JOULDANA BAR Volume 91 – No. 19 – 10/2/2020

Court Issue





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The Oklahoma Bar Journal Court Issue is published twice monthly and delivered electronically by the Oklahoma Bar Association, 1901 N. Lincoln Boulevard, Oklahoma City, Oklahoma 73105.

Subscriptions \$60 per year that includes the Oklahoma Bar Journal magazine published monthly, except June and July. Law students registered with the OBA and senior members may subscribe for \$30; all active members included in dues.

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OKLAHOMA BAR ASSOCIATION

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2020 OK 71

IN THE MATTER OF THE SUSPENSION OF MEMBERS OF THE OKLAHOMA BAR ASSOCIATION FOR NONCOMPLIANCE WITH MANDATORY CONTINUING LEGAL EDUCATION REQUIREMENTS FOR THE YEAR 2019

SCBD No. 6972. September 17, 2020

<u>CORRECTED</u> ORDER OF SUSPENSION FOR FAILURE TO COMPLY WITH THE RULES FOR MANDATORY CONTINUING LEGAL EDUCATION

On August 28, 2020, the Board of Governors of the Oklahoma Bar Association filed an Application for the suspension of members who failed to comply with mandatory legal education requirements for the year 2019 as required by Rules 3 and 5 of the Rules for Mandatory Continuing Legal Education (MCLE Rules), 5 O.S. 2011, ch. 1, app. 1-B and in compliance with SCAD 2020-24 and SCAD 2020-29. The Board of Governors recommended the members, whose names appear on the Exhibit A attached to the Application, be suspended from membership in the Oklahoma Bar Association and prohibited from the practice of law in the State of Oklahoma, as provided by Rule 6 of the MCLE Rules.

This Court finds that on March 13, 2020, the Executive Director of the Oklahoma Bar Association mailed, by certified mail to all Oklahoma Bar Association members not in compliance with Rules 3 and 5 of the MCLE Rules, an Order to Show Cause within sixty days why the member's membership in the Oklahoma Bar Association should not be suspended. The Board of Governors determined that the Oklahoma Bar Association members named on Exhibit A of its Application have not shown good cause why the member's membership should not be suspended.

This Court, having considered the Application of the Board of Governors of the Oklahoma Bar Association, finds that each of the Oklahoma Bar Association members named on Exhibit A, attached hereto, should be suspended from Oklahoma Bar Association membership and shall not practice law in this state until reinstated.

IT IS THEREFORE ORDERED that the attorneys named on Exhibit A, attached hereto, are hereby suspended from membership in the Association and prohibited from the practice of law in the State of Oklahoma for failure to comply with the MCLE Rules for the year 2019.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THE 14TH DAY OF SEPTEMBER, 2020.

> /s/ Noma D. Gurich CHIEF JUSTICE

ALL JUSTICES CONCUR

Tulsa, OK 74104-4909

EXHIBIT A (MCLE – SUSPENSION)

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2020 OK 73

BIANTRAV CONTRACTOR, LLC, an Oklahoma Limited Liability Company, aka BIANTRAV CORPORATION, Petitioner, v. HONORABLE JUDGE SHEILA CONDREN, Judge of the District Court for Rogers County, Respondent, SOFIDEL AMERICA CORP., a Florida for profit business corporation, SMI USA LLC, an Oklahoma Limited Liability Company, and INDEXA USA, INC., a New York for profit corporation, Real Parties in Interest.

No. 118,945. September 21, 2020

<u>ORDER</u>

¶1 Original jurisdiction is assumed in the cause now pending in the District Court of Rogers County, Case No. CJ-2019-508. Okla. Const. Art. 7, § 4. *Scott v. Peterson*, 2005 OK 84, ¶ 12, 126 P.3d 1232 (original jurisdiction may be assumed when decision is based on erroneous conclusion of law); *Cannon v. Lane*, 1993 OK 40, ¶ 13, 867 P.2d 1235 (assuming original jurisdiction and issuing writ where matter of public interest rendered a writ the appropriate remedy). The writ of prohibition is hereby granted.

¶2 The Respondent District Judge, or any other assigned judge, is prohibited from enforcing the July 14, 2020 Journal Entry of Judgment finding Petitioner's Corrected and Amended Mechanics and Materialmens Lien filed December 20, 2019, to be ineffective.

¶3 42 O.S. Supp. 2013, § 143 governs liens filed by and through a subcontractor, and requires a lien to be filed with the county clerk of the county in which the land is situated within ninety (90) days after the date upon which material or equipment used on said land was last furnished or labor last performed. The lien statement must state (1) the amount due and the items thereof, (2) the name of the owner of the property, (3) the name of the contractor, (4) the name of the subcontractor making the claim, and (5) a legal description of the property. ¶4 The purpose of the lien statute is to protect subcontractors who provide labor and services, secure payment of claims, and give notice to owners of the intent to file a lien in a definite amount. *Davidson Oil Country Supply Co., Inc. v. Pioneer Oil & Gas Equip. Co.,* 1984 OK 65, ¶ 6, 689 P.2d 1279.

¶5 Pursuant to 42 O.S. Supp. 2013, § 143, "The risk of all payments made to the original contractor shall be upon such owner until the expiration of the ninety (90) days herein specified, and no owner shall be liable to an action by such contractor until the expiration of said ninety (90) days." This portion of the statute is meant to exempt the owner of the subject property from suit by a contractor for the given statutory period provided for subcontractors to file their liens. *El Reno Elec. Light & Tel. Co. v. Jennison*, 1897 OK 64, ¶ 16, 50 P. 144.

¶6 On the other hand, 42 O.S. 2011, § 172 provides a means for enforcing a lien through the filing of a civil action in the district court. In cases where such an action is brought, "any lien statement may be amended by leave of court in furtherance of justice as pleadings may be in any matter, except as to the amount claimed." *Id.*

¶7 The Court finds 42 O.S. 2011, § 172 does not prohibit the filing of an amended lien statement, including an amendment as to the amount claimed, when the amended lien statement is filed within the 90-day time period prescribed by 42 O.S. Supp. 2013, § 143. Section 172 is intended as a mechanism, once a civil action for enforcement is filed, to permit amendments to a lien statement to correct technical defects after the statutory period to file a lien has expired.

¶8 Hence, a lien statement in a civil action commenced under Section 172 is treated just as any other pleading that may be amended "in furtherance of justice as pleadings may be in any matter." § 172; *Whitfield v. Frensley Bros. Lbr. Co.*, 1930 OK 18, ¶ 16, 283 P. 985. *See, e.g.*, 12 O.S. Supp. 2018, § 2015(C).

¶9 There is no dispute Petitioner's Corrected and Amended Mechanics and Materialmens Lien (increasing the amount claimed) was filed within the 90-day statutory period prescribed by 42 O.S. Supp. 2013, § 143. Accordingly, it was not prohibited by 42 O.S. 2011, § 172. *See Whitfield*, at ¶ 14 (a party may file multiple mechanic's lien statements in efforts to perfect a proper lien as long as the time for filing lien has not expired). DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 21ST DAY OF SEPTEMBER, 2020.

> /s/ Noma D. Gurich CHIEF JUSTICE

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

Kauger, J., concurs in part and dissents in part

Kauger, J., concurring in part; dissenting in part:

"I concur in the result. I dissent to the procedure."

Darby, V.C.J., not voting.

2020 OK 74

RE: Reinstatement of Credential of Registered Courtroom Interpreter

SCAD-2020-85. September 21, 2020

<u>ORDER</u>

The Oklahoma Board of Examiners of Certified Courtroom Interpreters recommended to the Supreme Court of Oklahoma that the revoked credential of **Cynthia Santiesteban** be reinstated as she has satisfied all requirements, including the payment of all applicable fees and has made application to the Board of Examiners for reinstatement of her credential.

IT IS HEREBY ORDERED pursuant to 20 O.S., Chapter 23, App. III, Rule 10, that the credential of the named interpreter be reinstated from the revocation previously imposed by this Court.

DONE BY ORDER OF THE SUPREME COURT this 21st day of September, 2020.

/s/ Noma D. Gurich CHIEF JUSTICE

Gurich, C.J., Kauger, Winchester, Edmondson, Colbert, Combs, Kane and Rowe, JJ. Concur.

Darby, V.C.J., not voting.

2020 OK 75

SHARLA WHIPPLE, individually, NEXT OF KIN, & PERSONAL REPRESENTATIVE OF THE ESTATE OF TAYLOR RAY BORTH, deceased, Plaintiff/Petitioner, v. PHILLIPS AND SONS TRUCKING, LLC., a Domestic Corporation, JDC DRILLING, LLC., a Domestic Corporation, TITAN DRILLING,

LLC., a Domestic Corporation, STEVE JERNIGAN, an Individual, BRADFORD G. BARBY, an Individual, STEVE POWLESS, an Individual, ROBERT L. SNYDER, an Individual, ROY ROUNDTREE, an Individual, ABEL GREGORY ORTEGA, an Individual, MATTHEW DOW HUGHES, an Individual, RAFAEL MARQUEZ, an Individual, GARY JENNINGS, an Individual, DEERING SAFETY CONSULTING LLC., a Domestic Corp., AARON DEERING, an Individual, Defendants/Respondents

No. 118,360. September 21, 2020

APPEAL FROM A CERTIFIED INTERLOCUTORY ORDER OF THE DISTRICT COURT OF CANADIAN COUNTY

Paul Hesse, Trial Court Judge

¶0 The petitioner's, Sharla Whipple's (petitioner/Whipple), twenty-three year old, unmarried son lost his life in a work related accident. Under the Workers Compensation Act, 85A O.S. Supp. 2014 §47, only a spouse, child, or legal guardian may file a Workers Compensation death benefit claim when a work related death occurs. Whipple's son had no spouse, child or legal guardian. Consequently, Whipple's only remedy was to file a wrongful death action in the District Court of Canadian County. However, the trial court granted partial summary judgment against Whipple, determining that her only remedy is limited to the Workers Compensation system, rather than the district court. Whipple appealed. We hold that the right of a parent as the next of kin to bring a wrongful death action when the decedent is an adult, unmarried, and childless, is established in the law pursuant to 12 O.S. 2011 §1053 and by art. 23 §7 of the Oklahoma Constitution. Therefore, the Legislative attempt to limit recovery for wrongful death pursuant to 85A O.S. Supp. 2014 §47 to a spouse, child or legal guardian dependent on the decedent is a nullity. The Okla. Const art. 23 §7 prohibits the abrogation of the right to recover for injuries resulting in death. The Legislature may limit the recovery, but may not eliminate the right to recover.

PETITION FOR CERTIORARI TO REVIEW CERTIFIED INTERLOCUTORY ORDER PREVIOUSLY GRANTED; TRIAL COURT REVERSED AND CAUSE REMANDED

Jack Zurawik, Micah Felton, Timothy P. Clancy, Tulsa, Oklahoma, for Plaintiff/Petitioner.

Don W. Danz, Rebecca S. Woodward, Tulsa, Oklahoma, for Defendants/Respondents.

KAUGER, J.:

¶1 The determinative issue on certiorari is whether a parent of an adult, unmarried, childless decedent killed in the course of employment may bring a wrongful death action in the district court. We hold that the right of a parent as the next of kin to bring a wrongful death action when the decedent is an adult, unmarried, and childless, is crystalized in the law pursuant to 12 O.S. 2011 §1053 and art. 23 §7 of the Oklahoma Constitution. Therefore, the Legislative attempt to deny recovery for wrongful death pursuant to 85A O.S. Supp. 2014 §47 to the mother of her unmarried childless son is unconstitutional. Her remedy lies in the District Court.

FACTS

¶2 The plaintiff/petitioner, Sharla Whipple (mother), lost her adult, twenty-three year old, unmarried, childless son, Taylor Ray Borth (Borth) in a work related accident on October 6, 2016. Borth was crushed to death by a gin pole truck operated during an oilfield mud pump unloading procedure. At the time of his death, the Workers' Compensation Act, 85A O.S. Supp. 2014 §47 only allowed wrongful death benefits to a spouse, child, or legal guardian, if the guardian was dependent on the employee.¹

¶3 Therefore, the mother was forced to bring this action in the District Court. She alleged the wrongful death of her son, and that the employer "knew or should have known that the injury" to Borth and that "the resulting death was substantially certain to occur." The employer filed a motion for summary judgment on May 29, 2019, arguing that the mother was attempting to avoid the workers compensation system. On July 25, 2019, the trial court granted summary judgment, in part, because it believed the mother's exclusive remedy was in the workers' compensation regime. The grant of summary judgment was in error because there is no provision for the mother to seek redress in the Workers Compensation system because of the statutory exclusion under 85A O.S. Supp. 2014 §47.²

¶4 On October 2, 2019, the trial court certified its ruling as a certified interlocutory appeal. On October 25, 2019, the trial court stayed all further proceedings until the appeal was resolved. The same day, the mother filed her appeal in this Court. We granted certiorari to review the certified interlocutory order on March 25, 2020, and the briefing cycle was completed on July 27, 2020.

THE RIGHT OF A PARENT AS NEXT OF KIN TO BRING A WRONGFUL DEATH ACTION WHEN THE DECEDENT IS AN ADULT, UNMARRIED, AND CHILDLESS, IS ESTABLISHED PURSUANT TO 12 O.S. 2011 §1053 AND art. 23 §7 OF THE OKLAHOMA CONSTITUTION. THE LEGISLATIVE ATTEMPT TO DENY RECOVERY FOR WRONGFUL DEATH PURSUANT TO 85A O.S. Supp. 2014 §47 BY LIMITING IT TO A SPOUSE, CHILD, OR LEGAL GUARDIAN DEPENDENT ON THE DECEDENT IS UNCONSTITUTIONAL, LEAVING THE ONLY OPTION FOR RECOVERY IN THE DISTRICT COURT

¶5 The employer argues that the Legislature has not abrogated the right of the mother to recover under the workers compensation provisions, but rather just limited any recoverable amount which is within its constitutional authority.³ The mother argues that limiting an amount of recovery to nothing is the equivalent to abrogating her right to bring an action for recovery.

¶6 The Okla. Const. art. 23, §7 provides:

The right of action to recover damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation, provided however, that the Legislature may provide an amount of compensation under the Workers' Compensation Law for death resulting from injuries suffered in employment covered by such law, in which case the compensation so provided shall be exclusive, and the Legislature may enact statutory limits on the amount recoverable in civil actions or claims against the state or any of its political subdivisions. (Emphasis supplied).

The history of this Constitutional provision is quite clear and well chronicled. In <u>Riley v.</u>

Brown and Root, Inc., 1992 OK 114, 836 P.2d 1298, the Court discussed art. 23 §7 in the context of applying a statute of repose. The Court recognized that this section was originally taken nearly verbatim from the New York Constitution and that it was amended in 1950 to add the provision allowing for some wrongful death actions to be governed by the Workers' Compensation Act.

¶7 The <u>Riley</u> Court said that "Section 7 had the effect of freezing into our law the right of action for wrongful death as it existed when the Constitution was adopted." The provision was intended to "crystalize and embody in the fundamental law of the state – the law of the land – the entire statutory right of action with its incidents."

¶8 Statutorily, the rights of wrongful death actions are found at 12 O.S. 2011 §§1051-1055. Section 1053(A) currently provides:

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

In <u>Riley</u>, supra, the Court also discussed the history of §1053, noting:

¶10 At the time of the Constitution's adoption, Section 4313 Oklahoma Statutes of 1893, was the only statute allowing for an action for wrongful death. <u>Capitol Steel</u> <u>and Iron Co. v. Fuller</u>, 206 Okl. 638, 245 P.2d 1134, 1137 (1952). With only slight modifications Section 4313 became the current 12 O.S. 1981 § 1053

At early common law and before Lord Campbell's Act, an action for personal injuries abated with the death of the injured person; no action for wrongful death existed. <u>Haws v. Luethje</u>, 503 P.2d 871, 873 (Okla. 1972). Now, a cause of action for wrongful death "accrues to the personal representative of the decedent solely by virtue of the statute." <u>Haws</u>, at 873. The action for wrongful death is not a separate and distinct tort, but is an action which [836 P.2d 1301] derives from the rights of the decedent. Whatever rights the decedent might have had in his life accrue to the personal representative at death, thus overcoming the common law barrier of death.

¶11 It is this right – the right of action provided by Section 1053 – that the Oklahoma Constitution protects. The constitutional provision does not create a right of action; rather it buttresses the statute which does so. In other words, the constitutional provision protects the right of action for wrongful death as provided by the legislature in Section 1053.

¶12 Article 23, Section 7 is meant to guarantee the individuals protected under Section 1053 the right to bring an action for wrongful death. See Roberts, 386 P.2d at 783. Our Section 1053, a form of the widely adopted Lord Campbell's Act, does away with the common law idea that an action died when the person who had suffered the injury died. Instead, the wrongful death statute leaves intact the rights of the deceased to now be asserted by a personal representative. Death is no longer a barrier to the assertion of these rights. Article 23, Section 7 says the legislature can never again reimpose the death of the injured person as an obstacle to an action by his survivors. (Footnotes omitted).

¶9 In <u>Capitol Steel and Iron Co. v. Fuller</u>, 1952 OK 209, ¶14, 231 P.2d 681, the Court in discussing the 1950 amendment to art. 23 §7, which expressly provided for work-related wrongful death actions to be brought under workers compensation laws, said:

... The 1950 constitutional amendment did not authorize the Legislature to make a distinction in the applicability of any provision of the Workmen's Compensation Law based upon whether or not the injury resulted in death except as to the amount of recovery. Therefore, any provision contained in said House Bill No. 312 which makes such distinction is unconstitutional and void to that extent. For the same reason, any provision in said act which modifies the provisions of sections 1053 and 1054 of Title 12 O.S. 1941, except to `provide an amount of compensation under the Workmen's Compensation Law for death resulting from injuries suffered in employment covered by such law,' is also void....

In <u>Hammons v. Muskogee Medical Center</u> <u>Authority</u>, 1985 OK 22, ¶7, 697 P.2d 539 we said that art. 23 §7 "forbids elimination of the right to recover damages for injuries resulting in death." <u>Hammons</u>, supra, involved the issue of whether a provision of the then Political Subdivision Tort Claims Act, 55 O.S. Supp. 1979 §152, should apply retroactively.

¶10 In <u>F.W. Woolworth Co., v. Todd</u>, 1951 OK 36, ¶11, 231 P.2d 681, a case involving the validity of a release, we said regarding art. 23 §7, that the "words 'shall never be abrogated,' as there used, mean: Shall never be annulled or repealed by an authoritative act, that is, shall never be withdrawn or taken away by the authority which bestowed it, that is, the legislative act, or other legislative authority." What the Court expressed in <u>Riley, Capital Steel</u>, <u>Hammons, Woolworth</u>, supra, was far from novel. We have reiterated the history of the constitutional provision and its relationship to wrongful death actions many times over.⁴

¶11 Because the cause of action for wrongful death is purely statutory, suit may be brought only by a person expressly authorized by statute to do so.⁵ Pursuant to 12 O.S. 2011 §1053, a decedent's representative may maintain an action against the tortfeasor, and if no personal representative has been appointed, the action may be brought by a surviving spouse or in their absence, next of kin.6 The former Workers' Compensation Act was compatible with the wrongful death statutes. Prior to the 2014 overhaul of workers compensation, if there were no surviving spouse or children, each parent, brothers, sisters, grandparents and grandchildren, if dependent, could receive death benefits.⁷ Where some pecuniary loss was shown by heirs at law, benefits were also recoverable.8

¶12 Now, parents, brothers, sisters, grandparents and grandchildren have been stricken and only financially dependent legal guardians, if there is no surviving spouse or children, are allowed any benefits. Recovery for pecuniary loss is no longer available.⁹ We have had numerous cases in which the next of kin bringing a wrongful death action, was the parent of an adult, unmarried, childless decedent, just like the petitioner in this cause.¹⁰ Such a construction abrogates the right of action to recover for damages resulting in death. The amount of damages may be limited, but they cannot be eliminated. ¶13 We recently, reiterated in <u>Farley v. City of</u> <u>Claremore</u>, 2020 OK 30, 465 P.3d 1213, a case involving a surviving spouse who brought a district court action after she received a workers compensation commission death benefits award. We said:

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

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

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

In *Ouellette* we explained a wrongful-death claim may be brought by persons authorized by statute, e.g., the personal representative of the decedent and if none has been appointed, then by the widow, or where there is no widow, by the decedent's next of kin, with recovery inuring to the exclusive benefit of the surviving spouse and children, if any, or next of kin....

¶46 The wrongful death cause of action pursuant to 12 O.S. §1053 created or authorized a survivable cause of death action with damages recovered by a surviving parent. Section 1053 defines the action as authorized when certain conditions are met including (1) wrongful death and (2) if the deceased has a judicially cognizable claim to maintain if living....

¶48 Historically, the right to workers' compensation death benefits was statuto-rily created to be consistent with 12 O.S.

§1053 and 84 O.S. §213 and the workers' compensation death benefits were treated as an exclusive statutory remedy substituted for the statutory wrongful death action guaranteed by an Oklahoma constitutional provision and approved by a vote of the People of Oklahoma.

¶14 Under the facts of this cause, the mother is left without any remedy in the District Court, unless she meets the very high burden of showing that she is also left without a remedy in the Workers' Compensation system because of the 2014 statutory changes. Constitutionally, she cannot be cut off from a remedy altogether. Accordingly, our only choice is to allow the mother to pursue her action for the wrongful death of her son in the District Court.

CONCLUSION

¶15 In 1950, art. 23 §7 transferred workrelated wrongful death claims to the purview of the workers compensation laws.¹¹ However, the constitution contains a caveat that precludes the Legislature from ever abrogating the right to recover for wrongful death as it existed when art. 23 §7 was adopted.12 The right of a parent as the next of kin to bring a wrongful death action when the decedent was an adult, unmarried, and without children is established in the law pursuant to 12 O.S. 2011 §1053¹³ and art. 23 §7. The Legislative attempt to limit recovery for wrongful death pursuant to 85A O.S. Supp. 2014 §47 to a spouse, child or legal guardian dependent on the decedent is unconstitutional.¹⁴

¶16 This is an easy fix for the Legislature. All it needs to do to render 85A O.S. 2014 §47 enforceable and constitutional is to amend it to include the statutory heirs just as it did before the 2014 amendments. At this time to avoid the constitutional prohibition against abrogation of the right of action for death, for this Mother is to bring her cause of action in the district court.

PETITION FOR CERTIORARI TO REVIEW CERTIFIED INTERLOCUTORY ORDER PREVIOUSLY GRANTED; TRIAL COURT REVERSED AND CAUSE REMANDED

GURICH, C.J., KAUGER, EDMONDSON, COLBERT, AND COMBS, JJ., concur.

WINCHESTER, KANE, and ROWE, JJ., dissent.

DARBY, V.C.J., not voting.

KAUGER, J.:

1. Title 85A O.S. Supp. 2014 §47 provides in pertinent part:

A. Time of death. If death does not result within one (1) year from the date of the accident or within the first three (3) years of the period for compensation payments fixed by the compensation judgment, a rebuttable presumption shall arise that the death did not result from the injury.

B. Common law spouse. A common law spouse shall not be entitled to benefits under this section unless he or she obtains an order from a court with competent jurisdiction ruling that a common law marriage existed between the decedent and the surviving spouse.

C. Beneficiaries - Amounts. If an injury or occupational illness causes death, weekly income benefits shall be payable as follows: 1. If there is a surviving spouse, a lump-sum payment of One Hundred Thousand Dollars (\$100,000.00) and seventy percent (70%) of the lesser of the deceased employee's average weekly wage and the state average weekly wage. In addition to the benefits theretofore paid or due, two (2) years' indemnity benefit in one lump sum shall be payable to a surviving spouse upon remarriage;

2. If there is a surviving spouse and a child or children, a lumpsum payment of Twenty-five Thousand Dollars (\$25,000.00) and fifteen percent (15%) of the lesser of the deceased employee's average weekly wage and the state average weekly wage to each child. If there are more than two children, each child shall receive a pro rata share of Fifty Thousand Dollars (\$50,000.00) and thirty percent (30%) of the deceased employee's average weekly wage; 3. If there is a child or children and no surviving spouse, a lumpsum payment of Twenty-five Thousand Dollars (\$25,000.00) and fifty percent (50%) of the lesser of the deceased employee's average weekly wage and the state average weekly wage to each child. If there are more than two children, each child shall receive a pro rata share of one hundred percent (100%) of the lesser of the deceased employee's average weekly wage and the state average weekly wage. With respect to the lump-sum payment, if there are more than six children, each child shall receive a pro rata share of One Hundred Fifty Thousand Dollars (\$150,000.0); 4. If there is no surviving spouse or children, each legal guardian, if financially dependent on the employee at the time of death, shall receive twenty-five percent (25%) of the lesser of the deceased employee's average weekly wage and the state average weekly wage until the earlier of death, becoming eligible for social security, obtaining full-time employment, or five (5) years from the date benefits under this section begin; and

 The employer shall pay the actual funeral expenses, not exceeding the sum of Ten Thousand Dollars (\$10,000.00)....
 The statute was amended in 2019, but relevant portions remain sub-

stantially unchanged. 2. Title 85A O.S. Supp. 2014 §47, see note 1, supra.

3. The employer also argues that the Court cannot procedurally consider a constitutional challenge to a statute because the Attorney General has not been notified pursuant to 12 O.S. Supp. 2016 §2024. It provides in pertinent part:

D. INTERVENTION BY STATE OF OKLAHOMA.

1. In any action, suit, or proceeding to which the State of Oklahoma or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of this state affecting the public interest is drawn into question, the court shall certify such fact to the Attorney General, and shall permit the State of Oklahoma to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State of Oklahoma shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

2. Upon receipt of notice pursuant to paragraph 1 of this subsection or other actual notice that the constitutionality of any statute of this state affecting the public interest is drawn into question, the Attorney General shall immediately deliver a copy of the proceeding to the Speaker of the House of Representatives and the President Pro Tempore of the Senate who may intervene on behalf of their respective house of the Legislature and who shall be entitled to be heard. Intervention by the Speaker of the House of Representatives or President Pro Tempore of the Senate shall not constitute waiver of legislative immunity.

Regardless of whether the trial court expressly notified the Attorney General, according to the petitioner, the Attorney General has been served with notice of this cause on multiple occasions and they have the mailing and delivery documentation should the Court desire it. The Attorney General has not responded with a request for intervention. We have previously held that, without question, the Attorney General must be served. <u>Okla. Tax Commission v. Smith</u>, 1980 OK 74, [15, 610 P.2d 794. However, sometimes, even when the trial court or the parties did not serve notice to the Attorney General, the notice is given by this Court when the appeal is filed. See, <u>Kelley v. Kelley</u>, 2007 OK 100, [16, 175 P.3d 400 and <u>Oklahoma City Urban Renewal Authority v. Medical Technology Research Authority of Oklahoma</u>, 2000 OK 23, [16, 4 P.3d 677. The appellate filings reflect that copies were sent to the Attorney General and thus, the Attorney General had the opportunity to participate. Accordingly, this argument is without merit.

4. <u>Riley v. Brown and Root, Inc.</u>, 1992 OK 114, ¶¶9-12, 836 P.2d 1298; <u>Hughes Drilling Co. v. Crawford</u>, 1985 OK 16, ¶¶4-8, 697 .2d 525; <u>Parker v. National Zinc Co.</u>, 1965 OK 152, ¶17, 406 P.2D 493; <u>Roberts v.</u> <u>Merrill</u>, 1963 OK250, ¶¶8-17, 386 P.2d 780; <u>Osmond v. Moody Construction Co.</u>, 1963 OK 171, ¶4, 409 P.2d 9; <u>Capitol Steel and Iron Co. v.</u> <u>Fuller</u>, 1952 OK 209, ¶¶4-13, 231 P.2d 681; <u>F.W. Woolworth Co., v. Todd</u>, 1951 OK 36, ¶¶10-13, 231 P.2d 681.

5. <u>Hamilton By and Through Hamilton v. Vaden</u>, 1986 OK 36, ¶7, 721 P.2d 412; <u>Abel v. Tisdale</u>, 1980 OK 161, ¶8, 619 P.2d 608; <u>Potter v.</u> <u>Pure Oil Co.</u>, 1938 OK 278, ¶20, 78 P.2d 694.

6. Title 12 O.S. 2011 §1053, see page 7, supra. Title 12 O.S. 2011 §1054 provides:

In all cases where the residence of the party whose death has been caused as set forth in the preceding section of this article is at the time of his death in any other state or Territory, or when, being a resident of this state, no personal representative is or has been appointed, the action provided in the said section may be brought by the widow, or where there is no widow, by the next of kin of such deceased.

Title 12 O.S. 2011 §1051 provides:

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

7. Title 85 O.S. 2011 §337 provided in pertinent part:

A. If an injury or occupational disease causes death, weekly income benefits shall be payable in the amount and for the benefit of the persons following, subject to the maximum limits specified hereafter:

1. If there is a surviving spouse, to such surviving spouse who shall remain unmarried, seventy percent (70%) of the average weekly wages the deceased was earning. In no event shall this spousal weekly income benefit be diminished by the award to other beneficiaries. In addition to the benefits theretofore paid or due, two (2) years' indemnity benefit in one lump sum shall be payable to a surviving spouse upon remarriage;

2. If there is a surviving spouse and a child or children, fifteen percent (15%) of the average weekly wages the deceased was earning for each child. Where there are more than two such children, the income benefits payable for the benefit of all children shall be divided among all children, to share and share alike, subject to the maximum limits in subsection D of this section;

3. To the children, if there is no surviving spouse, fifty percent (50%) of the average weekly wages the deceased was earning for one child, and twenty percent (20%) of such wage for each additional child, divided among all children, to share and share alke, subject to the maximum limits in subsection D of this section;

4. The weekly income benefits payable for the benefit of any child under this section shall cease when the child dies, marries, or reaches the age of eighteen (18), unless the child is over eighteen (18) years of age and remains enrolled as a full-time student in high school or is being home-schooled in a high-school course approved by the Oklahoma Department of Education; or unless a child is over eighteen (18) years of age and is physically or mentally incapable of self-support; or unless the child is under the age of twenty three (23) and enrolled as a full-time student in any accredited institution of higher education or vocational or technology education;

5. If there is no surviving spouse or children, to each parent, if actually dependent, twenty-five percent (25%) of the average weekly wages the deceased was earning, subject to the maximum limits in subsection D of this section;

6. If there is no surviving spouse or children, to the brothers, sisters, grandparents and grandchildren, if actually dependent, twenty-five percent (25%) of the average weekly wages the deceased was earning to each such dependent. If there should be more than one of such dependents, the total income benefits pay-

able for the benefit of such dependents shall be divided to share and share alike, subject to the maximum limits in subsection D of this section; . . .

8. Title 85 O.S. 2011 §337 provided in pertinent part:

... E. Where some pecuniary loss may be shown by heirs-at-law of the deceased, as defined by the descent and distribution statutes of Oklahoma, who are otherwise not entitled to receive benefits under other provisions of this section, such heirs-at-law shall receive compensation for their pecuniary loss not to exceed an aggregate of Five Thousand Dollars (\$5,000.00)....

9. Title 85A O.S. Sup. 2014 §47, see note 1, supra.

10. Rogers v. Worthan, 1970 OK 22, ¶2, 465 P.2d 431 [Decedent's mother recovered for wrongful death of adult, unmarried, childless son.]; Finefrock v. Rice, 1967 OK 61, ¶0, 426 P.2d 765 [Mother of deceased, adult, unmarried, childless son recovered wrongful death under workers compensation laws.]; Robberson Steel Company v. State Industrial Court, 1960 OK 163, 354 P.2d 11 [Parents of single, childless adult son recovered for wrongful death under workers compensation laws.] See also, West v. Board of County Commissioners of Pawnee County, 2011 OK 104, ¶0, 273 P.3d 31 [Father of unmarried, adult, mother of five brought wrongful death action.]; Corvin v. State Industrial Court, 1965 OK 182, ¶2, 408 P.2d 322, [Father of deceased, unmarried, high school senior brought wrongful death action under workers compensation laws.]; H.L. Maness Truck Lines v. Lemmons, 1965 OK 181, 408 P.2d 288 [Parents of adult decedents were not allowed to bring wrongful death action under workers compensation laws only because the decedent's divorce had not been completed, thus leaving him a surviving spouse.]

11. The Okla. Const. art. 23 §7, pages 2-3, supra.

12. The Okla. Const. art. 23 §7, see pages 2-3, supra; <u>Riley v. Brown</u> and <u>Root</u>, Inc., see note 2, supra; <u>Hughes Drilling Co. v. Crawford</u>, see note 2, supra; <u>Roberts v. Merrill</u>, see note 2, supra; <u>Osmond v. Moody</u> <u>Construction Co.</u>, see note 2, supra; <u>Capitol Steel and Iron Co. v. Fuller</u>, see note 2, supra; <u>F.W. Woolworth Co., v. Todd</u>, see note 2, supra.

13. Title 12 O.S. 2011 §1053, see pages 3-4, supra; The Okla. Const. art. 23 §7, pages 2-3, supra.

14. Title 85A O.S. Supp. 2014 §47, see note 1, supra.

2020 OK 76

State of Oklahoma ex rel. Oklahoma Bar Association, Complainant, v. Robert R. Faulk, Respondent.

SCBD No. 6974. September 28, 2020

ORDER OF IMMEDIATE INTERIM SUSPENSION

¶1 The Oklahoma Bar Association (OBA), in compliance with Rules 7.1 and 7.2 of the Rules Governing Disciplinary Proceedings (RGDP), has forwarded to this Court certified copies of the Information, Deferment, Judgment and Sentence, and Conditions of Probation in the matter of State of Oklahoma v. Robert R. Faulk, CF-2019-200, in Garfield County, Oklahoma. On September 4, 2020, Respondent entered a plea of Guilty to the fielony crime of Domestic Abuse – Prior Pattern of Physical Abuse in violation of 21 O.S.2011, § 644.1, and a plea of Guilty to the misdemeanor crime of Domestic Abuse – Assault and Battery in violation of 21 O.S.2011, § 644(C). The Court deferred judgment and sentence on the felony matter until September 3, 2022. The Center sentenced Faulk to a one-year suspended sentence on the misdemeanor conviction.

¶2 Rule 7.3 of the RGDP provides: "Upon receipt of the certified copies of Judgment and Sentence on a plea of guilty, order deferring judgment and sentence, indictment or information and the judgment and sentence, the Supreme Court shall by order immediately suspend the lawyer from the practice of law until further order of the Court." Having received certified copies of these papers and orders, this Court orders that Robert R. Faulk is immediately suspended from the practice of law. Robert R. Faulk is directed to show cause, if any, no later than October 5, 2020, why this order of interim suspension should be set aside. See RGDP Rule 7.3. The OBA has until October 19, 2020, to respond.

¶3 Rule 7.2 of the RGDP provides that a certified copy of a plea of guilty, an order deferring judgment and sentence, or information and judgment and sentence of conviction "shall constitute the charge and be conclusive evidence of the commission of the crime upon which the judgment and sentence is based and shall suffice as the basis for discipline in accordance with these rules." Pursuant to Rule 7.4 of the RGDP, Robert R. Faulk has until November 3, 2020, to show cause in writing why a final order of discipline should not be imposed, to request a hearing, or to file a brief and any evidence tending to mitigate the severity of discipline. The OBA has until November 18, 2020, to respond.

14 DONE BY ORDER OF THE SUPREME COURT in conference on September 28, 2020.

/s/ Noma D. Gurich CHIEF JUSTICE

ALL JUSTICES CONCUR

2020 OK 77

In the Matter of the Reinstatement of Travis Kendall Siegel to Membership in the Oklahoma Bar Association and to the Roll of Attorneys.

SCBD No. 6908. September 28, 2020

ORDER

¶1 The petitioner, Travis Kendall Siegel (Siegel/attorney) was stricken from the roll of attorneys from the Oklahoma Bar Association on January of, 2018, after he voluntarily resigned because he lived in California. Petitioner is currently licensed to practice law in California. On March 20, 2020 he petitioned this Court for reinstatement as a member of the Oklahoma Bar Association.

¶2 On July 23, 2020, a hearing was held before the Trial Panel of the Professional Responsibility Tribunal and the tribunal recommended that the attorney be reinstated. Upon consideration of the matter, we find:

- 1) The attorney has met all the procedural requirements necessary for reinstatement in the Oklahoma Bar Association as set out in Rule 11, Rules Governing Disciplinary Proceedings, 5 O.S. 2011, ch.1, app. 1-A.
- 2) The attorney has established by clear and convincing evidence that he has not engaged in the unauthorized practice of law in the State of Oklahoma.
- 3) The attorney has established by clear and convincing evidence that he possesses the competency and learning in the law required for reinstatement to the Oklahoma Bar Association.
- 4) The attorney has established by clear and convincing evidence that he possesses the good moral character which would entitle him to be reinstated to the Oklahoma Bar Association.

IT IS THEREFORE ORDERED that the petition of Travis Kendall Siegel for reinstatement be granted effective immediately. The costs associated with these proceedings, in the amount of \$37.95 and his 2020 bar dues shall be paid prior to reinstatement.

DONE BY ORDER OF THE SUPREME COURT THE 28th DAY OF SEPTEMBER, 2020.

/s/ Noma D. Gurich CHIEF JUSTICE

ALL JUSTICES CONCUR

2020 OK 78

In Re: Amendment of Rule Two of the Rules Governing Admission to the Practice of Law, 5 O.S. 2011, Ch. 1, app. 5

SCBD 6961. September 28, 2020

ORDER

This matter comes on before this Court upon an Application to Amend Rule Two, Sections 1 and 5 of the Rules Governing Admission to the Practice of Law, 5 O.S. 2011, Ch. 1, app 5. This Court finds that it has jurisdiction over this matter and the Rules are hereby amended as set out in Exhibit A attached hereto, effective immediately.

DONE BY THE SUPREME COURT IN CON-FERENCE this 28th day of September, 2020.

> /s/ Douglas L. Combs ACTING CHIEF JUSTICE

ALL JUSTICES CONCUR

EXHIBIT A

Rules Governing Admission to the Practice of Law in the State of Oklahoma Chapter 1, App. 5 Rule 2. Admission Upon Motion Without Examination.

(1) For purposes of this Rule, the term "reciprocal state" shall mean a state which grants Oklahoma judges and lawyers the right of admission on motion, without the requirement of taking an examination and whose requirements for admission are similar to Oklahoma's admission upon motion without examination standards. Reciprocal state includes the District of Columbia, territories, districts, and commonwealths or possessions of the United States.

The following persons, when found by the Board of Bar Examiners to be qualified under Section I and 2 of Rule One, may be admitted by the Supreme Court to the practice of law in the State of Oklahoma upon the recommendation and motion of the Board, without examination:

Section 1. Persons who are graduates of an American Bar Association approved law school, have been lawfully admitted to practice and are in good standing on active status in by a reciprocal state, and have engaged in the actual and continuous practice of law <u>under the supervision and subject to the disciplinary requirements of a reciprocal state bar association or supreme court in a reciprocal state for at least five of the seven years immediately preceding application for admission under the supervision and subject to the disciplinary requirements of practice earned <u>under the supervision and subject to the disciplinary requirements of in</u> multiple reciprocal states may be combined.</u>

For the purposes of this section, "practice of law" shall mean:

(a) Private practice as a sole practitioner or for a law firm, legal services office, legal clinic or similar entity, provided such practice was subsequent to being admitted to the practice of law in the reciprocal state in which that practice occurred;

(b) Practice as an attorney for a corporation, partnership, trust, individual or other entity, provided such practice was subsequent to being admitted to the practice of law in the reciprocal state in which the practice occurred and involved the primary duties of furnishing legal counsel, drafting legal documents and pleadings, interpreting and giving advice regarding the law, or preparing, trying or presenting cases before courts, executive departments, administrative bureaus, or agencies;

(c) Practice as an attorney for the federal, state, local government (including a territory, district, commonwealth or possession of the United States), branch of the armed services, or sovereign Indian nation with the same primary duties as described in Section I (b) above;

(d) Employment as a judge, magistrate, referee, law clerk, or similar official for the federal, state or local government (including a territory, district, commonwealth or possession of the United States); provided that such employment is available only to attorneys;

(e) Full time employment as a teacher of law at a law school approved by the American Bar Association; or

(f) Any combination of the above.

The period of the "practice of law" as defined above in subparagraphs 1(a) through 1(f) shall have occurred outside the State of Oklahoma <u>under the supervision and subject to the disciplinary requirements of a reciprocal state bar</u> <u>association or supreme court</u> in a reciprocal state. Applicants for admission without examination shall furnish such proof of practice and licensing as may be required by the Board. No applicant for admission without examination under this rule will be admitted if the applicant has taken and failed an Oklahoma bar examination without having later passed such examination.

An attorney practicing in Oklahoma under a Special Temporary Permit cannot later gain admission via Admission Upon Motion if five of the past seven years of actual and continuous practice experience were acquired in Oklahoma.

Section 2. Applicant shall provide at his or her own expense a report by the National Conference of Bar Examiners.

Section 3. Applications must be upon forms prescribed by the Board of Bar Examiners.

Section 4. It is the purpose of this rule to grant reciprocity to qualified judges and lawyers from other reciprocal states and to secure for Oklahoma judges and lawyers like privileges. If the former state of the applicant does not grant to Oklahoma judges and lawyers the right of admission on motion, then this Rule shall not apply and the applicant must, before being admitted to practice in Oklahoma, comply with the provisions of Rule Four. If the former state of the applicant permits the admission of Oklahoma judges and lawyers upon motion but the Rules are more stringent and exacting and contain other limitations, restrictions or conditions of admission and the fees required to be paid are higher, the admission of applicant shall be governed by the same Rules and shall pay the same fees which would apply to an applicant from Oklahoma seeking admission to the bar in the applicant's former state. If the applicant's actual and continuous practice for the past five of seven years is from a nonreciprocal state that does not grant Oklahoma judges and lawyers the right of admission on motion, the professional experience from the former state will not be considered, and any professional experience from a nonreciprocal state cannot be combined with the professional experience from a reciprocal state to meet the requisite five of seven years of actual and continuous practice.

Section 5. Any person who is admitted to the practice of law in a reciprocal state and who remains under the supervision and subject to the disciplinary requirements of a reciprocal state bar association or supreme court who becomes a resident of Oklahoma to accept or continue employment by a person, firm, association or corporation engaged in business in Oklahoma other than the practice of law, whose full time job is, or will be, devoted to the business of such employer, and who receives, or will receive, his or her entire compensation from such employer for applicant's legal services, may be granted a Special Temporary Permit to practice law in Oklahoma, without examination, if the applicant would be fully qualified to take the bar examination in Oklahoma under the rules of the Supreme Court, and so long as such person remains in the employ of, and devotes his or her full time to the business of, and receives compensation for legal services from no other source than applicant's said employer. Upon the termination of such employment or transfer outside the State of Oklahoma, the right of such person to practice law in Oklahoma shall terminate immediately without further action from the Bar Association or the Supreme Court of Oklahoma unless such person shall have been admitted to practice law in this state pursuant to some other rule.

The application must comply with Section 2 of Rule Two and be accompanied by a certificate from the clerk of the highest appellate court of the state in which the applicant last practiced, showing that applicant has been admitted, and is a member in good standing of the bar of that state; and a certificate from the employer of such applicant showing applicant's employment by such employer and that applicant's full time employment will be by such employer in Oklahoma. The Special Temporary Permit shall recite that it is issued under this Rule, and shall briefly contain the contents thereof. Such Special Temporary Permit shall be subject to Rule Ten of these Rules. An attorney practicing in Oklahoma under a Special Temporary Permit cannot gain admission via Rule Two, Section 2, Admission Upon Motion, if any of the five of the seven years immediately preceding of actual and continuous practice experience were acquired in Oklahoma under a Special Temporary Permit.

EXHIBIT A

Rules Governing Admission to the Practice of Law in the State of Oklahoma Chapter 1, App. 5 Rule 2. Admission Upon Motion Without Examination.

(1) For purposes of this Rule, the term "reciprocal state" shall mean a state which grants Oklahoma judges and lawyers the right of admission on motion, without the requirement of taking an examination and whose requirements for admission are similar to Oklahoma's admission upon motion without examination standards. Reciprocal state includes the District of Columbia, territories, districts, and commonwealths or possessions of the United States.

(2) For purposes of this Rule, the term "reciprocal state" shall mean a state which grants Oklahoma judges and lawyers the right of admission on motion, without the requirement of taking an examination and whose requirements for admission are similar to Oklahoma's admission upon motion without examination

standards. Reciprocal state includes the District of Columbia, territories, districts, and commonwealths or possessions of the United States.

The following persons, when found by the Board of Bar Examiners to be qualified under Section I and 2 of Rule One, may be admitted by the Supreme Court to the practice of law in the State of Oklahoma upon the recommendation and motion of the Board, without examination:

Section 1. Persons who are graduates of an American Bar Association approved law school, have been lawfully admitted to practice and are in good standing on active status by a reciprocal state, and have engaged in the actual and continuous practice of law under the supervision and subject to the disciplinary requirements of a reciprocal state bar association or supreme court for at least five of the seven years immediately preceding application for admission under this Rule. The years of practice earned under the supervision and subject to the disciplinary requirements of multiple reciprocal states may be combined.

For the purposes of this section, "practice of law" shall mean:

(a) Private practice as a sole practitioner or for a law firm, legal services office, legal clinic or similar entity, provided such practice was subsequent to being admitted to the practice of law in the reciprocal state in which that practice occurred;

(b) Practice as an attorney for a corporation, partnership, trust, individual or other entity, provided such practice was subsequent to being admitted to the practice of law in the reciprocal state in which the practice occurred and involved the primary duties of furnishing legal counsel, drafting legal documents and pleadings, interpreting and giving advice regarding the law, or preparing, trying or presenting cases before courts, executive departments, administrative bureaus, or agencies;

(c) Practice as an attorney for the federal, state, local government (including a territory, district, commonwealth or possession of the United States), branch of the armed services, or sovereign Indian nation with the same primary duties as described in Section I (b) above;

(d) Employment as a judge, magistrate, referee, law clerk, or similar official for the federal, state or local government (including a territory, district, commonwealth or possession of the United States); provided that such employment is available only to attorneys;

(e) Full time employment as a teacher of law at a law school approved by the American Bar Association; or

(f) Any combination of the above.

The period of the "practice of law" as defined above in subparagraphs 1(a) through 1(f) shall have occurred outside the State of Oklahoma under the supervision and subject to the disciplinary requirements of a reciprocal state bar association or supreme court. Applicants for admission without examination shall furnish such proof of practice and licensing as may be required by the Board. No applicant for admission without examination under this rule will be admitted if the applicant has taken and failed an Oklahoma bar examination without having later passed such examination.

An attorney practicing in Oklahoma under a Special Temporary Permit cannot later gain admission via Admission Upon Motion if five of the past seven years of actual and continuous practice experience were acquired in Oklahoma.

Section 2. Applicant shall provide at his or her own expense a report by the National Conference of Bar Examiners.

Section 3. Applications must be upon forms prescribed by the Board of Bar Examiners.

Section 4. It is the purpose of this rule to grant reciprocity to qualified judges and lawyers from other reciprocal states and to secure for Oklahoma judges and lawyers like privileges. If the former state of the applicant does not grant to Oklahoma judges and lawyers the right of admission on motion, then this Rule shall not apply and the applicant must, before being admitted to practice in Oklahoma, comply with the provisions of Rule Four. If the former state of the applicant permits the admission of Oklahoma judges and lawyers upon motion but the Rules are more stringent and exacting and contain other limitations, restrictions or conditions of admission and the fees required to be paid are higher, the admission of applicant shall be governed by the same Rules and shall pay the same fees which would apply to an applicant from Oklahoma seeking admission to the bar in the applicant's former state. If the applicant's actual and continuous practice for the past five of seven years is from a nonreciprocal state that does not grant Oklahoma judges and lawyers the right of admission on motion, the professional experience from the former state will not be considered, and any professional experience from a nonreciprocal state cannot be combined with the professional experience from a reciprocal state to meet the requisite five of seven years of actual and continuous practice.

Section 5. Any person who is admitted to the practice of law in a reciprocal state and who remains under the supervision and subject to the disciplinary requirements of a reciprocal state bar association or supreme court who becomes a resident of Oklahoma to accept or continue employment by a person, firm, association or corporation engaged in business in Oklahoma other than the practice of law, whose full time job is, or will be, devoted to the business of such employer, and who receives, or will receive, his or her entire compensation from such employer for applicant's legal services, may be granted a Special Temporary Permit to practice law in Oklahoma, without examination, if the applicant would be fully qualified to take the bar examination in Oklahoma under the rules of the Supreme Court, and so long as such person remains in the employ of, and devotes his or her full time to the business of, and receives compensation for legal services from no other source than applicant's said employer. Upon the termination of such employment or transfer outside the State of Oklahoma, the right of such person to practice law in Oklahoma shall terminate immediately without further action from the Bar Association or the Supreme Court of Oklahoma unless such person shall have been admitted to practice law in this state pursuant to some other rule.

The application must comply with Section 2 of Rule Two and be accompanied by a certificate from the clerk of the highest appellate court of the state in which the applicant last practiced, showing that applicant has been admitted, and is a member in good standing of the bar of that state; and a certificate from the employer of such applicant showing applicant's employment by such employer and that applicant's full time employment will be by such employer in Oklahoma. The Special Temporary Permit shall recite that it is issued under this Rule, and shall briefly contain the contents thereof. Such Special Temporary Permit shall be subject to Rule Ten of these Rules. An attorney practicing in Oklahoma under a

Special Temporary Permit cannot gain admission via Rule Two, Section 2, Admission Upon Motion, if any of the five of the seven years immediately preceding of actual and continuous practice experience were acquired in Oklahoma under a Special Temporary Permit.

2020 OK 79

IN RE: STATE QUESTION No. 813, INITIATIVE PETITION No. 429 PAUL TAY, Petitioner/Protestant, v. DANNA MALONE, R. HENDRIX, SHERRI TAYLOR, MONICA GREEN, JOHN KOUMBIS, and PATRICK MALONE Respondents/Proponents.

No. 118,733. September 28, 2020

<u>ORDER</u>

¶1 Original jurisdiction is assumed. Okla. Const. art. VII, § 4; *In re Initiative Petition No.* 409, *State Question No.* 785, 2016 OK 51, ¶ 2, 376 P.3d 250, 252; 34 O.S. Supp.2015, § 8. Petitioner Paul Tay challenges the legal sufficiency of State Question No. 813, Initiative Petition No. 429. Upon review, we hold that State Question No. 813's gist is misleading as it fails to alert potential signatories of changes being made to the law or with sufficient information to make an informed decision about the proposed constitutional amendment. State Question No. 813 is declared invalid and ordered stricken from the ballot.

¶2 Petitioner asserts State Question 813 is unconstitutional because it violates the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2, as well as Okla. Const., art. 1, § 1. Specifically, Petitioner contends State Question 813 directly conflicts with the Controlled Substances Act, 21 U.S.C. §§ 801-904, and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968. He also argues State Question 813 conflicts with the 10th Amendment of the United States Constitution. Finally, Petitioner challenges the ballot title of State Question 813 as misleading and claims that State Question 813 amounts to logrolling.

¶3 If enacted, State Question 813 would add a new article to the Oklahoma Constitution that would regulate and tax recreational and medical marijuana. The proposed article contains 38 sections, totaling 41 pages. State Question 813 seeks to establish a regulatory framework within the Constitution for recreational marijuana use (adult-use marijuana) and replace the current regulatory framework and the law for medical marijuana. State Question 813 sets a flat tax of 25% on all marijuana sales, while exempting marijuana sales from all other state, municipal, or other local taxes.

¶4 Proponents of State Question No. 813 have moved to dismiss Petitioner's protest as Petitioner did not serve copies of his challenge to State Question 813 on any of the Proponents when he initially filed his petition in protest. Citing Supreme Court Rule 1.4(g) and 12 O.S., § 2005(B), Proponents contend that failure to serve should result in dismissal. The Court directed Petitioner to serve Proponents with a copy of his protest, and Petitioner provided confirmation to the Court that he complied.

¶5 Petitioner's challenge is governed by 34 O.S. Supp.2015, § 8(B). Section 8(B) requires that if a person chooses to file a protest to an initiative petition, that person must give written notice to this Court and to the proponents of the initiative petition. 34 O.S., §8(B). The person must also send a copy of the protest to the Secretary of State. This Court treats protests to initiative petitions as part of its original jurisdiction. Both Supreme Court Rules governing filings here, Rule 1.191(e) and Rule 1.4(g), provide no firm mandate for dismissal where a party does not initially serve original action filings. Finally, we are guided by precedent, and service of a protest to this Court or the Secretary of State "is sufficient notice to all parties." In re Initiative Petition No. 260, State Question No. 377, 1956 OK 196, ¶ 8, 298 P.2d 753, 755. Petitioner complied with 34 O.S., § 8(b) and this Court's Rules, albeit late and at this Court's instruction. Therefore, we deny Proponents' request to dismiss Petitioner's protest.

¶6 We next turn to the Petitioner's legal challenges. The right to propose amendments to the Oklahoma Constitution by initiative petition is a right "zealously" protected by the Court. In re: State Question No. 807, Initiative Petition No. 423, 2020 OK 57, ¶ 10. "[I]t is the duty of this Court to review the petition to ensure that it complies with the rights and restrictions established by the Oklahoma Constitution, legislative enactments, and this Court's jurisprudence." Id. ¶ 11. Petitioner bears a heavy burden to establish any infirmity with State Question 813, and any doubt "is resolved in favor of the initiative" petition. Id. ¶ 12.

¶7 The majority of Petitioner's legal challenges have already been decided by this Court. In In re: State Question No. 807, Initiative Petition No. 423, 2020 OK 57, ¶ 41, the Court rejected Petitioner's arguments that State Question 807 violated the supremacy clause of both the Oklahoma and United States Constitution. State Question 807, like State Question 813, seeks to legalize, regulate, and tax recreational marijuana. The In re: State Question No. 807 Court held that the Controlled Substances Act does not preempt Oklahoma's ability to legalize, tax, or regulate marijuana. Id. ¶ 35. The Court also concluded that neither the 10th Amendment nor the anti-commandeering doctrine render SQ 807 unconstitutional. Id. ¶ 29. Finally, the Court concluded legalizing marijuana and taxing marijuana sales do not establish a violation of RICO. Id. ¶ 40. We apply those holdings to Petitioner's arguments here, and reject each.

¶8 Petitioner's next argument is that the ballot title of State Question 813 is misleading. Petitioner's challenge to the ballot title is premature. See 34 O.S., § 8(H). However, Petitioner timely filed his challenge to the legal sufficiency of the gist. See id. § 3; In re: Initiative Petition No. 426, State Question No. 810, 2020 OK 44, ¶ 6. We broadly construe Petitioner's argument here as he is proceeding pro se and the ballot title and gist are identical for State Question 813. Additionally, "this Court must review the petition to ensure that it complies with the parameters of the rights and restrictions [as] established by the Oklahoma Constitution, legislative enactments and this Court's jurisprudence." In re Initiative Petition No. 384, State Question No. 731, 2007 OK 48, ¶ 2, 164 P.3d 125, 127 (quoting In re Initiative Petition No. 379, State Question No. 726, 2006 OK 89, ¶16, 155 P.3d 32, 38). A gist must present an outline, or rough sketch, of what the initiative petition will accomplish to fully inform potential signatories. See Oklahoma's Children, Our Future, Inc. *v. Coburn*, 2018 OK 55, ¶ 13, 421 P.3d 867, 871.

The gist of State Question 813 is as follows:

This measure adds a new Article to the Constitution of the State of Oklahoma. This Article will heal State Question 788 which the Oklahoma State Legislature, the Oklahoma Medical Marijuana Authority, the Oklahoma Bureau of Narcotics and Dangerous Drugs, the Oklahoma State Department of Health, Local Governments, has desecrated since 57% of Oklahoma voters passed SQ788 on the historic day of June 26, 2018. This Article will not only heal the damage created by those named above, it will responsibly legalize, regulate and tax Adult-Use Marijuana for persons aged 18 and older under state law.

¶9 Only the final clause of the final sentence of the gist provides any detail as to what State Question 813 intends to amend in the Oklahoma Constitution. As the Court explained in *In* re Initiative Petition No. 409, 2016 OK 51, ¶ 6, 376 P.3d at 253, a gist that "fails to alert potential signatories of the changes being made to the law and does not provide a potential signatory with sufficient information to make an informed decision about the true nature of the proposed constitutional amendment" renders an initiative petition invalid. Here, the Court need not engage in any detailed analysis as it is clear State Question 813's gist fails to inform potential signatories of the extensive changes that State Question 813 proposes. Just at a cursory glance, the gist does not inform signatories that it replaces all medical marijuana laws and regulations, that it establishes an entire regulatory system for recreational marijuana, that it bars any further legislation, agency action, or local ordinance to regulate medical or recreational marijuana, that it exempts all marijuana sales from state and local taxes, and that it modifies banking regulations. State Question 813's gist is insufficient to inform signatories of the vast array of changes State Question 813 will make to existing law. We therefore hold that the gist does not fairly describe the proposed constitutional article and is invalid. The gist is not subject to amendment by this Court, and as a result, the only remedy is to strike the initiative petition from the ballot.

¶10 State Question No. 813, Initiative Petition No. 429 is declared invalid and ordered stricken from the ballot.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 28th DAY OF SEPTEMBER, 2020.

> /s/ Noma D. Gurich CHIEF JUSTICE

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

CONCURS IN RESULT: Edmondson, J.

CONCUR IN PART; DISSENT IN PART: Kane and Rowe (by separate writing), JJ.

KANE, J., concurring in part; dissenting in part:

"I dissent to the finding that State Question 813 is not preempted by the Controlled Substances Act, as noted in my dissent in *In re: State Question No. 807, Initiative Petition No. 423, 2020 OK 57.*"

Rowe, J., with whom Kane, J., joins, concurring in part, dissenting in part:

¶1 I concur in the Court's order assuming original jurisdiction; declaring the gist of State Question No. 813, Initiative Petition No. 429 ("SQ 813") legally insufficient; and striking SQ 813 from the ballot.

¶2 I dissent as to the Court's finding that SQ 813 is not preempted by the Controlled Substances Act ("CSA"), 21 U.S.C. §§ 801-904. As noted in my dissent in *In re State Question No.* 807, Initiative Petition No. 423, the legalization and regulation of recreational marijuana will lead to substantial increases in the cultivation, manufacture, distribution, dispensation, and use of marijuana. In re State Question No. 807, Initiative Petition No. 423, 2020 OK 57, ¶4 (Rowe, J., dissenting). The CSA designates marijuana as a Schedule I controlled substance and explicitly prohibits any person from manufacturing, distributing, or dispensing marijuana, or possessing it with intent to do any of foregoing. 21 U.S.C. §§ 841(a)(1), 844(a); 21 C.F.Ř. § 1308.11(d)(23). If SQ 813 were allowed to become law, it would present a "positive conflict" with federal law. See Hillsborough City, Fla. v. Automated Med Labs, Inc., 471 U.S. 707, 713 (1985) (describing "positive conflict" preemption as arising either when it is impossible to comply with both federal and state law, or where state law stands as an obstacle to the accomplishment and execution of Congress's full purposes and objectives). As such, SQ 813 is preempted by the CSA.

¶3 Accordingly, I concur in part and dissent in part.

Position Available: Administrative Director, Oklahoma Board of Bar Examiners

Overview

The Administrative Director is a highly responsible administrative and supervisory position which reports to the Board of Bar Examiners. The Administrative Director will oversee day-to-day operations of the Office of Bar Examiners, which is responsible for reviewing background investigative services on all applications for admission to Oklahoma; administering the Oklahoma bar examination and subsequent admission requirements; providing administrative support to the Oklahoma Board of Bar Examiners; maintaining admission records; receiving and processing payments for admission applications; and performing other duties and responsibilities as assigned by the Board of Bar Examiners.

Qualifications

- Education Bachelor's degree required.
- Experience The candidate must have strong supervisory skills and several years of experience of responsibility
 for managing multi-faceted programs; have experience working with a board of directors in a public, private
 or non-profit organization as well as coordinating volunteers; professional licensing experience and a strong
 working knowledge of high stakes examinations. Familiarity with issues involving disabilities and reasonable
 accommodations are preferred.

Skill Set

- Knowledge of information technology and software including Word, Excel, email, member data management software;
- · Ability to manage financial and budget issues;
- Ability to analyze rules and regulations, exercise independent judgment, identify potential issues and plan a course
 of action;
- Demonstrated leadership ability including good decision-making, problem-solving and interpersonal skills;
- · Ability to lead a team and effectively manage interpersonal conflict and flow of work;
- Ability to develop and implement short- and long-term plans, set priorities and manage multiple activities simultaneously and within specified deadlines;
- Excellent oral and written communication skills, organizational ability and attention to detail;
- Ability to communicate information and explanations as well as interact effectively in a compassionate, patient, tactful manner with department staff, other co-workers, current and prospective members of the bar and the general public.

Location

The Office of the Board of Bar Examiners is located in the Oklahoma Bar Association building at 1901 N Lincoln Blvd, Oklahoma City, OK. The duties and responsibilities of the Administrative Director must be performed from this location.

Salary and Benefits

The salary will be commensurate with experience. Benefits include participation in the OBA Health Insurance Program and the OBA Retirement System.

Application

Submit a resume with a cover letter of no more than two pages explaining why you are interested in this position and why you believe you are qualified for it to:

Chairman, Board of Bar Examiners P.O. Box 53036 Oklahoma City, OK 73152

The deadline for applications is October 13, 2020

The Oklahoma District Attorneys Council (DAC) is pleased to announce that DAC has been designated by the U.S. Department of Justice to award and disburse loan repayment assistance through the John R. Justice (JRJ) Loan Repayment Program. The State of Oklahoma has received a total of \$34,312.00 to be divided equally among eligible full-time **public defenders and prosecutors (including tribal government)** who have outstanding qualifying federal student loans.

Applications for new and renewal applicants are currently available online. For more information about the JRJ Student Loan Repayment Program and how to apply, please go to http://www.ok.gov/dac. Under "About the DAC", click on the "John R. Justice Student Loan Repayment Program" link. Application packets must be submitted to the DAC or postmarked no later than October 30, 2020 for consideration.



NOTICE OF JUDICIAL VACANCY

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

Associate District Judge Tenth Judicial District Osage County, Oklahoma

This vacancy is due to the appointment of the Honorable Stuart L. Tate to District Judge effective September 17, 2020.

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

Application forms can be obtained online at www.oscn.net (click on "Programs", then "Judicial Nominating Commission", then "Application") or by contacting Tammy Reaves at (405) 556-9300. Applications must be submitted to the Chairman of the JNC **no later than 5:00 p.m., Friday, October 23, 2020**. Applications may be mailed or delivered by third party commercial carrier. No hand delivery of applications is available at this time. If mailed, they must be postmarked **on or before October 23, 2020** to be deemed timely. Applications should be mailed/delivered to:

Jim Webb, Chairman Oklahoma Judicial Nominating Commission c/o Tammy Reaves Administrative Office of the Courts • 2100 N. Lincoln Blvd., Suite 3 Oklahoma City, OK 73105

2020 OK CR 19

STATE OF OKLAHOMA, ex rel. STEVE KUNZWEILER, District Attorney, Petitioner, v. THE HONORABLE KELLY GREENOUGH, District Judge, Respondent

No. PR-2020-389. September 17, 2020

OPINION GRANTING EXTRAORDINARY RELIEF

HUDSON, JUDGE:

¶1 Trevon Weaver is the defendant in Tulsa County District Court Case No. CF-2019-3404. The State charged him with Domestic Assault and Battery by Strangulation (21 O.S.Supp.2014, § 644(J)) and Assault and Battery in a Manner Likely to Produce Death (21 O.S.2011, § 652(C)).

¶2 At preliminary hearing, Weaver's girlfriend, Victoria Burnett, testified that on April 2, 2019, she was strangled by Weaver during an argument. Burnett testified Weaver squeezed her throat with his hands hard enough that it interfered with her ability to breathe. Burnett testified that on July 13, 2019, she was again strangled during the course of another argument with Weaver. Burnett testified that this time "he strangled me so hard the blood vessels in my eyes popped" and that she lost consciousness.

¶3 The State charged Weaver with domestic assault and battery by strangulation for the first alleged incident and assault and battery in a manner likely to produce death for the second. Domestic assault and battery by strangulation, for a first offense, is punishable by one to three years imprisonment under 21 O.S. Supp.2014, § 644(J). Assault and battery by means likely to produce death is punishable by imprisonment for up to life under 21 O.S.2011, § 652(C).

¶4 Weaver filed a motion to quash. He argued that the appropriate charge for each of the alleged acts was domestic assault and battery by strangulation because that charge is "more specific" than assault and battery by means likely to produce death.

¶5 Weaver relied primarily on *McWilliams v.* State, 1989 OK CR 39, 777 P.2d 1370. There, McWilliams was charged with attempting to escape from a penitentiary in violation of 21 O.S. § 434. Following preliminary hearing, the State was permitted to amend the information to allege a violation of a more general escape statute, 21 O.S. § 443(B). We found it was reversible error to allow the State to proceed under the more general statute. Our decision was based on the belief that "Section 11 of Title 21 mandates that a crime be brought under specific statutory provisions rather than more general codifications." *McWilliams*, 1989 OK CR 39, ¶ 10, 777 P.2d at 1372.

¶6 In a written order requiring the State to amend the charge, the trial court understandably found that *McWilliams* "controlled." In announcing the decision from the bench, Judge Greenough sought clarification: "I think this is an interesting issue for the Court of Criminal Appeals, so I would heartily urge the State to seek relief and get clarification on this issue because it is an issue that I am seeing a lot of right now."

¶7 Upon further consideration, we find that *McWilliams* was wrongly decided. There is nothing remarkable about the tenet recognizing that the specific controls over the general. *See, e.g., Bowman v. State,* 1990 OK CR 19, ¶ 4, 789 P.2d 631, 632 ("It is a basic rule of statutory construction that when there are two statutes on the same subject, the more specific of the two provisions controls."). However, resort to rules of construction is unfounded where the text of the statute is clear. *See State v. Farthing,* 2014 OK CR 4, ¶ 7, 328 P.3d 1208, 1210-11 (where there is no ambiguity in the language of the statute, "[u]se of canons of construction to fabricate a different result is improper").

¶8 We find no ambiguity in 21 O.S.Supp.2019, § 11. Section 11 specifically authorizes prosecution under any provision of the penal code where more than one section of the code is applicable. Section 11 provides:

If there be in any other provision of the laws of this state a provision making any specific act or omission criminal and providing the punishment therefor, and there be in this title any provision or section making the same act or omission a criminal offense or prescribing the punishment therefor, that offense and the punishment thereof, shall be governed by the special provisions made in relation thereto, and not by the provisions of this title. But an act or omission which is made punishable in different ways by different provisions of this title may be punished under any of such provisions, except that in cases specified in Sections 51.1 and 54 of this title, the punishments therein prescribed are substituted for those prescribed for a first offense, but in no case can a criminal act or omission be punished under more than one section of law; and an acquittal or conviction and sentence under one section of law, bars the prosecution for the same act or omission under any other section of law.

¶9 As pointed out by Judge Lumpkin in his dissenting opinion in *McWilliams*, Section 11

relates to provisions in other chapters of the laws of this state, i.e. penal provisions not contained in Title 21, the Oklahoma Penal Code. Section 11 goes further and states in the second sentence, "But an act or omission which is made punishable in different ways by different provisions of *this code* may be punished under either of such provisions, except that in cases specified in §§ 51 and 54, the punishments therein prescribed are substituted for those prescribed for a first offense, but in no case can he be punished under more than one; ..." (emphasis added). Both of the statutory provisions addressed in this case are contained in Title 21, The Oklahoma Penal Code. The provisions of [Section 11] allow election by the prosecutor under which statute the charges will be filed and prosecuted.

McWilliams, 1989 OK CR 39, ¶ 2, 777 P.2d at 1372 (Lumpkin, J. dissenting). *McWilliams'* holding to the contrary is hereby overruled.

¶10 Prosecutors have broad discretion to choose what charges to file. See Childress v. State, 2000 OK CR 10, ¶ 18, 1 P.3d 1006, 1011 ("The decision regarding which criminal charge to bring lies within the wide parameters of prosecutorial discretion."); Wolfenbarger v. State, 1985 OK CR 143, ¶ 5, 710 P.2d 114, 115 ("the prosecutor has sole authority to decide under which statute to file charges"). See also Leech v. State, 2003 OK CR 4, ¶ 6, 66 P.3d 987, 993 (Chapel, J. dissenting) ("This discretion is bounded on one hand by the Legislature's strict definitions of specific crimes, and on the other by a particular defendant's actions.").

¶11 We recognize that prosecutorial discretion regarding charging decisions is not limitless. For example, in State v. Franks, 2006 OK CR 31, 140 P.3d 557, we upheld the trial court where it granted a motion to quash and ordered the State to file an amended charge. There, the State alleged that Franks stole clothing worth \$320 from a retailer. It charged him with petit larceny, a felony in violation of 21 O.S. § 51.3(3). The trial court granted Franks' motion to quash reasoning that the "more specific" and therefore the appropriate charge was larceny of merchandise from a retailer, a misdemeanor in violation of 21 O.S. § 1731. In deciding the State's appeal, we concluded that the trial court's decision was correct because allowing the State to proceed on the felony charge would have "thwarted" the legislature's intent that larceny crimes from retail outlets should be brought under Section 1731 rather than under the general petit larceny statute. *Franks*, 2006 OK CR 31, ¶ 7, 140 P.3d at 559.

¶12 We make no such finding here. "[I]t is within the Legislature's authority to write laws so that a particular course of conduct might be prosecutable under more than one provision." *State v. Haworth*, 2012 OK CR 12, ¶ 18, 283 P.3d 311, 317. Domestic assault and battery by strangulation requires the State to prove, among other things, the intent to cause great bodily harm. Assault and battery in a manner likely to produce death requires proof of such force likely to produce death. See Instruction Nos. 4-26(D) and 4-7, OUJI-CR (2d), respectively. Depending on the circumstances, strangulation could fall within either statute. That the statutes may prohibit the same criminal acts, and in instances overlap, does not act to limit prosecutorial discretion regarding what charge is appropriate in a particular case. See Jones v. State, 1947 OK CR 39, 179 P.2d 484, 489 ("[W]e have often held that one committing a crime may violate more than one statute, and it is within the discretion of the county attorney to determine under which statute charges will be preferred"); State v. Bunch, 1922 OK CR 139, 214 P. 1093 (Syl. 2) ("As between specific statutes prescribing different penalties for any offense, the state may elect to try an offender under either statute."). Nothing prohibits the prosecutor from making such a choice here.

¶13 For a writ of prohibition Petitioner has the burden of establishing (1) a court, officer or person has or is about to exercise judicial or quasi-judicial power; (2) the exercise of said power is unauthorized by law; and (3) the exercise of said power will result in injury for which there is no other adequate remedy. *See* Rule 10.6(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2020). Based on the foregoing, we find Petitioner has met this burden. Accordingly, Petitioner's request for issuance of a writ of prohibition is **GRANTED**.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY THE HONORABLE KELLY GREENOUGH, DISTRICT JUDGE

APPEARANCES AT TRIAL

Charles Prather, Attorney at Law, 1711 E. 33rd Pl., Tulsa, OK 74105, Counsel for Defendant

Ashley Nix, Asst. District Attorney, 500 S. Denver, Ste. 900, Tulsa, OK 74103, Counsel for State

APPEARANCES ON APPEAL

Kevin Keller, Asst. District Attorney, 500 S. Denver, Ste. 900, Tulsa, OK 74103, Counsel for Petitioner

Charles Prather, Attorney at Law, 1711 E. 33rd Pl., Tulsa, OK 74105, Counsel for Respondent

OPINION BY: HUDSON, J.

LEWIS, P.J.: SPECIALLY CONCUR KUEHN, V.P.J.: SPECIALLY CONCUR LUMPKIN, J.: CONCUR ROWLAND, J.: CONCUR

KUEHN, V.P.J., SPECIALLY CONCURRING:

¶1 I specially concur in this case to underscore the longstanding holding that prosecutors have discretion to choose which provision of the criminal code to employ when more than one provision might apply. *State v. Haworth,* 20 12 OK CR 12, ¶ 18, 283 P.3d 311, 317; *Tracy v. State,* 1923 OK CR 201, 216 P. 941, 944. Reliance on *McWilliams v. State,* 1989 OK CR 39, 777 P.2d 1370 is misplaced because *McWilliams* is an outlier.

¶2 It is worth noting that the defendant did not simply argue below that the more specific statute must be used; he argued that the more specific statute must be used, but only if it benefitted the defendant by providing a more lenient sentence range. In any event, the facts of the crime here completely supported the State's choice to prosecute Count 3 under 21 O.S.2011, § $652(\hat{C})$. The defendant's conduct went beyond that which would support a charge under Section 644(J). The defendant didn't just grab his victim by the throat; he choked her until she lost consciousness, and caused damage to her eyes. The allegations themselves take the defendant's culpability to a higher level.

¶3 I am authorized to state Presiding Judge Lewis joins in this Specially Concurring separate writing.

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BAR NEWS

2021 OBA Board of Governors Vacancies

Nominating Petition Deadline was 5 p.m. Friday, Sept. 11, 2020

OFFICERS

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

Vice President Current: Brandi N. Nowakowski, Shawnee (One-year term: 2021) Nominee: Charles E. Geister III, Oklahoma City

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

Ponca City

Supreme Court Judicial District Six Current: D. Kenyon Williams Jr., Tulsa Tulsa County (Three-year term: 2021-2023) Nominee: **Richard D. White Jr., Tulsa**

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

Member At Large Current: Brian K. Morton, Oklahoma City Statewide (Three-year term: 2021-2023) Nominees: Cody J. Cooper, Oklahoma City Elliott C. Crawford, Oklahoma City April D. Kelso, Oklahoma City Kara I. Smith, Oklahoma City

NOTICE

Pursuant to Rule 3 Section 3 of the OBA Bylaws, the nominees

for uncontested positions have been deemed elected due to no other person filing for the position.

Terms of the present OBA officers and governors will terminate Dec. 31, 2020.

An election will be held for the Member At Large position. The Oklahoma Supreme Court has issued an order (SCBD 6938) allowing the OBA to conduct its Annual Meeting in an alternative method to an in-person meeting allowing delegates to vote by mail. Ballots for the election were mailed Sept. 21 with a return deadline of Friday, Oct. 9. If needed, runoff ballots will be mailed Oct. 19 with a return date of Monday, Nov. 2.

Counties needing to certify Delegate and Alternate selections should send certifications TO-DAY to: OBA Executive Director John Morris Williams, c/o Debbie Brink, P.O. Box 53036, Oklahoma City, OK 73152-3036, fax: 405-416-7001 or email debbieb@okbar.org.

Oklahoma Bar Association Nominating Petitions (See Article II and Article III of the OBA Bylaws)

BOARD OF GOVERNORS Supreme Court

Judicial District No. 1 Michael R. Vanderburg, Ponca City A Nominating Resolution from Kay County has been filed nominating Michael R. Vanderburg for election of Supreme Court Judicial District No. 1 of the Oklahoma Bar Association Board of Governors for a threeyear term beginning January 1, 2021. **April D. Kelso, Oklahoma City** Nominating Petitions have been filed nominating April D. Kelso, Oklahoma City for election of Member at Large of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2021.

A total of 56 signatures appear on the petitions.

Kara I. Smith, Oklahoma City

Nominating Petitions have been filed nominating Kara I. Smith, Oklahoma City for election of Member at Large of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2021.

A total of 62 signatures appear on the petitions.

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The Oklahoma Bar Journal

NOTICE

Oklahoma Bar Association 2021 Proposed Budget

Pursuant to Article VII, Section 1 of the Rules Creating and Controlling The Oklahoma Bar Association, Michael C. Mordy, President-Elect and Budget Committee Chairperson, has set a Public Hearing on the 2021 Oklahoma Bar Association budget for Thursday, October 22, 2020, at 10 a.m. at the Oklahoma Bar Center, 1901 N. Lincoln Boulevard, Oklahoma City, Oklahoma.

The purpose of the OBA is to engage in those activities enumerated in the Rules Creating and Controlling the Oklahoma Bar Association ("the Rules") and the OBA Bylaws ("the Bylaws"). The expenditure of funds by the OBA is limited both as set forth in the Rules and Bylaws and by OBA policy in compliance with *Keller v. State Bar of California*, 496 U.S. 1 (1990). If any member feels that any actual or proposed expenditure is not within such purposes of, or limitations on the OBA then such member may object by following the procedures set forth at www.okbar.org/wp-content/uploads/ 2020/03/OBA_KellerPolicy.pdf.

In accordance with the *Keller* policy an independent auditor has reviewed and certified the "opt out" amount for legislative activity that will be reflected on the annual dues statement, and the certification and pro rata calculation is available online at MyOKBar.

The proposed budget begins on the next page.

OKLAHOMA BAR ASSOCIATION 2021 PROPOSED BUDGET

For expanded detail, go to www.okbar.org/2021Budget

REVENUES	2021 PROPC	SED BUDGET	2020 BUDGET		
ADMINISTRATIVE:					
Dues and Penalties	\$ 4,157,525		\$ 4,206,750		
Investment Income	50,000		100,000		
Annual Meeting	40,000		45,000		
Commissions and Royalties	30,000		30,000		
Mailing Lists and Labels	5,000		5,000		
Council on Judicial Complaints - Rent and Services	10,000		10,000		
Board of Bar Examiners - Rent and Services	15,000		15,000		
Legal Intern Fees	6,000		6,000		
Other	10,000	\$ 4,323,525	11,000	\$ 4,428,750	
OKLAHOMA BAR JOURNAL					
AND COMMUNICATIONS:					
Oklahoma Bar Journal:					
Advertising Sales	145,000		150,000		
Subscription Sales	25,000		27,000		
Other Miscellaneous		170,000		177,000	
LAW RELATED EDUCATION:					
Grants	0	0	<u> </u>	0	
CONTINUING LEGAL EDUCATION:					
Seminars and Materials	848,200	848,200	1,014,200	1,014,200	
GENERAL COUNSEL:					
Disciplinary Reinstatements	10,000		10,000		
Cerficates of Good Standing	22,000		22,000		
Out of State Attorney Registration	359,200	391,200	349,200	381,200	
MANDATORY CONTINUING					
LEGAL EDUCATION:					
Filing Penalties	102,000		112,000		
Provider fees	109,700	211,700	94,100	206,100	
PRACTICE ASSISTANCE					
Consulting Fees and Material Sales	1,000		1,000		
Online Formbook					
Diversion Program	11,500	12,500	12,500	13,500	
COMMITTEES AND SPECIAL PROJECTS:					
Mock Trial Program	52,500		52,500		
Lawyers Helping Lawyers	26,750		26,750		
Insurance Committee	27,000		27,000		
Women-in -Law Conference	30,000		30,000		
Solo-Small Firm Conference	80,000		80,000		
Diversity Committee Conference	10,000		10,000		
Oklahoma Lawyers for America's Heroes Program YLD Kick It Forward Program	5,000		5,000		
Leadership Academy	2,300 800		2,300 800		
Young Lawyers Division		227 250		227 250	
Todily Lawyers Division	3,000	237,350	3,000	237,350	
TOTAL REVENUES		\$ 6,194,475		\$ 6,458,100	

OKLAHOMA BAR ASSOCIATION 2021 PROPOSED BUDGET

For expanded detail, go to www.okbar.org/2021Budget

EXPENDITURES		2021 PROPOSED BUDGET			2020 BUDGET		
ADMINISTRATIVE:							
Salaries and Benefits	\$	1,052,616		\$	1,047,369		
Annual Meeting		80,000			105,000		
Board of Governors and Officers		115,000			115,000		
Conferences and Organizational Development		14,200			16,200		
Legislative Monitoring		46,000			46,000		
General and Administrative:							
Utilities		118,000			120,000		
Insurance		53,000			50,000		
Data Processing		250,866			242,124		
Bank and Credit Card Processing Fees		90,000			100,000		
Building and Equipment Maintenance		84,000			114,000		
Postage		33,000			35,000		
Copier		40,000			38,000		
Supplies		20,200			21,700		
Grounds Maintenance		8,000			10,000		
Audit		24,000			20,500		
Legal		10,000			50,000		
Miscellaneous		18,000			18,500		
Overhead Allocated to Departments		(484,923)	\$ 1,571,958		(476,848)	\$ 1,672,545	
COMMUNICATIONS							
Salaries and Benefits		323,470			307,814		
Oklahoma Bar Journal:							
Weekly Issue Printing		5,000			45,000		
Special Issue Printing		160,000			160,000		
Other		4,000			4,000		
Public Information Projects		5,000			5,000		
Newsclip Service		3,700			3,700		
Pamphlets		5,000			5,000		
Photography		200			200		
Supplies		250			250		
Miscellaneous		16,220			9,700		
Allocated Overhead		101,083	623,923		100,688	641,352	
LAW RELATED EDUCATION:							
Salaries and Benefits		0			0		
		0			0		
Other Grant Projects		0			0 6,000		
Training, Development and Travel Newsletter		2,000					
Miscellaneous		0	2,000		0	6,000	
MISCENTIEOUS		0	2,000		0	0,000	
CONTINUING LEGAL EDUCATION:							
Salaries and Benefits		377,330			399,926		
Meeting Rooms and Food Service		30,000			60,000		
Seminar Materials		2,000			5,000		
Brochures and Bulk Mail		7,500			27,500		
Speakers		70,000			80,000		
Audio/Visual		2,000			3,000		
Online Provider Service Fees		186,200			181,200		
Credit Card Processing Fees		30,000			29,000		
Department Travel		1,500			1,500		
Supplies		1,200			1,200		
Miscellaneous		14,000			14,000		
Allocated Overhead		135,973	857,703		136,620	938,946	
			0011100		.00,020	000,040	

OKLAHOMA BAR ASSOCIATION 2021 PROPOSED BUDGET

For expanded detail,	go to www.okbar.org/2021Budget
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EXPENDITURES	2021 PROPOSEI	DBUDGET	2020 BU	DGET
GENERAL COUNSEL:	¢ 4 005 005			
Salaries and Benefits	\$ 1,365,935		\$ 1,358,943	
Investigation and Prosecution	66,000		66,000	
PRC Travel and Meetings	3,500		3,500	
PRT Travel and Meetings	12,000		10,000	
Department Travel	9,500		9,500	
Library	4,500		4,500	
Supplies	10,000		12,000	
Miscellaneous	12,300		11,300	
Allocated Overhead	130,810 \$	1,614,545	127,612	\$ 1,603,355
MANDATORY CONTINUING LEGAL EDUCATION:				
Salaries and Benefits	246,585		246,137	
Printing & Compliance Reporting	1,500		1,500	
Supplies	150		150	
Commission Travel	500		1,000	
Miscellaneous	11,200		10,250	
Allocated Overhead	58,529	318,464	55,964	315,001
PRACTICE ASSISTANCE				
Salaries and Benefits	396,169		387,384	
OBA-NET Expense	0		007,004	
Dues & Subscriptions	1,900		-	
Library	•		1,900	
Computer Software	1,000		1,000	
	2,750		2,750	
Supplies	750		750	
Diversion Programs	1,700		1,500	
Travel and Conferences	19,100		19,800	
Miscellaneous	5,700		5,900	
Allocated Overhead	58,529	487,598	55,964	476,948
COMMITTEES AND SPECIAL PROJECTS:				
Law Day	52,000		50,000	
Women-in -Law Conference	30,000		30,000	
Solo-Small Firm Conference	80,000		80,000	
Mock Trial Program	54,620		54,620	
FastCase Legal Research	91,000		91,000	
Leadership Institute	10,000		10,000	
General Committees	32,500		34,500	
Lawyers Helping Lawyers Program	120,000		120,000	
Oklahoma Lawyers for America's Heroes Program	20,000		25,000	
Public Education Initiative	20,000		the second se	
President's Service Program	3,000		2,000	
			5,000	
YLD Kick It Forward Program	3,300		3,300	
Young Lawyers Division	76,700	573,120	76,700	582,120
OTHER EXPENDITURES				
Client Security Fund Contribution	175,000		175,000	
Bar Center Renovations	0		50,000	
Furniture and Equipment	29,922		32,000	
Computer Hardware and Software	67,656	272,578	99,585	356,585
TOTAL EXPENDITURES		6,321,889	_	6,592,852
TOTAL REVENUES OVER (UNDER) EXPENDITURES		(127,414)		(134,752)
TRANSFER FROM RESERVE FUNDS:				
Technology Fund		67,656.00		235,976
AG Grant Fund		3,000.00		3,000
Bar Center Improvements Fund			_	-
NET SURPLUS (DEFICIT)	\$	(56,758)	_	\$ 104,224
		(00,100)		104,224

2020 OK CIV APP 46

BECKY S. WRIGHT, Plaintiff/Appellant/ Counter-Appellee, vs. BOARD OF COUNTY COMMISSIONERS OF CARTER COUNTY, Defendant/Appellee/Counter-Appellant.

Case No. 117,602. April 30, 2020

APPEAL FROM THE DISTRICT COURT OF CARTER COUNTY, OKLAHOMA

HONORABLE THOMAS K. BALDWIN, TRIAL JUDGE

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

Mark Hammons, HAMMONS, GOWENS, HURST & ASSOCIATES, Oklahoma City, Oklahoma, for Plaintiff/Appellant Counter-Appellee

Jordan L. Miller, Ambre C. Gooch, COLLINS, ZORN & WAGNER, P.C., Oklahoma City, Oklahoma, for Defendant/Appellee Counter-Appellant

JANE P. WISEMAN, CHIEF JUDGE:

¶1 Becky Wright appeals a trial court judgment entered after a jury verdict finding in her favor but awarding no damages in this wrongful termination action. Wright asserts the verdict must be set aside for the following reasons: it is internally inconsistent, the trial court erred in admitting evidence of criminal convictions, the trial court erred in instructing the jury, and the trial court improperly denied her First Amendment claim. The Board of County Commissioners of Carter County counterappeals asserting trial court error in denying its motion in limine but granting Wright's motion in limine and in instructing the jury regarding scope of employment. After review of the rec-ord and relevant law, we reverse the summary judgment on Wright's First Amendment claim but find no basis to reverse for any internal inconsistency in the verdict or for error in admitting evidence or instructing the jury. Based on our affirmance of the judgment on Wright's wrongful termination claim, we dismiss the counter-appeal as Board requested. In summary, we affirm the judgment on the wrongful termination claim, reverse and remand the summary judgment in favor of Board on Wright's First Amendment claim, and dismiss Board's counter-appeal.

FACTS AND PROCEDURAL BACKGROUND

¶2 Wright brought this lawsuit against Board for retaliation and wrongful termination of her employment after she reported criminal conduct by her supervisor, Cynthia Harmon, the County Clerk for Carter County. Board filed an answer, admitting some allegations, denying others, and claiming insufficient information to admit or deny the remainder. Board also asserted multiple affirmative defenses.

¶3 Board filed a motion for summary judgment claiming Wright "was terminated solely for embezzling county property." Board alleged Wright took advantage of her position to access index books in the County Clerk's office and to then sell information she obtained for her own personal gain as a landman.

¶4 In her brief in opposition to Board's motion for summary judgment, Wright claimed that while working as a deputy clerk with Harmon as her supervisor, she "reported to the Sheriff and the FBI allegations of criminal misconduct by Ms. Harmon including a fraudulent Indian citizenship card and filing a fraudulent deed." She asserted "that she was terminated for protected whistleblowing."

¶5 Wright filed motions in limine seeking to exclude argument, questioning, or evidence related to her criminal convictions that were more than ten years-old and her more recent plea of no contest and deferred misdemeanor sentence on charges related to her conduct while employed by the County Clerk. In response, Board asserted the 1990s' convictions for "conspiracy to obtain property, forgery, unauthorized use of a credit card, and uttering a forged instrument are highly probative, as [Wright] herself admits that these convictions are the reason she started working as a 'landman,' which did not require a background check." Board further argued the nolo contendere plea is admissible because, in making the plea, Wright was "admitting her own misconduct at the County Clerk's Office, based on the

very conduct for which she was terminated" and Board is seeking to introduce the evidence for "defensive purposes, namely to protect itself where [Wright] is now suing [Board] for damages."

¶6 On January 24, 2018, the trial court filed a "Notice of Decision" in which it overruled Board's motion for summary judgment finding "that there is substantial controversy as to material facts regarding the reason for terminating [Wright] and that a genuine issue exists to be decided by the trier of facts." Later in its pretrial order, the trial court granted judgment in Board's favor as a matter of law on Wright's § 1983 claim.

¶7 At trial, Wright introduced evidence and testimony supporting her claim of wrongful termination, which she claimed arose from being a whistleblower and reporting Harmon's allegedly duplicitous activity to the sheriff and the FBI. Board introduced evidence which it claimed supported Harmon's termination of Wright for embezzlement related to Wright's use and copying of index books from the County Clerk's office for personal gain related to Wright's landman business.

¶8 The jury returned a verdict finding in favor of Wright and against Board but assessing damages in the amount of \$0. The trial court entered judgment accordingly. Both Wright and Board appeal.

STANDARD OF REVIEW

¶9 "The appellate standard of review in a motion for summary judgment is *de novo.*" *Serra v. Estate of Broughton*, 2015 OK 82, ¶ 16, 364 P.3d 637. We will examine the evidentiary materials "to determine if there is a substantial controversy as to the material facts." *Id.* We must view all inferences and conclusions to be drawn from the evidentiary materials "in the light most favorable to the nonmoving party." *Id.*

¶10 As to the jury's verdict, this Court is "not allowed to substitute our judgment for that of the jury merely because we would have decided or viewed disputed material fact questions differently than the jury." *Badillo v. Mid Century Ins. Co.*, 2005 OK 48, ¶ 3, 121 P.3d 1080. "Where competent evidence was presented at trial to support reasonable findings as to those material fact questions relating to the claim in suit and no reversible error is otherwise shown, an appellate court must affirm a judgment based on a jury verdict, not second-guess such judgment or the jury verdict upon which it is based." Id.

¶11 "A trial court has discretion in deciding whether proffered evidence is relevant and, if so, whether it should be admitted, and a judgment will not be reversed based on a trial judge's ruling to admit or exclude evidence absent a clear abuse of discretion." *Myers v. Missouri Pac. R.R. Co.*, 2002 OK 60, ¶ 36, 52 P.3d 1014.

¶12 The standard of review for reviewing jury instructions "considers the accuracy of the statement of law, the applicability of the instructions to the issues when the instructions are considered as a whole, and above all, whether the probability arose that jurors were misled and reached a different conclusion due to an error in the instruction." *Cimarron Feeders, Inc. v. Tri-Cnty. Elec. Coop., Inc.,* 1991 OK 104, ¶ 6, 818 P.2d 901.

ANALYSIS

I. The Jury Verdict

A. Internal Inconsistency

¶13 In her first proposition of error, Wright asserts, "The Verdict Must Be Set Aside As Internally Inconsistent" because the jury found in her favor but awarded no damages. Wright cites *Sharp v. Whitworth*, 2017 OK CIV APP 40, ¶ 9, 401 P.3d 763, which states in part:

However, "when liability is established, and there is compelling uncontroverted evidence of damages, a zero damage award is inconsistent." *Clay v. Choctaw Nation Care Center, LLC,* 2009 OK CIV APP 35, 210 P.3d 855 (emphasis in original). Similarly, "[a] failure to award any damages for pain and suffering where clearly proved, under proper instructions is in effect a finding of no liability." *Hallford v. Schumacher,* 1958 OK 53, 323 P.2d 989. Under these circumstances, the jury verdict would be inconsistent and invalid. *Id.*

Wright asserts the undisputed evidence showed she suffered approximately \$19,000 in lost wages and additionally suffered emotional distress.

¶14 Board presented evidence suggesting Wright was using her position in the County Clerk's office for personal financial gain, so the evidence on the question of damages was not uncontroverted. Although Wright presented evidence of her damages, there was also evidence from which the jury could conclude she had suffered no loss in light of her financial gain from using county records in her landman business. The assessment of damages is clearly within the fact-finding province of a wellinstructed jury and will not be set aside absent reversible error by the trial court. With these considerations, we will not reverse the trial court's refusal to find the verdict internally inconsistent.

¶15 Wright directs our attention to a question from the jury during deliberations. The jury asked, "If we the jury find in favor of the Plaintiff, Becky Wright do we have to give her \$19,200.00 (or) do we have options?" The trial court responded: "You have heard all of the testimony, have all of the evidence, and the jury instructions from the trial to determine the amount of damages. The amount of damages that could be awarded the Plaintiff is at your sole discretion." Wright further reports that the bailiff told the trial court that the jury, upon being released, wanted to know if they had filled out the verdict form "wrong."

¶16 We conclude that the jury's question is not indicative of an internally inconsistent verdict. The jury's question could be read as asking if it had to award \$19,200 or could it award less than that amount or none at all. "Broad discretion is given to the jury to determine the amount of damages." *Fowler v. Lincoln Cty. Conservation Dist.*, 2000 OK 96, ¶ 18, 15 P.3d 502. The trial court's response to the question was correct, and we see no error in the court's acceptance of the jury's verdict.

<u>B. Criminal Convictions and 12 O.S.2011 §</u> 2609(B)

¶17 Wright next asserts the admission of her stale criminal convictions from the 1990s was prejudicial error. She states she filed a motion in limine to exclude this evidence, but the trial court denied the motion.¹ She says she "elected to attempt to minimize the prejudice by addressing the issue herself." She continues, "Of course [Board] elaborated on these convictions adducing that they were in four different counties," arguing she had difficulty getting a job due to "four felonies," stating she had been in jail and prison, and mentioning the convictions in closing argument.

¶18 The trial court's decision on the motion in limine is not *per se* appealable. *Myers v. Missouri Pac. R.R. Co.,* 2002 OK 60, n. 66, 52 P.3d 1014. "The party against whom a liminal ruling is made must re-press the issue at trial and obtain a final order. Only the latter is appealable." *Id.* As a tactical decision, rather than waiting until Board introduced evidence of her convictions, Wright's attorney raised them in his opening statement and did not wait until the evidence was offered to renew his motion in limine or object to it.

¶19 Board argues the trial court correctly denied Wright's motion in limine because the probative value of the evidence of her 1990s' convictions supported by specific facts and circumstances substantially outweighed their prejudicial effect, as provided in 12 O.S.2011 § 2609(B). Board's argument posits that these convictions show why Wright was working as a landman while employed by the County Clerk and why she was using the land records in her private business.

¶20 As Board notes in its answer brief, the trial court denied this motion in limine off the record, so we cannot ascertain, as called for by § 2609(B), the "specific facts and circumstances" persuading the court of the evidence's substantial probative value.² We must agree with Wright that, without the benefit of the trial court's on-the-record findings as to the "specific facts and circumstances" leading the court to allow evidence of 20-plus year-old convictions, which should "very rarely"³ be permitted, this would appear to fail the balancing test required to find the prejudicial effect outweighed by its probative value. We fail to see the probative value of introducing evidence of convictions to establish why Wright was working as a landman or why she was using County Clerk records in her landman business - the former question simply serves as a pretext to admit evidence of her stale convictions and the latter can be answered without reference to the convictions. This record leads us to conclude that denying this motion in limine and allowing admission of these "ancient" convictions was error.

¶21 But even if this evidence should not have been admitted, Wright is not automatically entitled to reversal and a new trial. "Before any claimed error concerning the admission or exclusion of evidence will be deemed reversible error, an affirmative showing of prejudicial error must be made." *Kahre v. Kahre*, 1995 OK 133, ¶ 45, 916 P.2d 1355; *see also* 12 O.S.2011 § 2104(A) ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of a party is affected"). Our review leads us to conclude that Wright is not entitled to such a reversal when she advised the jury in opening statement of her convictions and did not protect her record by waiting for Board to offer the evidence and re-urging her meritorious objection. We are unable to conclude that any prejudice she might have suffered from this evidence requires reversal when she contributed to the error by raising it before the jury.

¶22 We must also add that it is difficult for us to find prejudicial error when the jury found in her favor on the issue of liability for wrongful termination. Although Wright argues that prejudice from this evidence "very likely influenced the jury to render an inconsistent verdict where they found for [Wright], but declined to award undisputed damages," we cannot agree. It cuts the argument too fine, and to some degree defies logic, to say the jury did not hold these convictions against her for purposes of liability, but did for purposes of setting damages. We will not reverse the judgment on this jury's verdict based on this record.⁴

C. Jury Instructions

¶23 Wright next asserts, "A major issue in the case was whether Ms. Wright had to prove that her whistleblower [*sic*] was the 'but for' cause of her termination." She claims she proposed a modification to the OUJI instruction that would "delet[e] an erroneous part of the instruction which required the protected act to be the 'but for' cause of the termination." The trial court denied the request for modification, including a request made before the instructions were read, and the court read the OUJI instruction as written.

¶24 The instruction the trial court read was based on OUJI-CIVIL 21.9:

The evidence may show that Becky Wright was discharged for more than one reason. Becky Wright need not prove that her reporting the alleged fraudulent conduct of Cynthia Harmon, was the only reason she was discharged. Becky Wright must prove that her reporting the alleged fraudulent conduct of Cynthia Harmon to law enforcement was a significant factor in the decision of the County Clerk, Cynthia Harmon[,] to discharge her.

In order for you to decide that Becky Wright's reporting the alleged fraudulent conduct of Cynthia Harmon to law enforcement was a significant factor for Becky Wright's termination, you must determine whether Cynthia Harmon would have discharged Becky Wright, even if Becky Wright had not reported allegations of fraud to law enforcement, and everything else remained the same.

¶25 "A judgment will not be disturbed because of allegedly erroneous instructions, unless it appears reasonably certain that the jury was misled thereby." *Johnson v. Ford Motor Co.*, 2002 OK 24, ¶ 16, 45 P.3d 86. "The test of reversible error in instructions is whether the jury was misled to the extent of rendering a different verdict than it would have rendered, if the alleged errors had not occurred." *Id.* The instruction is a correct statement of the law, and we will not reverse based on this instruction when the verdict on liability was in Wright's favor.

¶26 Wright's last jury instruction argument is that the trial court erred in denying her request to give an instruction "Defining The County As The Defendant." She states, "Because there was a persistent conflation of suing the county in the name of its board of commissioners, and suing the commissioners themselves," she proposed an instruction "to clearly identify Carter County, a governmental entity, as the Defendant in this case." Again, given the wrongful termination verdict in Wright's favor, we are not persuaded that the jury was misled or that Wright has shown prejudice on this issue.

II. Summary Judgment on Wright's § 1983 Claim

¶27 Wright also raises the trial court's decision to grant summary judgment on her 42 U.S.C.A. § 1983 First Amendment claim. The motion was initially denied on January 27, 2018. In the pretrial conference order filed April 20, 2018, however, the trial court stated, "Current [Defendant] not liable for § 1983 cause of action as a matter of law." Other portions of the order show Wright's First Amendment claims marked through with a line and the trial judge's initials written near those portions. Wright asserts that "the trial court sua sponte dismissed the First Amendment claim with only a cursory explanation." She states, "The contents of the Court's notes, particularly in light of the contrary holding regarding the state law whistleblower claim, indicates that the Court believed that the County could not be held liable for the actions of its [County] Clerk." She asserts that because Harmon had
the authority to hire and fire her own deputies, her final decision-making authority was sufficient to hold Board liable for violating her First Amendment rights.

¶28 Title 42 U.S.C.A § 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Federal courts apply the *Garcetti/Pickering* test to claims of retaliation for First Amendment speech under § 1983:

"(1) whether the speech was made pursuant to an employee's official duties; (2) whether the speech was on a matter of public concern; (3) whether the government's interests, as employer, in promoting the efficiency of the public service are sufficient to outweigh the plaintiff's free speech interests; (4) whether the protected speech was a motivating factor in the adverse employment action; and (5) whether the defendant would have reached the same employment decision in the absence of the protected conduct." Dixon v. Kirkpatrick, 553 F.3d 1294, 1302 (10th Cir.2009). The first three elements are issues of law for the court to decide, while the last two are factual issues typically decided by the jury. *Id.* But see Cypert v. Indep. Sch. Dist. No. I-050 of Osage Cnty., 661 F.3d 477, 483-84 (10th Cir.2011) (affirming summary judgment for defendants where plaintiff could not meet evidentiary burden at the fourth step).

Trant v. Oklahoma, 754 F.3d 1158, 1165 (10th Cir. 2014). The trial court in this instance did not reach a determination of disputed facts on

Wright's First Amendment claim, but concluded that Board could not be held liable for her § 1983 claim as a matter of law.

¶29 The United States Supreme Court in *Monell v. Department of Social Services of City of New York,* 436 U.S. 658, 690-91, 98 S. Ct. 2018, 2035-36, 56 L. Ed. 2d 611 (1978), stated:

Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress did intend municipalities and other local government units to be included among those persons to whom § 1983 applies. Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. Moreover, although the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other § 1983 "person," by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decisionmaking channels. As Mr. Justice Harlan, writing for the Court, said in Adickes v. S. H. Kress & Co., 398 U.S. 144, 167-168, 90 S.Ct. 1598, 1613, 26 L.Ed.2d 142 (1970): "Congress included customs and usages [in § 1983] because of the persistent and widespread discriminatory practices of state officials Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law."

On the other hand, the language of § 1983, read against the background of the same legislative history, compels the conclusion that Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort. *In particular, we conclude that a municipality cannot be held liable solely because it employs a tortfeasor – or, in other words, a municipality cannot be held liable under § 1983 on a respondeat superior theory.*

(Emphasis added; footnotes omitted.) The Court went on to state:

We begin with the language of § 1983 as originally passed:

"[*A*]*ny person who*, under color of any law, statute, ordinance, regulation, custom, or usage of any State, *shall subject*, or *cause to be subjected*, any person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress" 17 Stat. 13. (emphasis added).

The italicized language plainly imposes liability on a government that, under color of some official policy, "causes" an employee to violate another's constitutional rights. At the same time, that language cannot be easily read to impose liability vicariously on governing bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor. Indeed, the fact that Congress did specifically provide that A's tort became B's liability if B "caused" A to subject another to a tort suggests that Congress did not intend § 1983 liability to attach where such causation was absent. See Rizzo v. Goode, 423 U.S. 362, 370-371, 96 S.Ct. 598, 602, 46 L.Ed.2d 561 (1976).

Id. at 691-92, 98 S. Ct. 2018, 2036-37 (emphasis added; footnote omitted). The Court concluded "that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents." *Id.* at 694, 98 S. Ct. 2018, 2037. The Court explained, "Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.* at 694, 98 S. Ct. 2018, 2037-38.

¶30 In *Seifert v. Unified Government of Wyandotte County/Kansas City,* 779 F.3d 1141, 1159 (10th Cir. 2015), the United States Court of Appeals for the Tenth Circuit said:

A local government is not liable for every constitutional violation by one of its officers or employees. "Under Section 1983, municipalities cannot be held liable for the actions of others under the common law principle of *respondeat superior*; they are responsible only for their own actions." Simmons v. Uintah Health Care Special Dist., 506 F.3d 1281, 1284 (10th Cir.2007). Under this standard, "a municipality is responsible for both [1] actions taken by subordinate employees in conformance with preexisting official policies or customs and [2] actions taken by final policymakers, whose conduct can be no less described as the 'official policy' of a municipality." Id. at 1285 (emphasis omitted); see Pembaur v. City of Cincinnati, 475 U.S. 469, 480, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986) (municipal liability can arise from those "whose acts or edicts may fairly be said to represent official policy" (internal quotation marks omitted)).

The *Seifert* Court, however, concluded the defendant sheriff could subject the county to potential liability because "it appears that the actions of Sheriff Ash, in his position as the final policymaker for the Wyandotte County Sheriff's Department, represent the official policy of the Unified Government." *Id.*

¶31 "A municipality may not be held liable under § 1983 solely because its employees inflicted injury on the plaintiff." *Hinton v. City of Elwood, Kan.,* 997 F.2d 774, 782 (10th Cir. 1993). A plaintiff must show the following to establish municipal liability: "1) the existence of a municipal policy or custom, and 2) that there is a direct causal link between the policy or custom and the injury alleged." Id. According to the Tenth Circuit Court of Appeals:

A municipal policy or custom may take the form of (1) "a formal regulation or policy statement"; (2) an informal custom "amoun[ting] to 'a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law'''; (3) "the decisions of employees with final policymaking authority"; (4) "the ratification by such final policymakers of the decisions – and the basis for them – of subordinates to whom authority was delegated subject to these policymakers' review and approval"; or (5) the "failure to adequately train or supervise employees, so long as that failure results from 'deliberate indifference' to the injuries that may be caused." Brammer-Hoelter v. Twin Peaks Charter Acad., 602 F.3d 1175, 1189-90 (10th Cir.2010) (quoting *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988) and *City of Canton v. Harris*, 489 U.S. 378, 388-91, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989)) (internal quotation marks omitted).

Bryson v. City of Oklahoma City, 627 F.3d 784, 788 (10th Cir. 2010).

¶32 Title 19 O.S.2011 § 161(1) defines "County officer" for purposes of compensation, expenses and related matters as "the county clerk, county commissioner, county assessor, district court clerk, county treasurer and county sheriff." Section 162 provides, "Subject to the approval of the county excise board, every county officer shall appoint such regular and special deputies as are essential to the performance of the duties of office in an efficient manner and shall fix their salaries and compensation." 19 O.S.2011 § 162. Section 162 further states:

It shall be the responsibility of the board of county commissioners to cause such job descriptions and salary levels to be established. The county officer shall annually make request for appropriation for payment of salaries, traveling expenses, supplies and equipment and other needs for performing his official duties. The board of county commissioners and the county excise board shall annually appropriate amounts that will enable a county officer to hire and keep capable deputies, provide their instruction, provide sufficient supplies and equipment for the county officer and his deputies, provide reimbursement for traveling expenses for the county officer or deputies whose assignments require expenditures therefor, or provide a monthly travel allowance for the county officer in lieu of reimbursed expenditures for travel within this state.

19 O.S.2011 § 162.

¶33 As a county officer, Harmon is in the category of "those whose edicts or acts may fairly be said to represent official policy" for Carter County. *Monell v. Department of Soc. Servs. of City of New York*, 436 U.S. 658, 694, 98 S. Ct. 2018, 2037-38, 56 L. Ed. 2d 611 (1978). As a result, Wright may be able to show in support of her § 1983 claim that there was an official policy or custom in Harmon's decision to terminate her because Harmon had final policy-making authority. In short, it was error to grant

Board's motion for summary judgment as a matter of law on Wright's § 1983 claims.

III. Board's Counter-Appeal

¶34 In its counter-appeal, Board asserts error arising from two motions in limine and jury instructions. Board asserts none of Wright's propositions of error necessitates a new trial and asks us to consider its propositions of error only if reversible error results in granting a new trial. It says, "If this Court does not order a new trial based on any of [Wright's] Propositions of Error, [Board] requests that the Court dismiss its appeal at [Board's] request." Having found no basis for ordering a new trial on the issue tried to the jury, we will not address Board's propositions of error and will dismiss its counter-appeal.

CONCLUSION

¶35 We conclude Wright has failed to show prejudicial error in the trial court's admission of evidence, instructions to the jury, or acceptance of the jury verdict. However, summary judgment on Wright's claim of retaliation for exercise of her First Amendment rights pursuant to 42 U.S.C. § 1983 must be reversed, and we remand for further proceedings solely on the § 1983 issues. Because no new trial on Wright's wrongful termination claim is warranted, we dismiss Board's counter-appeal.

¶36 DISMISSED IN PART, AFFIRMED IN PART, AND REVERSED AND REMANDED IN PART FOR FURTHER PROCEEDINGS.

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

JANE P. WISEMAN, CHIEF JUDGE:

1. Wright recites in her appeal brief in chief that the trial court denied her request to exclude "the ancient felony convictions," but granted the motion in limine as to her no contest plea and deferred sentence arising from embezzlement charges against her for appropriating property of the County Clerk for her own purposes. (Br. in chief at p. 2). Board contends in its answer brief that the trial court's order on the no contest plea was "unclear" and merely deferred the issue to trial to see if Wright "opened the door" to its admissibility. (Br. at p. 7). Board further states that the court on the second day of trial "unequivocally" ruled that any discussion or reference to the no contest plea was strictly off limits. (Br. at p. 9).

2. The Oklahoma Court of Criminal Appeals in *Croney v. State*, 1987 OK CR 274, 748 P.2d 34, has determined that it is reversible error for the trial court to admit evidence of a defendant's previous convictions which were more than ten years old when the following occur:

First, the State failed to give advance written notice to the [defendant] that his stale convictions would be used for impeachment purposes. Second, the State failed to offer any, much less sufficient, specific facts and circumstances to satisfy their burden of proof that the probative value of the stale convictions substantially outweighed the prejudicial effect. Third, the trial court failed to conduct a balancing test to determine whether the probative value of the stale convictions substantially outweighed the prejudicial effect, and failed to support its admission of the stale convictions by identifying the specific facts and circumstances which determined its decision to admit the prior convictions which fell outside the ten (10) year limitation of Section 2609(B).

Id. \P 7. The Court stated specifically, "The trial court is further required to make a record and support its admission of the stale convictions by identifying the 'specific facts and circumstances' which determined its decision." *Id.* \P 12.

3. United States v. Beahm, 664 F.2d 414, 418 (4th Cir. 1981).

4. Because we reverse a portion of this case and remand for further proceedings, we caution that this issue may arise again and the trial court should be guided by our analysis of this question.

2020 OK CIV APP 47

IN RE THE ADOPTION OF: P.R.M., OKLAHOMA COUNTY PUBLIC DEFENDER o/b/o THE MINOR CHILD, Appellant/Cross-Appellee, vs. ADAM and SAMANTHA JONES, Appellees/ Cross-Appellants.

Case No. 118,478. August 18, 2020

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE ALLEN WELCH, TRIAL JUDGE

AFFIRMED

Robert A. Ravitz, OKLAHOMA COUNTY PUBLIC DEFENDER, Abigail M. Patten, ASSIS-TANT PUBLIC DEFENDER, OKLAHOMA COUNTY, Oklahoma City, Oklahoma, for Appellant

Alexandria Lewis Temple, M. Jordan Berglund, BELOVED ADOPTION LAW, PLLC, Tulsa, Oklahoma, for Appellees

P. THOMAS THORNBRUGH, PRESIDING JUDGE:

¶1 Appellant/Cross-Appellee, the Oklahoma County Public Defender (OCPD), appeals from the trial court's order granting a motion by Appellees/Cross-Appellants, Adam and Samantha Jones (Adoptive Parents), to approve adoption-related expenses. Adoptive Parents have filed a cross-appeal from the trial court's late entry of an order appointing OCPD to represent P.R.M. (Child) for the purpose of reviewing the expenses included in Adoptive Parents' motion. Adoptive Parents also have filed a motion to dismiss this appeal, the decision of which has been deferred to this time. For the reasons set forth below, we deny Adoptive Parents' motion to dismiss the appeal and affirm the trial court's order appointing OCPD as Child's attorney, from which Adoptive Parents have appealed. We summarily affirm, pursuant to Supreme Court Rule 1.202(d) and (e), the order from which OCPD appeals.

BACKGROUND

¶2 Neither party challenges the entry of a final decree of adoption to Adoptive Parents in this matter, nor is there an allegation that the state's child trafficking laws have been violated. Rather, the disputes concern whether the trial court acted unreasonably in approving adoption-related expenses and in making an appointment of OCPD to serve as Child's counsel after the court had already approved the expenses.

¶3 Child was born in March 2019 in Arizona. Both the Arizona and Oklahoma Offices for the Administration of the Interstate Compact for the Placement of Children (ICPA) approved Child's placement with Adoptive Parents, and on May 10, 2019, Adoptive Parents filed a Petition for Pre-Adoption Termination of Parental Rights in Oklahoma County District Court. The court entered an order terminating the biological mother's parental rights on June 24, 2019, and an order terminating the biological father's rights on July 12, 2019.

¶4 Also on July 12, 2019, Adoptive Parents filed their Petition for Adoption of Child. They then submitted an "Affidavit of Adoption-Related Costs and Expenditures" to OCPD for review pursuant to Oklahoma County Administrative Order A07-2014-21 (Local Order A07-2014-21)¹ and 10 O.S. Supp. 2017 § 7505-3.2,² the provisions of which are at the heart of this case.

¶5 Parent's Affidavit listed \$42,658 in total expenses, and included \$30,750 in charges attributable to ABC Infant Adoption, LLC, an agency affiliated with International Child Foundation, Inc. (Agency). Agency's invoice was attached, showing \$1,500 for "agency registration," \$15,500 for "adoption fee at matching," and \$13,750 for "birthmother counseling, planning, placement & consents," but no further detail.

16 On August 9, 2019, OCPD filed a letter with the court stating:

Pursuant to administrative order, I have reviewed the expense records in FA-2019-0247. The Public Defender objects to ABC Infant Adoption, LLC's fees as grossly excessive as it is approximately \$15,000 more than is typically approved, but does not object to the attorney fees.

¶7 On September 16, 2019, Adoptive Parents filed a motion for an order approving their adoption-related expenses. An Agency representative and attorney, Kelly Sifferman, also submitted an affidavit breaking down the \$30,750 charge as comprised of Agency services costing a total of \$20,250 and birth mother living expenses of \$10,500. Sifferman's Affidavit explained the various aspects of Agency's services, and noted that Agency had submitted an accounting of its expenses to Oklahoma's ICPC office, which approved the placement on April 2, 2019.

¶8 The court conducted an evidentiary hearing on October 8, 2019. Adoptive Mother, Samantha Jones, testified as to the considerable research she and Adoptive Father had conducted prior to selecting Agency to handle their private adoption, including comparisons of amounts charged by agencies. She agreed that two services they had looked at within Oklahoma had fees of approximately \$16,000 and \$18,000, but those amounts did not include the expenses of the birth mother (which is included in Agency's fee). She also said, however, that the average fee being charged by the various adoption agencies they researched was about \$39,000, including birth mother expenses. Jones testified to the numerous services provided by Agency to the couple prior to, at the time of, and after the birth of Child, including coordinating meetings and other communications with the birth mother and being present throughout the birth mother's labor and delivery of Child. She estimated Adoptive Parents spent at least 50 hours interacting with Agency personnel overall, and she said the Agency was available to them consistently. She stated that Agency disclosed full information concerning their fees prior to contacting the birth mother on their behalf.

¶9 Agency attorney Sifferman testified to her experience as an adoption law practitioner, stating that she had completed 72 adoptions in the last year and more than 2,000 over the course of her 35-year career practicing law. She identified her previously submitted Affidavit, and described at length the services provided by Agency, which she considered as a responsible and reasonably priced coordinator of adoption services in Arizona.

¶10 A particular discrepancy that was brought out during her testimony concerned the \$10,500 charged by Agency for a "birth mother living expense fund," although the actual amount received by the birth mother for expenses was \$6,544.30. Sifferman explained that Arizona adoption regulations permit agencies to charge a pooled or average fee of a set amount for birth mother expenses in order to help offset agency expenditures for birth mothers who decide not to go through with the adoption. She said the same amount is charged to all adoptive parents who use the agency, and the arrangement was fully disclosed to Adoptive Parents in Agency's itemized "estimated expense" billing document that was admitted as an exhibit. Sifferman also said the Agency maintained detailed receipts for birth mother expenses, although those receipts were not provided as part of Adoptive Parents' request for approval, as such were not required to be produced under Arizona law to Arizona birth mothers.

¶11 In addition to its list of itemized expenses, exhibits offered by Adoptive Parents and admitted at the hearing included the following: (1) a "Social and Medical Summary/Counseling Report" describing the birth mother and listing the various services provided to her by Agency; (2) copies of a motion and order of an Arizona court approving the birth mother's requested expenses;³ and (3) a copy of Sifferman's letter to the Arizona ICPC office together with a list of all documents provided to that agency.

¶12 Though OCPD appeared and cross-examined the witnesses, it presented no evidence and called no witnesses. OCPD thereafter submitted proposed findings of fact and conclusions of law, as did Adoptive Parents. OCPD argued in its proposed findings that "[t]ypically, Courts in Oklahoma County have approved costs to be reasonable at approximately \$15,000.00 less than what was requested here," and that "[r] ecently ... this Court has awarded similar Agencies fees and deemed those fees to be reasonable at approximately \$15,000 less" than the fee requested by Agency in this matter, apparently referring to the \$30,750 appearing on Agency's initial invoice. OCPD again complained of the lack of detailed receipts concerning the birth mother's expenses, and specifically requested that the court deny approval and order reimbursement to Adoptive Parents of the \$3,955 difference between the amount actually paid to the birth mother and the \$10,500 paid to Agency.

¶13 On November 8, 2019, the court entered a detailed, 18-page order approving the adoption-related costs and expenses. The order describes at length the testimony of the two witnesses and the evidence presented, including the "agency fee" of \$20,250, and "birth

mother expense charge" of \$10,500. The order accurately describes the legal positions taken by Adoptive Parents and by OCPD with regard to the three matters of particular concern to OCPD: (a) the "pooled cost basis" allowed by Arizona law; (b) "Agency's failure to provide this Court with receipts"; and (c) "whether this Court must extend full faith and credit to Orders entered by the Arizona Court." The order contains a lengthy analysis of the evidence and law, and, stating the court was "mindful of its duty 'to independently determine the reasonableness of adoption-related expenses,"⁴ found that Adoptive Parents had sustained their burden of demonstrating the reasonableness of adoption-related expenses, and granted their motion.

¶14 Also on November 8, OCPD relates that it was in the process of preparing to file the instant appeal, when "it was realized there was never a written Order entered Appointing [OCPD] to review costs and expenses . . . as is required to appeal a case, according to Oklahoma State Supreme Court Rule 1.23."⁵ OCPD made a verbal request to the court to be appointed counsel, which the court set for *in camera* argument on November 12, 2019. Adoptive Parents objected to the appointment, asserting OCPD was acting as a "special master" for the court pursuant only to Local Order A07-2014-21, and was not acting as Child's counsel. The court took the matter under advisement.

¶15 On the following day, November 13, 2019, the court held a previously-scheduled finalization hearing and entered a Final Decree of Adoption. OCPD did not appear at the final hearing.

¶16 On November 18, the trial court ordered OCPD to file a written motion seeking appointment as Child's counsel, and on November 25, OCPD filed a "renewed motion to memorialize by written order" the appointment of OCPD. On December 2, the court entered an order appointing OCPD as Child's attorney for the purpose of reviewing adoption-related fees, costs, and expenses, pursuant to 10 O.S. § 7505-1.2(A)(1). In a lengthy explanation of the parties' competing arguments, the court granted OCPD's motion, finding that an order appointing OCPD would serve "to make de [jure]6 that which has been *de facto*, and . . . to recognize and formalize the work that [OCPD] has already been performing "

¶17 OCPD filed this appeal from the order approving adoption-related costs and expens-

es, asserting trial court error in approving Agency's charge for its services. Adoptive Parents filed a cross-appeal challenging the court's order appointing OCPD. Adoptive Parents also moved to dismiss OCPD's appeal, challenging OCPD's standing to seek review of the order approving the expenses associated with the adoption.

STANDARD OF REVIEW

¶18 The reasonableness of expenses in an adoption case is reviewed for abuse of discretion. "The appellate court will reverse for abuse of discretion where the lower court ruling is without a rational basis in the evidence or where it is based upon an erroneous legal conclusion." In re Adoption of Baby Boy A., 2010 OK 39, ¶ 19, 236 P.3d 116. Issues that involve statutory construction or that question a party's standing present issues of law, and are subject to *de novo* review. See id. ¶ 20 (statutory construction); In re Adoption of Baby W., 2009 OK CIV APP 21, ¶ 7, 220 P.3d 32 (standing). "De novo review is plenary, independent, and non-deferential to the lower courts." Baby Boy *A.*, 2010 OK 39 at ¶ 20.

ANALYSIS

I. Adoptive Parents' Motion to Dismiss and Cross-Appeal

Adoptive Parents' Motion to Dismiss Denied; Trial Court's Order Appointing Child's Counsel Affirmed

¶19 The question of OCPD's standing to bring this appeal is central both to Adoptive Parents' motion to dismiss and to their appeal of the trial court's order appointing OCPD as an attorney for Child to review adoption-related costs and expenses. Adoptive Parents rely heavily on In re Adoption of Baby G., 2008 OK 92, 195 P.3d 377, where the Supreme Court held that a public defender who was not appointed to represent the adopted children, but instead was appointed as a "special master" to assist the court in reviewing adoption expenses, lacked standing to appeal from orders approving the expenses. In dismissing the appeal, the Court explained, "The Public Defender is simply not 'aggrieved' by the refusal of the appointing trial courts to follow the Public Defender's recommendations in regard to the flat fee contracts and administrative expenses." *Id.* ¶ 6.

¶20 Adoptive Parents rely on *Baby G.* in support of their motion to dismiss this appeal and of their merits appeal from the order concern-

ing OCPD's appointment. They contend that (1) OCPD was appointed only as a special master and thus lacks standing to appeal; (2) OCPD did not adequately perform as Child's attorney; (3) OCPD's request for appointment was moot because it was not made until after the court had already approved the expenses; and (4) the trial court abused its discretion by appointing OCPD.

¶21 In support of its claim that it has standing to appeal, OCPD argues that the year after In re Baby G. was decided, the Legislature amended § 7505-1.2(A)(1) to its current version, which allows for the appointment of an attorney for a child solely for the purpose of "examin[ing] all expenses and attorney fees presented to the court for approval." Compare 10 O.S.2001 § 7505-1.2(A)(1) (in effect at the time of the Baby G. decision) with 10 O.S. Supp. 2009 § 7505-1.2(A)(1). OCPD further argues that in the 2010 decision of In re Adoption of Baby Boy A., 2009 OK 39, 236 P.3d 116, the Court permitted, without challenge, a public defender's appeal "in his capacity as the attorney for the minor child" to seek review of a district court's approval of the adoptive parents' application for approval of costs and expenses.

¶22 Adoptive Parents argue that *Baby Boy A*. is inapplicable here because the attorney who was appointed in that case represented the child throughout the proceeding, which began as a contested adoption. They contend that OCPD here fulfilled only the role of a "special master," and did not perform the traditional role of an attorney for Child, having not met Child or been actively advocating for Child throughout the case.

¶23 Assuming *arguendo* the validity of these criticisms, however, Adoptive Parents ignore the clear language in § 7505-1.2(A) providing for the appointment of an attorney "for the child" for the sole purpose of "examin[ing] all expenses and attorney fees presented to the court for approval." Thus, the statute contemplates that counsel may be appointed for a more limited role in an uncontested case.

¶24 Further, in *Baby G.*, the Court recognized that the public defender's participation in the case inured to the benefit of the children; however, the fact that the public defender was not appointed to "represent the children" but instead was to merely assist the court, deprived him of standing. 2008 OK 92 at ¶ 3. The amendment to § 7505-1.2(A) since the date of *Baby G.* indicates an intent by the Legislature to clarify

the role to be played by an attorney appointed in such a case – *i.e.*, to assure compliance with § 7505-3.2, the primary purpose of which is to prevent trafficking in children. As explained by the Court in *Baby Boy A*.:

The district court's duties under § 7505-3.2 are unmistakable. Section 7505-3.2 clearly mandates a thorough and rigorous inquiry into the adoption-related expenditures by the district court as part of the adoption proceedings. *The obvious goal to be achieved by this mandated district court inquiry of expenditures in connection with an adoption is to thwart the subtle as well as the apparent buying and selling of children.*

2010 OK 39 at ¶ 23 (emphasis added) (footnotes omitted). Here, the trial court and OC-PD's failure to assure that the appointment of OCPD was not memorialized until after OCPD had entered the case and performed its function in accord with the law should not be used to effectively deprive Child of the protections intended by § 7505-3.2.

¶25 Though Adoptive Parents question whether the trial court properly exercised its discretion by entering an order after the fact acknowledging OCPD's role as attorney for Child, it is important to note that they do not challenge the validity of OCPD's actions during the course of the proceeding. Nor did Adoptive Parents themselves ever question or object to the lack of a specific order being entered in the case file appointing OCPD prior to the time that OCPD raised the issue on its own.

¶26 Neither party provides citation to authority specifically on point with the circumstances presented by this case. However, the Oklahoma Supreme Court "has in a number of cases determined that public officials were *de facto* officers where they lacked some qualification necessary to constitute them *de jure* officers and has held their acts valid where they involved the public and third persons." Ajax Contractors, Inc. v. Myatt, 1967 OK 19, ¶ 15, 424 P.2d 30. Among the cases cited in *Ajax Contractors* was Sheldon v. Green, 1938 OK 165, 77 P.2d 114, in which the Court held valid the actions of a "de facto" judge who had been appointed to the office although he lacked the legal qualifications for the position. The Court in Ajax Contractors further noted "that the official acts of such persons are regarded as valid on the grounds of public policy, and for the protection of those having official business to transact." 1967 OK 19 at \P 18.

¶27 Though not totally analogous, a similar situation is presented by the trial court's "afterthe-fact" appointment acknowledging OCPD's status as Child's attorney for the purpose of reviewing adoption-related expenses, when OCPD already had been acting in that capacity. We therefore reject Adoptive Parents' arguments for reversal of the appointment order and for dismissal of this appeal. We deny the motion to dismiss, and affirm the order that is the subject of Adoptive Parents' cross-appeal.

II. OCPD's Appeal

Trial Court's Approval of the Cost of Agency's Services is Summarily Affirmed Under Supreme Court Rule 1.202(d) and (e)

¶28 In its appellate briefs OCPD argues three propositions of error that raise the same issues argued in the trial court: trial court error in finding the adoption-related expenses were reasonable; error in approving living expenses for the birth mother without requiring itemized receipts; and error in approving an Agency fee that it continues to assert was grossly in excess of fees charged in Oklahoma.

¶29 In *Baby Boy A.*, the Court explained the trial court's duties in reviewing and approving an application concerning adoption-related expenses:

[T]he district court, in its review of the prospective adoptive parents' affidavit of expenditures, must thoroughly examine each and every expenditure disclosed by the affidavit and the evidence offered in support of the expenditure, and determine the legality and reasonableness of each expenditure. Before approving the prospective adoptive parents' expenditures, the district court must be satisfied that all expenditures have been disclosed and that the expenditures are authorized by § 7505-3.2. If an expenditure is not specifically listed in § 7505-3.2(B) or has not been previously authorized based upon a finding of unusual circumstance by the court, the district court must, in writing, disapprove the expenditure and order reimbursement. If an expenditure is not reasonable, it is not in compliance with § 7505-3.2(B), and the district court must, in writing, disapprove the expenditure and order reimbursement.

Under the statute, the district court is the gatekeeper protecting the vulnerable pro-

spective adoptive parents from excessive charges for the adoption and preventing prospective adoptive parents from making excessive payments for the adoption.

2010 OK 39 at ¶¶ 24 and 50.

¶30 On review of the record and the briefs of the parties, we find the trial court fulfilled its duties as set forth above. We further find that no reversible error of law appears, that the findings of fact and conclusions of law of the trial court adequately explain the decision, and that the trial court did not abuse its discretion. Accordingly, the order approving expenses is summarily affirmed pursuant to Supreme Court Rule 1.202(d) and (e).

CONCLUSION

¶31 OCPD has standing to bring this appeal and to challenge the trial court's determination concerning the reasonableness of expenses by Adoptive Parents. The trial court's "after-thefact" appointment acknowledging OCPD as Child's counsel for the purpose of reviewing Adoptive Parents' adoption-related expenses is free of reversible error and is affirmed for the reasons set forth above. The court's order granting Adoptive Parents' motion for approval of adoption-related expenses also is free of reversible error and is summarily affirmed under Supreme Court Rule 1.202(d) and (e).

¶32 AFFIRMED.

WISEMAN, C.J., and HIXON, J., concur. P. THOMAS THORNBRUGH, PRESIDING JUDGE:

1. Local Order A07-2014-21, which the parties agree is applicable, requires that judges "shall adhere" to the following rules/procedures in adoption matters:

1. Strict compliance with allowable costs and expenses detailed in 10 O.S. § 7505--3.2B is mandatory.

3. The Public Defender shall be appointed in all cases where adoption-related costs and expenses are requested and shall assist the Court in the review of the application for such costs and expenses. The Public Defender shall be an advocate for strict compliance with the law. (10 O.S. § 7505-1.2).

4. The adoption courts shall require full documentation of all claimed costs and expenses be provided Any costs or expenses not fully documented shall not be allowed.

2. Pursuant to subsections (A)(2) and (B) of § 7505-3.2 (in pertinent part):

[A. 2.] No final decree of adoption shall be entered until the court is satisfied that all costs and expenses have been disclosed, are reasonable, and that the costs and expenses do not violate the provisions of subsection B of this section. Upon its review of the affidavit of monies expended, the court shall in writing disapprove any expenditure that the court deems unreasonable or in violation of [21 O.S. 2011 & Supp. 2015 §§ 865 through 870, prohibiting trafficking in children]

B. 1. Except as otherwise specifically provided by law, the following list of adoption-related costs and expenses specified in this paragraph may be deemed proper items for a person to pay in connection with an adoption:

a. reasonable attorney fees and court costs,

b. reasonable medical expenses for birth mother and minor to be adopted,

c. reasonable adoption counseling expenses for birth parents before and after the birth of the minor, not to exceed six (6) months from placement of the minor,

d. reasonable fees of a licensed child-placing agency, including social services staff fees provided by agency employees that include:

(1) casework services,

(2) adoptive child and family studies,

(3) placement services,

(4) certification of agency facilities,

(5) admission assessments, and

(6) service planning,

(c) set vice priming, e. (1) reasonable and necessary living expenses of the birth mother that are incurred during the adoption planning process or during the pregnancy, not to exceed two (2) months after the birth of the minor or after the consent or relinquishment of the birth mother. Reasonable and necessary living expenses include but are not limited to:

(a) housing expenses,

(c) butilities, such as electric, gas, water, or telephone bills,(c) food for the birth mother and any minor child of the birth

mother residing in the home of the birth mother,

(d) travel expenses for transportation to support the pregnancy, such as gasoline, bus fares, or providing for the tempo-(e) child care or foster care for any minor child of the birth

mother associated with pregnancy-related medical care.

(2) Reasonable and necessary living expenses shall not include:

(a) any expenses met by existing resources of the birth mother, (b) any expenses used for the support of family members who are not minor children of the mother,

(c) any expenses for recreational or leisure activities, and

(d) the purchase or gift of an automobile,

f. reasonable expenses for a home study,

g. reasonable and necessary costs associated with an international adoption,

h. reasonable expenses legally required by any governmental entity related to the adoption of a minor, and

i. a one-time gift to the birth mother from the prospective adoptive parents of no greater value than One Hundred Dollars (\$100.00).

2. In addition, all expenses approved by the court should be commensurate with other customary fees for similar services by persons of equivalent experience and training where the services are performed. Any services provided outside this state shall be allowed in an amount as if the services had been performed within the State of Oklahoma...

5. Except as otherwise ordered by the court except for good cause shown, all payments made pursuant to this section shall be paid directly to the third-party provider of services or goods. Any living expense paid on behalf of a birth mother in a domestic adoption which is not supported by an itemized receipt shall not be allowed for payment. If gift cards are issued to pay expenses, an itemized receipt verifying purchases shall be required for approval by the court. The accounting shall include vouchers for all monies expended, copies of all checks written and receipts for all cash payments attesting to the accuracy of the accounting. 3. The actual birth mother expenses were less than the requested

and court-approved expenses, which totaled \$8,490.

4. The court here cited In re Adoption of Baby Boy A., 2010 OK 39, ¶ 16, 236 P.3d 116 (emphasis in original).

5. Supreme Court Rule 1.23, 12 O.S. Supp. 2013 ch. 15, app., con-tains the following language, to which OCPD apparently is making reference:

In a juvenile appeal when the appellant is a minor represented by court-appointed counsel, that counsel may file, in lieu of premitting the cost deposit provided by 20 O.S. § 15, an *in forma* pauperis affidavit stating that the minor is indigent to the best information and belief of counsel, and a certified copy of the order appointing counsel as the lawyer for the minor. The affidavit and copy of the order of appointment shall be filed with the minor's petition in error.

We note that the trial court's order entered on December 2, 2019, is attached to the pauper's affidavit on file in OCPD's appeal.

6. This a corrected spelling of the term used by the court.

NOTICE OF JUDICIAL VACANCY

The Judicial Nominating Commission seeks applicants to fill a vacancy for the position of Judge for the Oklahoma Court of Civil Appeals, District 5, Office 1. This vacancy is created by the retirement of the Honorable Kenneth L. Buettner.

To be appointed to the office of Judge of the Court of Civil Appeals, one must be a legal resident of the respective district at the time (s)he takes the oath of office and assumes the duties of office. Additionally, prior to appointment, such appointee shall have had a minimum of four years' experience in Oklahoma as a licensed practicing attorney, a judge of a court of record, or both.

Application forms can be obtained online at www.oscn.net (click on "Programs," then "Judicial Nominating Commission," then "Application") or by contacting Tammy Reaves at 405-556-9300. Applications must be submitted to the Chairman of the JNC no later than 5:00 p.m., Friday, October 9, 2020. Applications may be mailed or delivered by third party commercial carrier. No hand delivery of applications is available at this time. If mailed, they must be postmarked on or before October 9, 2020 to be deemed timely. Applications should be mailed/delivered to:

> Jim Webb, Chairman **Oklahoma Judicial Nominating Commission** c/o Tammy Reaves Administrative Office of the Courts • 2100 N. Lincoln Blvd., Suite 3 Oklahoma City, OK 73105

Disposition of Cases Other Than by Published Opinion

COURT OF CRIMINAL APPEALS Thursday, September 10, 2020

C-2018-590 — Collin Eric Moore, Petitioner, entered a blind plea in Case No. CF-2015-8742 in the District Court of Oklahoma County to the crime of Forcible Oral Sodomy. The Honorable Cindy Truong sentenced him to a ten year sentence with all but the first four years suspended plus various costs and fees. Judge Truong also ordered credit for time served. Petitioner thereafter timely filed a motion to withdraw his no contest plea. After a hearing, Judge Truong denied Petitioner's motion to withdraw plea. Petitioner now seeks a Writ of Certiorari. The Petition for Writ of Certiorai is DENIED. The Judgment and Sentence of the District Court is AFFIRMED. However, this matter is REMANDED to the District Court with instructions to enter an order *nunc* pro tunc correcting the Judgment and Sentence document. Opinion by: Hudson, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs; Lumpkin, J., Concurs; Rowland, J., Concurs.

F-2019-177 — Kindell Rayshun Adair, Appellant, was tried by jury for the crime of Child Abuse in Case No. CF-2015-5585 in the District Court of Oklahoma County. The jury returned a verdict of guilty and recommended as punishment twenty years imprisonment. The trial court sentenced accordingly. From this judgment and sentence Kindell Rayshun Adair has perfected his appeal. The judgement and sentence is AFFIRMED and Mandate is Ordered. Opinion by: Lumpkin, J; Lewis, P.J., concurs; Kuehn, J., concurs; Hudson, J., concur in results; Rowland, J., Concurs.

C-2019-692 — Brian Ater, Petitioner, pled no contest to assault with intent to commit a felony in Case No. CF-2019-39 in the District Court of Custer County. The Honorable Jill C. Weedon, District Judge, found Petitioner guilty and sentenced him to ten (10) years imprisonment, suspended. Petitioner filed a timely application to withdraw plea, which was denied. Brian Ater now seeks the writ of certiorari. The petition for writ of certiorari is DENIED. The Judgment and Sentence is AFFIRMED. Opinion by: Lewis, P.J.; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs; Rowland, J., concurs.

Thursday, September 17, 2020

C-2020-179 — Sergio Soto, Appellant, was tried by jury for the crime of Counts 1, 11, & 15 first degree rape; Count 2 kidnapping; Counts 3-5 attempted kidnapping; Counts 6-9 possession of an offensive weapon during the commission of a felony; Count 10 attempted first degree rape; Count 12 second degree rape by instrumentation; Count 13, attempted robbery with a firearm; and Count 14, forcible oral sodomy in Case No. CF-2016-9867 in the District Court of Oklahoma County. The jury returned a verdict of guilty and recommended Counts 1, 10-13 and 15: 51 years imprisonment; Count 2, 20 years imprisonment; Counts 3-5, 10 years imprisonment; Counts 6-9, 10 years imprisonment; and Count 14, 20 years imprisonment as punishment . The trial court sentenced accordingly. From this judgment and sentence Sergio Soto has perfected his appeal. The petition for a writ of certiorari is DÉNIED. The judgment and sentence of the district court is AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs in Results; Hudson, J., Concurs; Rowland, J., Concurs.

RE-2019-930 — On December 23, 2011, Appellant David Wayne Johnson entered a plea of guilty to Lewd Acts with Child Under Age of 12 in Oklahoma County Case No. CF-2011-5316. He was sentenced to twenty-five (25) years imprisonment with all but the first four (4) years suspended. On April 15, 2019, the State filed an application to revoke Johnson's suspended sentence. A the conclusion of a revocation hearing conducted December 2, 2019, the District Court of Oklahoma County, the Honorable Natalie Mai, District Judge, found Johnson violated his probation and revoked ten (10) years of Johnson's remaining suspended sentence. The partial revocation of Johnson's suspended sentence is AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J.; Concurs; Kuehn, V.P.J.; Concurs; Hudson, J.; Concurs; Rowland, J.; Concurs in Results.

F-2019-270 — Brian Lee Kingfisher, Appellant, was tried by jury for the crime of Trafficking in Illegal Drugs, After Former Conviction of Two or More Felonies in Case No. CF-2017-294 in the District Court of Mayes County. The jury returned a verdict of guilty and set punishment at thirty years imprisonment. The trial court sentenced accordingly. From this judgment and sentence Brian Lee Kingfisher has perfected his appeal. AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs in results; Kuehn, V.P.J., concurs in results; Lumpkin, J., concurs in results; Hudson, J., concurs.

C-2019-846 — Petitioner Cordell Ortiz, appeals the denial of his motion to withdraw plea in the District Court of Garfield County, Case Nos. CF-2019-35 and CM-2019-196. Ortiz entered negotiated pleas of guilty to Assault and Battery with a Deadly Weapon and Possession of a Controlled Dangerous Substance, respectively. The Honorable Tom L. Newby, Associate District Judge, accepted Ortiz's guilty pleas and sentenced him in accordance with the plea agreements to thirty years imprisonment with all but the first fifteen years suspended in CF-2019-35 and one year and a \$100.00 fine in CM-2019-196. The sentences were ordered to be served concurrently. Ortiz filed a timely motion to withdraw his pleas which were denied. Ortiz appeals. The Petition for a Writ of Certiorari is DENIED. The district court's denial of Petitioner's motion to withdraw plea is AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs.

F-2019-243 — Alex Warren Klinger, Appellant, was tried by jury for the crime of three counts of Assault and Battery with Deadly Weapon, six counts of Shooting with Intent to Kill, and one count of Maiming in Case No. CF-2017-284 in the District Court of Grady County. The jury returned verdicts of guilty and set as punishment life imprisonment on each count. The trial court sentenced accordingly. From this judgment and sentence Alex Warren Klinger has perfected his appeal. AFFIRMED. Opinion by: Rowland, J.; Lewis, P.J., concurs in results; Kuehn, V.P.J., concurs; Lumpkin, J., concurs; Hudson, J., concurs.

F-2019-608 — Anthony Walter Fuller, Appellant, was tried by jury for the crime of Count 1, Rape by Instrumentation; Count 2, Sexual Abuse of a Child Under 12; Counts 3 & 4, Rape by Instrumentation by Aiding and Abetting; & Enabling Child Sexual Abuse in Case No.

CF-2018-21 in the District Court of Beaver County. The jury returned a verdict of guilty and recommended as punishment 10 years in prison on Counts 1, 3, & 4; fifty years in prison on Count 2; and 2 years in prison on Count 5. The trial court sentenced accordingly. From this judgment and sentence Anthony Walter Fuller has perfected his appeal. The Judgement and Sentence is AFFIRMED and the Mandate is Ordered. Opinion by Lumpkin, J.; Lewis, P.J., Concurs; Kuehn, V.P.J., Concurs in Results; Hudson, J., Concurs; Rowland, J., Concurs.

Thursday, September 24, 2020

M-2019-664 — A jury convicted Appellant James Brewer of illegal entry (Count I), outraging public decency (Count II), and assault on a police officer (Count III). Appellant was sentenced to one (1) year in jail and a \$250.00 fine for each of Counts I and II and six (6) months in jail and a \$250.00 fine for Count III. Counts I and II were ordered to be served concurrently, but consecutive to Count III. The Judgment and Sentence is AFFIRMED. Opinion by: Lumpkin, J.; Lewis, P.J.: Concurs; KUuehn, V.P.J.: Concurs; Hudson, J.: Concurs; Rowland, J.: Concurs.

F-2019-512 — Appellant Tony L. Tarver was tried by jury for the crime of First Degree Murder in Oklahoma County District Court Case No. CF-2018-2743. In accordance with the jury's recommendation, the trial court sentenced Appellant to life imprisonment and fined him \$10,000. From this judgment and sentence Tony L. Tarver has perfected his appeal. AF-FIRMED. Opinion by: Kuehn, V.P.J.; Lewis, P.J., concur; Lumpkin, J., concur; Hudson, J., concur; Rowland, J., concur.

S-2019-570 — On August 21, 2018, Defendant Kearline Datara Anderson was charged with one count of Child Neglect in Rogers County Case No. CF-2018-546. On May 31, 2019, the District Court of Rogers County, the Honorable Lara M. Russell, Special Judge, sustained Anderson's demurrer. The State appealed the ruling to the district court and Judge Russell's ruling was affirmed by the District Court of Rogers County, the Honorable Stephen R. Pazzo, Jr., District Judge. The State has perfected its appeal. The order of the District Court of Rogers County sustaining Anderson's demurrer is REVERSED and REMANDED for further proceedings. Opinion by: Kuehn, V.P.J.; Lewis, P.J., concur; Lumpkin, J., concur; Hudson, J., concur; Rowland, J., concur.

F-2019-423 — Jerome Fudge, Appellant, was tried by jury for the crime of, Lewd or Indecent Acts with a Child Under Twelve in Case No. CF-2018-14 in the District Court of Comanche County. The jury returned a verdict of guilty and recommended as punishment six years imprisonment, the trial court sentenced accordingly. From this judgment and sentence Jerome Fudge has perfected his appeal. Judgment and Sentence is AFFIRMED, and the Mandate is Ordered. Opinion by: Lumpkin, J.; Lewis, P.J., concurs; Kuehn, V.P.J, concurs in results; Hudson, J., concurs; Rowland, J., concurs.

COURT OF CIVIL APPEALS (Division No. 1) Wednesday, September 9, 2020

117,357 — Lawrence Breedlove, Plaintiff/ Appellant, v. Oklahoma Pardon and Parole Board; Delynn Fudge, Director, Defendants/ Appellees. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Aletia Haynes, Judge. Lawrence Breedlove, Plaintiff/Appellant, requested a writ of mandamus requesting a hearing before the Oklahoma Pardon and Parole Board, Defendant/Appellee. He appeals the order of the district court placing him on the registry of prisoners who have made frivolous or malicious filings. We hold the court was not deprived of jurisdiction to make this determination by Breedlove's voluntary motion to dismiss the action. AF-FIRMED. Opinion by Goree, J.; Bell, P.J., and Buettner, J., concur.

117,984 — SGN Foods, L.L.C., an Oklahoma Limited Liability Company, Plaintiff/Appellee, v. Sweet Appetit, Inc., an Oklahoma Limited Liability Company, Defendant/Appellant. Appeal from the District Court of Tulsa County, Oklahoma. Honorable William D. LaFortune, Judge. Sweet Appetit, Inc., Defendant/ Appellant, seeks review of the Tulsa County District Court's April 17, 2019 order granting the Motion for Temporary Injunction requested by SGN Foods, L.L.C., Plaintiff/Appellee. SGN did not establish irreparable harm would result and the injunction should not have been granted. The order of the Tulsa County District Court granting the temporary injunction requested by SGN is REVERSED. Opinion by Goree, J.; Bell, P.J., dissents and Buettner, J., concurs.

118,198 — James B. Hall, Plaintiff/Appellant, v. The Oklahoma Department of Human Services, an Agency of the State of Oklahoma,

Calitra Fisher, in her individual capacity, Defendants/Appellees. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Susan Stallings, Judge. Plaintiff/Appellant, James B. Hall brought this action against Defendant/Appellee, State of Oklahoma ex rel. Oklahoma Department of Human Services (DHS), and Defendant/Appellee, Calitra Fisher, individually, for damages resulting from DHS's negligence and Defendants' violation of Plaintiff's constitutional due process property and liberty interests guaranteed by Art. 2 §§7 and 30 of the Oklahoma Constitution. Plaintiff appeals from the trial court's order granting the Defendants' motions to dismiss. We hold the trial court erred when it dismissed Plaintiff's petition against DHS and Fisher under §§155(4) and (5) of the Governmental Torts Claims Act (GTCA), 51 O.S. Supp. 2015 §151 et seq. Because we reverse and remand, we decline to address the propriety of the trial court's dismissal of Plaintiff's constitutional claims against DHS and Fisher or the legal effect of *Barrios v*. Haskell County Pub. Facilities Auth., 2018 OK 90, 432 P.3d 233. The trial court's order is REVERSED AND THIS MATTER IS REMANDED FOR FUR-THER PROCEEDINGS. Opinion by Bell, P.J.; Buettner, J., concurs and Goree, J., concurs in part and dissents in part.

Thursday, September 10, 2020

118,465 — In the Matter of J.M., Alleged Deprived Child, State of Oklahoma, Petitioner/Appellee, v. Kendra Tyler, Respondent/Appellant. Appeal from the District Court of Oklahoma County, Oklahoma. Honorable Lydia Y. Green, Judge. Respondent/Appellant, Kendra Tyler (Mother), appeals from the trial court's order entered upon a jury verdict terminating her parental rights to her minor child, J.M., a deprived child. Petitioner/Appellee, The State of Oklahoma (State), sought immediate termination of Mother's parental rights pursuant to 10A O.S. Supp. 2015 §1-4-904(B)(9) on the basis that Mother failed to protect the child from abuse or neglect that is heinous and shocking. The court found the child was an Indian Child under the Oklahoma Indian Child Welfare Act, 10 O.S. 2011 §40.1 et seq., and the Indian Child Welfare Act, 25 U.S.C.A. §1901 et seq. (jointly ICWA), and that State met ICWA's requirements. The trial court found State demonstrated beyond a reasonable doubt by the testimony of a qualified witness that Mother's continued custody of the child is likely to result in serious emotional or physical damage/harm to the child. And, after a jury trial, the court found, by clear and convincing evidence, that Mother's parental rights should be terminated under §1-4-904(B)(9) for failure to protect the child from heinous and shocking abuse or neglect, and that termination of Mother's rights was in the child's best interest. The court also found active efforts to provide remedial services and rehabilitative programs to prevent the breakup of the Indian family have been made and have proven unsuccessful. After reviewing the record, we affirm. Opinion by Bell, P.J.; Buettner, J., and Goree, J., concur.

Monday, September 14, 2020

118,244 — Meredith Cochran, Petitioner, v. Comanche County Memorial Hospital (Own Risk #13032) and The Workers' Compensation Commission, Respondents. Proceeding To Review an Order of The Workers' Compensation Commission. Petitioner, Meredith Cochrane, seeks review of an order of the Workers' Compensation Commission denying her request for medical treatment from Respondent, Comanche County Memorial Hospital (Employer). The Commission's order is not clearly erroneous in view of the evidence and we therefore sustain. Opinion by Buettner, J.; Goree, J., concurs and Bell, P.J. dissents.

118,756 — Franklin L. Kiker, Plaintiff/Appellant, vs. Darnell E. Blackmon, M.D., Hillcrest Hospital South, and The Orthopaedic Center, Defendants/Appellees. Appeal from the District Court of Tulsa County, Oklahoma. Honorable William D. LaFortune, Judge. Plaintiff/ Appellant Franklin L. Kiker appeals from summary judgment granted in favor of Defendants/Appellees Darnell E. Blackmon, M.D., Hillcrest Hospital South, and The Orthopaedic Center on Kiker's claims for medical negligence. Kiker did not present evidentiary materials establishing the res ipsa loquitur presumption or creating a dispute of fact on his claims for negligence. We AFFIRM. Opinion by Buettner, J.; Bell, P.J., and Goree, J., concur.

(Division No. 2) Thursday, September 10, 2020

118,642 — Multiple Injury Trust Fund, Petitioner, vs. Dennis Carbin Kolbe, and The Workers' Compensation Commission, Respondents. Proceeding to Review an Order of a Three-Judge Panel of The Workers' Compensation Commission. The Multiple Injury Trust Fund (MITF) appeals the Worker's Compensation Commission *en banc* (Commission) Order Reversing the Decision of the Administrative Law Judge (ALJ) (Order) which Order awarded the Claimant, Dennis Carbin Kolbe (Kolbe), permanent total disability benefits based upon a combination of injuries and impairments. Kolbe seeks to combine Oklahoma adjudicated injuries, a hearing loss, and obvious and apparent impairment to his legs to obtain a PTD rating and PTD benefits from MITF. MITF maintains that the leg impairments cannot be combined because they are part of the California back injury and neither a member nor an Oklahoma adjudication. The Commission rejected the argument. This Court holds that under the effective statute the issue is whether there is an obvious and apparent impairment to the legs. The evidence that there is an obvious and apparent impairment to Kolbe's legs is not refuted. The cause of the impairment to the legs is not relevant. Therefore, the impairment to the legs may be combined. After review of the IME's testimony and report, this Court concludes that the Commission's interpretation of the testimony is correct. The IME consistently rated Kolbe PTD. The IME was initially under the erroneous impression that Kolbe's California injuries could be combined, but after being informed otherwise he did not change his rating. Therefore, the Order of the Commission is sustained. SUSTAINED. Opinion from Court of Civil Appeals, Division II, by Rapp, J.; Barnes, P.J., and Fischer, J., concur.

117,584 — Teresa Ann Wells, Petitioner/Appellant, vs. Henry Elton Wells, Jr., Respondent/ Appellee. Appeal from an Order of the District Court of Payne County, Hon. Stephen R. Kistler, Trial Judge. The petitioner, Teresa Ann Wells (Wife), appeals that part of the Decree of Divorce and Dissolution of Marriage which ruled that an Antenuptial Agreement (Antenuptial Agreement) and an Agreement Validating Oral Prenuptial Agreement (Validating Agreement) entered into with respondent, Henry Elton Wells, Jr. (Husband) were valid and enforceable. In her appeal, Wife challenges the existence and validity of an Antenuptial Agreement and a Validating Agreement. The parties signed the Agreements after they married. However, the clear weight of the evidence shows that the parties had an oral agreement before they married and that the Agreement they signed restated that oral agreement. Title 43 O.S. Supp. 2019, §121(B) requires that antenuptial agreements be in writing, but the statute is silent regarding whether such writing must precede the marriage. Therefore, the general rule

applies, and they may, and did, validate an oral antenuptial agreement, in all respects valid other than not being in writing. After further review, this Court concludes that the parties did reach a valid oral antenuptial contract. Their contract met the criteria which are considered to ascertain whether such contracts are valid. The necessary conclusion that Wife had a generally accurate knowledge of Husband's worth is not against the clear weight of the evidence. Wife has not demonstrated error in upholding the Antenuptial Agreement's provisions for no alimony and payment of legal expenses. The decision of the trial court upholding the Validating Agreement and Antenuptial Agreement is not against the clear weight of the evidence or contrary to law and is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Rapp, J.; Barnes, P.J., and Fischer, J., concur.

Tuesday, September 15, 2020

117,729 — Johnathan Bonanno, Plaintiff/Appellee, vs. David Stanley of Norman, LLC, Defendant/Appellant, and David Stanley, an individual and d/b/a David Stanley Auto Group; Amtrust Financial Services, Inc., a Delaware corporation; and WS Aftermarket Services Corporation, a Delaware corporation, Defendants. Appeal from an Order of the District Court of Cleveland County, Hon. Lori Walkley, Trial Judge. Defendant, David Stanley of Norman, L.L.C., (Dealership) appeals the trial court's Journal Entry of Judgment denying Defendant's Motion to Dismiss or in the Alternative, Stay Proceedings in Favor or [sic] Arbitration. This Court finds the trial court did not err in denying Dealership's Motion to Dismiss, or in the Alternative, Stay Proceedings in Favor of Arbitration. Thus, the trial court's Journal Entry of Judgment is affirmed. AF-FIRMED. Opinion from Court of Civil Appeals, Division II, by Rapp, J.; Barnes, P.J., and Fischer, J., concur.

Wednesday, September 16, 2020

117,819 — Jerry Wayne Cooper, Plaintiff/ Appellee, vs. Billy and Michelle Bryce, Defendants/Appellants. Appeal from Order of the District Court of Muskogee County, Hon. Weldon Stout, Trial Judge. Appellants Billy and Michelle Bryce appeal the district court's order in favor of their former landlord, Jerry Wayne Cooper, in this small claims forcible entry and detainer action. Appellants failed to compile an adequate record for this Court to determine error. "Legal error may not be presumed from a silent record, it must be affirmatively demonstrated." *First Fed. Sav. And Loan Ass'n v, Nath,* 1992 OK 129, ¶ 10, 839 P.2d 1335 (footnote omitted). In the absence of evidence to the contrary, we must presume that the district court did not abuse its discretion. The order of the district court in favor of Cooper for rent and court costs is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Fischer, J.; Barnes, P.J., concurs, and Rapp , J., dissents.

118,717 — Wells Fargo Bank, N.A., Plaintiff, v. Jeffrey D. Tate, Suzanne M. Tate, et al., Defendants/Third-Party Plaintiffs/Appellants, v. State Farm Fire and Casualty Company, Third-Party Defendant/Appellee. Appeal from the District Court of Kingfisher County, Hon. Lance Schnieter, Trial Judge. The present appeal arises out of a third-party claim for negligence in a mortgage foreclosure action by Plaintiff Wells Fargo Bank, N.A. (Wells Fargo), against Defendants/Third-Party Plaintiffs/Appellants Jeffrey D. Tate, and Suzanne M. Tate. Third-Party Defendant/Appellee State Farm Fire and Casualty Company was permitted to amend its answer to add a statute of limitations defense three years after it filed its answer, having made the motion to amend about two months after it filed its first motion for summary judgment in which it argued the statute as a defense. The trial court allowed State Farm to amend its answer to add the affirmative defense but denied the motion for summary judgment. State Farm again moved for summary judgment on the ground that the statute of limitations barred the Tates' claims against it. The Tates appeal from the trial court's award of summary judgment to State Farm on its second motion for summary judgment. Although some dates were included in the Tates' amended third-party petition, we conclude the trial court did not abuse its discretion in allowing the amendment because of the absence of undue delay, bad faith or dilatory motive on the part of State Farm, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the Tates or futility of amendment. We further conclude the trial court did not err as a matter of law in determining the Tates' claims are time-barred. Accordingly, we affirm. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Barnes, P.J.; Rapp, J., and Fischer, J., concur.

Thursday, September 17, 2020

117,721 — Kevin C. Corbett and Kim M. Corbett, Plaintiffs/Appellants, vs. Anadarko E&P Company, L.P., Defendant/Appellee, and Chesapeake Appalachia, L.L.C., Statoil USA Onshore Properties, Inc., and Mitsui E&P USA, LLC, Appellees. Appeal from an Order of the District Court of Oklahoma County, Hon. Patricia G. Parrish, Trial Judge. The plaintiffs, Kevin C. Corbett and Kim M. Corbett (collectively Corbetts) appeal the trial court's favorable ruling, after a bench trial, for the defendant, Anadarko E & P Company, L.P. (Anadarko), consisting of a denial of Corbetts' amended petition claims for reformation of a Pennsylvania oil and gas lease, denial of a claim for unjust enrichment and denial of a claim that the oil and gas lease is unconscionable. As briefed by Corbetts, Corbetts also appeal the partial denial of their motion to reconsider a grant of summary judgment. Corbetts appeal the trial court's favorable ruling, after a bench trial, for Anadarko consisting of a denial of Corbetts' amended petition claims for reformation of the Lease, denial of a claim for unjust enrichment and denial of a claim that the Lease is unconscionable. As briefed by Corbetts, Corbetts also appeal the partial denial of their motion to reconsider a grant of summary judgment as to their original petition. Corbetts' original petition claims are barred by applicable Statutes of Limitations. The facts of the case clearly show that Corbetts knew of their claim or had sufficient notice that they had a claim against Anadarko more than five years prior to filing their lawsuit, yet continued to accept payments from Anadarko. The trial court resolved conflicting evidence regarding the claim for reformation of the Lease against Corbetts on their amended claim. The resolution is not against the clear weight of the evidence. This resolution effectively upholds the validity of the Lease, so Corbetts have no claim for unjust enrichment. The trial court did not err in declining to find the Lease unconscionable. That ruling is a matter of Pennsylvania law, and this Court was not provided with authority from that jurisdiction to support Corbetts' claim of unconscionability. The judgment is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Rapp, J.; Barnes, P.J., and Fischer, J., concur.

118,207 — Echo Property Upkeep, LLC, an Oklahoma limited liability company, Plaintiff, vs. Bricktown Joint Venture, LLC, an Oklahoma limited liability company, and All America

Bank, an Oklahoma domestic bank, defendants, and All America Bank, an Oklahoma domestic bank, Third-Party Plaintiff Appellee, vs. Nitin Jariwala, an individual, Chetna Hira, an individual, Third-Party Defendants/Appellants. Appeal from an Order of the District Court of Oklahoma County, Hon. R. Trent Pipes, Trial Judge. The third-party defendants, Nitin Jariwala (Jariwala) and Chetna Hira (Hira) appeal an Order Denying Motion to Recall Bench Warrants and Motion to Quash Service on Order for Hearing on Assets. The appellant is All America Bank (Bank). Bank obtained a judgment against Jariwala and Hira based upon their guarantee of their company's loan from Bank. Although Jariwala and Hira are residents of Texas, the trial court had personal jurisdiction over all parties when the judgment and a deficiency judgment were rendered. Bank obtained an order to appear and answer to assets and had it served on Jariwala and Hira. They did not appear, and bench warrants and contempt citations issued. They unsuccessfully challenged the issuance of those writs on the jurisdictional ground that the court had no post-judgment jurisdiction. This Court holds that the trial court has the power to enforce its judgment and the orders issued in connection with the enforcement of the judgment. The argument that Bank had to proceed with a domesticated judgment in Texas is rejected. The trial court's Order Denying Motion to Recall Bench Warrants and Motion to Ouash Service on Order for Hearing on Assets is affirmed. Both parties asked for attorney fees and costs in their respective Briefs. Both requests are denied for failure to conform to Ökla.Sup.Ct.R. 1.14, 12 O.S. Supp. 2019, Ch. 15, app. 1. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Rapp, J.; Barnes, P.J., and Fischer, J., concur.

Friday, September 18, 2020

118,376 — In the matter of M.T., N.T., Z.T., Z.T, and Z.T., adjudicated deprived children: Kevin Michael Tucker, Appellant, vs. State of Oklahoma, Appellee. Appeal from Order of the District Court of Oklahoma County, Hon. Susan K. Johnson, Trial Judge. Appellant Kevin Michael Tucker appeals the district court's order terminating his parental rights to minor children MT, NT, ZT, ZT, and ZT on the grounds of heinous and shocking sexual abuse of a child or sibling pursuant to 10A O.S. Supp. 2015 § 1-4-904(B)(9). After review of the record and relevant law, we find that the State carried its evidentiary burden of proving by clear and convincing evidence that Father's parental rights should be terminated. We further find that clear and convincing evidence exists to support the district court's finding that termination of Father's parental rights was in the best interests of the children. The decision of the district court is affirmed. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Fischer, J.; Barnes, P.J., concurs, and Rapp, J., concurs in result.

118,457 — In the Matter of P.B.R., a Deprived Child: Brenton and Jessica Graefe, Respondents/Appellants, vs. The State of Oklahoma, Appellee, and Tina and Jonathan Daniels, Petitioners/Appellees. Appeal from an Order of the District Court of Oklahoma County, Hon. Cassandra M. Williams, Trial Judge. In this deprived proceeding in which competing petitions for adoption were filed, Brenton and Jessica Graefe, the foster parents of PBR, appeal from the trial court's Order Determining Best Interest in which the court determined that it was in PBR's best interest to be placed with Tina and Jonathan Daniels, the adoptive parents of PBR's half-sibling, and granted the Daniels' petition for adoption. We affirm. AFFIRMED. Opinion from Court of Civil Appeals, Division II, by Barnes, P.J.; Rapp, J., and Fischer, J., concur.

(Division No. 3) Friday, September 18, 2020

117,289 — In Re The Marriage of Shane Franklin Bishop, Petitioner/Appellee, v. Denley Ann Bishop, Respondent/Appellant. Appeal from the District Court of Stephens County, Oklahoma. Honorable Russell G. Brent. Denley Ann Bishop ("Appellant"), seeks review of the August 6, 2018 Stephens County District Court divorce decree granting the divorce of Appellant and Shane Franklin Bishop ("Appellee"). The appellate record in this case does not provide transcripts or a narrative statement of the events which occurred at the district court. 12 O.S. Supp.1997, Ch. 15, App. 1, Rule 1.30. On a silent record, the appellate court does not presume the district court erred. Hamid v. Sew Original, 1982 OK 46, 645 P.2d 496, 497. In addition, it is permissible for the district court to bifurcate divorce proceedings, wherein the court can grant the divorce and address other matters separately, such as custody or child support. Alexander v. Alexander, 2015 OK 52, ¶15, 357 P.3d 481, 485. We do not find error in the district court granting the parties' requested divorce yet deferring issues concerning the parties'

children. The August 6, 2018 decree of the Stephens County District Court is AFFIRMED. Opinion by Pemberton, J.; Swinton, V.C.J., and Mitchell, P.J., concur.

118,391 — Mackenzie Edward Demers, Petitioner, v. Infrastructure & Energy Alternatives, LLC and The Workers' Compensation Commission, Respondents. Proceeding to Review an Order of the Workers' Compensation Commission. The petitioner/employee/claimant appeals from an order of the Workers' Compensation Commission that affirmed an administrative law judge's (ALJ's) order finding that the petitioner's injury was not compensable because it did not occur within the course and scope of petitioner's employment with the respondent/employer. Because the uncontroverted facts show that the accident occurred not in the course of employment but on the petitioner's daily commute to work, we affirm. Opinion by Mitchell, P.J.; Swinton, V.C.J., and Pemberton, J., concur.

(Division No. 4) Tuesday, September 8, 2020

117,848 — Vanessa Maria Albertson, Plaintiff/Appellant, vs. Rabi Dawud Assad, Defendant/Appellee. Appeal from an Order of the District Court of Garvin County, Hon. Steven Kendall, Trial Judge. Vanessa Maria Albertson (Albertson) appeals an order denying attorney fees incurred in a partition action Albertson filed in Garvin County. Albertson bore the burden of demonstrating that her requested attorney fees were incurred for the benefit of both parties in the underlying partition action. The district court correctly determined that Albertson was required to make that showing. In the absence of any record demonstrating to the contrary, we assume the district court's determination that Albertson failed to meet her burden was supported by every fact necessary, was not an abuse of discretion and that the court's February 15, 2019 Order Denying Plaintiff's Motion for Attorney Fees was correct. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Hixon, J.; Wiseman, C.J., and Thornbrugh, P.J., concur.

118,734 — Markel Maybin, Plaintiff/Appellant, vs. AHS Oklahoma Physician Group, LLC, d/b/a Utica Park Clinic, a foreign limited liability company, Defendant/Appellee. Appeal from an Order of the District Court of Tulsa County, Hon. William D. LaFortune, Trial Judge. Maybin appeals an order granting AHS Oklahoma Physician Group, d/b/a Utica Park Clinic's (UPC)

motion for summary judgment. Maybin contends he was defamed by an e-mail sent by an employee of UPC to other employees of UPC. In Oklahoma, agents and employees of a corporation are not third parties to the corporation in their relations with the corporation; therefore, communications between those agents and employees are not considered publications, because it is the corporation communicating with itself. Magnolia Petroleum Co. v. Davidson, 1944 OK 182, ¶¶ 30-35, 148 P.2d 468. As the e-mail was a communication among UPC's employees, it was not published as a matter of law. Accordingly, Maybin could not prove a defamation theory of recovery. Maybin also alleges the trial court erred by granting UPC summary judgment on his tortious interference with his business relationship theory of recovery. The undisputed material facts show Maybin could not meet the essential elements to prove a tortious interference with a business relationship theory of recovery. Accordingly, we affirm the trial court's order granting UPC summary judgment. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Hixon, J.; Wiseman, C.J., and Thornbrugh, P.J., concur.

Friday, September 18, 2020

118,362 — Barry K. Bollenbach, Joy Lynn States, Valeria Norwood and Wilbur Robinson, Plaintiffs/Appellees, vs. Spess Oil Company, Inc., Defendant/Appellant, and Chesapeake Exploration, LLC, et al., Additional Defendants. Appeal from and Order of the District Court of Kingfisher County, Hon. Lance E. Schneiter, Trial Judge. Spess Oil Company, Inc. (Spess) appeals from the district court's denial of its Motion for New Trial in an action to quiet title and cancel its interest in certain oil and gas leases, following entry of partial summary judgment for Plaintiffs and issuance of a final order for interlocutory appeal, pursuant to 12 O.S.2011, § 994. Spess did not dispute Plaintiffs' evidentiary materials that the Crosswhite 27A well failed to produce in paying quantities for more than 120 days, and that production did not resume and no further wells were commenced during that period, as required by the Subject Leases' Cessation Clause. Upon this cessation in production, the Subject Leases were to terminate under the Habendum Clause. The district court did not err as a matter of law in granting partial summary judgment to Plaintiffs, terminating and cancelling the Subject Leases, and therefore did not abuse its

discretion in denying Spess' Application for New Trial. We affirm the district court's August 16, 2019 Order denying Spess' Application for New Trial. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Hixon, J.; Wiseman, C. J., and Thornbrugh, P.J., concur.

118,438 — Enbridge Pipelines (Ozark), LLC, Plaintiff/Appellee, v. Kathy Sherman, Lincoln County Treasurer, and Lincoln County Board of Tax Roll Corrections, Defendants/Appellants. Appeal from an order of the District Court of Lincoln County, Hon. Phillip Corley, Trial Judge, granting summary judgment in favor of Plaintiff Enbridge Pipelines (Ozark), LLC. Defendants assert the trial court erred in determining that the State Board of Equalization did not "properly correct[] the 2010 assessed value of [Enbridge's] property." Defendants further argue the "County Treasurer properly corrected the tax rolls" and "Plaintiff was notified about the corrected assessment before paying its final payment." After de novo review, we find that the trial court correctly granted summary judgment to Enbridge because under the material undisputed facts, Enbridge is entitled to judgment as a matter of law. The Lincoln County Board of Tax Roll Corrections' "corrected certificates" were untimely, having been issued after Enbridge paid its 2010 taxes in full. The judgment is affirmed. AFFIRMED. Opinion from the Court of Civil Appeals, Division IV, by Wiseman, C.J.; Thornbrugh, P.J., and Hixon, J., concur.

ORDERS DENYING REHEARING Supreme Court Monday, September 14, 2020

117,081 — Independent School District # 52 of Oklahoma County (Midwest City-Del City); Independent School District #57 of Garfield County (Enid); Independent School District #71 of Kay County (Ponca City); and Independent School District #89 of Oklahoma County (Oklahoma City), plaintiffs/appellants, v. Joy Hofmeister, Superintendent of Oklahoma State Department of Education; Oklahoma Tax Commission; and Ken Miller, Oklahoma State Treasurer, defendants/appellees, and Tulsa Public School District, I-1 of Tulsa County; Sand Springs Public School District, I-2 of Tulsa County; Broken Arrow Public School District, I-3 of Tulsa County; Bixby Public School System, I-4 of Tulsa County; Jenks Public School District, I-5 of Tulsa County; Union Public School District, I-9 of Tulsa County and Owasso Public School District, I-11 of Tulsa County and Oklahoma Public Charter School Association, intervenor defendants/appellees, and Western Heights Independent School District No. 1-41 of Oklahoma County, plaintiff, v. The State of Oklahoma ex rel., Oklahoma State Department of Education; Oklahoma State Board of Education; Joy Hofmeister, State Superintendent of Public Instruction for the State of Oklahoma; Oklahoma Tax Commission; and Ken Miller, Oklahoma State Treasurer, defendants/appellees. Plaintiffs/appellants' petition for rehearing is *DENIED*.

Court of Civil Appeals (Division No. 1) Thursday, September 10, 2020

118,325 — William D. French, Petitioner/ Appellant, vs. City of Tulsa, Own Risk #10435, and The Workers' Compensation Commission, Respondent/Appellee. Appellant's Petition for Rehearing, filed September 3, 2020, is *DENIED*.

Tuesday, September 15, 2020

117,938 — Debra M. Cooper, Plaintiff/Appellant, vs. Northwest Rogers County Fire Protection District, a political subdivision; James Mathew Shockley, in his individual capacity; Mel W. Dainty, in his individual capacity; and Northwest Professional Firefighters Local No. 4057, an Oklahoma Organization, Defendants/ Appellees. Appellant's Petition for Rehearing, filed September 8, 2020, is *DENIED*.

(Division No. 2) Monday, September 21, 2020

117,465 — Matthew Sherman, Kayla Sherman and Anna Sherman, Plaintiffs/Appellees, vs. James Cox and Cox Environmental, LLC, Defendants/Appellants. Appellants' Petition for Rehearing is hereby *DENIED*.

(Division No. 3) Wednesday, September 16, 2020

118,178 — James Brice Martin, Petitioner, vs. City of Tulsa (Own Risk #10435) and The Workers' Compensation Commission, Respondents. Petitioner's Petition for Rehearing and Brief in Support, filed September 2, 2020, is *DENIED*.

(Division No. 4) Monday, September 21, 2020

117,806 — Gary Richardson, an individual, Plaintiff/Appellant, vs. Tribune Media Company; Tribune Broadcasting Oklahoma City, LLC, d/b/a KFOR-TV; and Wesley Lee Milbourn, Defendants/Appellees. Appellees' Petition for Rehearing is hereby *DENIED*.

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MCLE 6/1

WORKSHOP LEADERS:

Donna Jackson, JD, CPA, Donna J. Jackson & Associates, PLLC

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