suspended sentences on August 1, 2017. Following a revocation hearing on May 25, 2019, the balance of Appellant's remaining suspended sentences was revoked in full, with credit for time served. In CF-2014-280 the sentences were ordered to be served concurrently each with the other and concurrently with CF-2014-281 but consecutive to CF-2013-415. In CF-2014-281 the sentence was ordered to be served concurrently with CF-2014-280. Appellant appeals the revocation of her suspended sentences. The revocation of Appellant's suspended sentences is AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs; Hudson, J., Concurs; Rowland, J., Concurs.

C-2019-948 — Marlon Larenze Burge, Petitioner, pled guilty to conjoint robbery in Oklahoma County District Court Case No. CF-2018-3996. Sentencing was deferred for 10 years. Following a Motion to Accelerate Sentence based on Petitioner's violation of probation, the court sentenced Petitioner to 17 years imprisonment. Petitioner moved to withdraw his original guilty plea, which the district judge denied after a hearing. Marlon Larenze Burge has perfected the certiorari appeal of the district court's denial of his motion to withdraw plea. Petition for Certiorari DENIED. Opinion by: Kuehn, V.P.J.; Lewis, P.J., Concurs; Lumpkin, J., Concurs; Hudson, J., Concurs; Rowland, J., Concurs.

RE-2019-282 — Jeffrey Jones Shepherd, Appellant, entered a plea of guilty on August 8, 2005, to Trafficking in Illegal Drugs in Jackson County District Court Case No. CF-2005-43. Sentencing was continued until Appellant completed the Offender Accountability Plan for Delayed Sentencing, completed the RID Program and obtained his GED. Appellant successfully completed the RID Program and obtained his GED. On May 2, 2006, Appellant was sentenced to fifteen years, all suspended, with rules and conditions of probation, on Count 1. He was fined $10,000.00, all suspended but $1,000.00. Upon request of the State, Count 2, Possession of Controlled Substance, was dismissed. The State filed a third application to revoke Appellant's suspended sentence on October 5, 2018. Following a revocation hearing on April 15, 2019, before the Honorable Winford Mike Warren, Associate District Judge, Appellant's suspended sentence was revoked in full. Appellant appeals the revocation of his suspended sentence. The revocation of Appellant's suspended sentence is AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs in results; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs.

Thursday, July 30, 2020

F-2019-417 — Henry Warren Kwe Kwe, Appellant, was tried by jury for the crime of Conjoint Robbery (Count 1), Shooting with Intent to Kill (Count 2), Possession of a Sawed-Off Shotgun (Count 4), and Leaving Scene of a Collision Involving Injury (Count 5) in Case No. CF-2016-4098 in the District Court of Tulsa County. The jury returned verdicts of guilty and set as punishment nine years imprisonment and a $2,500.00 fine on Count 1, twenty-eight years imprisonment and a $1,800.00 fine on Count 2, two years imprisonment and a $600.00 fine on Count 4, and one year imprisonment and a $600.00 fine on Count 5. The trial court sentenced accordingly ordering the sentences to be served concurrently and awarding credit for all time served. From these judgments and sentences Henry Warren Kwe Kwe has perfected his appeal. AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs.

RE-2019-0228 — Christopher Anthony French, Appellant, entered a plea of no contest on December 16, 2016, to Concealing Stolen Property in Oklahoma County District, Court Case No. CF-2014-4054, after nine prior felony convictions. He was sentenced to ten years, with all suspended except for the first 90 days, with credit for time served, and with rules and conditions of probation. The State filed a third application to revoke Appellant's suspended sentence on February 21, 2019. Following a revocation hearing on March 18, 2019, before the Honorable Amy Palumbo, District Judge, Appellant's suspended sentence was revoked in full. Appellant appeals the revocation of his suspended sentence. The revocation of Appellant's suspended sentence is AFFIRMED. Opinion by: Hudson, J.: Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs in Results; Rowland, J., Concurs.

F-2019-501 — On October 26, 2011, Appellant Jeffrey Jedidiah James entered guilty pleas in Delaware County District Court Case Nos. CF-2011-49 and CF-2011-70. Appellant was sentenced to Drug Court. On September 25, 2012, the State filed applications to remove Appellant from the Drug Court program and to sentencing him in conformity with the plea agreement. Appellant stipulated to the allegations contained in the applications. Following a hearing held April 15, 2013, the Honorable Alicia Littlefield, Special Judge, terminated Appellant from the Drug Court program and, pursuant to the terms of the plea agreement, sentenced him to various terms of imprisonment. The District Court's orders are AFFIRMED. Opinion by: Hudson, J.; Lewis, P.J., Concur; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs; Rowland, J., Concurs.

RE-2019-619 — On August 3, 2018, Appellant Mark Donovan Pemberton entered a plea of guilty to Endangering Others While Eluding/Attempting to Elude a Police Officer (Count 1) and Possession of a Stolen Vehicle (Count 3) in Cleveland County District Court Case No. CF-2017-246. Appellant was convicted and sentenced to fifteen years imprisonment for each count, with all fifteen years suspended and the first two years served under the supervision of the community sentencing program. On March 27, 2019, the State filed an amended motion to revoke Appellant's suspended sentence. Following a revocation hearing, the trial court revoked Appellant's suspended sentence in full. Appellant appeals. The revocation of Appellant's suspended sentence is AFFIRMED, but the matter is REMANDED to the trial court for modification of the revocation order to give four days credit for time served. Opinion by: Lumpkin, J.; Lewis, P.J.: Concur; Kuehn, V.P.J.: Concur; Johnson, J.: Concur; Hudson, J.: Concur.

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

118,131 — Ocwen Loan Servicing, LLC, Plaintiff/Appellee, v. Chandra R. Graham, Defendant/Appellant. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Cindy Truong, Judge. Defendant/Appellant, Chandra R. Graham, appeals from the trial court's order denying her motion to vacate a foreclosure judgment entered in favor of Plaintiff/Appellee, Ocwen Loan Servicing, LLC. In 2000, Graham executed a Promissory Note and Mortgage in favor of GMAC Mortgage Corporation which was subsequently acquired by Plaintiff. In 2016, Plaintiff filed its original foreclosure petition alleging Graham defaulted on the Note by failing to make required installment payments. Plaintiff thereafter moved for summary judgment. Graham, a licensed Oklahoma attorney who represented herself throughout the proceedings, filed an answer to the petition and a response to the summary judgment motion. With the trial court's permission, Plaintiff filed an Amended Petition in July 2017. Plaintiff also withdrew its original summary judgment motion and filed a second motion for summary judgment based on the Amended Petition. Both pleadings were mailed to Graham, who does not dispute receiving them. However, Graham never filed an answer to the Amended Petition or a response to the summary judgment motion. The first scheduled hearing was stricken due to Graham's bankruptcy filing. After the bankruptcy stay was lifted, Plaintiff sought a new hearing date. Graham was not served with notice of the hearing. The trial court granted summary judgment to Plaintiff and a copy of the judgment was mailed to Graham, who then filed the instant motion to vacate. We hold that because of her default, Graham was not entitled to notice of the hearing and that she admitted all material facts set forth in Plaintiff's summary judgment motion. We further find Graham failed to demonstrate error with respect to either the lifting of the bankruptcy stay or to the alleged failure of Plaintiff to follow local court rules. AFFIRMED. Opinion by Bell, P.J.; Buettner, J., and Goree, J., concur.

118,384 — Michael C. Washington, Plaintiff/Appellant, v. Cathy O'Connor and John Michael Williams, Defendants/Appellees. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Susan Stallings, Trial Judge. The trial court granted the motion for summary judgment filed by Defendants/Appellees, Cathy O'Connor and John Michael Williams. Plaintiff/Appellant, Michael C. Washington, proposes the district court erroneously (1) denied him a fair chance to file his reply brief and (2) denied his motion to stay its ruling until after discovery could be completed. The trial court did not abuse its discretion and the order is AFFIRMED. Opinion by Goree, J.; Bell, P.J., and Buettner, J., concur.

Wednesday, July 22, 2020

117,313 — Cody Craig, Plaintiff/Appellee, v. Bob Mills Furniture Co., LLC., and James Ses-

ock, Defendants/Appellants. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Lisa T. Davis, Trial Judge. In this negligence action, Plaintiff sued Defendants for injury to his dominant hand. The trial court denied Defendants' motion for directed verdict in which they argued lack of duty of care to Plaintiff. It also denied Defendants' motion for judgment notwithstanding the verdict and their motion for new trial. Defendants seek reversal of a jury verdict awarding Plaintiff actual damages in the amount of $7.5 million and $1.5 million in punitive damages. We AFFIRM. Opinion by Goree, J.; Bell, P.J., and Buettner, J., concur.

117,429 — In Re The Marriage Of: Sharon Ilene Kerr, Petitioner/Appellee, V. Aaron Brent Kerr, Respondent/Appellant. Appeal from the District Court of Payne County, Oklahoma. Honorable Katherine E. Thomas, Trial Judge. In this dissolution of marriage proceeding, Petitioner/Appellant, Sharon Ilene Kerr (Wife), appeals from the trial court's decree dividing marital property and apportioning marital debt. Wife contends the trial court abused its discretion because it failed to identify, value and equitably divide the parties' marital assets and debts and it only awarded her one-half of the Firefighters' Retirement Plan B (Pension) monthly benefits for a period of ten (10) years. These benefits are currently being paid to Respondent/Appellee, Aaron Brent Kerr (Husband). Because the trial court's decree fails to identify and assign values to the marital assets and debt, including the Pension, this Court cannot ascertain whether such marital assets and debts were equitably divided and/or whether Wife was properly awarded an equitable share of Husband's Pension. Accordingly, we hold the trial court abused its discretion in this respect and that portion of the decree is reversed and remanded to the trial court with instructions to identify and assign values to the marital assets and debts, including the Pension, and to equitably divide same. Wife also contends the trial court abused its discretion when it refused to hold Husband in contempt for failing to reduce Wife's prescription debt by Wife's insurance reimbursements. We cannot find the trial court abused its discretion when it declined to find Husband in contempt; however, on remand the court is directed to clarify the debt's status as a marital obligation, determine how each spouse shall bear the responsibility for the obligation, and re-adjust and balance the equities based on the allocation and award of this debt. In all other respects, the trial court's decree is AFFIRMED. Opinion by Bell, P.J.; Buettner, J., and Goree, J., concur.

(Division No. 2)
Wednesday, July 15, 2020

117,185 — Dottie McBride, Plaintiff/Appellee, v. Thomas McBride, Defendant/Appellant. Appeal from Order of the District Court of Seminole County, Hon. George W. Butner, Trial Judge. Appellant Thomas McBride appeals the denial of his Motion to Enforce Final Order of Dismissal in this child support action. We review the district court's order pursuant to the Uniform Interstate Family Support Act, 43 O.S. Supp. 2015 §§ 601-100 through 601-903, and find that Oklahoma was the issuing tribunal for the child support order and retained continuing, exclusive jurisdiction to modify the order. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Fischer, J.; Barnes, P.J., and Rapp, J., concur.

117,781 — In Re the Marriage of: Kari Hensley, Petitioner/Appellee, v. Curtis Dean Hensley, Respondent/Appellant. Appeal from the District Court of Woodward County, Hon. Don A. Work, Trial Judge. In this dissolution of marriage proceeding, Curtis Dean Hensley (Husband) appeals from that part of the trial court's Order for Property Division, Debts and Child Support in which the court determined an enhanced value during the marriage of a business the court awarded to Husband as his separate property, divided the enhanced value as a marital asset and awarded Kari Hensley (Wife) thirty percent of that enhanced value, calculated Husband's income to include income beyond the amount he claimed he received in salary and awarded child support based on that calculated amount, awarded back child support, awarded to Husband as his separate debt his credit card debt, and valued certain personal property the court awarded to Husband and awarded Wife alimony in lieu of personal property. With one exception, based on our review of the record on appeal, we conclude the trial court's valuation of Husband's business and division of its assets, calculation of income imputed to Husband for child support and award of back child support, award of Husband's credit card debt to him as his separate debt, and valuation of personal property awarded to Husband and award to Wife of alimony in lieu of personal property are not clearly against the weight of the evidence and the trial court did not abuse its discretion in

those valuations, calculations and awards. However, we conclude the trial court erred in using as a date of valuation of the business of December 31, 2014, about five months before the parties separated and a petition was filed, instead of December 31, 2015, the date used by Husband's expert. The trial court found the valuation factor used by Wife's expert to be the appropriate multiplier of the valuation method used by both experts. Wife's expert presented a calculation using that factor with a valuation date of December 31, 2015, for a value of $367,825. The trial court found Wife's fair share of the increase in the value of the business gained through the parties' joint efforts was thirty percent of the enhanced value. Thus, in this equitable action, we make the determination the trial court should have made that the business' enhanced value subject to division is $367,825, and modify the court's Order to reflect an award to Wife of thirty percent of that value for an award of $110,347.50. Accordingly, we affirm the trial court's Order as modified. AFFIRMED AS MODIFIED. Opinion from Court of Civil Appeals, Division II, by Barnes, P.J.; Rapp, J., and Fischer, J., concur.

Thursday, July 16, 2020

117,966 — Lauren Danielle Edmonds, Petitioner/Appellee, v. Daniel Ethan Edmonds, Defendant/Appellant. Appeal from the District Court of Muskogee County, Hon. Weldon Stout, Trial Judge. Daniel Ethan Edmonds appeals from a final order of protection sought by his wife, Lauren Danielle Edmonds, on behalf of her five minor children. The dispositive issue on appeal is whether the trial court erred in issuing a final order of protection without holding an evidentiary hearing but rather relying on a finding of probable cause made at a preliminary hearing by a different judge to bind Mr. Edmonds over for trial in a criminal proceeding. Ms. Edmonds argues that the finding of probable cause in the criminal matter "satisfied" the requirement of 22 O.S. 2011 & Supp. 2019 § 60.4(C) that the trial court reasonably believes a legal remedy is needed to prevent or cease domestic violence, stalking, abuse, or harassment of a victim. We do not agree. The statutory language is clear. In cases like the present, one in which sufficient grounds are stated in the petition, a full hearing is to be held on the petition for a protective order, 22 O.S. § 60.4(B)(1), and at the hearing, the court may impose any terms and conditions the court reasonably believes are necessary to bring about an end to the abuse, stalking or harassment of the victims, § 60.4(C). Contrary to Ms. Edmonds' argument, without such a hearing, there is in this record no competent evidence reasonably tending to support the trial court's conclusion. Consequently, the trial court abused its discretion because its conclusions and judgment were clearly erroneous, against reason and evidence. Accordingly, we reverse and remand for further proceedings. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division II, by Barnes, P.J.; Rapp, J., and Fischer, J., concur.

Monday, July 27, 2020

118,713 — Deutsche Bank National Trust Company, Plaintiff/Appellee, vs. Robert Lee Wolford, Defendant/Appellant, and Spouse of Robert Lee Wolford; Jane Doe Occupant of Premises; John Doe Occupant of Premises; Defendants, and Robert Lee Wolford, Third Party Plaintiff/Appellant, vs. Deutsche Bank National Trust Company, as Trustee, Counterclaim Defendant/Appellee, and Ocwen Loan Servicing, LLC, a foreign limited liability company, Third Party Defendant/Appellee. Appeal from an Order of the District Court of Tulsa County, Hon. Doug Drummond, Trial Judge. The defendant, counter-claimant and cross-plaintiff, Robert Lee Wolford (Wolford) appeals a Journal Entry of Judgment of Foreclosure entered in accord with the trial court's grant of summary judgment to the plaintiff and counter claim defendant, Deutsche Bank National Trust Company (Deutsche Bank) and cross-defendant, Ocwen Loan Servicing, LLC (Ocwen). This appeal proceeds under the provisions of Okla. Sup.Ct.R. 1.36, 12 O.S. Supp. 2019, Ch. 15, app. 1. Claiming default, Deutsche Bank sued Wolford to foreclose a mortgage and collect a promissory note. Wolford denied being in default and alleged that the Loan Servicing agent, Ocwen, wrongfully claimed that he did not have hazard insurance and wrongfully established an escrow and then claimed default when Wolford did not pay the added escrow portions of his monthly payment. Ocwen accepted the principal and interest payments for several months and then refused to accept those payments and gave notice of default. Wolford's answer denied default and set out his allegations about Ocwen's actions. He also asserted counterclaims against Deutsche Bank and crossclaims against Ocwen. Deutsche Bank moved for summary judgment as to its petition

and as to the counterclaims. Ocwen joined and also moved for summary judgment as to the crossclaims. The trial court granted summary judgment. There are material, substantial factual issues related to the alleged cause of default and Wolford's denial of default. As set out above, these disputed facts preclude summary judgment on the petition and some, but not all of the crossclaims and counterclaims. Therefore, the judgment of the trial court is reversed in part, affirmed in part and the cause is remanded for further proceedings. The issue of the absence of a trial court ruling on Wolford's request for additional discovery time and his request to take judicial notice are moot in light of the above rulings. AFFIRMED IN PART, REVERSED IN PART AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from Court of Civil Appeals, Division II, by Rapp, J.; Barnes, P.J., and Fischer, J., concur.

118,193 — National Bank of Sallisaw, a Division of the First National Bank of Fort Smith, a national banking corporation, Plaintiff/Appellee, vs. Tracy W. Fulton and Kimberly D. Fulton, husband and wife, Defendants/Appellants, and JSCO, Inc., Terry Plunkett, and Discover Bank, Defendants, vs. Aviagen North America, Inc., RCDC Equipment, Inc., and A.R.T. Construction, Inc., Third-Party Defendants. Appeal from an Order of the District Court of Muskogee County, Hon. Thomas H. Alford, Trial Judge. This is an action by the plaintiff, National Bank of Sallisaw (Bank), for collection of loans and foreclosure of mortgages. The defendants and third-party plaintiffs, Tracy W. Fulton and Kimberly D. Fulton (collectively "Fulton") appeal an Order and Judgment in Favor of National Bank of Sallisaw and Decree of Foreclosure against Tracy W. Fulton and Kimberly D. Fulton (Order). The appeal followed the trial court's grant of a summary judgment to Bank and certification of the Order. The action by Fulton against the third-party defendants, Aviagen North America, Inc., RCDC Equipment, Inc., and A.R.T. Construction, remains pending before the trial court. This appeal proceeds under the provisions of Okla.Sup.Ct.R. 1.36, 12 O.S. Supp. 2019, Ch. 15, app. 1. There is nothing in the creditor-debtor relationship between Bank and Fulton which gives rise to a duty on the part of Bank to monitor and oversee Fulton's project. Here, the mortgage specifically provides that any such inspections, valuations, and appraisals are entirely for Bank's benefit. The FSA regulations impose a duty on Bank, but these regulations are for the benefit of FSA as a federal agency that guaranteed the Fulton loan. Therefore, the summary judgment in favor of Bank is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Rapp, J.; Barnes, P.J., and Fischer, J., concur.

118,034 — LL Oak Two LLC, LL Ark Properties, LLC and Scott Landers, Plaintiffs/Appellants, vs. MooreNouri, LLC; David Stanley CJD of Norman, L.L.C. and David Stanley, Defendants/Appellees. Appeal from an Order of the District Court of Cleveland County, Hon. Lori Walkley, Trial Judge. The plaintiffs, LL Oak Two LLC, LL Ark Properties, LLC, and Scott Landers appeal a judgment granting summary judgment to the defendants, MooreNouri, LLC, Stanley CJD of Norman, L.L.C., and David L. Stanley. This appeal proceeds under the provisions of Okla.Sup.Ct.R. 1.36, 12 O.S. Supp. 2019, Ch. 15, app. 1. Plaintiffs and Defendants entered into multiple agreements concerning purchase of assets, assignment of a Dealership Lease and purchase of real property. The owner of the property and the owner of the dealership are parties to an option (Chrysler Option) giving the optionee the right to use the property for an auto dealership if the owner and the current dealer discontinued the current dealership. The Chrysler Option was not disclosed in the documents between the parties or otherwise by Defendants. Plaintiffs claim that the Chrysler Option materially diminished the value of the property and Dealership Lease and that they are entitled to remedies due to Defendants' misrepresentation by not disclosing the Chrysler Option information. However, Plaintiffs undertook their independent investigation and obtained title insurance prior to closing. The title insurance specifically exempted the Chrysler Option. Plaintiffs' reliance must be justifiable. Here, Defendants have demonstrated that a key, material element of Plaintiffs' claims does not exist. Because Plaintiffs had actual notice of the fact that forms the premise for their claims, it cannot be ruled that Plaintiffs could, or did, justifiably rely on the instruments and silence of Defendants. Therefore, the summary judgment is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Rapp, J.; Barnes, P.J., and Fischer, J., concur.

117,129 (Consolidated with Case No. 117,130) — In the Matter of the Estate of Jackie Laverne Carter, Deceased: Billy E. Skelton, Appellee, vs Billy Carter, Appellant. Appeal from Order of the District Court of Roger Mills County, Hon.

F. Pat Versteeg, Trial Judge. In these consolidated appeals, Appellant/Will Contestant Billy Carter, surviving brother and sole heir at law of Decedent Jackie Laverne Carter (Decedent), seeks review of the district court's orders overruling his motions for summary judgment.[1] Carter asserted in separate summary judgment motions that Decedent was incompetent at the time he executed the Last Will and Testament offered to probate by Appellee/Will Proponent Billy E. Skelton, and that Skelton and others had exercised undue influence over Decedent. Carter claimed he was entitled to judgment as a matter of law on those issues. Material facts remain in dispute, and Carter was not entitled to summary judgment on either issue. AFFIRMED. Opinion from Court of Civil Appeals, Division II by Fischer, J.; Barnes, P.J. and Rapp, J. concur.

1. This Court directed Carter to show cause why the orders in this appeal were immediately appealable. Carter responded to this Court's order with specific authority, satisfying this Court that these consolidated appeals should proceed. *See* 58 O.S.2011 § 721(10) ("An appeal may be taken from . . . any other judgment, decree or order of the court in a probate cause, or of the judge thereof, affecting a substantial right.").

(Division No. 3)
Friday, July 10, 2020

118,298 — Ashu Garg, M.D., Plaintiff/Appellant, v. State of Oklahoma Ex Rel. Board of Regents of the University of Oklahoma, Defendant/Appellee. Appeal from the District Court of Cleveland County, Oklahoma. Honorable Michael Tupper, Judge. In this breach of contract action, the trial court granted summary judgment to the defendant. The defendant argued that (1) the only evidence the plaintiff had to support the alleged breach was inadmissable hearsay, and (2) the uncontroverted facts demonstrated that, even if the defendant had breached the contract, such breach did not cause the damages flowing from that breach. Because we find that (1) the evidence tending to show breach is not hearsay, and (2) there are material questions of fact remaining as to the cause of plaintiff's damages, we REVERSE. Opinion by Mitchell, P.J.; Swinton, V.C.J., concurs, and Bell, P.J. (sitting by designation), dissents.

118,335 — In The Matter Of N.W.C., D.N.C., L.T.C., and E.J.C., Alleged Deprived Children: State of Oklahoma, Petitioner/Appellee, v. Tabitha Clemens, Respondent/Appellant. Appeal from the District Court of Bryan County, Oklahoma. Honorable Trace Sherrill, Judge. Respondent/Appellant Tabitha Clemens (Mother) appeals from the trial court's order terminating her parental rights to her children, N.W.C., D.N.C., L.T.C., and E.J.C. Mother contends she was denied due process because she was without counsel during a portion of the pre-termination proceedings. Mother's counsel was discharged during a six-month period of time in which Mother was doing well in her treatment plan, and the trial court immediately reappointed counsel when new allegations were raised against Mother. Under these circumstances, we find no due process violation. We also find no due process violation based on Mother's argument that she lacked access to counsel due to her incarceration in Texas; the record shows the court made sufficient efforts to ensure Mother could communicate with her attorney and participate in the proceedings. We also find no merit to Mother's argument that her counsel was ineffective. Finally, we find sufficient evidence of the harm posed to the children by Mother. The order terminating Mother's parental rights is AFFIRMED. Opinion by Mitchell, P.J.; Swinton, V.C.J., and Bell, P.J. (sitting by designation), concur.

118,500 — Michael Dewayne Hutchins, Jr., an individual, Plaintiff/Appellant, v. UPS Industrial Services, LLC, a foreign limited liability company, Defendant/Appellee, and Terra International (Oklahoma) LLC, a foreign limited liability company, Nicholas Beard, an individual, and Mandy Parker, an individual, Defendants. Appeal from the District Court of Tulsa County, Oklahoma. Honorable Doug Drummond, Judge. In this personal injury case, the trial court granted summary judgment to the last-remaining defendant. The court found that the defendant owed no legal duty to the plaintiff because the plaintiff's injury was not reasonably foreseeable. Alternatively, even assuming the injury was foreseeable, the court found that the defendant's conduct was not unreasonably dangerous. However, the trial court's conclusions rest on disputed material facts and summary judgment was, therefore, inappropriate. REVERSED and REMANDED. Opinion by Mitchell, P.J.; Swinton, V.C.J., concurs in result, and Bell, P.J. (sitting by designation), concurs.

Tuesday, July 28, 2020

117,367 — Bridgett Nicole Sparks, Plaintiff/Appellee, vs. Stacy Jack, Defendant/Appellant. Appeal from the District Court of Okmulgee County, Oklahoma. Honorable Kenneth Adair, Trial Judge. Defendant Stacy Jack appeals the trial court's denial of her motion to vacate final protective order in favor of Plain-

tiff Bridgett Nicole Sparks. AFFIRMED. Opinion by Swinton, V.C.J.; Bell, J. (sitting by designation), concurs; Mitchell, P.J., dissents.

(Division No. 4)
Wednesday, July 15, 2020

117,572 — Tanya Bowen, Petitioner/Appellee, vs. Robert Cook, II, Respondent/Appellant. Appeal from an Order of the District Court of Tulsa County, Stephen R. Clark, Trial Court. Robert Cook, II (Cook) appeals an October 30, 2018 Decree of Dissolution of Marriage, which, *inter alia,* found the parties were common-law married and divided the marital estate and liabilities. For his first assertion of error, Cook contends the Oklahoma Legislature previously abrogated common-law marriage through statutes concerning marriage licenses, now codified at 43 O.S.2011, §§ 4 and 5. Cook's argument supplies no basis to reverse the trial court's order. This assertion of error is therefore denied. Cook further contends the trial court erred in finding a common-law marriage by clear and convincing evidence. The trial court weighed the conflicting evidence of the parties' relationship, determined the credibility of witnesses, and issued detailed findings of fact and conclusions of law finding Bowen proved by clear and convincing evidence that a common-law marriage existed. We find the trial court's finding of a common-law marriage in this case is not clearly against the weight of the evidence. This assertion of error is therefore denied. Next, Cook asserts the trial court erred in its disposition of the tax ramifications of the court's marital asset division. Cook has not established an abuse of discretion. The trial court has wide latitude in determining its award. There is no indication the trial court based its decision on an erroneous conclusion of law or acted arbitrarily. We find no error. Finally, Cook asserts the matter should be remanded for a trial de novo by one judge to dispose of all issues. The Oklahoma Supreme Court previously considered and rejected this assertion. Accordingly, we reject this assertion of error. The trial court's Decree of Dissolution of Marriage is affirmed is all respects. AFFIRMED. Opinion from the Court of Civil Appeals, by Hixon, J.; Wiseman, C.J., and Thornbrugh, P.J., concur.

118,105 — Carmen D. McFarland, Petitioner, vs. Oklahoma Department of Corrections, CompSource Mutual Ins. Co. (f/k/a CompSource Oklahoma), and the Oklahoma Workers' Compensation Commission, Respondents. Proceeding to review an order of the Oklahoma Workers' Compensation Commission En Banc, Hon. T. Shane Curtin, Administrative Law Judge, affirming the decision by an ad-ministrative law judge finding, among other things, that the Department of Corrections (Employer) overpaid temporary total disability (TTD) benefits. The primary issue on appeal is whether Claimant was limited to 16 weeks of TTD benefits because she sustained a soft tissue injury. Claimant asserts that the WCC committed error in ordering an overpayment credit for TTD benefits Claimant received beyond 16 weeks. Claimant asserts that 85A O.S. Supp. 2014 § 45 requires Employer to provide alternative work, and by not providing Claimant with alternative work, Employer violated § 45 and must therefore pay TTD benefits for the period it did not provide alternative work. It is undisputed that Claimant suffered a soft tissue injury. Title 85A O.S. Supp. 2014 § 62 clearly covers Claimant's injury and specifically governs the limitation of TTD benefits for soft tissue injuries. She did not receive surgery, and was not recommended for surgery, but did receive injections. Pursuant to the clear terms of § 62, Claimant was entitled to 16 weeks of TTD benefits, and we see no error by the WCC in determining Employer was entitled to credit for paying TTD benefits beyond 16 weeks. Section 62(A) unambiguously acknowledges the rules set out in § 45 and pointedly states that notwithstanding those provisions, a different rule applies where, as here, "an employee suffers a nonsurgical soft tissue injury." Finding no error, we sustain the WCC's decision. SUSTAINED. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, C.J.; Thornbrugh, P.J., and Hixon, J., concur.

118,103 — Randy J. O'Neal, Ridgley Properties, Ltd., and Dawn Webb, Plaintiffs/Appellees, vs. Canyon Exploration, Co., Defendant/Appellant. Appeal from an Order of the District Court of Beaver County, Hon. Jon K. Parsley, Trial Judge. Canyon Exploration Co. (Canyon) appeals the district court's order certifying a class against it to adjudicate claims arising from Canyon's assessment of administrative costs or distribution fees against working interest owners for whom Canyon administers and distributes profits from oil and gas wells. The class certified by the district court is comprised of Oklahoma residents or owners of working interests in wells located in Oklahoma who dispute fees that appear to have been charged uniformly across the proposed class, under one of

two virtually identical contract terms. Though the record does not establish as a matter of law, as held, that Texas law applies uniformly to the claims of the entire class, there remain sufficient common issues of law and fact to support the district court's order certifying the defined class as a matter of law. Therefore, we affirm the district court's Order. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Hixon, J.; Wiseman, C.J., and Thornbrugh, P.J., concur.

Thursday, July 16, 2020

117,734 — Mortgage Clearing Corporation, Plaintiff/Appellant, vs. Robert Scott Banfield, Kimberly Dawn Banfield, BancFirst, Occupant 1 and Occupant 2, Defendants/Appellees. Appeal from an order of the District Court of McClain County, Hon. Leah Edwards, Trial Judge, granting BancFirst's motion for an order distributing sales proceeds from a sheriff's sale. The question is whether the order granting this relief was an abuse of discretion. We cannot ascertain from the record whether the trial court held that Mortgage Clearing Corporation's (MCC) mortgage lien did not survive the sheriff's sale but was extinguished by the confirmation of sale. This is a significant, dispositive issue we cannot address in the first instance, *i.e.,* whether MCC's lien survived the sheriff's sale held pursuant to the foreclosure of BancFirst's lien, which was specifically foreclosed subject to MCC's mortgage lien. If BancFirst thought it was proceeding with the sale pursuant to both foreclosure judgments, this was in error. The judgment it relied on – and the special execution issued pursuant to that judgment – only concerned BancFirst's mortgage. Before granting BancFirst's motion to recall MCC's special execution and order of sale, the trial court was required to determine this issue and to determine whether, as argued by BancFirst, MCC's failure to object to the confirmation of sale precludes MCC from holding a second sale. We may not "make first-instance determinations of disputed law or fact issues." *Evers v. FSF Overlake Assocs.*, 2003 OK 53, ¶ 18, 77 P.3d 581. After review, the decision under review is reversed and the case remanded for further proceedings consistent with this Opinion. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, C.J.; Thornbrugh, P.J., and Hixon, J., concur.

Wednesday, July 21, 2020

117,131 — Robert O. Kerns, derivatively on behalf of Kerns Construction, Inc. and Kerns Asphalt Company, both Oklahoma corporations, Plaintiff/Appellee/Counter-Appellant, vs. Jeffrey O. Kerns, Defendant/Appellant/Counter-Appellee, Kerns Construction, Inc., and Kerns Asphalt Company, Nominal Defendants. Appeal from an Order of Payne County, Hon. Phillip C. Corley, Trial Judge. Jeffrey O. Kerns appeals a May 23, 2018 order denying his motion for new trial. Robert O. Kerns, derivatively on behalf of Kerns Construction, Inc. and Kerns Asphalt Company, counter-appeals from the underlying judgment entered on February 27, 2018, as corrected on May 23, 2018. The trial court's May 23, 2018, order denying Jeffrey's motion for new trial is affirmed in part and reversed in part consistent with this Opinion. The trial court did not abuse its discretion in denying Jeffrey's motion for new trial concerning promissory estoppel, breach of contract/anticipatory repudiation, or admissibility of evidence. However, the court's determination that Robert was entitled to a KA salary is against the clear weight of the evidence and an abuse of discretion. The court's February 27, 2018, judgment awarding Robert $81,600.00, as corrected, is therefore reversed. The trial court further erred in determining Jeffrey was not entitled to an attorney's fee pursuant to 18 O.S. Supp. 2014, § 1126(C). The court's judgment is therefore reversed and the matter remanded for a determination of the appropriate and reasonable attorney's fee. The February 27, 2018, judgment is affirmed in all other respects. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from the Court of Civil Appeals, Div. IV, by Hixon, J.; Wiseman, C.J., and Thornbrugh, P.J., concur.

117,607 — In re the Marriage of: Shirley Ann Stewart, Petitioner/Appellee, vs. James Daniel Stewart, Jr., Respondent/Appellant. Appeal from an Order of the District Court of Bryan County, Hon. Rocky L. Powers, Trial Judge. Husband appeals the trial court's Decree of Dissolution of Marriage. He asserts the court erred in its characterization and division of marital property and award of support alimony. The trial court's Decree of Dissolution of Marriage awarding Wife support alimony is affirmed. The Decree awarding the 1965 International Tractor as marital property to Wife is in error and is reversed. Upon remand, the

1965 International Tractor shall be confirmed in Husband as his separate property. Finally, the trial court failed to identify and value the marital property. Because this was not done, we reverse this portion of the Decree and remand the matter to the trial court to identify the marital property, to value it, and to divide it in a just and reasonable manner. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS. Opinion from Court of Civil Appeals, Division IV, by Hixon, J.; Wiseman, C.J., concurs, and Thornbrugh, P.J., concurs in part and dissents in part.

Tuesday, July 27, 2020

117,487 — In re the Marriage of: Jolene Marie Jovee, Petitioner/Appellee, vs. Nathan Edward Jovee, Respondent/Appellant. Appeal from a divorce decree issued by the district court of Bryan County, Oklahoma, Honorable Rocky L. Powers, Trial Judge. Husband appeals several decisions of the district court including child custody, debt allocation, and child support calculation. The facts were highly contested in this case. We find the challenged decisions of the district court to be within its discretion, and affirm them, with the exception of the assignment of the entire debt on a Cabela's credit card to Husband. We therefore remand with instructions for the district court to make an adjustment of $1,750 in the decree in favor of Husband. AFFIRMED IN PART, REVERSED IN PART AND REMANDED WITH INSTRUCTIONS. Opinion from the Court of Civil Appeals, Division IV, by Thornbrugh, P.J.; Wiseman, C.J, and Hixon, J., concur.

118,414 — Three Jacks, LLC, Plaintiff/Appellant, vs. John and Karen Cherry, Trustees of The Cherry Living Trust, and American Eagle Title Group, LLC. Appeal from an Order of the District Court of Oklahoma County, Hon. Don Andrews, Trial Judge, holding on summary judgment that The Cherry Living Trust was entitled to retain $30,000 in earnest money after the failure of a proposed land deal. The sole issue before the district court, and this Court, is the fate of the $30,000 in earnest money that Three Jacks, LLC, paid to Trust. We conclude the form contract used in this transaction appears ambiguous or uninformative as a matter of law as to who is entitled to keep the earnest money, and this conflict does not appear to be resolvable within the four corners of the contract. Because questions of fact remain, we reverse the summary judgment, and remand for further proceedings. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS. Opinion from the Court of Civil Appeals, Division IV, by Thornbrugh, P.J.; Wiseman, C.J., and Hixon, J., concur.

ORDERS DENYING REHEARING
(Division No. 1)
Friday, July 17, 2020

118,368 — Lisa A. Ligeikis, individually and as mother and next friend of E.S.L., a minor, Plaintiff/Appellant, vs. Independent School District No. 1 of Tulsa County, Oklahoma, Defendant/Appellee. Appellant's Petition for Rehearing and Brief in Support, filed June 25, 2020, is *DENIED*.

Thursday, July 23, 2020

118,455 — In the Matter of the Estate of Billy Pat Eberhart, Deceased. David Shawn Fritz, Petitioner/Appellant, vs. Estate of Billy Pat Eberhart, Respondent/Appellee. Appellant's Request for Reconsideration of Interlocutory Order and Brief, filed July 6, 2020, is *DENIED*.

(Division No. 2)
Thursday, July 23, 2020

117,486 — In Re the marriage of: Aaron D. Compton, Patitioner/Appellant, vs. Amy G. Compton, Respondent/Appellee. Appellee's Petition for Rehearing is hereby *DENIED*.

Monday, July 27, 2020

118,031 (Companion with Case No. 118,032) — Garrie Lynn Cook, Petitoner/Appellee, vs. Casey Wayne Cook, Respondent/Appellant. Appellant's Petition for Rehearing is hereby *DENIED*.

118,032 (Companion with Case No. 118,031) — Calvin W. Cook, Petitioner/Appellee, vs. Casey Wayne Cook, Respondent/Appellant. Appellant's Petition for Rehearing is hereby *DENIED*.

117,023 — Rose Mary McMahan Heatly, Rose Mary Knorr and Ralph Heatly, Plaintiffs/Appellees, vs. Robert Heatly, Defendant/Appellant. Appellant's Petition for Rehearing is hereby *DENIED*.

(Division No. 3)
Thursday, June 25, 2020

117,354 — Advanced Urology & Wellness Center Muskogee, LLC, an Oklahoma Limited Liability Company, Plaintiff/Appellant, vs. Newground Resources, Inc., a Delaware Corporation, and Newground International, Inc., an Illinois Corporation, Defendants/Appel-

lees. Appellees' Petition for Rehearing, filed April 23, 2020, is *DENIED*.

Tuesday, July 7, 2020

117,385 — Carl P. Bright and IBALL Instruments, LLC, Plaintiffs/Appellees, vs. Myron Butler, Mark Davis and TOC Solutions, Inc., an Oklahoma Corporation, Defendants/Appellants. Appellant's Petition for Rehearing, filed June 4, 2020, is *DENIED*.

Tuesday, July 14, 2020

117,345 — Kris Agrawal, Plaintiff/Appellant, Vimala Agrawal, DBA Exploration LLC and/or Coal Gas USA, LLC and/or On Line Oil Inc. and/or Mittal Well, LLC and/or Kay Kay Engineering and/or Realty Management Associates LLC, an Oklahoma Employer, Plaintiffs, vs. Oklahoma Department of Labor, Lloyd Fields, Labor Commissioner, and Wage Claimants Chris Holland, Justin Holland, Richard Polio, Cilbert Ventura, and Jason Cox, Defendants/Appellees. Appellant's Petition for Rehearing and Brief in Support, filed June 25, 2020, is *DENIED*.

118,179 — Lashana Ford Adeyemo, Petitioner, vs. American Airlines, New Hampshire Insurance Company, and the Workers' Compensation Court of Existing Claims, Respondents. Petitioner' Petition for Rehearing, filed July 6, 2020, is *DENIED*.

(Division No. 4)
Monday, June 29, 2020

117,676 — In the Matter of the Custody and/or Guardianship of P.S., Alisha Goodin, Appellant, vs. Amy Spradlin, Respondent/Appellee. Appellant's Petition for Rehearing is hereby *DENIED*.

Wednesday, July 1, 2020

117,677 — Hiland Partners Holdings LLC, as successor-in-interest to Hiland Partners, LP, Hiland Operating L.L.C. and Hiland Partners GP Holdings, L.L.C., Plaintiffs/Appellants, vs. National Union Fire Insurance Company of Pittsburgh, PA and AIG Claims, Inc., Defendants/Appellees. Appellees' Petition for Rehearing is hereby *DENIED*.

Wednesday, July 15, 2020

117,273 — George A. Christian, Jr., Petitioner/Appellant, vs. City of Oklahoma City (OCPD); Oklahoma County District Attorney's Office; David Prater; Catherine Hammarsten (PD), Respondents/Appellees. Petitioner's Petition for Rehearing is hereby *DENIED*.

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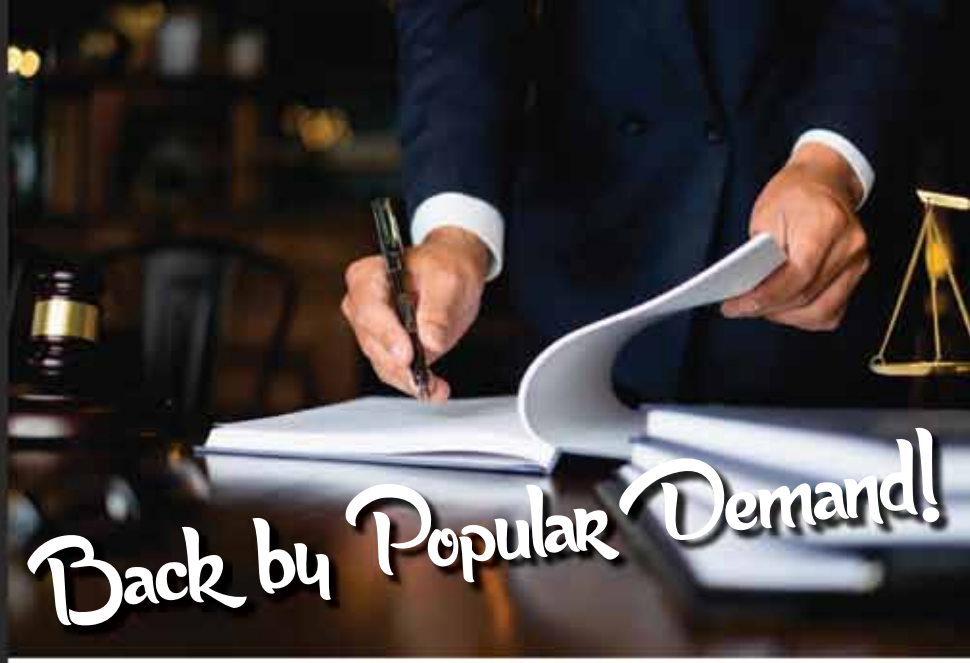

FRIDAY, SEPT. 24, 2020

9 - 11:40 A.M. MORNING PROGRAM
12:10 - 2:50 P.M. AFTERNOON PROGRAM

LIVE WEBCAST Only

MCLE 3/3 MORNING PROGRAM
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FEATURED PRESENTER:

Roy Ginsburg,
Strategic Advisor to Lawyers and Law Firms

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- Capturing Their Hearts (acting techniques that drawn the audience in)

Participants delve deeply into various aspects of voice, including release of habitual tension, breath, resonance, articulation, inflection that communicates meaning, and using verb imagery to find authenticity and variety. Bring a copy of an opening, closing or speech that you would like to work on. Sample openings will be also be provided.

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